

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

JEFFREY Q. SMELTZER

Appellant

No. 674 MDA 2012

Appeal from the Judgment of Sentence March 8, 2012
In the Court of Common Pleas of Lancaster County
Criminal Division at No(s): CP-36-CR-0000796-2011

BEFORE: PANELLA, J., OTT, J., and STRASSBURGER, J.*

MEMORANDUM BY OTT, J.:

Filed: February 22, 2013

Jeffrey Q. Smeltzer appeals from the judgment of sentence imposed on March 8, 2012 by the Lancaster County Court of Common Pleas, after a jury found Smeltzer guilty of driving under the influence ("DUI") (general impairment).¹ Thereafter, the trial court found Smeltzer guilty of the summary offense of driving under a suspended license.² On appeal, Smeltzer alleges the court erred in admitting testimony from the

* Retired Senior Judge assigned to the Superior Court.

¹ 75 Pa.C.S. § 3802(a)(1). The jury also found that Smeltzer refused to submit to chemical testing.

² 75 Pa.C.S. § 1543(b)(1).

investigating police officer regarding his administration of field sobriety tests. Based on the following, we affirm.

The trial court set forth the facts and procedural history as follows:

On January 22, 2011, [Smeltzer] was arrested for driving under the influence. The day earlier, [Smeltzer] had a domestic dispute with his live-in girlfriend. He left their residence in his girlfriend's car. Officer Micha[e]l Lyons was dispatched to the residence following a report of a domestic disturbance. [Smeltzer]'s girlfriend told Officer Lyons that [Smeltzer] had taken her vehicle and that it was not insured. She gave a description of the vehicle. The night of the 22nd, while on routine patrol, Officer Lyons spotted a vehicle matching the description he received. He followed behind the vehicle while running its tags and confirmed the vehicle was registered to [Smeltzer]'s girlfriend.

Officer Lyons activated his emergency lights and stopped the vehicle. He identified the driver as [Smeltzer]. Upon initial contact with [Smeltzer], Officer Lyons smelled the odor of alcohol. He also observed that [Smeltzer] had red, glassy eyes and lethargic speech. Officer Lyons asked [Smeltzer] to perform field sobriety tests. Based upon those tests and his observations of [Smeltzer], Officer Lyons believed [Smeltzer] to be under the influence of alcohol. Officer Lyons placed [Smeltzer] under arrest and transported him to Southwest Regional Police Department for a blood alcohol breath test. Officer Lyons reviewed the chemical test warnings form with [Smeltzer]. [Smeltzer] signed the form, but refused to submit to chemical testing. Ultimately, Officer Lyons charged [Smeltzer] with driving under the influence (DUI).

[Smeltzer] proceeded to a jury trial on March 7, 2012. At trial, defense counsel objected to testimony from Officer Lyons on the basis that he was not formally certified in the administration of field sobriety tests. The Court overruled the objection and Officer Lyons was permitted to testify regarding his administration of field sobriety tests on [Smeltzer]. Following the close of testimony and deliberation, the jury found [Smeltzer] guilty of driving under the influence of alcohol, general impairment, and found that [Smeltzer] refused to submit

to chemical testing. After the jurors were dismissed, the Court found [Smeltzer] guilty of driving under suspended license.

On the driving under the influence count, the Court sentenced [Smeltzer] to one and one-half to five years of state imprisonment. On the suspended license count, the Court sentenced [Smeltzer] to ninety days of imprisonment. The sentences were made consecutive to each other.

Trial Court Opinion, 6/5/2012, at unnumbered 1-2 (footnotes omitted). This appeal followed.³

In Smeltzer's sole argument, he claims the trial court erred in overruling his objection and in permitting Officer Lyons to testify that Smeltzer failed a standardized field sobriety test, the "walk-and-turn" test, because the officer was not admitted as an expert. Smeltzer's Brief at 10. Specifically, he contends that whether the field sobriety tests are "non-standardized" or "standardized", as delineated by National Highway Traffic Safety Administration ("NHTSA"), police officers, who give lay opinion testimony, may not use "value-added language" to characterize a defendant's performance, such as testifying the defendant "failed the test." *Id.* at 16. Relying on *United States v. Horn*, 185 F.Supp.2d 530 (D. Md. 2002), he states:

[I]t might [have] been permissible for Officer Lyons to give non-expert testimony regarding [Smeltzer]'s performance on the field

³ On April 9, 2012, the trial court ordered Smeltzer to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Smeltzer filed a concise statement on April 25, 2012. The trial court issued an opinion pursuant to Pa.R.A.P. 1925(a) on June 5, 2012.

sobriety tests. Also, it might have been permissible to give a lay opinion based on the totality of the evidence that [Smeltzer] was under the influence. However, he was not permitted under the guiding decisional law to give an opinion with “value-added language” regarding [Smeltzer]’s failing the field sobriety test.

Smeltzer’s Brief at 16.⁴ Smeltzer concludes such evidence was not harmless error as it was irrelevant and prejudicial pursuant to the Pennsylvania Rules of Evidence.

We begin with our well-settled standard of review:

The admissibility of evidence is within the sound discretion of the trial court, wherein lies the duty to balance the evidentiary value of each piece of against the dangers of unfair prejudice, inflaming the passions of the jury, or confusing the jury. We will not reverse a trial court’s decision concerning admissibility of evidence absent an abuse of the trial court’s discretion.

Commonwealth v. Flor, 998 A.2d 606, 623 (Pa. 2010) (citations omitted).

Pennsylvania Rule of Evidence 701 governs opinion testimony by lay witnesses and provides:

If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness, helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

⁴ Moreover, he argues that because the officer was permitted to testify regarding his opinion, the court erred in instructing the jury on two occasions that Smeltzer failed to pass a field sobriety test. To the extent that Smeltzer raises this argument, we conclude that it is waived for failure to make a contemporaneous objection. ***See Commonwealth v. Henkel***, 938 A.2d 433, 445 (Pa. Super. 2007) (jury instruction issue waived on appeal for failure to raise a contemporaneous objection to evidence at trial).

Pa.R.E. 701.

Pennsylvania Rule of Evidence 702 concerns expert testimony and is set forth as follows:

If scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

Pa.R.E. 702.

Here, the trial court found the following:

[Smeltzer]'s sole issue on appeal concerns the admissibility of testimony from the arresting officer regarding his administration of field sobriety tests where the officer has undergone no formal training regarding the administration of such tests. Although defense counsel objected to such testimony, he stated no authority to support his position that formal training is required.

Regarding certification, the Court finds no certification requirement for performing NHTSA field sobriety tests. Here, Officer Lyons was experienced in observing signs of intoxication. He testified that he was trained to administer field sobriety tests from other, more experienced officers. He has made approximately 300 arrests for driving under the influence and close to a thousand arrests for public drunkenness. The Court finds Officer Lyon[s's] experience and training was sufficient to administer field sobriety tests.

Moreover, Officer Lyons administered field sobriety tests that would allow a normal observer to opine as to whether [Smeltzer] was intoxicated based on his coordination, communication, and actions. Evidence regarding non-standardized field sobriety tests is admissible in DUI prosecutions where it allows an ordinary observer to form an opinion as to whether a driver was intoxicated based upon the driver's demonstration of coordination and concentration.

Commonwealth v. Drake, 452 Pa. Super. 315, 320, 681 A.2d 1357, 1359 (1996); see also *Commonwealth v. Ragan*, 438 Pa. Super. 505, 512, 652 A.2d 925, 928 (1995).

In *Ragan*, the Superior Court considered the admissibility of the "finger to nose," "one leg stand," and "walking in a straight line" sobriety tests:

The three sobriety tests, which we here review, are grounded in theories which link an individual's lack of coordination and loss of concentration, with intoxication. This inter-relationship is also recognized in what is generally accepted as the common indicia of intoxication, within the understanding and experience of ordinary people. See *Commonwealth v. Bowser*, 425 Pa. Super. 24, 624 A.2d 125 (1993), *appeal denied* 537 Pa. 638, 644 A.2d 161 (1994), *cert. denied Bowser v. Pennsylvania*, 513 U.S. 867, 115 S. Ct. 186, 130 L. Ed. 2d 120 (1994). In fact, non-expert testimony is admissible to prove intoxication where such testimony is based upon the witness' observation of the defendant's acts and speech and where the witness can opine as to whether the defendant was drunk. *Id.*

Ragan, supra, at 928. In *Drake*, the Superior Court found a test requiring an individual to count his fingers back and forth with his thumb and a test requiring an individual to recite the alphabet admissible under the reasoning of *Ragan*. *Drake, supra*, at 1359.

Here, Officer Lyons administered non-standardized sobriety tests where he was not looking for hints or clues. Specifically, he asked [Smeltzer] to walk nine steps forward, heel-to-toe, turn around, and walk back nine steps, heel-to-toe, all while looking at his feet and counting out loud. [Smeltzer] did not touch his heel to his toe on any of the steps, did not count out loud, and did not look at his feet as instructed. [Smeltzer] refused to do the one-leg stand. Officer Lyons asked [Smeltzer] to recite the ABC's, but [Smeltzer] answered that he did not know them. In contrast to standardized NHTSA field sobriety tests, where the administrator is looking for a quantifiable number of clues for failure of a test, the tests here

were performed to evaluate [Smeltzer]'s overall coordination, concentration, and actions. As such, the Court found this testimony admissible for the jury to weigh and consider within their ordinary experience.

Trial Court Opinion, *supra*, at unnumbered 2-4.

We accept the well-reasoned findings of the trial court. Because this Court has permitted evidence that a defendant's performance can be evaluated based on the investigating officer's common observation and experience of an intoxicated person and has also accepted testimony regarding the results of the type of field sobriety tests administered to Smeltzer, Officer Lyons did not have to be qualified as an expert under Rule 702 and was properly admitted under Rule 701. *See Ragan, supra*.⁵ Therefore, we discern no abuse of discretion on the trial court's part in permitting the officer to testify regarding Smeltzer's performance of those tests.

Moreover, we decline Smeltzer's request to apply *Horn, supra*, to this matter as we are "not bound by decisions of federal courts inferior to the

⁵ *See also Commonwealth v. Palmer*, 751 A.2d 223, 228 (Pa. Super. 2000) ("Evidence that the driver was not in control of himself, such as failing to pass a field sobriety test, may establish that the driver was under the influence of alcohol to a degree which rendered him incapable of safe driving, notwithstanding the absence of evidence of erratic or unsafe driving."); *Commonwealth v. Smith*, 904 A.2d 30, 37 (Pa. Super. 2006) (An "appellant's performance on field sobriety tests would inform the officer as to her state of intoxication, and along with his other observations, form the basis of his opinion on the matter.").

United States Supreme Court." *Commonwealth v. Jones*, 951 A.2d 294, 301 (Pa. 2008). Accordingly, we affirm the judgment of sentence.

Judgment of sentence affirmed.