

[Cite as *Cincinnati v. Bryant*, 2010-Ohio-4474.]

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

CITY OF CINCINNATI,	:	APPEAL NO. C-090546
Plaintiff-Appellant,	:	TRIAL NO. 09TRC-2513
vs.	:	<i>DECISION.</i>
ANTHONY BRYANT,	:	
Defendant-Appellee.	:	

Criminal Appeal From: Hamilton County Municipal Court

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: September 24, 2010

*Jacqueline Stachowiak*, Assistant City Prosecutor, for Plaintiff-Appellant,

*Leslie F. Thomas* and *Leslie F. Thomas Co., L.P.A.*, for Defendant-Appellee.

Please note: This case has been removed from the accelerated calendar.

Per Curiam.

{¶1} In a single assignment of error, plaintiff-appellant the city of Cincinnati appeals from the order of the Hamilton County Municipal Court granting defendant-appellee Anthony Bryant’s motion to suppress evidence gathered pursuant to his arrest for operating a vehicle under the influence of alcohol or drugs (“OVI”) in violation of R.C. 4511.19(A). Bryant was arrested for OVI following a traffic stop initiated when officers observed Bryant driving his vehicle backwards off a one-way street. Before the arrest, the arresting officer had administered two nonstandardized field sobriety tests—the alphabet and finger-to-nose tests—and had attempted to administer one standardized field sobriety test—the horizontal gaze nystagmus (“HGN”) test, which is based on a scientific process. In granting the motion to suppress, the trial court found that all of the arresting officer’s testimony concerning the field sobriety testing was “unreliable” and essentially ruled that it could not be used to establish probable cause.

{¶2} The city contends that the trial court erred by not ruling that there was probable cause to arrest based on the officer’s observations even before any field sobriety tests were administered. Alternatively, the city argues that the trial court erred when it refused to consider the officer’s observations made during the field sobriety testing. Because we find error in the trial court’s determination of the historical facts, and because we conclude that the historical facts, when properly considered, provided probable cause to arrest for OVI before the administration of any field sobriety tests, we hold that the trial court erred in suppressing the subsequently gained evidence of intoxication. Accordingly, we do not need to address the city’s second issue.

I.

{¶3} Veteran Cincinnati Police Officer Tracy Jones and newly recruited Officer Richard Christoph were on routine patrol in the city of Cincinnati shortly after 10:30 p.m. on January 12, 2009, when they observed Bryant driving backwards from a one-way street onto the street where they were travelling. After they decided to make a traffic stop of Bryant's vehicle, Bryant quickly complied and pulled over on the side of the road without incident.

{¶4} Christoph approached the vehicle and asked Bryant for his driver's license and proof of insurance. Bryant handed Christoph his license, but he had a difficult time locating his insurance card and passed over it several times. Christoph testified that he noticed a strong odor of alcohol emanating from both Bryant and the inside of the vehicle, and that Bryant's eyes were watery and "just kind of glazed over," with tightly constricted pupils.

{¶5} As Christoph and Bryant engaged in conversation, Christoph noticed that Bryant's speech was "slightly slurred." Bryant admitted drinking one beer. At this point, Christoph asked Bryant to exit from his vehicle.

{¶6} Bryant "struggled with the door handle several times" and was unable to exit until he had unlocked the door with the remote button on the ignition key, which was still in the ignition. After Bryant exited, Christoph noticed a moderate odor of alcohol on Bryant's "person," but he did not know if it was specifically emanating from Bryant's breath.

{¶7} Christoph then asked Bryant to submit to a series of field sobriety tests, which included the alphabet, finger-to-nose, and HGN tests. Christoph testified that he had been trained to administer these tests during 40 hours of special alcohol detention, apprehension, and prosecution training, as well as an alcohol

workshop at the police academy. Given the location of the traffic stop, Christoph did not administer any type of walking or standing tests.

{¶8} Christoph testified that Bryant had spoken over him when he gave directions for the alphabet test, and that Bryant had been unable in at least three tries to successfully recite more than three consecutive letters. Further, Bryant had used the incorrect hand and had been unable to keep his eyes closed during his first attempt at the hand-to-nose test, but he successfully completed the test on his second try.

{¶9} During the administration of the HGN test, Bryant had been unable to follow an instruction to follow a pen with his eyes: he first tracked the movement with his head and later stared ahead without tracking the pen's movement. Christoph determined that Bryant was unable to perform the HGN test.

{¶10} On cross-examination at the suppression hearing, Christoph acknowledged that Bryant had been polite and compliant. But his testimony on the other historical facts was not impeached. With regard to the odor of alcohol, he maintained that the odor was definitely coming from Bryant, but that he could not say that it was coming from his breath. When asked if he had observed any impaired driving, he stated that "most people who are sober do not back down a one-way street."

{¶11} Christoph determined based on the totality of the circumstances that Bryant had likely been driving while under the influence of alcohol. He then arrested Bryant and transported him to a police station, where Bryant refused to take a chemical test and admitted that he had consumed a pint of wine in addition to the beer.

{¶12} Bryant moved to suppress the evidence obtained by the police on the grounds that he had been unlawfully detained and arrested. At the suppression hearing, the city presented Christoph’s testimony, a DVD recording of the traffic stop taken from the police cruiser’s camera, and the testimony of Jones, who claimed that he had noticed the odor of alcohol emanating from Bryant’s breath when he had stood behind Christoph during the field sobriety tests.

{¶13} After reviewing this evidence, the trial court concluded that the police lacked probable cause to arrest Bryant for OVI and granted the motion to suppress in part. The court presumably denied the motion to the extent that it challenged the period of detention preceding the arrest.

II.

{¶14} The city contends the court erred by granting the motion to suppress because Christoph had probable cause to arrest Bryant before the administration of any field sobriety tests. As stipulated by the city, Bryant was arrested without a warrant. An arrest without a warrant is constitutionally valid if, when the arrest is made, the arresting officer has probable cause to make it.<sup>1</sup>

{¶15} The legal standard for determining whether a law enforcement officer had probable cause to arrest an individual for OVI is whether, “at the moment of the arrest, the police had sufficient information, derived from a reasonably trustworthy source of facts and circumstances, sufficient to cause a prudent person to believe that the suspect was driving under the influence.”<sup>2</sup> This is an objective standard, not a subjective one.<sup>3</sup>

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<sup>1</sup> *Beck v. Ohio* (1964), 379 U.S. 89, 91, 85 S.Ct. 223; *State v. Deters* (1998), 128 Ohio App.3d 329, 333, 714 N.E.2d 972.

<sup>2</sup> *State v. Homan*, 89 Ohio St.3d 421, 427, 2000-Ohio-212, 732 N.E.2d 952, superseded by statute on other grounds as recognized in *State v. Boczar*, 113 Ohio St.3d 148, 2007-Ohio-1251, 863 N.E.2d 155.

<sup>3</sup> *Deters* at 333.

{¶16} Our review of the trial court’s findings of fact and legal conclusions entails a two-step inquiry. First, this court must review the trial court’s findings of the historical facts only for clear error, “giving due weight to inferences drawn from those facts” by the trial court and local police officers.<sup>4</sup> Next, accepting those properly supported facts as true, we must determine as a matter of law, without deference to the trial court’s conclusion, whether they meet the applicable legal standard for probable cause to arrest.<sup>5</sup> Importantly, in making our probable-cause determination, we look to the totality of the circumstances to confirm whether the arresting officer had a reasonable ground for belief of guilt.<sup>6</sup>

{¶17} The trial court made oral and written factual findings and conclusions of law in support of its decision. We can discern from the trial court’s factual findings that it did not consider as evidence of probable cause Christoph’s testimony with regard to Bryant’s performance and conduct during the administration of the field sobriety tests. While the court stated that this evidence was “unreliable,” the court’s complete analysis of this issue is unclear.

{¶18} The trial court indicated also that it did not believe Jones’s testimony that he had noticed alcohol on Bryant’s breath, and that it had discounted Christoph’s description of Bryant’s eyes. The court apparently accepted as facts that Bryant had fumbled for his insurance card, had had difficulty getting out of the car, and had admitted consuming one beer.

{¶19} The trial court did not mention Christoph’s observation of Bryant’s slurred speech, which was audible on the DVD recording of the stop. Finally, the court accepted that Bryant had committed the traffic violation, but it made a

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<sup>4</sup> *Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657; see, also, *Deters*, supra, at 334.

<sup>5</sup> *Id.*

<sup>6</sup> *Maryland v. Pringle* (2003), 540 U.S. 366, 371-372, 124 S.Ct. 795; *Homan*, supra, at 427.

distinction between “backing out of a one-way street” and “driving down a one-way street.”

{¶20} As an appellate court, we defer to the trial court’s findings of the historical facts unless the findings are clearly erroneous. Accordingly, we give due weight to the trial court’s finding that Jones was not credible. Relying on the DVD recording of the stop, the court found that Jones had been too far away from Bryant to smell alcohol on his breath. The credibility of the witnesses was primarily for the trial court, sitting as the trier of fact, to determine, and we can find no clear error in this credibility determination.<sup>7</sup>

{¶21} We also accept that Bryant had fumbled for his insurance card, that he could not get out of his car initially, that he had admitted consuming one beer, and that his driving had not been impaired or noteworthy except for backing out of a one-way street. All such findings are not clearly erroneous.

{¶22} But we cannot defer to all the trial court’s findings of the historical facts in this case. Specifically, the court discounted Christoph’s testimony describing Bryant’s eyes because, according to the court, Christoph testified only to what the eyes “appeared to be,” but not to what “the eyes were.” The court’s recollection that Christoph’s testimony on this issue was equivocal is clearly erroneous. Christoph’s exact and unchallenged testimony was that “I noticed watery eyes that were just kind of glazed over. And his pupils were tightly constricted.” As a result, we accept Christoph’s testimony and do not defer to the trial court’s finding in this respect.

