

[Cite as *State v. Robertson*, 2004-Ohio-556.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 03AP-277
Linda Robertson,	:	(M.C. No. 2002TRC-217038)
Defendant-Appellant.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on February 5, 2004

Richard C. Pfeiffer, Jr., City Attorney, and *Heather L. Keck*, for appellee.

Koffel & Jump, and *Bradley P. Koffel*, for appellant.

APPEAL from the Franklin County Municipal Court.

LAZARUS, P.J.

{¶1} Defendant-appellant, Linda Robertson, appeals from a judgment of the Franklin County Municipal Court finding her guilty of operating a motor vehicle while under the influence of alcohol in violation of R.C. 4511.19.

{¶2} On November 14, 2002, at approximately 12:20 a.m., Trooper Craig Cvetan of the Ohio Highway Patrol stopped appellant on Bethel Road for speeding. Upon

approaching the driver's side window of appellant's automobile, Trooper Cvetan noticed that appellant's eyes were red and glassy and that a smell of alcohol emanated from the car's interior. After requesting appellant's driver's license and registration, Trooper Cvetan asked appellant how much she had had to drink that evening. Appellant responded that she had consumed one glass of wine. Trooper Cvetan then returned to his cruiser to check appellant's license and registration. After returning to appellant's car, Trooper Cvetan issued appellant a citation for speeding and performed a cursory horizontal gaze nystagmus ("HGN") test on appellant while she was still in her car. Trooper Cvetan then had appellant exit her vehicle and perform three field sobriety tests: the one-leg-stand test, the walk-and-turn test, and a second HGN test. After completion of the field sobriety tests, Trooper Cvetan placed appellant under arrest and transported her to the police headquarters where she submitted to a breath test. The results of appellant's breath test showed appellant had a blood alcohol level in excess of the legal limit. Appellant was charged with operating a motor vehicle while under the influence of alcohol in violation of R.C. 4511.19(A)(1) and (A)(3).

{¶3} Appellant moved to suppress all evidence of the field sobriety tests and to dismiss the charge against her arguing that in the absence of the field sobriety tests Trooper Cvetan lacked probable cause to arrest appellant. At the suppression hearing, Trooper Cvetan testified and a videotape with audio of the traffic stop that led to appellant's arrest was played and admitted into evidence. At the close of the hearing, the trial court granted appellant's motion to suppress the initial HGN test performed by Trooper Cvetan but overruled the motion to suppress with respect to the one-leg-stand test, the walk-and-turn test, and the second HGN test. Based on the results of these

three tests, the trial court concluded that Trooper Cvetan possessed probable cause to arrest appellant. Thereafter, appellant entered a no contest plea and the trial court found her guilty of operating a motor vehicle while under the influence of alcohol. Appellant appeals from the judgment of the trial court assigning the following error:

[I.] APPELLANT'S CONVICTION MUST BE REVERSED BECAUSE THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT WHEN IT OVERRULED HER MOTION TO DISMISS/SUPPRESS WHEN IT CONCLUDED THAT THE ARRESTING OFFICER HAD PROBABLE CAUSE TO ARREST APPELLANT FOR OPERATING A MOTOR VEHICLE UNDER THE INFLUENCE OF ALCOHOL/DRUGS.

{¶4} 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 findings 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; and *State v. Klein* (1991), 73 Ohio App.3d 486. 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. Finally, an appellant may argue the trial court has incorrectly decided the ultimate or final issue 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 93; and *State v. Claytor* (1993), 85 Ohio App.3d 623.

{¶5} Under her sole assignment of error, appellant contends that the trial court should have suppressed all evidence of the one-leg-stand test, the walk-and-turn test, and a second HGN test, as these tests were not conducted in strict compliance with the National Highway Traffic Safety Adm., U.S. Dept. of Transp., HS 178 R2/00, DWI Detection and Standardized Field Sobriety Testing, Student Manual ("NHTSA Manual") as required by *State v. Homan* (2000), 89 Ohio St.3d 421. Without the evidence of these field sobriety tests, appellant contends that Trooper Cvetan lacked probable cause to arrest her and her conviction must therefore be reversed.

