2010 WL 3929036

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Second District, Clark County.

STATE of Ohio, Plaintiff-Appellee
v.
David TWEDDELL, Defendant-Appellant.

No. 2010 CA 41. | Decided Oct. 8, 2010.

West KeySummary

1 **Automobiles**
Intoxication; Implied Consent

The arresting police officer complied with the statutory procedures, supporting his administrative suspension of driver's license after he was arrested for driving under the influence of alcohol. The police officer approached the vehicle after he noticed it in the ditch, and when he asked the driver to get out, the officer smelled a strong odor of an alcoholic beverage and found that the driver was belligerent, uncooperative, and irrational. The officer then notified the driver of his rights and obligations with respect to taking a breath test. The driver took the breath test, which indicated an illegal alcohol content. The officer followed all the required protocol, and hence properly revoked the license. R.C. 4511.192; R.C. 4511.197(C).

Cases that cite this headnote

Criminal appeal from Municipal Court.

Attorneys and Law Firms

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Jon J. Saia, Columbus, OH, for Defendant-Appellant.

Opinion

FROELICH, J.

***1** {¶ 1} David Tweddell appeals from a judgment of the Municipal Court of Clark County, which affirmed the administrative license suspension imposed after he was arrested for driving under the influence of drugs or alcohol. For the following reasons, the judgment of the trial court will be affirmed.

I

{¶ 2} At approximately 4:55 a.m. on December 6, 2009, Ohio State Trooper David Slanker noticed a car in a ditch off the side of I-675 in Clark County, Ohio. Tweddell exited the vehicle and stumbled to the roadway. Upon approaching Tweddell, Trooper Slanker smelled a strong odor of an alcoholic beverage and found that Tweddell was belligerent, uncooperative, and irrational. Tweddell stated that the car had been in the ditch for only "five seconds." Slanker placed Tweddell in the rear of the cruiser, advised him of his rights, and transported him to the Clark County jail.

{¶ 3} At the jail, Trooper Slanker advised Tweddell that he was under arrest for operating a vehicle under the influence, in violation of R.C. 4511.19(A)(1)(a). Slanker then informed Tweddell of his rights and obligations with respect to taking a breath test, as stated on the back of BMV Form 2255 ("BMV 2255"). Tweddell signed the form and took the breath test, which indicated an alcohol content of .205 percent.

{¶ 4} Based on the test results, Trooper Slanker completed Part B of BMV 2255 to impose an administrative license suspension ("ALS"); Slanker signed the form, but his signature was not notarized, nor was the form signed by the Deputy Clerk of Courts. Deputy Doolin, who had apparently witnessed the execution of the form and the testing, signed the form on the line for "Deputy Clerk of Court." Tweddell also signed the form, indicating that it had been read to him and he had received a copy. BMV 2255 was then filed, along with the complaint and the supporting documents, with the Clerk of the Clark County Municipal Court on the morning of December 8, 2009. [1] According to its normal procedures, the Ohio State Highway Patrol forwarded a copy of BMV 2255 to the BMV.

{¶ 5} Tweddell filed an appeal of his ALS and a motion to suppress his breath test results. The trial court stayed the ALS while the appeal and motion to suppress were pending.

{¶ 6} Tweddell argued that the statutory procedures imposed by R.C. 4511.192 for imposition of an ALS had not been followed in several respects, including: BMV 2255 had not been timely executed and served on the court and on the BMV; the document had not been properly "sworn;" BMV 2255 had not been completed within two hours of his operation of the vehicle; the breath test had not been administered with three hours of his operation of the vehicle; [2] and the trooper had not had reasonable grounds to believe that he (Tweddell) was under the influence of drugs or alcohol when the breath test was administered.

{¶ 7} The trial court conducted a hearing on both the ALS appeal and the motion to suppress on February 11, 2010. Trooper Slanker was the only witness. Slanker testified about his interaction with Tweddell on the morning in question; he also testified about the time and manner in which Tweddell had been informed of his rights and obligations with respect to taking or not taking a test and the potential consequences of the test or refusal. Slanker stated that the test was administered within three hours of Tweddell's operation of the vehicle. After the hearing, the trial court denied Tweddell's appeal of the ALS and his motion to suppress the breath test results, and it lifted the stay on the ALS. Relying on R.C. 4511.197(C), the trial court concluded that the State had established "reasonable grounds for an OVI arrest" and that Tweddell's other objections did not fall within the scope of the permissible reasons for an appeal.

