

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
PREBLE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2008-11-022
- vs -	:	<u>OPINION</u>
	:	8/31/2009
JOHN E. BURKHEAD,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM PREBLE COUNTY COURT OF COMMON PLEAS
Case No. 08CR10154

Martin P. Votel, Preble County Prosecuting Attorney, Eric E. Marit, Preble County Courthouse, 101 East Main Street, 1st Floor, Eaton, Ohio 45320, for plaintiff-appellee

James W. Thomas, Jr., 112 N. Barron Street, Eaton, Ohio 45320, for defendant-appellant

HENDRICKSON, J.

{¶1} Defendant-appellant, John E. Burkhead, appeals the decision of the Preble County Court of Common Pleas denying his motion to suppress the result of a breathalyzer test following his arrest for driving while under the influence of alcohol. We affirm the decision of the trial court.

{¶2} On the evening of August 15, 2008, appellant was stopped by Deputy Matthew Lunsford of the Preble County Sheriff's Office after he was observed committing a number of

minor traffic violations. Upon approaching appellant, Deputy Lunsford detected an odor of alcoholic beverage on his person, and noticed that he "displayed glassy eyes" and "had some slurred speech." After failing two field sobriety tests, and after being told to spit out his wad of chewing tobacco, Deputy Lunsford arrested appellant for driving while under the influence of alcohol (OVI) and transported him to the Preble County Jail. Once there, appellant submitted to a breathalyzer test administered by Captain Michael Thornsberry, also with the Preble County Sheriff's Office, the results of which indicated appellant's sample contained .171 grams of alcohol per 210 liters of breath.

{¶3} Appellant was charged with, among other things, operating a vehicle under the influence of alcohol (OVI impaired) in violation of R.C. 4511.19(A)(1)(a), a first-degree misdemeanor, and operating a vehicle with a prohibited blood-alcohol concentration (OVI blood alcohol content) in violation of R.C. 4511.19(A)(1)(h), which, due to a prior OVI conviction, rose to a third-degree felony.

{¶4} On October 16, 2008, appellant filed a motion to suppress the breathalyzer test result, which the trial court denied. On November 18, 2008, after entering a no contest plea to the OVI blood alcohol content charge, appellant was found guilty and sentenced. Appellant now appeals the trial court's decision denying his motion to suppress, raising one assignment of error.

{¶5} "BASED UPON THE TESTIMONY OF THE THREE PREBLE COUNTY SHERIFF'S DEPARTMENT OFFICIALS THE TRIAL COURT ERRED IN DETERMINING THAT THE STATE OF OHIO COMPLIED WITH O.A.C. SECT. 3701-53(C) AS THE APPELLANT INGESTED A FOREIGN SUBSTANCE DURING THE TWENTY MINUTE OBSERVATION PERIOD PRIOR TO TAKING THE BAC TEST IN THE CASE AT BAR."

{¶6} In his sole assignment of error, appellant argues that the trial court should have suppressed the breathalyzer test result because the test was not administered in substantial

compliance with Ohio Department of Health (ODH) regulations. We disagree.

{¶7} Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Wilson*, Clinton App. No. CA2006-03-008, 2007-Ohio-353, ¶17; *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. When considering a motion to suppress, the trial court, as the trier of fact, is in the best position to weigh the evidence in order to resolve factual questions and evaluate witness credibility. *State v. Eyer*, Warren App. No. CA2007-06-071, 2008-Ohio-1193, ¶8. In turn, the appellate court must accept the trial court's findings of fact so long as they are supported by competent, credible evidence. *State v. Lange*, Butler App. No. CA2007-09-232, 2008-Ohio-3595, ¶4; *State v. Bryson* (2001), 142 Ohio App.3d 397, 402. After accepting the trial court's factual findings as true, the appellate court must then determine, as a matter of law, and without deferring to the trial court's conclusions, whether the trial court applied the appropriate legal standard. *State v. Forbes*, Preble App. No. CA2007-01-001, 2007-Ohio-6412, ¶29; *State v. Dierkes*, Portage App. No. 2008-P-0085, 2009-Ohio-2530, ¶17.

{¶8} Appellant argues that the trial court erred by finding that he "did not ingest any foreign substance during the twenty minute observation period prior to taking the [breathalyzer] test," as such a finding "was simply not supported by competent, credible evidence." In support of this argument, appellant claims that the evidence presented at the suppression hearing proves that he "ingested chewing tobacco during the observation period prior to taking the [breathalyzer] test," and therefore, the state failed to establish substantial compliance with ODH regulations. This argument lacks merit.

