

MASON MUNICIPAL COURT
WARREN COUNTY, OHIO

FILED
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Case No. 11TR001388
MUNICIPAL COURT
MASON, OHIO

STATE OF OHIO

Plaintiff,

Vs

RACHEL WALLACE

Defendant,

DECISION AND ENTRY
OVERRULING IN PART AND
SUSTAINING IN PART
DEFENDANT'S
MOTION TO SUPPRESS

This matter came before the court on May 26, 2011 for Defendant's Motion to Suppress filed on May 2, 2011. Jeffrey C. Meadows appeared on behalf of the Defendant and Bethany Bennett appeared on behalf of the state, with Trooper Bloomberg, of the Ohio State Highway Patrol (OSHP), testifying for the state. Both parties stipulate to the Troopers training and offer the video of the stop as a joint exhibit. For reasons stated below, the Defendant's motion as to the Field Sobriety Tests and probable cause to arrest is hereby overruled. For reasons stated below, the Defendant's motion to suppress the results of the breath test is hereby sustained.

Facts

On or about May 20, 2010, Trooper Bloomberg, recorded a vehicle driven by the Defendant, Rachel Wallace, traveling 57 miles per hour (MPH) in a 45 MPH speed limit zone. The Trooper commenced the stop and approached the vehicle. The Trooper noted a strong odor of alcohol as well as blood shot and glassy eyes. The Trooper asked the Defendant for license, registration, and proof of insurance. The Defendant was able to provide all three.

Initially, the Defendant admitted to drinking one beer before driving; however, later admitted to drinking one beer and one shot before driving. The Trooper placed the Defendant in the front seat of his vehicle while he ran her license to check her record. While in the cruiser the Trooper noted a strong odor of alcohol on her breath. The Trooper decided to administer the Field Sobriety Tests (FSTs)

The trooper began the FSTs with the horizontal gaze nystagamus (HGN) test. The Trooper verbally issued the Defendant the instructions and then conducted the test. The Trooper noted a lack of smooth pursuit and distinct nystagamus at maximum deviation. The Trooper also noted an onset nystagamus prior to forty-five degrees. Overall, the Trooper observed all six possible clues.

The Trooper moved to the one-leg stand (OLS) test. The Trooper both gave instructions and demonstrated the test to the Defendant before the Trooper administered the test. The Trooper noted the Defendant put her foot down twice during the test and pulled her arms more than six inches away from her body for balance. Overall the Trooper noted 2 out of 4 possible clues.

Trooper Bloomberg then moved to the walk & turn test (W&T). The Trooper verbally issued the instructions and then demonstrated the test including an individual demonstration of the turn. Next, Trooper Bloomberg administered the test. The Trooper noted the Defendant moved her feet from the instruction phase. She also only took eight steps out instead of the nine steps she was instructed to take. Overall the Trooper noted 3 out of 8 possible clues.

After he administered the FSTs, Trooper Bloomberg was under the impression that the Defendant was noticeably impaired. The Trooper placed the Defendant under

arrest based on the totality of the circumstances. The Trooper then moved the Defendant's vehicle into a parking lot instead of having it towed. The Defendant was taken to an OSHP post and read 2255 form. The Defendant submitted to a breathalyzer test taken on an Intoxilyzer 8000.

Suspicion to Stop

The Defendant is not challenging the "probable cause" of the stop.

Field Sobriety Tests

In response to a motion to suppress regarding field sobriety tests, the state must show the requisite level of compliance with accepted testing standards. *State v. Schmitt*, 101 Ohio St.3d 79, 801 N.E.2d. 446 (2004). The typical standards, as were used in this case, are those from the National Highway Traffic Safety Administration (NHTSA) manual. *State v. Jimenez*, 2007 WL 41419 (Ohio App. 12 Dist.). Strict compliance with the NHTSA standards is not necessary, but instead, clear and convincing evidence of substantial compliance with the NHTSA standards is sufficient. R.C. 4511.19(D)(4)(b); see also *State v. Schmitt*, ¶ 9.

The extent of the state's burden of proof establishing substantial compliance "only extends to the level with which the defendant takes issue with the legality of the test."

