

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

KENNETH W. NICHOLS

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.

Hon. Sheila G. Farmer, J.

Hon. Patricia A. Delaney, J.

Case No. 09-CA-50

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Fairfield County Municipal
Court Case No. 2008-TRC-05611

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

May 11, 2010

APPEARANCES:

For Plaintiff-Appellee:

STEPHANIE L. SMITH 0082045
Assistant City Prosecutor
City of Lancaster
123 E. Chestnut St.
P.O. Box 1008
Lancaster, Ohio 43130

For Defendant-Appellant:

THOMAS R. ELWING 0069449
60 W. Columbus Street
Pickerington, Ohio 43147

Delaney, J.

{¶1} Defendant-Appellant, Kenneth Nichols, was convicted on his plea of no contest to one count of operating a vehicle under the influence in violation of R.C. 4511.19(A)(1)(a). The State of Ohio is Plaintiff-Appellee.

{¶2} On June 24, 2008, at approximately 2:30 a.m., Fairfield County Deputy Swinehart observed Appellant operating a motor vehicle at a high rate of speed on U.S. Route 33. She confirmed his speed by radar at 75 miles per hour. The posted speed limit on that particular stretch of highway is 60 miles per hour.

{¶3} Deputy Swinehart immediately initiated a traffic stop of Appellant's vehicle. Upon approaching the vehicle, Deputy Swinehart immediately noticed a strong odor of alcohol emanating from the vehicle. She testified at the suppression hearing that Appellant was the only passenger in the vehicle.

{¶4} She asked Appellant where he was going, and he initially stated he was on his way to Columbus, which was in the opposite direction of his direction of travel. He then stated that he was going to Circleville. Deputy Swinehart stated Appellant appeared confused and disoriented. She additionally testified that Appellant was commenting on his time in Iraq, as if he were still in Iraq. Throughout the conversation, Deputy Swinehart observed that Appellant's eyes were glassy.

{¶5} Deputy Swinehart asked Appellant to step out of the vehicle so that she could administer field sobriety tests. At that time, Deputy Ash arrived at the scene. Because Deputy Ash had more experience with administering field sobriety tests, the deputies determined that he would administer the tests to Appellant.

{¶6} Deputy Ash asked Appellant to first complete the horizontal gaze nystagmus (“HGN”) test. Deputy Ash observed all six clues on the HGN test. He also noticed a strong odor of alcohol coming from Appellant’s mouth while he administered the test.

{¶7} Next, Deputy Ash asked Appellant to complete the walk and turn test. He stated that Appellant exhibited all eight clues of intoxication based on the walk and turn test.

{¶8} Finally, he asked Appellant to complete the one leg stand test. Appellant proceeded to lift his foot off of the ground and count to “one, one thousand” before putting his foot down and refusing to complete the test.

{¶9} Deputy Ash stopped the field sobriety tests at that time, believing that Appellant was intoxicated based on his performance on the field sobriety tests.

{¶10} Deputy Swinehart testified that based on the speed of Appellant’s vehicle, her interaction with Appellant, the strong odor of alcohol emanating from his person, his glassy eyes, slurred speech, and disorientation, she decided to arrest him for operating a vehicle under the influence (“OVI”). Prior to taking Appellant into custody, the officers had to subdue him at taser point because he became belligerent.

{¶11} After his arrest, Appellant was *Mirandized* and transported to the Ohio Highway Patrol Post where he refused to submit to a breath alcohol test. Appellant was charged with one count of OVI, in violation of R.C. 4511.19(A)(1)(a) and one count of speeding, in violation of R.C. 4511.21.

{¶12} Appellant was arraigned in Fairfield County Municipal Court on June 25, 2008, and he pled not guilty to both charges. On July 22, 2008, he filed a motion to

suppress. On November 19, 2008, he filed a motion for a competency evaluation. His motion was granted, and he was found competent to stand trial by journal entry dated January 13, 2009.

{¶13} On March 27, 2009, an oral hearing was conducted on Appellant's motion to suppress. The trial court overruled Appellant's motion, finding that reasonable suspicion existed to stop Appellant's vehicle and that probable cause existed on which to arrest him. The trial court further found that the standardized field sobriety tests administered were administered in substantial compliance with the National Highway Traffic Safety Administration ("NHTSA") standards.