{¶6} In *Homan*, the Ohio Supreme Court held that "[i]n order for the results of a field sobriety test to serve as evidence of probable cause to arrest, the police must have administered the test in strict compliance with standardized testing procedures." *Id.*, paragraph one of the syllabus. "When field sobriety testing is conducted in a manner that departs from established methods and procedures, the results are inherently unreliable." *Id.* at 424. Quoting from the NHTSA Manual, the Supreme Court noted, "[i]f any one of the standardized field sobriety test elements is changed, the validity is compromised." *Id.* at 425. The court then went on to state: "[I]t is well established that in field sobriety testing even minor deviations from the standardized procedures can severely bias the results." *Id.* at 426.

{¶7} A portion of the NHTSA Manual containing the specific procedures which must be followed for each of the three field sobriety tests at issue here was admitted into evidence during the suppression hearing. This document sets forth the procedures that must be followed in administering the three field sobriety tests at issue in relevant part as follows:

Procedures of Horizontal Gaze Nystagmus Testing: The Three Clues

* * *

Specific Procedures

Begin by asking "are you wearing contact lenses", make a note whether or not the suspect wears contacts before starting the test.

If the suspect is wearing eyeglasses, have them removed.

Give the suspect the following instructions from a position of interrogation (FOR OFFICER SAFETY KEEP YOUR WEAPON AWAY FROM THE SUSPECT):

"I am going to check your eyes."

"Keep your head still and follow this stimulus with your eyes only."

"Keep focusing on this stimulus until I tell you to stop."

Position the stimulus approximately 12-15 inches from the suspect's nose and slightly above eye level. Check the suspect's eyes for the ability to track together. Move the stimulus smoothly across the suspect's entire field of vision. Check to see if the eyes track the stimulus together *or* one lags behind the other. If the eyes don't track together it could indicate a possible medical disorder, injury, or blindness.

Next, check to see that both pupils are equal in size. If they are not, this may indicate a head injury.

Check the suspect's left eye by moving the stimulus to your right. Move the stimulus smoothly, at a speed that requires about two seconds to bring the suspect's eye as far to the side as it can go. While moving the stimulus, look at the suspect's eye and determine whether it is able to pursue smoothly. Now, move the stimulus all the way to the left, back across suspect's face checking if the right eye pursues smoothly. Movement of the stimulus should take approximately two seconds out and two seconds back for each eye. Repeat the procedure.

After you have checked both eyes for lack of smooth pursuit, check the eyes for distinct nystagmus at maximum deviation beginning with the suspect's left eye. Simply move the object to the suspect's left side until the eye has gone as far to the side as possible. Usually, no white will be showing in the corner of the eye at maximum deviation. Hold the eye at that position for approximately four seconds, and observe the eye for distinct nystagmus. Move the stimulus all the way across the suspect's face to check the right eye holding that position for approximately four seconds. Repeat the procedure.

After checking the eyes at maximum deviation, check for onset of nystagmus prior to 45 degrees. Start moving the stimulus towards the right (suspect's left eye) at a speed that would take about four seconds for the stimulus to reach the edge of the suspect's shoulder. Watch the eye carefully for any sign of jerking. When you see it, stop and verify that the jerking continues. Now, move the stimulus to the left (suspect's right eye) at a speed that would take about four seconds for the stimulus to reach the edge of the suspect's shoulder. Watch the eye carefully for any sign of jerking. When you see it, stop and verify that the jerking continues. Repeat the procedure. NOTE: It is important to use the full four seconds when checking for onset of nystagmus. If you move the stimulus too fast, you may go past the point of onset or miss it altogether.

If the suspect's eyes start jerking before they reach 45 degrees, check to see that some white of the eye is still showing on the side closest to the ear. If no white of the eye is showing, you either have taken the eye too far to the side (that is more than 45 degrees) or the person has unusual eyes that will not deviate very far to the side.

NOTE: Nystagmus may be due to causes other than alcohol. These other causes include seizure medications, PCP, inhalants, barbiturates and other depressants. A large disparity between the performance of the right and left eye may indicate a medical condition.

Test Interpretation

You should look for three clues of nystagmus in each eye.

1. The eye cannot follow a moving object smoothly.
2. Nystagmus is distinct when the eye is at maximum deviation.
3. The angle of onset of nystagmus is prior to 45 degrees.

