

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-08-197
- vs -	:	<u>OPINION</u> 4/4/2011
KATHLEEN HENRIKSSON,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY AREA III COURT
Case No. TRC 0905803 A

Michael T. Gmoser, Butler County Prosecuting Attorney, Donald R. Caster, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

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RINGLAND, J.

{¶1} Defendant-appellant, Kathleen Henriksson, appeals from her conviction in the Butler County Area III Court for operating a motor vehicle with a prohibited concentration of alcohol in her breath. For the reasons outlined below, we affirm.

{¶2} On the evening of October 13, 2009, appellant was stopped by Trooper Scott Bierer, a nine-year veteran with the Ohio State Highway Patrol, after he observed her "driving

erratically within her lane" and failing to signal a lane change as she travelled westbound on State Route 63 located in Monroe, Butler County, Ohio. Upon approaching appellant's vehicle, Trooper Bierer noticed it had a "strong odor of an alcoholic beverage," and that appellant, who admitted to consuming "a little" vodka, exhibited glassy eyes and had an odor of alcoholic beverage on her person. Thereafter, once she completed the standardized field sobriety tests, including the horizontal gaze nystagmus (HGN) test, appellant told Trooper Bierer that she "probably" had too much to drink and asked if he "would follow her home." However, instead of following appellant home, Trooper Bierer placed appellant under arrest for operating a motor vehicle while under the influence of alcohol.

{¶3} After Trooper Bierer transported her to the local Ohio State Highway Patrol Post, appellant submitted to a breathalyzer test, the results of which indicated her sample contained .241 grams of alcohol per 210 liters of breath. It is undisputed that prior to requesting appellant to submit to the breathalyzer test, Trooper Bierer read the applicable portions of the Bureau of Motor Vehicles (BMV) Form 2255 to appellant. Appellant was subsequently charged with, among other things, operating a motor vehicle under the influence of alcohol in violation of R.C. 4511.19(A)(1)(a), and operating a motor vehicle with a prohibited concentration of alcohol in her breath in violation of R.C. 4511.19(A)(1)(h), both first-degree misdemeanors. The state later nolleed the R.C. 4511.19(A)(1)(a) charge.

{¶4} On July 1, 2010, after denying her motion to suppress, the trial court found appellant guilty of operating a motor vehicle with a prohibited concentration of alcohol in her breath in violation of R.C. 4511.19(A)(1)(h). The trial court then sentenced appellant, a first-time offender, to serve three days in jail, ordered her to complete three days in a drivers' intervention program, fined her \$1,000, and suspended her driver's license for 180 days.

{¶5} Appellant now appeals from her conviction, raising three assignments of error for review. For ease of discussion, appellant's first and second assignments of error will be

addressed out of order.

{¶6} Assignment of Error No. 2:

{¶7} "THE COURT ERRED IN FAILING TO GRANT THE MOTION TO SUPPRESS."

{¶8} In her second assignment of error, appellant argues that the trial court erred by denying her motion to suppress.

{¶9} Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Burkhead*, Preble App. No. CA2008-11-022, 2009-Ohio-4466, ¶7; *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.

{¶10} Initially, appellant argues that the trial court erred by denying her motion to suppress because, according to her, Trooper Bierer lacked probable cause to effectuate her arrest. We disagree.

{¶11} As this court has previously stated, probable cause to arrest 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." *State v. Way*, Butler App. No. CA2008-04-098, 2009-Ohio-96, ¶30. In determining whether probable cause exists, the trial court examines the "totality of the surrounding circumstances." *State v. Thomas*, Warren App. No. CA2004-01-010, 2004-Ohio-4527, ¶15; *Columbus v. Bickis*, Franklin App. No. 09AP-898, 2010-Ohio-3208, ¶21.

{¶12} In this case, and as noted above, prior to initiating a traffic stop of appellant's vehicle, Trooper Bierer testified that he saw appellant "driving erratically within her lane" and change lanes without signaling. In addition, Trooper Bierer testified that after approaching appellant's vehicle, which had a "strong odor of an alcoholic beverage," he noticed appellant, who admitted to drinking "a little" vodka, exhibited glassy eyes and had an odor of alcoholic beverage on her person. Furthermore, after she completed the standardized field sobriety tests, Trooper Bierer testified that appellant told him she "probably" had too much to drink and asked if he "would follow her home." We find these facts sufficient to establish probable cause to arrest appellant for driving while under the influence of alcohol. See *Way* at ¶33; *State v. Hammons*, Warren App. No. CA2004-01-008, 2005-Ohio-1409, ¶5; *State v. Baker*, Warren App. No. CA2009-06-079, 2010-Ohio-1289, ¶53; *Wilmington v. Taylor*, Butler App. No. CA2009-11-018, 2010-Ohio-3255, ¶20; see, also, *State v. Homan*, 89 Ohio St.3d 421, 2000-Ohio-212. Therefore, because Trooper Bierer had probable cause to effectuate her arrest, appellant's first argument is overruled.

{¶13} Next, appellant argues that the trial court erred by denying her motion to suppress because she "was never advised that if she took [a breathalyzer test] and it read .17 or over she would automatically receive increased penalties." However, contrary to appellant's claim, pursuant to R.C. 4511.192(A), Trooper Bierer, the arresting officer, was only required to advise appellant as to the information contained in R.C. 4511.192(B), the same information as found on BMV Form 2255. See *State v. Davis* (Sept. 13, 1993),

Clermont App. No. CA93-04-027, at 6-7; see, also, *Bryan v. Hudson* (1997), 77 Ohio St.3d 376, syllabus. Nothing in R.C. 4511.192(B) requires the arresting officer to advise any person under arrest for driving while under the influence of alcohol regarding the automatic increase in penalties as appellant now asserts. Therefore, appellant's second argument is overruled.

{¶14} In light of the foregoing, because we find no error in the trial court's decision denying her motion to suppress, appellant's second assignment of error is overruled.

{¶15} Assignment of Error No. 1:

{¶16} "THE COURT ERRED IN REFUSING TO ALLOW DEFENDANT TO PRESENT EVIDENCE AS TO THE HGN AND THE IN CAR VIDEO TAPE."

{¶17} In her first assignment of error, appellant argues that the trial court erred by excluding evidence regarding the HGN test results, as well as video of the traffic stop taken from Trooper Bierer's in-dash camera. We disagree.

{¶18} A trial court's decision to admit or exclude evidence will not be reversed absent an abuse of discretion. *State v. Craft*, Butler App. No. CA2006-06-145, 2007-Ohio-4116, ¶48; *State v. Barnes*, 94 Ohio St.3d 121, 123, 2002-Ohio-68. An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶130.

{¶19} In this case, appellant was tried for violating R.C. 4511.19(A)(1)(h), which provides, in pertinent part, "[n]o person shall operate any vehicle * * * if, at the time of operation, [t]he person has a concentration of seventeen-hundredths of one gram or more by weight of alcohol per two hundred ten liters of the person's breath." In turn, when prosecuting this case, the state was only required to prove two elements; namely, that appellant was operating a vehicle within the state, and that, at the time of the offense, she had a concentration of .17 of one gram or more by weight of alcohol per 210 liters of her

breath. See *State v. Jobe* (July 13, 1998), Clermont App. No. CA97-10-083, at 4-5; *State v. Knapke*, Franklin App. No. 08AP-933, 2009-Ohio-2989, ¶8. As a result, because these two facts are the only facts of consequence in this case, the HGN test results, as well as the video taken from Trooper Bierer's in-dash camera, are not relevant in prosecuting a violation of R.C. 4811.19(A)(1)(h), and therefore, not admissible.¹ See *State v. Boyd* (1985), 18 Ohio St.3d 30, 31; see, also, *State v. Obhof*, Franklin App. No. 07AP-324, 2007-Ohio-5661, ¶16; Evid.R. 402. Accordingly, appellant's first assignment of error is overruled.

{¶20} Assignment of Error No. 3:

{¶21} "THE COURT ERRED IN SENTENCING [APPELLANT] TO SIX DAYS OF CONFINEMENT."

{¶22} In her third assignment of error, appellant argues that "the court erred in its interpretation of the law and that [she] could have been sentenced to the minimum of 3 days." However, contrary to appellant's claim, and pursuant to R.C. 4511.19(G)(1)(a)(ii), if a sentence is being imposed for a violation of R.C. 4511.19(A)(1)(h), such as the case here, "a mandatory jail term of at least three consecutive days and a requirement that the offender attend, for three consecutive days, a drivers' intervention program * * *." This is the minimum sentence that a first time offender can receive for violating R.C. 4511.19(A)(1)(h). See *State v. Paulo*, Hamilton App. No. C-050725, 2006-Ohio-4035. Therefore, because the trial court sentenced appellant to the mandatory minimum sentence, i.e., three days in jail and three days in a drivers' intervention program, we find no abuse of discretion in the trial court's sentencing decision. See *State v. Fields*, Brown App. No. CA2009-05-018, 2009-Ohio-6921,

1. It should be noted, however, that appellant could have challenged the accuracy of her specific breathalyzer test result by introducing evidence showing "something went wrong with [the] test and consequently, the result was at variance with what the approved testing procedure should have produced." *Columbus v. Aleshire*, 187 Ohio App.3d 660, 2010-Ohio-2773, ¶24, 27; see, also, *State v. Tanner* (1984), 15 Ohio St.3d 1, 6 ("[a] defendant may still challenge the accuracy of his specific test results, although he may not challenge the general accuracy of the legislatively determined test procedure as a valid scientific means of determining blood alcohol levels").

¶10; *State v. Hause*, Warren App. No. CA2008-05-063, 2009-Ohio-548, ¶24; see, also, R.C. 2929.22(A). Accordingly, appellant's third assignment of error is overruled.

{¶23} Judgment affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.

[Cite as *State v. Henriksson*, 2011-Ohio-1632.]