{¶14} On April 1, 2009, Appellant filed a motion for expert witness at the state's expense. The motion was summarily denied on April 10, 2009.

{¶15} On July 23, 2009, Appellant changed his plea of not guilty to a plea of no contest on the charge of OVI. The speeding charge was dismissed. Appellant was sentenced on that same date, but his sentence was stayed pending the present appeal.

{¶16} Appellant raises two Assignments of Error:

{¶17} "I. THE TRIAL COURT ERRED WHEN IT OVERRULED APPELLANT'S MOTION TO SUPPRESS FIELD SOBRIETY TESTS.

{¶18} "II. THE TRIAL COURT ERRED WHEN IT OVERRULED APPELLANT'S MOTION FOR AN EXPERT WITNESS AT STATE'S EXPENSE."

I.

{¶19} In his first assignment of error, Appellant argues that the trial court erred in denying his motion to suppress the results of the field sobriety tests because the state

failed to provide proof that the tests were administered in substantial compliance with current NHTSA testing standards.

{¶20} There are three methods of challenging a trial court's ruling on a motion to suppress on appeal. First, an appellant may challenge the trial court's finding of fact. In reviewing a challenge of this nature, an appellate court must determine whether the trial court's findings of fact are against the manifest weight of the evidence. See *State v. Fanning* (1982), 1 Ohio St.3d 19, 1 Ohio B. 57, 437 N.E.2d 583; and *State v. Klein* (1991), 73 Ohio App.3d 486, 597 N.E.2d 1141. Second, an appellant may argue that the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. See *State v. Williams* (1993), 86 Ohio App.3d 37, 619 N.E.2d 1141. Finally, an appellant may argue the trial court has incorrectly decided the ultimate or final issues raised in a motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry* (1994), 95 Ohio App.3d 623, 620 N.E.2d 906.

{¶21} This Court has previously held that in order for the results of the field sobriety tests to be admissible, the state must show by clear and convincing evidence that the officer performing the testing substantially complied with accepted testing standards. *State v. Secoy*, 5th Dist. No. CT2008-0065, 2009-Ohio-5100, ¶14, citing *State v. Jimenez*, 12th Dist. No. CA2006-01-005, 2007-Ohio-1658 citing *State v. Schmitt*, 101 Ohio St.3d 79, 2004-Ohio-37, 801 N.E.2d 446; R.C. 4511.19(D)(4)(b). Typically, the standards used are those from the NHTSA. *Id.* at ¶12. Part of the state's

burden “includes demonstrating what the NHTSA requirements are, through competent testimony and/or by introducing the applicable portions of the NHTSA manual.” *State v. Djisheff*, Trumbull App. No.2005-T-0001, 2006-Ohio-6201 citing *State v. Brown*, 166 Ohio App.3d 638, 2006-Ohio-1172, 852 N.E.2d 1228; *State v. Ryan*, 5th Dist. No. 02-CA00095, 2003-Ohio-2803. In this case, the NHTSA guidelines were not in evidence and no witness testified as to the current standards in effect in 2008.

{¶22} While field sobriety tests must be administered in substantial compliance with standardized procedures, probable cause to arrest does not necessarily have to be based, in whole or in part, upon a suspect's poor performance on one or more of these tests. The totality of the facts and circumstances can support a finding of probable cause to arrest even where no field sobriety tests were administered. *State v. Homan* (2000), 89 Ohio St.3d 421, 732 N.E.2d 952. Further, the Ohio Supreme Court has made clear that the officer may testify regarding observations made during a defendant's performance of standardized field sobriety tests even absent proof of “strict compliance.” *State v. Schmitt* (2004), 101 Ohio St.3d 79, 84, 2004-Ohio-37 at ¶15, 801 N.E.2d 446, 450.

{¶23} In this case, the record reflects that there was sufficient competent, credible evidence apart from the field sobriety tests that Appellant was under the influence of alcohol. Appellant was disoriented, stating that he was going to Columbus, when in fact he was heading in the opposite direction. He stated that he thought he was still in a combat zone in Iraq. He had an odor of alcohol on his person, he had glassy eyes, his speech was slurred, and he was belligerent to the officers, having to be

subdued at taser point during the traffic stop. These factors were sufficient to show probable cause to arrest for operating a vehicle under the influence of alcohol.

