[Cite as *Whitehouse v. Stricklin*, 2012-Ohio-1877.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio/Village of Whitehouse	Court of Appeals No. L-10-1277
Appellee	Trial Court No. 09TRC05760-1
v.	
Robert T. Stricklin	**DECISION AND JUDGMENT**
Appellant	Decided: April 27, 2012

* * * * *

Melissa M. Purpura, for appellee.

Eric Allen Marks, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} This is an appeal from a judgment issued by the Maumee Municipal Court following a no contest plea to an OVI charge. Because we conclude that the trial court erred in denying appellant's motion to suppress, we reverse.

{¶ 2} In September 2009, appellant, Robert T. Stricklin, was cited by Whitehouse police for operating a vehicle under the influence of alcohol or drugs, in violation of R.C. 4511.19(A)(1)(a) or (A)(1)(d), and for failure to have two working headlights, in violation of Whitehouse Ordinance 337.03(a). Appellant pled not guilty and filed a motion to suppress based upon the validity of the initial traffic stop, which the court denied. Appellant obtained new counsel and a second motion to suppress was filed on the basis that the arresting officer did not have reasonable suspicion to warrant the administration of field sobriety tests, which the court also denied.

{¶ 3} At the suppression hearings, a Whitehouse police officer testified that, at 1:26 a.m. on September 12, 2009, she stopped appellant because the vehicle he was driving had only one lighted headlight. After the officer explained the reason for the stop, appellant asked to exit the vehicle. Appellant walked up to the driver's side headlight, struck it with his hand, and it became operational. Appellant then returned to his vehicle and the officer continued to have a conversation with him.

{¶ 4} The officer testified that during her conversation with appellant, there was nothing unusual about his responses to questions or his actions. She stated that she observed a "slight odor" of alcohol on his breath and he had bloodshot, glassy eyes. The officer testified in court that appellant also appeared "anxious," even though she acknowledged that she had not included that fact in her official report of the incident. According to the officer, appellant denied consuming alcohol or illegal drugs. The officer then returned to her patrol vehicle and ran appellant's license information which

indicated he had a prior OVI conviction in 2005. After appellant refused to submit to a portable breath test, the officer had appellant exit the vehicle to administer field sobriety tests. The officer determined that he failed to perform the tests sufficiently and then arrested appellant, charging him with the OVI offense.

{¶ 5} On September 17, 2010, reserving the right to appeal the denial of his motions to suppress, appellant pled no contest to the OVI charge under R.C. 4511.19(A)(1)(d) and the other charges were dismissed. Appellant was sentenced to 180 days at the Correction Center of Northwest Ohio, fined $550, and ordered to pay court costs. In addition, the court suspended appellant's driver's license for one year, but granted privileges to drive for work, school, and AA meetings, subject to several conditions. The court then suspended 165 days of incarceration, on the condition that appellant have three years with no alcohol related offenses.

{¶ 6} Appellant now appeals from that decision, arguing the following sole assignment of error:

The trial court erred in denying appellant's motion to suppress.

{¶ 7} Appellant asserts that the trial court erred in denying his motion to suppress when it determined that the officer had sufficient evidence to warrant the administration of field sobriety tests.

{¶ 8} Appellate review of a motion to suppress presents a mixed question of law and fact. When determining a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and evaluate witness

credibility. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E. 2d 71, ¶ 8. A reviewing court is bound to accept the trial court's findings of fact in ruling on a motion to suppress if the findings are supported by competent, credible evidence. *Id.*, citing *State v. Fanning*, 1 Ohio St.3d 19, 20, 437 N.E.2d 583 (1982). Nevertheless, without deference to the trial court's conclusion, the reviewing court must independently determine as a matter of law whether the trial court's decision meets the appropriate legal standard. *Burnside*, *supra*; *State v. Turner*, 10th Dist. No. 00AP-248, 2000 WL 1863410 (Dec. 21, 2000).

{¶ 9} A person has been seized for purposes of the Fourth Amendment when an officer conducts an investigative stop and detains the person in order to administer field sobriety tests. *State v. Robinette*, 80 Ohio St.3d 234, 240-41, 685 N.E.2d 762 (1997); *State v. Litteral*, 4th Dist. No. 93CA510, 1994 WL 268261 (June 14, 1994) (roadside sobriety tests are a "search" within the meaning of the Fourth Amendment). Accordingly, an officer must have reasonable suspicion based upon specific, articulable facts that a driver is intoxicated before the officer may conduct field sobriety tests. *State v. Perkins*, 10th Dist. No. 07AP-924, 2008-Ohio-5060, ¶ 8, appeal not allowed, 121 Ohio St.3d 1409, 902 N.E.2d 33, 2009-Ohio-805; *State v. George*, 5th Dist. No. 07-CA-2, 2008-Ohio-2773, ¶ 22.