***2** {¶ 8} Tweddell raises one assignment of error on appeal.

II

{¶ 9} Tweddell's assignment of error states:

{¶ 10} "THE TRIAL COURT ERRED IN DENYING APPELLANT'S ADMINISTRATIVE LICENSE APPEAL."

{¶ 11} Tweddell argues that the State must present a prima facie case that the arresting officer complied with the statutory procedures in R.C. 4511.192 for imposing an ALS before the burden shifts to an arrestee to show a basis for appeal under R.C. 4511.197(C). He claims that the State failed to demonstrate that it had complied with statutory procedures set forth in R.C. 4511.192. Tweddell also contends that the trial court erred in interpreting R .C. 4511.197(C) to allow appeals from the imposition of an ALS only when the enumerated circumstances exist.

{¶ 12} R.C. 4511.192 provides that an arresting officer must advise a defendant orally and in writing of his rights with respect to refusing a breath alcohol test. This procedure must be witnessed by someone other than the arresting officer, who certifies this fact by signing the written form setting forth the defendant's rights. The statute also provides that the defendant must consent to the test within two hours of the alleged violation. If the defendant refuses to take the test or tests over the legal limit, the officer must notify the defendant that his license is suspended immediately and will be suspended at least until the defendant's initial court appearance. The officer must also send a sworn report to the court in which the arrested person is scheduled to appear and to the BMV within forty-eight hours of the arrest, stating the defendant's decision with respect to submitting to the test and the result of the test, if it was administered. R.C. 4511.192(F) provides that "[t]he sworn report of an arresting officer completed under this section is prima-facie proof of the information and statements that it contains. It shall be admitted and considered as prima-facie proof of the information and statements that it contains in any appeal under [R.C. 4511.197] relative to any suspension of a person's driver's or commercial driver's license or permit or nonresident operating privilege that results from the arrest covered by the report." An administrative license suspension is subject to appeal as provided in R.C. 4511.197, which provides:

{¶ 13} "(A) If a person is arrested for operating a vehicle * * * in violation of [R.C. 4511.19(A) or (B)] or a municipal OVI ordinance * * * and if the person's driver's * * * license * * * is suspended under [R.C. 4511.191], the person may appeal the suspension * * *.

{¶ 14} * * *

{¶ 15} "(C) If a person appeals a suspension under division (A) of this section, the scope of the appeal is limited to determining whether one or more of the following conditions have not been met:

{¶ 16} "(1) Whether the arresting law enforcement officer had reasonable ground to believe the arrested person was

operating a vehicle * * * in violation of [R.C. 4511.19(A) or (B)] * * * and whether the arrested person was in fact placed under arrest;

***3** {¶ 17} h"(2) Whether the law enforcement officer requested the arrested person to submit to the chemical test or tests designated pursuant to [R.C. 4511.19(A)];

{¶ 18} "(3) Whether the arresting officer informed the arrested person of the consequences of refusing to be tested or of submitting to the test or tests;

{¶ 19} "(4) Whichever of the following is applicable:

{¶ 20} "(a) Whether the arrested person refused to submit to the chemical test or tests requested by the officer;

{¶ 21} "(b) Whether the arrest was for a violation of [R.C. 4511.19(A) or (B)] or a municipal OVI ordinance and, if it was, whether the chemical test results indicate * * * the person's breath contained a concentration of eight-hundredths of one gram or more by weight of alcohol per two hundred ten liters of the person's breath, * * * at the time of the alleged offense."

{¶ 22} Tweddell contends that the State did not present a prima facie case that the arresting officer complied with R.C. 4511.192. He claims that the report filed with the court (BMV 2255) did not satisfy this requirement, as contemplated by R.C. 4511.192(F), because it was not properly sworn, i.e., it was not notarized or signed by the Deputy Clerk of Courts, and was not sent timely to the court and the BMV.

{¶ 23} The trial court held that Trooper Slanker's sworn testimony at the hearing on the ALS appeal was a permissible alternative to the filing of a sworn BMV 2255. The court relied on *Triguba v. BMV* (June 27, 1996), Franklin App. 95APG11-1416, in which the officer's sworn report (BMV 2255) was sent to the court, but not to the BMV. *Triguba* held that, under these circumstances, BMV 2255 could not serve as prima facie evidence that the arresting officer had complied with all of the mandated procedures, but that an officer could nonetheless testify at the ALS hearing to establish the prima facie case. We have previously adopted this reasoning as well. See *Langen v. Caltrider* (Aug. 20, 1999), Montgomery App. No. 17698.

