

STATE OF OHIO; COUNTY OF WARREN  
IN THE WARREN COUNTY COURT

CRIMINAL/TRAFFIC DIVISION 2011 NOV -1 AM 10:33

STATE OF OHIO

Plaintiff

v.

JAMEY B. LINVILLE

Defendant.

WARREN COUNTY COURT  
CASE NO: 2011TRC01374

(Judge Oda)

DECISION AND ENTRY

This matter came before the Court upon the Motion to Suppress filed on behalf of the Defendant. Present before the Court was the Defendant, represented by Rob Kaufman. The State was represented by Assistant Prosecuting Attorney Anne Tamashasky.

In consideration of the Motion, the Court heard the testimony of Officer Aaron Zimarro, who testified he observed the Defendant's motorcycle driving erratically and weaving in and out of traffic. He initiated a traffic stop, where he observed the Defendant had glassy, bloodshot eyes and was uneasy on his feet. Although he could initially smell only gasoline while the Defendant was on the motorcycle, after he dismounted, he could smell the odor of an alcoholic beverage coming from the Defendant. He admitted he had consumed some alcohol, specifically beer, earlier.

A police officer may stop a vehicle based on probable cause that a traffic violation, even minor, has occurred or is occurring. Dayton v. Erickson, 76 Ohio St.3d 3, 11-12, 1996 Ohio 431. Such is the case when this officer witnessed a traffic violation and then stopped the Defendant for this traffic violation.

Police do not need probable cause to conduct field sobriety tests. Reasonable suspicion of criminal activity is all that is required to administer the tests. State v. Herman, 1995 Ohio App. LEXIS 3408 (Aug. 21, 1995), Warren App. No. CA95-02-014, unreported. See, also, Columbus v. Anderson (1991), 74 Ohio App. 3d 768, 770. In determining whether there is reasonable suspicion of criminal activity, an arresting officer must point to specific and articulable facts which, when taken together with rational inferences from those facts, reasonably warrant the intrusion. Middletown v. Proffitt, 1989 Ohio App. LEXIS 1438.

At the time the officer requested the Defendant complete field sobriety tests, the Court finds the observations of the Officer at the time of the stop, when taken together, are sufficient to warrant a reasonable suspicion of criminal activity and justify further inquiry.

The officer administered three field sobriety tests: Horizontal Gaze Nystagmus (HGN), the Walk and Turn and One Leg Stand. For the purpose of this hearing, the Court, *sua sponte*, takes

judicial notice of the NHTSA manual and its standards governing the administration of field sobriety tests, including the HGN test. The Ohio Supreme Court has clearly indicated that the applicable standardized test procedures regarding field sobriety tests are set forth in the NHTSA manual. See State v. Homan, 89 Ohio St.3d 421; State v. Frazee, Warren App. No. CA2004-07-085, 2005 Ohio 3513; Evid.R. 201. These standards are not subject to reasonable dispute because they are capable of accurate and ready determination by reference to the NHTSA manual itself, a source whose accuracy cannot be questioned given its status as the seminal authority in this area. Frazee at 8.

The NHTSA manual contains specific instructions officers are taught to provide the suspect with prior to the field tests. However, an officer is not required to give the instructions verbatim. State v. Wood (Oct. 20, 2008), Clermont App. No. CA2007-12-115, 2008-Ohio-5422; Nicholson at 2. Despite the absence of the quoted, verbatim language from NHTSA, a trial court may determine the instructions provided are sufficient to apprise the defendant of the manner in which he or she is to perform the test, Plunkett at 11.

The Officer testified that he performed field sobriety tests and did so in substantial compliance with his training. This evidence is sufficient for the State to meet its burden in this case. The Motion to Suppress as to the field sobriety tests is **OVERRULED**.

