[Cite as *State v. Palmieri*, 2010-Ohio-5667.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO, :

Plaintiff-Appellee, : CASE NO. CA2009-12-294

: O P I N I O N

- vs - 11/22/2010

:

JAMES C. PALMIERI, :

Defendant-Appellant. :

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2008-11-2055

Robin N. Piper III, Butler County Prosecuting Attorney, Lina N. Alkamhawi, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45012-0515, for plaintiff-appellee

Robert L. Raper, Gateway Center West, 300 Madison Avenue, Suite 200, Covington, KY 41011, for defendant-appellant

HENDRICKSON, J.

{¶1} Defendant-appellant, James C. Palmieri, appeals from a Butler County Court of Common Pleas decision denying his motion to suppress his blood-alcohol test results. For reasons outlined below, we affirm the decision of the trial court.

{¶2} On October 2, 2008 at approximately 12:12 a.m., appellant was involved in a head on collision with Thomas D. Bennett while he was traveling south in the northbound

lanes of State Route 4 located in Butler County, Ohio. Once police and paramedics arrived at the scene, an open can of beer was located on the center console of appellant's vehicle and appellant, who had slurred speech and smelled of alcoholic beverage, admitted to drinking "eight to ten beers and shots." At 3:05 a.m., after being transported to the hospital by helicopter, a doctor, at the direction of a police officer who did not have a warrant, took a blood sample from appellant in order to conduct a blood-alcohol test. The blood-alcohol test revealed appellant had a blood-alcohol level of .17.

{¶3} Appellant was subsequently arrested and charged with, among other things, aggravated vehicular assault in violation of R.C. 2903.08(A)(1), a third-degree felony, operating a vehicle under the influence of alcohol in violation of R.C. 4511.19(A)(1)(f), a first-degree misdemeanor, and driving the wrong direction on a one way highway in violation of R.C. 4511.32(A), a minor misdemeanor. Appellant moved to suppress his blood-alcohol test results, but the trial court denied his motion. Thereafter, appellant pled no contest, was found guilty, and was sentenced to serve a total of two years in prison.

{¶4} Appellant now appeals the trial court's decision denying his motion to suppress, raising one assignment of error.

{¶5} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT DENIED THE MOTION OF SUPPRESS WHERE [APPELLANT] DID NOT SUBMIT TO THE BLOOD TEST WITHIN THE TWO HOUR TIME FRAME REQUIRED UNDER OHIO LAW AND WAS NOT UNDER ARREST AT THE TIME OF THE BLOOD TEST."

{¶6} In his sole assignment of error, appellant argues that the trial court erred by denying his motion to suppress his blood-alcohol test results. We disagree.

{¶7} Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Davenport*, Fayette App. No. CA2008-01-011, 2009-Ohio-557, ¶6; *State v. Burnside,* 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. When considering a motion to

suppress, the trial court, as the trier of fact, is in the best position to weigh the evidence in order to resolve factual questions and evaluate witness credibility. *State v. Eyer,* Warren App. No. CA2007-06-071, 2008-Ohio-1193, ¶8. In turn, the appellate court must accept the trial court's findings of fact so long as they are supported by competent, credible evidence. *State v. Lange,* Butler App. No. CA2007-09-232, 2008-Ohio-3595, ¶4; *State v. Bryson* (2001), 142 Ohio App.3d 397, 402. After accepting the trial court's factual findings as true, the appellate court must then determine, as a matter of law, and without deferring to the trial court's conclusions, whether the trial court applied the appropriate legal standard. *State v. Forbes,* Preble App. No. CA2007-01-001, 2007-Ohio-6412, ¶29; *State v. Dierkes,* Portage App. No. 2008-P-0085, 2009-Ohio-2530, ¶17.