If you observe four or more clues, it is likely that the suspect's BAC is above 0.10. Using this criterion you will be able to classify correctly about 77% of your suspects with respect to whether they are above 0.10. That probability was determined during laboratory and field testing and helps you weigh the various field sobriety tests in this battery as you make your arrest decision.

* * *

Procedures for Walk-and-Turn Testing

1. Instructions Stage: Initial Positioning and Verbal Instructions

For standardization in the performance of this test, have the suspect assume the heel-to-toe stance by giving the following verbal instructions, accompanied by demonstrations:

"Place your left foot on the line." (Place your own left foot on the line to demonstrate.)

"Place your right foot on the line ahead of the left foot, with heel of right foot against toe of left foot." (Demonstrate).

"Place your arms down at your side."

"Keep this position until I tell you to begin. Do not start to walk until I tell you to do so."

"Do you understand the instructions so far?" (Make sure suspect indicates understanding.)

2. Demonstrations and Instructions for the Walking Stage

Explain the test requirements, using the following verbal instructions, accompanied by demonstrations:

"When I tell you to start, take nine heel-to-toe steps down the line, turn around, and take nine heel-to-toe steps back up the line." (Demonstrate 2 or 3 heel-to-toe steps.)

"When you turn, keep the front foot on the line, and turn by taking a series of small steps with the other foot, like this." (Demonstrate).

"While you are walking, keep your arms at your sides, watch your feet at all times, and count your steps out loud."

"Once you start walking, don't stop until you have completed the test."

"Do you understand the instructions?" (Make sure suspect understands.)

"Begin, and count your first step from the heel-to-toe position as 'One.' "

3. Test Interpretation

You may observe a number of different behaviors when a suspect performs this test. Research, however, has demonstrated that the behaviors listed below are the most likely to be observed in someone with a BAC above 0.10. Look for the following clues each time this test is given:

A. Cannot keep balance while listening to the instructions. Two tasks are required at the beginning of this test. The suspect must balance heel-to-toe on the line, and at the same time, listen carefully to the instructions. Typically, the person who is intoxicated can do only one of these things. The suspect may listen to the instructions, but not keep balance. Record this clue if the suspect does not maintain the heel-to-toe position throughout the instructions. (Feet must actually break apart.) Do not record this clue if the suspect sways or uses the arms to balance but maintains the heel-to-toe position.

B. Starts before the instructions are finished. The impaired person may also keep balance, but not listen to the instructions. Since you specifically instructed the suspect not to start walking "until I tell you to begin," record this clue if the suspect does not wait.

C. Stops while walking to steady self. The suspect pauses for several seconds after one step. Do not record this clue if the suspect is merely walking slowly.

D. Does not touch heel-to-toe. The suspect leaves a space of one-half inch or more between the heel and toe on any step.

E. Steps off the line. The suspect steps so that one foot is entirely off the line.

F. Uses arms to balance. The suspect raises one or both arms more than 6 inches from the sides in order to maintain balance.

G. Improper turn. The suspect removes the front foot from the line while turning. Record this clue if both feet are removed from the line. Also record this clue if the suspect clearly has not followed directions as demonstrated.

H. Incorrect number of steps. Record this clue if the suspect takes more or fewer than nine steps in either direction.

Note: If suspect cannot do test, record as if all eight clues were observed. Consideration should be given to terminating the test if the suspect cannot safely complete it.

Should the suspect have difficulty with this test (for example, steps off the line), repeat the test from the point of difficulty, not from the beginning. This test tends to lose its sensitivity if it is repeated several times.

Observe the suspect from 3 or 4 feet away and remain motionless while suspect performs the test. Being too close or excessive motion on your part will make it more difficult for the suspect to perform, even if sober.

If the suspect exhibits two or more distinct clues on this test or fails to complete it, classify the suspect's BAC as above 0.10. Using this criterion, you will be able to correctly classify about 68% of your suspects.

4. Test Conditions

Walk-and-Turn test requires a designated straight line, and should be conducted on a dry, hard, level, nonslippery surface, under relatively safe conditions. There should be sufficient room for suspects to complete nine heel-to-toe steps. If these conditions do not exist, suspects should be asked to perform this test elsewhere or only HGN should be used. SUSPECT'S AND OFFICER'S SAFETY SHOULD BE CONSIDERED AT ALL TIMES.