State v. Nicholson, 2004-9229 (Ohio App. 12 Dist.). For example, if the defendant's motion to suppress issues in general terms, then the state is only required to show substantial compliance in general terms. *Nicholson* ¶ 10; *Plunker* ¶ 12, citing *Jimenez*, 2007 WL 41419. The state's burden to show compliance in regards to a general allegation is only the amount of specificity as stated in the motion. *Nicholson* ¶ 11. The state needs only to "present general testimony that

there was compliance" when the motion is not sufficiently specific. *Id.* However, if the defendant's motion to suppress lacks the required particularity, the defendant may still provide some factual basis, either during cross-examination or by conducting formal discovery, to support a claim that the standards were not followed in an effort to "raise the 'slight burden' placed on the state. *Plunkett* at 25-26, citing *State v. Embry*, 2004 WL 2698417 (Ohio App. 12 Dist).

In the Defendant's motion, he uses language asserting that Trooper Hutchinson was not in substantial compliance with NHTSA guidelines when administering the field sobriety tests. During both cross examination and his written argument in support of his motion, the Defendant was unable to provide any compelling evidence to support his claim. Furthermore, this Court finds the testimony of Trooper ^{Bloomer} Hutchinson to be both convincing and persuasive that the tests were administered in substantial compliance with NHTSA guidelines

With respect to the horizontal gaze nystagamus (HGN) test, the NHTSA manual states that "a police officer should instruct the suspect that [he is] going to check the suspect's eyes, that the suspect should keep [his] head still and follow the stimulus with [his] eyes, and that the suspect should do so until told to stop. After these initial instructions are provided, the officer is instructed to position the stimulus approximately 12 to 15 inches from the suspect's nose and slightly above eye level. The officer is then told to check the suspect's pupils to determine if they are of equal size, the suspect's ability to track the stimulus, and whether the suspect's tracking is smooth. The officer is then to check the suspect for nystagamus at maximum deviation and for onset of nystagamus prior to 45 degrees." *State v. Wood*, WL 4616597 (Ohio App. 12 Dist.).

Trooper Bloomberg gave directions to the Defendant prior to conducting the HGN test. The trooper noted a lack of smooth pursuit and distinct nystagamus at maximum deviation in both eyes. The Trooper also saw an onset of nystagamus prior to 45 degrees. The Trooper testified that the even though the Defendant was seated in the front seat of his cruiser, he had enough room to fully administer the HGN test. The fact that Trooper Bloomberg did not turn the camera in his cruiser to capture the administration of the HGN test bears no merit on this case since he is not required to do so by law. Trooper Bloomberg's testimony as to how the test was administered satisfied the State's burden of demonstrating that the test was done in "substantial compliance" with NHTSA standards. Therefore, the Defendant's motion as to the HGN test is overruled.

With respect to the W&T test, an officer is required to, "first instruct the suspect of the initial positioning, which requires the suspect to stand with [his] arms down at [his] side, and to place one foot directly in front of the other in a line. The suspect is then told to remain in that position while further instructions are given. These further instructions include, the method by which the suspect walks while touching his heel to his toe for every step, counting the nine steps out loud while walking down the line, and making a turn with small steps with one foot while keeping the other foot on the line. The officer is also told to demonstrate the instructions to ensure that the suspect fully understands." *State v. Henry* 2009 WL 18054 (Ohio App. 12 Dist.). See also, *Wood*, 2008-Ohio-5422 ¶ 21.

Trooper Bloomberg, as with the other tests, gave instructions to the Defendant on how the test would be administered. He then demonstrated the W&T test for the Defendant including an individual demonstration of the turn. After the instructions and

demonstration, Trooper Bloomberg administered the test in the same manner he had informed the Defendant. Trooper Bloomberg's testimony satisfies the burden placed upon the State to prove the Trooper acted within "substantial compliance" of NHTSA guideless. Therefore, the Defendant's motion regarding the W&T test is overruled.

With respect to the OLS test, a trooper is required to "inform the suspect that [he] must begin the test with [his] feet together and that [he] must keep [his] arms at [his] side for the entire test. The trooper also [must tell] the suspect that he must raise one leg, either leg, six inches from the ground and maintain that position while counting out loud for thirty seconds. * * * NHTSA standards provide that the counting should be done in the following manner: 'one thousand and one, one thousand and two, until told to stop.'"