{¶8} The Fourth Amendment to the United States Constitution protects individuals against unreasonable searches and seizures. *State v. Kelley*, Butler App. No. CA2009-03-092, 2009-Ohio-5924, ¶12. In general, warrantless searches are considered per se unreasonable. *State v. Boland*, Clermont App. Nos. CA2007-01-016, CA2007-01-017, 2008-Ohio-353, ¶11; *State v. Sisler* (1995), 114 Ohio App.3d 337, 341; *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507. However, certain situations, such as where there is imminent danger that evidence will be lost or destroyed if a search is not conducted immediately, "present exigent circumstances that justify a warrantless search." *State v. Moore*, 90 Ohio St.3d 47, 52, 2000-Ohio-10; *State v. Christopher*, Clermont App. No. CA2009-08-041, 2010-Ohio-1816, ¶32. Withdrawing blood from a suspect to determine his blood-alcohol content constitutes a search and seizure within the meaning of the Fourth Amendment. *State v. Abbott*, Warren App. No. CA2001-10-093, 2002-Ohio-6278, ¶10; *State v. Patterson*, Montgomery App. No. 20977, 2006-Ohio-1422, ¶26.

{¶9} In *Schmerber v. California* (1966), 384 U.S. 757, 86 S.Ct. 1826, the United States Supreme Court determined that a warrantless seizure of a blood sample for purposes

of testing an individual's alcohol level could be justified based on exigent circumstances resulting from the evanescent nature of the evidence, i.e., the fact that the level of alcohol in blood dissipates over time. In so holding, the Supreme Court set forth certain criteria to be used in determining if such an intrusion violates the Fourth Amendment: (1) the government must have a "clear indication" that incriminating evidence will be found; (2) there must be a search warrant or exigent circumstances, such as the imminent destruction of evidence, to excuse the warrant requirement; and (3) the method used to extract the evidence must be reasonable and must be performed in a reasonable manner. Id. at 770-772; *Christophe*r at ¶32; *State v. Troyer*, Wayne App. No. 02-CA-0022, 2003-Ohio-536, ¶14. This is true even in the absence of an arrest or actual consent. See *State v. Woods* (Sept. 9, 1991), Butler App. No. CA90-07-125, 5-6; *State v. King*, Hamilton App. No. C-010778, 2003-Ohio-1541, ¶26.

{¶10} In this case, based on appellant's slurred speech, odor of alcoholic beverage, and statements admitting to the consumption of "eight to ten beers and shots," the officer had probable cause to believe appellant had been driving under the influence of alcohol, and therefore, there existed a clear indication that a blood-alcohol test would reveal incriminating evidence. See *Woods* at 6-9; see, also, *State v. Hessel*, Warren App. No. CA2009-03-031, 2009-Ohio-4935, ¶23; *State v. Henry*, Preble App. No. CA2008-05-008, 2009-Ohio-10, ¶44-45; *State v. Hill*, Coshocton App. No. 2008-CA-0011, 2009-Ohio-2468, ¶21.

{¶11} Furthermore, exigent circumstances justified the warrantless search. See *Woods* at 11; *Troyer* at ¶27-28. These include the rapid rate at which alcohol diminishes in the blood, the time that had passed since the accident, as well as the obvious difficulty in obtaining a search warrant during the early morning hours. Such circumstances indicate there was an imminent danger that the evidence would be lost if the blood sample was not drawn immediately.

{¶12} In addition, because the blood sample was drawn by trained medical personnel

using medically acceptable procedures, it is clear that the method used to extract the evidence was reasonable and performed in a reasonable manner. Cf. *State v. Starnes* (1970), 21 Ohio St.2d 38, 43 (finding the Supreme Court's holding in *Schmerber* authorized the administration, over the objection of the accused, of the tests specified in R.C. 4511.191).

{¶13} In light of the foregoing, we find the warrantless search and seizure of appellant's blood for purposes of testing his alcohol level was justified under the principles outlined by the Supreme Court in *Schmerber*. While appellant challenges the denial of his motion to suppress on the basis that he was not asked to have his blood drawn within two hours of the accident and was not under arrest at the time the blood-alcohol test was administered, these arguments are without merit. Due to our conclusion that the trial court did not err in its decision denying appellant's motion to suppress, appellant's sole assignment of error is overruled.

{¶14} Judgment affirmed.

BRESSLER, P.J., and RINGLAND, J., concur.