

[Cite as *Wilmington v. Taylor*, 2010-Ohio-3255.]

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
CLINTON COUNTY

CITY OF WILMINGTON,	:	
Plaintiff-Appellant,	:	CASE NO. CA2009-11-018
- vs -	:	<u>OPINION</u> 7/12/2010
CHAD M. TAYLOR,	:	
Defendant-Appellee.	:	

CRIMINAL APPEAL FROM CLINTON COUNTY MUNICIPAL COURT  
Case No. TRC0902825A

Lynn W. Turner, Wilmington City Prosecutor, 69 North South Street, P.O. Box 71, Wilmington, Ohio 45177, for plaintiff-appellant

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**POWELL, J.**

{¶1} Plaintiff-appellant, the city of Wilmington, appeals the decision of the Clinton County Municipal Court suppressing evidence and finding a lack of probable cause to arrest defendant-appellee, Chad Taylor, for OVI. We reverse the decision of the trial court.

{¶2} At approximately 1:30 a.m. on March 25, 2009, Officer Sean Early of

the Wilmington Police Department was patrolling near Mulberry and Main Streets in Wilmington, Ohio when he saw a vehicle travel left of center to the point that no on-coming traffic would be able to pass. As Early followed the vehicle, he observed it travel left of center for four to five blocks before he initiated a traffic stop.

{¶13} The driver, later identified as Taylor, stopped his vehicle and spoke with Early through the passenger-side window. At the motion to suppress hearing, Early testified that as he spoke with Taylor, he could "smell a moderate odor of alcohol," even though Taylor denied having consumed any alcohol that night. Early also testified that Taylor had "bloodshot glassy eyes," and that he was "very short and pertinent" when responding to Early's questions.

{¶14} Early tried to perform a horizontal gaze nystagmus test, but Taylor would not cooperate and further refused to take any additional field sobriety tests. Early arrested Taylor for OVI, and applied for a warrant to draw and test Taylor's blood. The judge granted the warrant, and Early was later cited for driving left of center and OVI.

{¶15} Taylor filed a motion to suppress, asserting that Early had neither a reasonable articulable suspicion that he committed a minor traffic offense, nor probable cause to believe that he was under the influence of alcohol at the time of the offense. After a hearing, the trial court granted Taylor's motion to suppress, finding that the stop was proper, but that Early did not have "enough probable cause" to arrest Taylor. Wilmington now appeals, raising two assignments of error. Because the assignments are interrelated, and for ease of discussion, we will address both assignments together.

{¶16} Assignment of Error No. 1:

{¶7} "THE TRIAL COURT ERRED WHEN FINDING FACTS WHICH WERE CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶8} Assignment of Error No. 2:

{¶9} "THE TRIAL COURT ERRED WHEN FAILING TO FIND PROBABLE CAUSE EXISTED FOR THE DEFENDANT'S ARREST."

{¶10} In its assignments of error, Wilmington asserts that the trial court improperly granted Taylor's motion to suppress because Officer Early had probable cause to arrest Taylor for OVI. We find Wilmington's argument meritorious.

{¶11} Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Cochran*, Preble App. No. CA2006-10-023, 2007-Ohio-3353. Acting as the trier of fact, the trial court is in the best position to resolve factual questions and evaluate witness credibility. *Id.* Therefore, when reviewing a trial court's decision regarding a motion to suppress, a reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Oatis*, Butler App. No. CA2005-03-074, 2005-Ohio-6038. "An appellate court, however, independently reviews the trial court's legal conclusions based on those facts and determines, without deference to the trial court's decision, whether as a matter of law, the facts satisfy the appropriate legal standard." *Cochran* at ¶12.

{¶12} In granting Taylor's motion to suppress, the trial court found that Early did not have enough probable cause to arrest Taylor and needed a basis other than a "slight" odor of alcohol, Taylor's blood shot eyes, and short pertinent speech. The court suggested that Early "should have asked the defendant to then do the walk and turn and the one leg stand and in this instance the court is not convinced that this

was done."