{¶ 10} In this case, the officer had probable cause to initially stop defendant for the faulty headlight violation. Her additional detainment of appellant, however, violates the Fourth Amendment unless she had the requisite reasonable, articulable suspicion that

defendant was intoxicated. The propriety of such an investigative stop must be viewed in light of the totality of the circumstances. *See United States v. Cortez*, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); *State v. Bobo*, 37 Ohio St.3d 177, 524 N.E.2d 489 (1988), paragraph one of the syllabus.

{¶ 11} In order to warrant removing a person from his vehicle to conduct field sobriety tests, a police officer must have reasonable articulable suspicion to believe that the person was driving under the influence of drugs or alcohol. *State v. Knox*, 2d Dist. No. 2005-CA-74, 2006-Ohio-3039, ¶ 11. This standard is fact-sensitive, and all evidence suggesting an alcohol offense should be examined together to decide whether the officer has reasonable suspicion to administer a field sobriety test.

{¶ 12} Traffic violations of a de minimus nature, combined with a slight odor of an alcoholic beverage, and an admission of having consumed a "couple" beers, are not sufficient to support a reasonable and articulable suspicion of DUI. *See State v. Spillers*, 2d Dist. No. 1504, 2000 WL 299550 (Mar. 24, 2000). *See also State v. Dixon*, 2d Dist. No. 2000-CA-30, 2000 WL 1760664 (Dec. 1, 2000) (mere detection of odor of alcohol and glassy, bloodshot eyes at 2:20 a.m., unaccompanied by any basis to correlate the odor with a level of intoxication which would impair driving ability, did not justify administration of field sobriety tests). Likewise, a trial court's grant of a motion to suppress was upheld where, after stopping defendant for failure to signal, the police officer considered only two factors to conduct field sobriety tests: the defendant had bloodshot, glassy eyes and smelled of alcohol, with no testimony regarding the intensity

or strength of the odor of alcohol. *See State v. Swartz*, 2d Dist. No. 2008 CA 31, 2009-Ohio-902.

{¶ 13} In contrast, an officer's observation that the driver has very red and glassy eyes, a strong odor of alcohol on his breath, and slurred speech is sufficient to warrant the administration of field sobriety tests. *State v. Castle*, 2d Dist. No. 21698, 2007-Ohio-5165, ¶ 10-11. Likewise, where an officer stopped a car for driving at 1:30 a.m. without headlights on and noticed the driver had glassy, bloodshot eyes, a strong odor of alcohol, and thick, slurred speech, such factors were held to be sufficient to warrant conducting field sobriety tests. *Knox*, *supra*, at ¶ 9-10.

{¶ 14} In the present case, the officer did not notice any indicators of intoxication when appellant pulled over, exited the vehicle, fixed the non-working headlight, and then returned to his vehicle. After seeing the headlight was working, however, the officer went back to the vehicle and continued talking to appellant. Even though appellant's verbal responses were not unusual, the officer continued to detain appellant, observing a slight smell of alcohol, bloodshot eyes, and his "anxious" demeanor. As noted by the court in *Dixon*, the time of day could have accounted for the bloodshot eyes. In addition, upon being stopped by police, most motorists might seem "anxious." Without some other true indication of intoxication or impairment, such factor does not warrant the administration of field sobriety tests. It was only after the officer discovered a prior OVI offense, four years prior to this incident, that she decided to administer field sobriety

tests. The prior OVI offense was simply not relevant to whether sufficient factors existed to extend detainment at the initial stop.

{¶ 15} Here, appellant was stopped for a de minimus traffic violation; he had not demonstrated any erratic driving or exhibited any other behaviors which would indicate that he was intoxicated. The only *valid* factors which formed the basis of the officer's decision to conduct field sobriety tests were a slight odor of alcohol and glassy, bloodshot eyes. Under the facts of this case, those factors alone did not provide a reasonable articulable suspicion to warrant the administration of field sobriety tests.

{¶ 16} Moreover, once the officer ascertained that appellant had a working headlight, she no longer had sufficient reason to continue detaining him for further questioning. Under the facts of this case, we conclude that the factors relied upon by the officer were insufficient to support a reasonable suspicion that appellant was driving while intoxicated and to warrant conducting field sobriety tests. Therefore, the trial court erred in denying appellant's motion to suppress the sobriety test results.

{¶ 17} Accordingly, appellant's sole assignment of error is well-taken.

{¶ 18} The judgment of the Maumee Municipal Court is reversed. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, P.J.
CONCUR. _____
JUDGE

Stephen A. Yarbrough, J.,
DISSENTS.

YARBROUGH, J.

{¶ 19} I respectfully dissent.