{¶9} In order for a breathalyzer test result to be admissible, the state must prove that the subject's breath sample was taken and analyzed in substantial compliance with the methods and rules established by the ODH. *State v. Moats*, Ross App. No 99CA2524, 2001-Ohio-2502, 2001 WL 803835 at *3, citing *State v. Trill* (1991), 66 Ohio App.3d 622, 624; *City*

of *Elyria v. Conley* (1994), 99 Ohio App.3d 40, 42. According to ODH regulations, specifically Ohio Adm.Code 3701-53-02(C)-(D), breath samples must be "analyzed according to the operational checklist for the [approved] instrument being used," which, in this case, was the BAC DataMaster. The BAC DataMaster operational checklist requires the testing officer to, among other things, "observe subject for twenty minutes prior to testing to prevent oral intake of any material" that may affect the test result. *State v. Mason*, Clinton App. No. CA99-11-033, at 14; *State v. Bibler*, Marion App. No. 9-01-19, 2001-Ohio-2289, 2001 WL 1187817 at *2; *State v. Murray*, Ross App. No. 95 CA 2090, 1995 WL 752454 at *3, citing *State v. Birth* (1987), 41 Ohio App.3d 112.

{¶10} Because "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," the burden is on the accused to show that he did, in fact, ingest some material during the 20-minute period. *Bibler*, 2001-Ohio-2289, 2001 WL 1187817 at *2. As this court has previously held, the mere assertion that ingestion during the 20-minute period was hypothetically possible, without more, does not render the breathalyzer test result inadmissible. *Id.*; *State v. Embry*, Warren App. No. CA2003-11-110, 2004-Ohio-6324, ¶25; *State v. Needham* (Aug. 3, 1992), Butler App. No. CA91-11-184, at 5-6; *State v. Steele* (1977), 52 Ohio St.2d 187, 190.

{¶11} At the suppression hearing, Deputy Lunsford testified that he was patrolling the village of Camden when he observed appellant "proceeding northbound in what would have been the southbound lane," fail to use his turn signal on three occasions, and noticed that his rear license plate was not illuminated. After stopping appellant for these minor traffic violations, Deputy Lunsford testified that he detected an odor of alcoholic beverage on his person, noticed that he "displayed glassy eyes," and that he "had some slurred speech." Deputy Lunsford testified that appellant, when asked for his driver's license, "explained that

he did not have a license due to a prior OVI arrest," and that he smelled of alcoholic beverage because "it had been spilled on him while he was [at a bar]." However, according to Deputy Lunsford, after looking over appellant's clothes, "[i]t didn't look like anything had been spilled on [him]." After appellant failed two field sobriety tests, Deputy Lunsford testified that he placed appellant under arrest.

{¶12} Deputy Lunsford testified that, after placing appellant under arrest, but before handcuffing his hands behind his back, Lunsford discovered a can of chewing tobacco in appellant's left rear pant pocket, and that appellant had a wad of tobacco in his mouth. Upon making this discovery, Deputy Lunsford testified that he removed the can from appellant's pocket and instructed him to "spit [the tobacco] out." After appellant spit out a wad of tobacco, Deputy Lunsford testified that he used a flashlight to "check his mouth again," which revealed that "he was good" and that he "didn't have anything in his mouth." Deputy Lunsford then testified that he handcuffed appellant's hands behind his back and placed the can of tobacco in appellant's front pant pocket before he was transported to jail.

{¶13} After arriving at the Preble County Jail, Deputy Lunsford testified that appellant agreed to submit to a breathalyzer test and that he was observed for "over 33 minutes." During this time, Deputy Lunsford testified that appellant did not ingest anything or put anything in his mouth, and that appellant did not have anything in his mouth before he submitted to the breathalyzer test. However, after being told that appellant now had tobacco in his mouth, Deputy Lunsford testified that he went to the holding cell where appellant informed him that some tobacco "had just come back up." Deputy Lunsford then testified that he understood this to mean that appellant had regurgitated the tobacco after the administration of the breathalyzer test.

{¶14} Also at the suppression hearing, Captain Michael Thornsberry testified that he was called to the scene to back up Deputy Lunsford. While there, Captain Thornsberry

testified that he saw appellant "spit out the tobacco along the side of the patrol car," and that he watched Deputy Lunsford use a flashlight to check appellant's mouth for tobacco remnants. Captain Thornsberry then testified that it "didn't appear that [appellant] had anything else in his mouth" after spitting out the wad of tobacco, and that he did not have access to anything that he could have ingested or placed in his mouth after being handcuffed and placed in the back of the police cruiser.

{¶15} Once appellant arrived at the jail, Captain Thornsberry testified that he administered the breathalyzer test to him, and that he did not see appellant ingest anything or put anything into his mouth during the observation period. However, several minutes after the test was complete, Captain Thornsberry testified that appellant called him over to the holding cell where appellant "advised [him] that he didn't think that the test was valid." Captain Thornsberry then testified that appellant pulled down his bottom lip down to reveal "what appeared to be brown dip or tobacco." When asked how much tobacco was present, Captain Thornsberry testified that it was "not very much."