The Ohio Supreme Court has recognized that when a law enforcement officer has probable cause to believe that the suspect was operating a motor vehicle while under the influence of alcohol, the officer is allowed to make a warrantless arrest. State v. Henderson (1990), 51 Ohio St. 3d 54, 56. A warrantless arrest is constitutionally valid if, at the time of the arrest, the facts and circumstances within the officer's knowledge were sufficient to warrant a prudent man in believing that the suspect had committed the offense. Beck v. Ohio (1976), 379 U.S. 89, 91,

Therefore, a valid arrest is made when, based on the totality of the circumstances, a prudent person would believe that the defendant was driving under the influence of alcohol. State v. Johnson (Dec. 21, 1998) Warren App. No CA98-07-080, 1998 Ohio App. LEXIS 6138.

The Court concludes, based upon the testimony of the officer, his observations, combined with the defendant's performance on the field sobriety tests and admission of alcohol consumption establishes there was probable cause to arrest the Defendant. The Motion to Suppress as to this issue is **OVERRULED**.

Following his arrest, the Defendant submitted to an alcohol test on the Intoxilyzer 8000, where his BAC was .106 g/210L. The Defendant seeks to suppress the results of this test, challenging the machine itself and noncompliance with the Department of Health regulations in this area.

As to this issue, the State presented the testimony of Mary Martin, who testified (in general, not scientific terms) as to the methodology and operation of the machine.

Because the Intoxilyzer 8000 is a new machine, the accepted judicial practice would be for the State to present evidence as to the reliability of the machine. This procedure is set forth by Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) and has been followed throughout the state for devices such as radar and laser speed detection devices.

However, in State v. Vega, 12 Ohio St. 3d 185 (1984) the Ohio Supreme Court held that R.C. §

4111.19 provides a legislative determination that certain breath testing devices are generally reliable. The Vega decision prevents trial courts such as this one from making an independent judgment as to the reliability of an approved instrument.

Under R.C. § 4511.19(D) and (E), the Ohio General Assembly has provided that bodily substances taken to prove a violation for operating a vehicle while under the influence or exceeding a specified concentration of alcohol shall be analyzed in accordance with methods approved by the Director of Health. The Intoxilyzer 8000 is authorized as a breath alcohol test instrument in the State of Ohio pursuant to OAC § 3701-53-02(A)(3).

Notwithstanding the fact that this Court has serious reservations about the reliability of this particular machine and the method by which it became an approved instrument in this state, the Court owes deference to the legislature and its authority to establish the procedure and delegate to the Director of Health the methods by which testing shall take place. The Ohio Supreme Court has sanctioned and approved of this process with prior breath testing instruments. Therefore, this Court has no authority to make an independent examination of the reliability of the Intoxilyzer 8000, nor to permit a general attack on the validity of the machine. The Motion to Suppress as to this issue is **OVERRULED**.

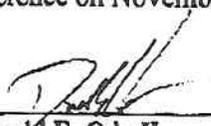
The only issue remaining is whether the State provided sufficient evidence, in this case, that the testing procedure properly complied with the procedures set forth by the Ohio Department of Health. The Defendant alleges there was not a dry gas control test before and after every subject test, as required by OAC § 3701-53-04(B). On this point, Mary Martin testified that the Intoxilyzer 8000 is a command-prompt based operating system that walks the operator, and thus the Defendant, through a series of predetermined steps designed to take two separate breath samples and yields the results of those samples. The printout sets forth the time sequence followed in this step-by-step process. Martin testified the operator does not have the ability to alter the procedure as the test is in progress.

Defendant offered Exhibits A, B, C and D, which were subject test reports for the Defendant and three other individuals. In each of these reports, the machine does a series of tests, including a dry gas control test, then completes two subject tests which each register a BAC level, then machine does a second series of tests, including a dry gas control test, after the subject test samples.

Clearly, the machine does not perform a dry gas control test before and after each test sample. However, the Court finds the two samples, taken collectively, represent the subject test sample set forth in OAC § 3701-53-04(B). Therefore, the operation of the machine substantially complies with the dry gas control requirement. The Motion to Suppress as to this issue is **OVERRULED**.

The matter is hereby set for further pretrial conference on November 17, 2011 at 2:00 p.m.

So Ordered.

  
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Donald E. Oda II  
Judge, Warren County Court

cc. Anne Tamashasky, Rob Kaufman