{¶ 20} While the standard of review for a challenged suppression ruling involves mixed questions of law and fact, *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, ¶ 50, we must accept the trial court's factual findings if they are supported by competent and credible evidence. *Id*. In denying Stricklin's motion to suppress the field-sobriety tests, the trial court made the following findings:

Clearly the lack of [the] headlight was sufficient cause to stop the vehicle.

As to whether there was sufficient cause in order to inquire into the

consumption of alcohol, clearly you have to look to *the totality of the circumstances*. And quite frankly this isn't a close call. Time of night is nearly 1:30 in the morning, the defendant, the officer testified that she could smell an odor of alcohol, even if it was light, asked the defendant if he had consumed anything and he said no, which obviously is reasonable suspicion to believe that he's lying. Then the additional statement where he made that "I would never drink and drive" and then his conviction for OVI clearly is additional justification for the officer to proceed further. His appearance, the fact that he was glassy-eyed, along with all the other factors clearly indicates that there's, this officer was justified in the procedures that she followed. (Emphasis added.)

{¶ 21} There is no dispute here that Officer Kantner lawfully stopped Stricklin for an observed equipment violation—only one working headlight, plainly a nominal infraction. Once lawfully stopped, however, Kantner had the authority to order him out of the vehicle for any reason under *Pennsylvania v. Mimms*, 434 U.S. 106, 111, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977). The authority to order the driver out arises automatically from the lawfulness of the stop, and that authority is independent of whether reasonable suspicion ever develops for ordering field sobriety tests. *State v. Wiesenbach*, 11th Dist. No. 2011-P-29, 2011-Ohio-402, ¶ 20.

{¶ 22} At first, Stricklin exited the vehicle voluntarily in response to the officer's headlight query, got the headlight working, and then re-entered the vehicle. The facts as

they developed from there must be assessed from three perspectives: first, the totality of the circumstances, which the majority opinion acknowledges but then discards in favor of a parsed chronology of events; second, a court's view of that totality must be undertaken "through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold." *State v. Andrews*, 57 Ohio St.3d 86, 87-88, 565 N.E.2d 1271 (1991) ("A court reviewing the officer's actions must give due weight to his experience and training and view the evidence as it would be understood by those in law enforcement." *Id.*); *see also State v. Mapes*, 6th Dist. No. F-04-031, 2005-Ohio-3359, ¶ 41; third, appellate review of a suppression ruling compels deference to the trial court's factual findings. *New London v. Gregg*, 6th Dist. H-06-030, 2007-Ohio-4611, ¶ 8.

{¶ 23} After the initial stop, Kantner required only reasonable suspicion to detain Stricklin further for field sobriety tests. That suspicion can accrue during the stop from several sources and, in fact, it did here. These include: additional observations made by the officer; statements made to the officer by the person stopped; or other indicators of possible intoxication or impairment when viewed in totality.

{¶ 24} In *State v. Lavalette*, 6th Dist. No. WD-02-025, 2003-Ohio-1997, this court reviewed the stop of a vehicle for what the officer thought was a minor equipment violation—improper plates—but after pulling the driver over the officer discovered he was mistaken and the plates were valid. The officer nevertheless approached the driver of the vehicle to give him a "courtesy explanation" for why he had been stopped. While conversing with the driver, the officer smelled the odor of an alcoholic beverage. He

then began investigating the stop as a possible driving while under the influence (DUI) violation. This court held that "once the officer smelled the alcoholic beverage, he did, in fact, have new and independent articulable suspicion that appellant was engaging in criminal behavior (DUI), and he was entitled to investigate for that." *Id*. at ¶ 19, referencing *State v. Chatton*, 11 Ohio St.3d 59, 463 N.E.2d 1237 (1984).

{¶ 25} Here, after Stricklin re-entered his car, he and the officer were conversing when she noticed his "blood shot glassy eyes and [a] slight odor of alcoholic beverage." [1]

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[1] In *New London v. Gregg*, *supra*, we reviewed a DUI case that similarly began as a stop for a minor equipment violation.

> It was shortly before and while gathering information in order to issue a citation for the seat belt violation that [Officer] Wilson perceived indicia which aroused his suspicion that appellant was intoxicated. Specifically, he described appellant's eyes as "red, glassy," and he smelled a "mild" to "moderate" odor of alcohol emanating from inside the vehicle. *Wilson admitted that the smell was not strong* and that he could not determine whether the smell was coming from the passenger, the vehicle, or appellant. Appellant's speech was not slurred or otherwise impaired. Wilson acknowledged that appellant's driving was not impaired and he saw no other violations, aside from the lack of a license plate, before he stopped appellant. (Emphasis added.) *Id.* at ¶ 16.