{¶ 24} Although R.C. 4511.192 provides that a sworn report is prima facie evidence of the information in the report, it does not say that this is the only means of establishing prima facie evidence of the information in the report. Because Trooper Slanker's testimony at the hearing on the ALS appeal and motion to suppress "established that there were reasonable grounds for an OVI arrest" and the other information in his report, the trial court apparently concluded that the State had set forth a prima facie case for the ALS. We agree with the trial court's conclusion that Slanker's testimony at the hearing established the basis for imposing the ALS and eliminated the need to rely on the prior unsworn statement. [3]

{¶ 25} After the State established that it had complied with R.C. 4511.192, the burden shifted to Tweddell to show that he had grounds to appeal the ALS. The individual appealing an ALS under R.C. 4511.197 has the burden of proving, by a preponderance of the evidence, that one or more of the conditions specified in R.C. 4511.197(C) has not been met. R.C. 4511.197(D). As stated above, Tweddell's arguments in opposition to the ALS dealt with the State's compliance with R.C. 4511.192, including whether the BMV 2255 had been completed within two hours of his operation of the vehicle, whether it had been timely filed with the court and the BMV, and whether there had been reasonable grounds to believe he was under the influence of alcohol when the breath test was administered.

***4** {¶ 26} The trial court's decision was lengthy and detailed. The court concluded that R.C. 4511.197(C) implicitly "bars consideration of whether the procedures mandated by the statute [R.C. 4511.192] have been satisfied" unless those procedures are enumerated in the statute as bases for an appeal. The court noted that failure to serve BMV 2255 on the court and the BMV within 48 hours, whether BMV 2255 was properly sworn, and the amount of time taken to complete the form-all of which related to the State's compliance with R.C. 4511.192-are not listed in R.C. 4511.197(C) as bases for an appeal. Further, the trial court concluded that R.C. 4511.192(E), the statutory provision which required BMV 2255 to be forwarded to the court within 48 hours, was "directory, not mandatory," stating that, if the legislature had intended the filing requirement to be mandatory, it would have included the requirement in R.C. 4511.197(C)'s list of bases for an appeal. Beyond this, we note that R.C. 4511.192(D) instructs the officer to "*send* a copy of the sworn report to the court" "not later than forty-eight hours after the arrest of the person." (Emphasis added.) There is nothing in the statute about when it must be received by or filed with the court.

{¶ 27} In the past, this court and several others have reached the same conclusion as the trial court: that the scope of an appeal of an ALS suspension is limited to determining whether one or more of the conditions set forth in R.C. 4511.197(C) have not been met. See *Langen*, supra (interpreting a prior version of the statute); see, also, *State v. Mallin*, Ottawa App. No. OT-06-040, 2007-Ohio-4476, ¶ 26; *State v. Hays*, Licking App. No. 07-CA-38, 2007-Ohio5517, ¶ 10; *State v. Matos*, Belmont App. No. 05-BE-9, 2006-Ohio-895, ¶ 18. The statutory provision that "the scope of the appeal is limited to determining whether one or more of the [listed] conditions have not been met" is unambiguous. This does not mean that the State does not have to present a prima facie case that it substantially complied with R.C. 4511.192 in imposing the ALS, but only that the appeal challenging the suspension is limited by the provisions of R.C. 4511.197(C).

{¶ 28} Tweddell's assignment of error is overruled.

III

{¶ 29} The judgment of the trial court will be affirmed.

BROGAN, J. and GRADY, J., concur.

Parallel Citations

2010 -Ohio- 4927

Footnotes

1 The form was filed in the municipal court approximately 52 hours after the breath test was conducted.

2 The requirement that the test be administered within three hours of the operation of the vehicle is set forth in R.C. 4511.19(D)(1)(b), rather than R.C. 4511.192(A) (which controls when the person must submit to a chemical test or it will constitute a refusal). Tweddell does not address the three hour time limit set forth in R.C. 4511.19(D) on appeal to this court.

3 Tweddell relies on *Triguba* for the proposition that "the State must present prima facie proof that the arresting officer complied with certain mandated procedures." He also acknowledges its holding that *either* sworn testimony from the arresting officer *or* a sworn report can be used to establish the prime facie case for the imposition of an ALS. In *Trigula*, however, where the officer's testimony was admitted because the sworn report was not properly filed, the officer also "failed to testify * * * that he had reasonable grounds to believe [the defendant] * * * was operating a motor vehicle while under the influence of alcohol" at the time of his arrest. Thus, in that case, neither the sworn report nor the officer's testimony established the prima facie case for an administrative license suspension, and the judgment affirming the ALS was reversed.