Nicholson, 2004-Ohio-6666, ¶ 24

In this case, Trooper Bloomberg informed the Defendant of the required instructions and demonstrated the OLS test for the Defendant. The Trooper's testimony regarding his instructions and the demonstration of the OLS test he provided to the Defendant is enough to prove that the Trooper performed the test in "substantial compliance" with NHTSA standards. Therefore, the Defendant's motion regarding the OLS test is overruled.

Probable Cause to Arrest

The state carries the burden of proof to justify the seizure of a person without a warrant, showing that the officer had probable cause to arrest. *Xenia v. Wallace* 37 Ohio St. 3d 216 (1988). Probable Cause exists when, at the time of the arrest, the facts and circumstances known by the officer and of which the officer had reasonably trustworthy information were sufficient to warrant a prudent person in believing that the accused had

committed or was committing an offense. *Beck v. Ohio* 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed.2d 142. A Court makes this determination based on the totality of facts and circumstances surrounding the arrest. *State v. Homan*, 89 Ohio St. 421, 427, 732 N.E.2d 952, 2000-Ohio-212. Resolution of whether the facts establish sufficient probable cause to arrest is a question of law. *State v. Deters* (1998), 128 Ohio App.3d 329, 333, 714 N.E.2d 972.

The Defendant argues that Trooper Bloomberg did not have the necessary probable cause to arrest her. Trooper Bloomberg commenced a traffic stop after recording the Defendant traveling 57 mph in a 45 mph zone. At that point the Trooper had the necessary "probable cause" to make an investigatory stop on the Defendant. The Trooper then inquired in to the Defendant's level of sobriety after the Trooper noted the Defendant smelled of alcohol while her eyes were glassy and blood shot. The Trooper also used the Defendant's performance on the FSTs to gauge the Defendant's level of intoxication. This Court, based on the totality of these circumstances, concludes Trooper Bloomberg had the necessary probable cause to arrest the Defendant for operating a vehicle under the influence (OVI).

Breath Test

"When a motion to suppress challenges [the states compliance] with the Ohio Administrative Code regulations governing breath tests, the burden is on the State to show substantial compliance with the regulations." *State v. Stendahl*, (2005) WL 3588435 (Ohio App. 12 Dist). Breath analysis performed on any of the approved evidential testing devices must comply with certain standard requirements. First, officers must observe the suspect for at least 20 minutes prior to testing. "The purpose of the

observation rule is to require positive evidence that during the twenty minutes prior to the test the accused did not ingest some material which might produce an inaccurate test result." *State v. Kissinger*, 2010 WL 2499709 (Ohio App. 2 Dist.). Second, qualified personnel must perform a proper instrument check of the testing apparatus in accordance with the administrative regulations and manufacturer's directions.

In this case, the State has failed to prove that the testing procedure was in "substantial compliance" with the regulations. State Exhibit "A" (the Defendant's breath test report) shows an inaccuracy in the testing. The breath test report shows "7 sample attempts" after the first test yet shows only one sample attempt after the second test. Without any evidence from the State to refute this discrepancy, the breath test strongly indicates that the machine was flawed in this situation. Since there is a strong indication that the machine was flawed in this situation, the State has the burden to prove "substantial compliance" with regulations, and the State has failed to offer any evidence to prove that the test fell within "substantial compliance" of the required regulations, the Defendant's motion to suppress the results from the breath test is granted.

Conclusion

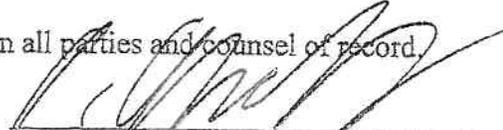
The State, having shown with clear and convincing evidence that both the stop and the arrest of the Defendant were lawful and the field sobriety tests were in substantial compliance with NHTSA guidelines, will be permitted to use any relevant evidence, other than the results of the breath test, obtained in the investigation of this offense. Defendant's motion to suppress in regards to the FSTs and probable cause to arrest is overruled. Defendant's motion to suppress in regards to the breath test results is sustained.

IT IS SO ORDERED.



Judge D. Andrew Batsche

To the Clerk: Please serve a copy of this entry upon all parties and counsel of record.



Judge D Andrew Batsche