In upholding the extension of the stop to investigate for intoxicated driving, we held:

> [Officer] Wilson, although his stated intention in requesting appellant's driver's license was to issue (improperly) a seat belt violation, did have facts within his knowledge to create reasonable suspicion that appellant was driving under the influence of alcohol. These facts, as is so often the case, present a close issue. "Where a non-investigatory stop is initiated and the odor of alcohol is combined with glassy or bloodshot eyes *and further indicia of intoxication*, such as an admission of having consumed alcohol, reasonable suspicion exists." * * * *State v. Beeley*, 6th Dist. L-05-1386,

Having detected this, Kantner asked for and received Stricklin's driver's license and registration.

{¶ 26} She then asked if he had consumed any alcohol or illegal drugs. Stricklin replied: "No, I would never drink and drive."

{¶ 27} Given the physical manifestations of insobriety that Kantner had just observed—admittedly slight—she was fully entitled to determine whether his license was valid and to vet his unequivocal statement by checking for prior intoxicated-driving offenses. The majority opinion appears to suggest that Kantner either should have ignored his answer or simply accepted it at face value. No precedent is cited that would require Kantner to do either. In dismissively stating that the 2005 DUI conviction "was not relevant," the majority misses its relevance: not the conviction itself, but the exposure of Stricklin's denial that he would ever "drink and drive" as a bald-faced lie, in conjunction with the already-observed physical indicators, heightened the reasonableness of Kantner's suspicion that she was dealing with exactly that—an alcohol-impaired driver.

2006-Ohio-4799, ¶ 16. (Internal citations omitted; emphasis added.) *Id.* at ¶ 19.

Here, while Stricklin denied that he would ever "drink and drive," other salient indicia of reasonable suspicion (as detailed in this dissent) evolved during the stop to support Kantner's decision to conduct the field sobriety tests.

{¶ 28} More importantly, the few minutes it took to go to her patrol car and check Stricklin's license status and prior record did not unreasonably extend the stop. In *Gregg*, which involved a roadside detention emanating from a license-plate violation, we held that the officer's request for a driver's license and the few minutes needed to verify its status and other information are only "minimally intrusive." *Id*. at ¶ 20. Any relevant information this check uncovers may furnish additional facts contributing to reasonable suspicion to continue the detention or, indeed, "fresh probable cause" to believe that a crime has occurred unrelated to the original purpose of the stop (e.g., driving with a suspended license.) *Id*.

{¶ 29} As the record indicates, after learning that Stricklin had a 2005 DUI conviction Kantner returned to Stricklin, seated in his vehicle. Now aware that his categorical denial was a lie, she asked him to submit to a portable breath test (PBT). Stricklin refused. In a DUI prosecution before a jury, where proof of guilt beyond a reasonable doubt is the standard, jurors are permitted, under certain circumstances, to draw a negative inference from a defendant's refusal to submit to a chemical test for intoxication. *See Maumee v. Anistik*, 69 Ohio St.3d 339, 632 N.E.2d 497 (1994). Certainly, during an otherwise lawful traffic stop at 1:30 a.m., where all that is needed to administer field-sobriety tests is reasonable suspicion, any objectively reasonable police officer in Kantner's position, after hearing Stricklin first declare "I would never drink and drive" and then discovering that to be a lie, could justifiably infer from his refusal of the PBT that he feared it would reveal, or at least suggest, an illegal blood-alcohol content.

Viewed in totality from Kantner's perspective, this refusal was an additional fact supporting reasonable suspicion to conduct field sobriety tests before deciding whether to release him or continue the detention.

{¶ 30} Before Kantner did that, however, and while Stricklin was still seated in the car, she conducted a preliminary horizontal gaze nystagmus (HGN) test. She observed the "lack of smooth pursuit and bouncing of his eyes." At that point she ordered Stricklin from the car. After he got out, Kantner conducted a *second* HGN test, which she termed "the official HGN" at the suppression hearing. This revealed "five" negative clues.

{¶ 31} Only after accumulating the foregoing facts did Kantner conduct the disputed field sobriety tests. The majority opinion finds no reasonable basis for doing so, concluding that "[t]he only *valid* factors which formed the basis of the officer's decision to conduct field sobriety tests were a slight odor of alcohol and glassy, bloodshot eyes. Under the facts of this case, those factors alone did not provide a reasonable articulable suspicion to warrant the administration of field sobriety tests." (Emphasis sic.)

{¶ 32} Obviously those were not the *only* "valid" factors that developed during this stop. Nor were they the only ones Kantner took into account in believing that field-sobriety tests were warranted. In reaching its conclusion, the majority opinion selectively focuses on fewer facts than were actually known to Kantner when she decided to administer the tests. In that respect, the majority opinion not only fails to defer to the trial court's factual determinations, but also impermissibly substitutes its perspective for

Kantner's roadside view of Stricklin—perceptibly inebriated and boldly mendacious at 1:30 a.m. on the gravelly berm of Waterville Street in the village of Whitehouse.

{¶ 33} Given the totality of facts in this record, I would find the sole assigned error not well-taken and affirm the trial court's judgment denying Stricklin's motion to suppress.