NOTE: In the research study, suspects were only asked to "assume a heel-to-toe position on a designated line". Therefore, a suspect could start with either the right or left foot on the line and not violate the procedures used in the research study. However, for standardization of the administrative procedures for this test, have suspect place left foot on line first, right foot in front, heel-to-toe.

Some people have difficulty with balance even when sober. The test criteria for Walk-and-Turn is not necessarily valid for suspects 65 years of age or older, persons with injuries to their legs, or persons with inner ear disorders. Individuals wearing heels more than 2 inches high should be given the opportunity to remove their shoes. Individuals who cannot see out of one eye may also have trouble with this test because of poor depth perception.

* * *

Procedures for One-Leg Stand Testing

1. Instructions Stage: Initial Positioning and Verbal Instructions

Initiate the test by giving the following verbal instructions, accompanied by demonstrations.

"Please stand with your feet together and your arms down at the sides, like this." (Demonstrate)

"Do not start to perform the test until I tell you to do so."

"Do you understand the instructions so far?" (Make sure suspect indicates understanding.)

2. Demonstrations and Instructions for the Balancing and Counting Stage

Explain the test requirements, using the following verbal instructions, accompanied by demonstrations:

"When I tell you to start, raise one leg, either leg, approximately six inches off the ground, toes pointed out." (Demonstrate one leg stance.)

"You must keep both legs straight, arms at your side."

"While holding that position, count out loud for thirty seconds in the following manner: "one thousand and one, one thousand and two, until told to stop." (Demonstrate a count, as follows: "one thousand and one, one thousand and two, etc." Officer should not look at his foot when conducting the demonstration – OFFICER SAFETY.)

"Keep your arms at your sides at all times and keep watching the raised foot."

"Do you understand?" (Make sure suspect indicates understanding.)

"Go ahead and perform the test." (Officer should always time the 30 seconds. Test should be discontinued after 30 seconds.)

Observe the suspect from at least 3 feet away. If the suspect puts the foot down, give instructions to pick the foot up again and continue counting from the point at which the foot touched the ground. If the suspect counts very slowly, terminate the test after 30 seconds. If the suspect is counting quickly, have the suspect continue counting until told to stop.

3. Testing Interpretation

You may observe a number of different behaviors when a suspect performs this test. Researchers, however, have found that behaviors listed below are the most likely to be observed in someone with a BAC above 0.10. Look for the following clues each time the One-Leg Stand test is administered.

A. The suspect sways while balancing. This refers to side-to-side or back-and-forth motion while the suspect maintains the one-leg stand position.

B. Uses arms for balance. Suspect moves arms 6 or more inches from the side of the body in order to keep balance.

C. Hopping. Suspect is able to keep one foot off the ground, but resorts to hopping in order to maintain balance.

D. Puts foot down. The suspect is not able to maintain the one-leg stand position, putting the foot down one or more times during the 30-second count.

Note: If suspect cannot do test or puts foot down three or more times, record as if all four clues were observed. Consideration should be given to terminating the test if the suspect cannot safely complete it.

Remember that time is critical in this test. Research has shown that a person with a BAC above 0.10 can maintain balance for up to 25 seconds, but seldom as long as 30.

If an individual shows two or more clues or fails to complete the One-Leg Stand, there is a good chance the BAC is above 0.10. Using that criterion, you will correctly classify about 65% of the people you test as to whether their BAC's are above or below 0.10.

Observe the suspect from at least 3 feet away, and remain as motionless as possible during the test so as not to interfere. If the suspect puts the foot down, give instructions to pick the foot up again and continue counting from the point at which the foot touched the ground. If the suspect counts very slowly, terminate the test after 30 seconds. If the suspect is counting quickly, have the suspect continue counting until 30 seconds have elapsed.

4. Test Conditions

One-Leg Stand requires a reasonably level, and smooth surface. There should be adequate lighting for the suspect to have some visual frame of reference. Suspect's safety should be considered at all times.

Some people have difficulty with the One-Leg Stand even when sober. The test criteria for the One-Leg Stand is not necessarily valid for suspects 65 years of age or older, or 50

pounds or more overweight. Persons with injuries to their legs, or inner ear disorders, may have difficulty with the test. Individuals wearing heels more than 2 inches high should be given the opportunity to remove shoes.