{¶23} The trial court’s factual findings were also incomplete. The court did not mention Christoph’s testimony that Bryant’s speech had been slightly slurred. This testimony was unchallenged, and the observation of the slurred speech was

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<sup>7</sup> See *Deters*, supra, at 334; *State v. True* (1999), 137 Ohio App.3d 348, 352, 738 N.E.2d 830.

corroborated by the audio recording of the stop and arrest. Slurred speech is a well-accepted indication of intoxication;<sup>8</sup> the trial court’s omission of this fact from its analysis was clearly erroneous.

{¶24} With the historical facts properly taken into account, we now independently determine whether those facts, viewed from the standpoint of an objectively reasonable police officer, established probable cause to arrest for OVI.

{¶25} This court held in *State v. Taylor*<sup>9</sup> that a minor traffic violation, “coupled with the arresting officers’ perception of the odor of alcohol, and nothing more” does not suffice to establish probable cause.<sup>10</sup> We emphasized, however, that the same circumstances, coupled with “some reasonable indicia” of operation under the influence, would have sufficed to establish probable cause.<sup>11</sup>

{¶26} Further, Ohio case law reflects that the totality of the circumstances can support a finding of probable cause to arrest even where no field sobriety tests have been administered, or where the trial court finds that the testimony related to the field sobriety testing cannot serve as evidence of probable cause.<sup>12</sup>

{¶27} In this case, the traffic violation—backing out of a one-way street—is more suggestive of impairment than the nominal speeding at issue in *Taylor*.<sup>13</sup> And Christoph’s observation of the traffic violation and the moderate odor of alcohol on Bryant’s person outside his vehicle were accompanied by other reasonable indicia of impairment and alcohol consumption: slightly slurred speech; eyes that were watery and glazed over to some degree; confusion and clumsiness in locating his insurance

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<sup>8</sup> See, e.g., *State v. Evans* (1998), 127 Ohio App.3d 56, 63, 711 N.E.2d 761; *Deters*, supra, *State v. Denlinger* (Feb. 2, 1983), 1st Dist. No. C-820252.

<sup>9</sup> (1981), 3 Ohio App.3d 197, 444 N.E.2d 481.

<sup>10</sup> *Id.* at 198.

<sup>11</sup> *Id.*

<sup>12</sup> See *Homan*, supra, at 427.

<sup>13</sup> See, e.g., *State v. Fisher*, 1st Dist. No. C-080497, 2009-Ohio-2258 (holding that driving 22 m.p.h. over the speed limit is not equivalent to the nominal speeding observed by the officer in *Taylor*).

card and in exiting from his vehicle; and the admitted consumption of some alcohol. We conclude that these facts and circumstances, when considered as a whole, would have justified an objectively reasonable officer in believing that Bryant had been driving under the influence of alcohol.<sup>14</sup>

{¶28} We hold, therefore, that there was sufficient evidence to establish probable cause to arrest, even before Christoph asked Bryant to perform a single sobriety test. Accordingly, we sustain the city's assignment of error.

{¶29} Consequently, we reverse the trial court's judgment, and we remand this case for further proceedings consistent with this decision.

Judgment reversed and cause remanded.

**CUNNINGHAM, P.J., HILDEBRANDT and MALLORY, JJ.**

Please Note:

The court has recorded its own entry on the date of the release of this decision.

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<sup>14</sup> See, e.g., *Homan*, supra (evidence of erratic driving, red and glassy eyes, odor of alcohol on breath, and admission of alcohol consumption provided probable cause to arrest); *State v. Lopez*, 1st Dist. Nos. C-020516 and C-020517, 2003-Ohio-2072 (evidence of driving 26 m.p.h. over the speed limit and strong odor of alcohol on breath, bloodshot eyes, and admission of alcohol consumption provided probable cause to arrest); *State v. Jacobs*, 1st Dist. Nos. C-010279, C-010280, and C-010281, 2001-Ohio-4031 (evidence of abruptly pulling away from the curb without properly signaling, odor of alcohol on breath, slurred speech, bloodshot and glassy eyes, and repeated fumbling for license provided probable cause); *State v. Sims* (Oct. 26, 1991), 1st Dist. Nos. C-010178 and C-010179 (evidence of failure to stop at stop sign, strong odor of alcohol about person, admission of alcohol consumption, and watery and bloodshot eyes provided probable cause); *Deters*, supra (evidence of erratic operation of a watercraft, slurred speech, odor of alcohol, and admission of recent alcohol consumption provided probable cause to arrest); *Tonne*, supra (evidence of red, watery eyes, the odor of alcohol on the breath, the presence of empty beer cans in the car, and swaying back and forth provided probable cause to arrest); *Denlinger*, supra (evidence of odor of alcohol on the breath, glassy eyes, slurred speech, and admission to consuming four drinks provided probable cause).