{¶16} In addition, Officer Michael Morgan, a corrections officer at the Preble County Jail, testified that he administered the formal pat-down on appellant when he entered the facility. Officer Morgan, besides conducting the formal pat-down, also testified that he instructed appellant to open his mouth, lift up his tongue, and spread his cheeks apart so that he could determine if his mouth contained any contraband. After appellant opened his mouth, Officer Morgan testified that he did not find anything except for "just a little bit of flaky, black flaky material in his teeth," and that it "wasn't a full piece of tobacco," but instead, just "the remains of him spitting it out, just in between his teeth and gums." Morgan also testified that he did not see appellant ingest anything or put anything in his mouth prior to the administration of the breathalyzer test.

{¶17} Appellant, on the other hand, testified that he had tobacco in his mouth when Deputy Lunsford pulled him over that evening, and that he did the "best [he] could" to spit it out, but that he still "had some on the right side of his cheek." Appellant then testified that, even though he knew that he had "probably half" of his original wad of tobacco in his mouth, he did not tell any of the officers about it until several minutes after the breathalyzer test was complete. Appellant also testified that Deputy Lunsford never shined a flashlight into his mouth, that he did not regurgitate any tobacco while he was in the holding cell, and that he did not tell anyone that the tobacco found in his mouth had "just came back up."

{¶18} The trial court, in its decision denying appellant's motion to suppress, determined that appellant's testimony was not credible, and found that he "cleared his mouth of tobacco at the scene shortly after the stop." The trial court also found that appellant did not "orally [take] any substance during the twenty minutes just prior to the test," and that the tobacco found in his mouth after the administration of the breathalyzer test was "either ingested after the test or regurgitated back into [his] mouth after the test."

{¶19} Upon a thorough review of the record, and while there was some testimony from Officer Morgan indicating appellant had remnants of "black flaky material" on his teeth, and although appellant testified that he only spit out "probably half" of his original wad of tobacco, the trial court's findings that he had "cleared his mouth of tobacco at the scene," and that any tobacco in his mouth "was either ingested after the test or regurgitated back into [his] mouth after the test," were well supported by the competent, credible testimony of Deputy Lunsford and Captain Thornsberry. See *Moats*, 2001-Ohio-2502, 2001 WL 803835 at *4; *Murray*, 1995 WL 752454 at *3; *Conley*, 99 Ohio App.3d at 44. Therefore, because the trial court, as the trier of fact, is best able to view witnesses and observe their demeanor, gestures, and voice inflections in weighing witness credibility, we find no error in the trial court's finding appellant did not have any tobacco in his mouth after Deputy Lunsford

instructed him to remove it at the scene. See *State v. Kosin*, Columbia App. No 01-CO-7, 2002-Ohio-1544, ¶¶27-30; see, also, *Conley* at 43-44; *Murray*, 1995 WL 752454 at *4; *Bibler*, 2001-Ohio-2289, 2001 WL 1187817 at *2; *Moats*, 2001-Ohio-2502, 2001 WL 803835 at *4; *Dierkes*, 2009-Ohio-2530, ¶¶16, ¶¶48, ¶¶52; but, see, *State v. Baldrige*, Ashland App. No. 01-COA-01412, 2001-Ohio-7029, 2001 WL 1673756 at *2.

{¶20} Furthermore, even if we were to assume that appellant had tobacco in his mouth, the record is devoid of any evidence that appellant, in fact, ingested any material, tobacco or otherwise, during the 20-minute observation period preceding the administration of the test. See *Bibler*, 2001-Ohio-2289, 2001-WL 1187817 at *2; *Dierkes* at ¶¶48-50; *Murray*, 1995 WL 752454 at *4 (finding substantial compliance with ODH regulations where defendant presented no evidence that he ingested any material during observation period). In addition, there is nothing in the record to indicate the effect, if any, the tobacco would have had on the accuracy of the breathalyzer test result. See e.g., *State v. Balkman*, Lake App. No. 94-L-123, 1995 WL 411820 at *3 (finding substantial compliance with 20-minute observation requirement where evidence did not demonstrate the insertion of a small amount of tobacco in suspect's mouth 20 minutes prior to the test would have affected the validity of the test results); *Murray*, 1995 WL 752454 at *3-*4 (finding substantial compliance with observation requirement even though "minute particles of snuff" may have remained in suspect's mouth during administration of breathalyzer test when defendant failed to present evidence as to its alleged effect on the breathalyzer test result); *Conley* at 44 (evidence did not indicate chewing tobacco had any effect on the validity of the breathalyzer test result); see, also, *Bibler*, 2001-Ohio-2289, 2001 WL 1187817 at *2; *State v. Gackstetter*, Ottawa App. No. 92OT047, 1993 WL 189491 at *3.

{¶21} In light of the foregoing, we find that the record demonstrates that the state met its burden establishing substantial compliance with the applicable ODH regulations.

Therefore, the trial court did not err in overruling appellant's motion to suppress. Appellant's sole assignment of error is overruled.

{¶22} Judgment affirmed.

BRESSLER, P.J., and POWELL, J., concur.

[Cite as *State v. Burkhead*, 2009-Ohio-4466.]