{¶13} On review, we are bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. However, several of the court's findings of fact are not supported by the evidence. While the court's written entry states that, "the officer detected a slight odor of an alcoholic beverage," Early testified that he smelled a "moderate odor of alcohol." The court may have taken the word "slight" from Early's citation detail report in which Early stated, "I could smell the slight to moderate odor of an intoxicating beverage coming from the vehicle." Even then, Early considered the odor coming from Taylor's vehicle slight *to moderate*, and in the next few sentences, stated that after Taylor exited the car, he could smell "the moderate to strong odor of an intoxicating beverage coming from his person." The court's finding that Early smelled merely a "slight" odor is not supported by either Early's testimony or his citation report.

{¶14} The trial court also found that Early should have asked Taylor to perform the "walk and turn" and "one-leg stand" field sobriety tests. However, the record indicates that Early tried to have Taylor complete various tests, but that Taylor refused to cooperate and expressly stated that he "was done doing the tests."

{¶15} In both Early's hearing testimony and his citation detail report, Early discussed his attempt to perform the horizontal gaze nystagmus test, and that the testing was not completed because Taylor would not cooperate with Early's instructions. Although Early asked Taylor multiple times to perform the gaze test according to protocol, Taylor would not follow the stimuli as instructed, and then stated that he was not going to do the test. Early also testified that when he tried to perform other field sobriety tests, Taylor stated that "he was done doing the tests."

Therefore, the court's finding did not acknowledge that the lack of testing was due to Taylor's outright refusal to cooperate, rather than any failure on Early's part.<sup>1</sup>

{¶16} Even if the trial court's findings of fact had been supported by competent and credible evidence, we would still independently review the court's legal conclusions and determine whether as a matter of law, the facts satisfy the appropriate legal standard. The court found that the evidence was insufficient to provide probable cause that Taylor was under the influence, but did not cite to any legal authority on which to base its decision.

{¶17} "Probable cause to arrest for OVI exists when, at the moment of arrest, the arresting officer had sufficient information, derived from a reasonably trustworthy source of facts and circumstances, to cause a prudent person to believe the accused was driving under the influence of alcohol. The trial court makes this determination based on the totality of the surrounding circumstances." *State v. Way*, Butler App. No. CA2008-04-098, 2009-Ohio-96, ¶30.

{¶18} In *Way*, this court reversed the trial court's suppression of evidence where the arresting officer observed Way drive left of center, and after initiating the traffic stop, detected an odor of alcohol on Way's breath and noticed that he had bloodshot and glassy eyes. In reversing the suppression, we held that "these facts alone are sufficient to establish probable cause to arrest Way for OVI." *Id.* at ¶ 33.

{¶19} *Way* is also similar to the case at bar in that the trial court found that Way was not given proper field sobriety testing. However, we found that the trial

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1. The trial court could have considered Taylor's refusal to perform the field sobriety testing as a factor when considering whether Johnson had probable cause to arrest Taylor for OVI. See *State v. Bauerle*, Lake App. No. 2007-L-078, 2008-Ohio-1493, ¶27 (holding that "a refusal to take field sobriety tests may be taken into account when determining whether an officer had probable cause to effectuate an arrest").

court erred in failing to consider the totality of the circumstances surrounding Way's arrest where evidence independent of the sobriety tests existed to provide probable cause. In deciding as such, we cited the Ohio Supreme Court's holding that "the totality of the facts and circumstances can support a finding of probable cause to arrest even where no field sobriety tests were administered." *State v. Homan*, 89 Ohio St.3d 421, 427, 2000-Ohio-212, superseded by statute on other grounds. Despite the fact that the court found the testing in *Homan* defective, it nonetheless found that Homan's arrest was supported by probable cause where the arresting officer observed the appellee driving erratically, that her breath smelled of alcohol, and that her eyes were red and glassy. *Id.*

{¶20} As in *Way* and *Homan*, Taylor's arrest was supported by probable cause based on the totality of the facts and circumstances. Early initiated the traffic stop after he observed Taylor continually driving left of center, and smelled moderate to strong odors of alcohol coming from Taylor's vehicle and person. Early also noticed that Taylor's eyes were bloodshot and glassy, and that his speech was slow and pertinent. Despite Taylor's refusal to perform field sobriety testing, Early had probable cause to arrest Taylor for OVI, and the trial court erred in finding otherwise.

{¶21} Having found that Taylor's arrest was supported by probable cause and that the court erred in granting Taylor's motion to suppress, we sustain Wilmington's assignments of error.

{¶22} Judgment reversed and cause remanded.

YOUNG, P.J., and RINGLAND, J., concur.