{¶8} In the present case, appellant attacks each of the three field sobriety tests on different grounds. With respect to the walk-and-turn test, appellant asserts that Trooper Cvetan failed to properly instruct her on how to perform the test. Specifically, appellant contends that that Trooper Cvetan merely instructed her to "put her right foot in front of her left foot" rather than instructing her to place her left foot on the line and then to place her right foot on the line ahead of her left foot, with heel of her right foot against toe of her left foot, as specified in the NHTSA Manual. Our review of the videotape reveals that Trooper Cvetan did in fact instruct appellant properly with respect to the walk-and-turn test. Although Trooper Cvetan did not use the exact words contained in the NHTSA Manual, his instructions and demonstration made it very clear that appellant was to place her left foot on the line and then to place her right foot on the line ahead of her left foot, with heel of her right foot against toe of her left foot.

{¶9} Appellant also contends that the trial court erred in considering the results of the walk-and-turn test as evidence going to probable cause because the videotape indicates that appellant passed the test. At the hearing, Trooper Cvetan testified that appellant failed the walk-and-turn test because she moved her feet for balance while he was instructing her on the test and because she shuffled her feet to maintain balance during the turn portion of the test. Appellant argues that the videotape shows that appellant neither moved her feet during the instruction nor shuffled her feet during the

turn. With respect to appellant's actions during the instruction, appellant's claim is utterly without merit. Appellant can plainly be seen on the videotape pulling her right foot off the line to balance on two separate occasions while Trooper Cvetan is instructing her on the test. With respect to appellant's actions during the turn portion of the test, the video is inconclusive as appellant's feet are obscured by the front of Trooper Cvetan's cruiser during this portion of the walk-and-turn test. Absent conclusive evidence to the contrary, the trial court was free to accept Trooper Cvetan's testimony that appellant shuffled her feet while turning and we will not second-guess this factual finding.

{¶10} Appellant also attacks the admissibility of the second HGN test administered by Trooper Cvetan. With respect to this test, the videotape is of no value as the test was performed out of the camera's view. Appellant argues, however, that the record fails to establish that Trooper Cvetan strictly complied with the requirements of the NHTSA Manual while performing this test. First, appellant points to Trooper Cvetan's admission on cross-examination that he did not ask appellant whether she had any eye defects prior to performing the test. It is true that Trooper Cvetan testified that he did not ask appellant about eye defects. It is also true that the NHTSA instructs that an officer administering an HGN test should look for possible medical conditions that might compromise the test results. However, the NHTSA Manual does not require that a officer administering an HGN test specifically inquire whether individual being tested has a defect of the eye.

{¶11} Appellant next argues that the second HGN test should have been suppressed because Trooper Cvetan testified that he held the stimulus for approximately four seconds while checking for nystagmus at maximum deviation. According to

appellant, Trooper Cvetan should have indicated that he took approximately four seconds to reach maximum deviation, rather than that he held the stimulus for approximately four seconds once he had reached maximum deviation. Actually, both requirements appear in the NHTSA Manual's procedures for the HGN test. And, in fact, the transcript reveals that Trooper Cvetan testified both that he held the stimulus for approximately four seconds after reaching maximum deviation and that he took approximately four seconds to reach maximum deviation with the stimulus.

{¶12} Appellant also attacks the admissibility of the one-leg-stand test. Appellant contends that prior to starting the test, Trooper Cvetan failed to instruct her that she could choose to raise either foot during the test, failed to time the test, and failed to stop the test after 30 seconds as required by the NHTSA Manual. We decline to address this claim, however, as we conclude that the results of the walk-and-turn test and the second HGN test, together with Trooper Cvetan's observation that appellant's eyes were red and glassy and appellant's admission that she had been drinking provided Trooper Cvetan with probable cause to arrest appellant for operating a motor vehicle while under the influence of alcohol. See *State v. Schmitt*, 101 Ohio St.3d 79, 2004-Ohio-37 (holding that a law enforcement officer may testify at trial regarding observations made while a defendant was not performing a standardized field sobriety test, even where the results of one or more field sobriety tests administered by the officer are inadmissible because the officer failed to administer the tests in compliance with standardized test requirements).

{¶13} Based on the foregoing discussion, appellant's single assignment of error is overruled and the judgment of the trial court is affirmed.

Judgment affirmed.

BRYANT and BROWN, JJ., concur.