{¶24} Assuming *arguendo* the field sobriety tests should not have been admitted at the suppression hearing, the admission of the evidence was harmless beyond a reasonable doubt.

{¶25} Pursuant to Crim. R. 52(A), any error will be deemed harmless if it did not affect an accused's substantial rights. Appellant entered a plea of no contest to a violation of R.C. 4511.19(A)(1)(a):

{¶26} “A)(1) No person shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, any of the following apply:

{¶27} “(a) The person is under the influence of alcohol, a drug abuse, or a combination of them.”

{¶28} In *State v. Salrymple*, 5th Dist. No. 07CA33, 2008-Ohio-2827, this Court held that the appellant did not demonstrate prejudice as a result of the trial court's alleged improper admission of breath test results because the appellant pleaded no contest to a violation of R.C. 4511.19(A)(1)(a), and because there was competent, credible evidence apart from the breath test that the appellant was under the influence of alcohol, the trial court did not necessarily rely on the breath test results in convicting the appellant. *Id.* at ¶15. See also, *State v. Cox*, 5th Dist. No. TRC 0702199 A-B, 2009-Ohio-1625; and *State v. Secoy*, 5th Dist. No. TRC0803004, 2009-Ohio-5100.

{¶29} As previously stated, the trial court had competent, credible evidence apart from the field sobriety tests that Appellant was under the influence of alcohol to support the court's finding of guilt upon the plea.

{¶30} Accordingly, the first assignment of error is overruled.

II.

{¶31} In Appellant's second assignment of error, he argues that the trial court erred in overruling his motion for expert assistance at the state's expense.

{¶32} We review Appellant's claim under an abuse of discretion standard. See *State v. Jones* (2000), 90 Ohio St.3d 403, 414, 2000-Ohio-187 739 N.E.2d 300. The term "abuse of discretion" connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶33} "Due process, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution, does not require the government to provide expert assistance to an indigent defendant in the absence of a particularized showing of need. Nor does it require the government to provide expert assistance to an indigent criminal defendant upon mere demand of the defendant." *State v. Mason* (1998), 82 Ohio St.3d 144, 150, 694 N.E.2d 932.

{¶34} Decisions as to the appointment of experts are to be made "in the sound discretion of the court" based upon "(1) the value of the expert assistance to the defendant's proper representation * * * and (2) the availability of alternative devices that would fulfill the same functions." *State v. Jenkins* (1984), 15 Ohio St.3d 164, 15 OBR 311, 473 N.E.2d 264, paragraph four of the syllabus. See, also, Sup.R. 20(IV)(D).

{¶35} A defendant must provide the trial court with sufficient facts to establish a particularized need for expert assistance and must demonstrate more than a mere possibility of assistance to receive an expert witness at the state's expense. See *State*

v. Nields (2001), 93 Ohio St.3d 6, 2001-Ohio-1291, 752 N.E.2d 859; see also *State v. Campbell* (2000), 90 Ohio St.3d 320, 2000-Ohio-183, 738 N.E.2d 1178.

{¶36} This Court has previously held that “undeveloped assertions that the proposed assistance would be useful to the defense are patently inadequate.” *In the matter of Kristopher F.*, 5th Dist. No. 2006CA00312, 2007-Ohio-3259, ¶48.

{¶37} In the present case, Appellant failed to provide sufficient facts to establish a particularized need for expert assistance. In his motion for assistance, Appellant asserted generally that he “may have been experiencing flashbacks related to post-traumatic stress disorder”. He claimed that the fact that he was disoriented when speaking with the officers was the basis for his request for an expert. Appellant failed to request a hearing to litigate his request.

{¶38} With only Appellant’s self-serving statement that he believed he was suffering from flashbacks, the trial court was within its discretion to deny his request.

{¶39} Accordingly, Appellant’s second assignment of error is overruled.

{¶40} The judgment of the Fairfield County Municipal Court is affirmed.

By: Delaney, J.

Gwin, P.J. and

Farmer, J. concur.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
KENNETH W. NICHOLS	:	
	:	
Defendant-Appellant	:	Case No. 09-CA-50
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Fairfield County Municipal Court is affirmed. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER