

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

STATE OF OHIO,	:	APPEAL NO. C-190360
Plaintiff-Appellee,	:	TRIAL NOS. C-16TRC-36680(A-B)
vs.	:	<i>JUDGMENT ENTRY.</i>
SCOTT A. GERHARDT,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Scott A. Gerhardt was involved in a serious single-car accident on interstate 71 on September 4, 2016. State Trooper Jeffrey Madden was called to the scene. Prior to the crash, motorists had reported that Gerhardt's vehicle had been weaving dangerously on the interstate. When Madden arrived, Gerhardt had already been detained by deputies from the Hamilton County Sheriff's Department and officers from the Montgomery Police Department, had been handcuffed and was being placed in a cruiser. Madden was told that Gerhardt was restrained because of his aggressive behavior. Madden was also informed that one of the officers smelled alcohol on Gerhardt's breath. Madden noticed a strong odor of alcohol coming from Gerhardt as soon as he approached him. He also saw that Gerhardt's eyes were glassy and red.

Madden retrieved Gerhardt and performed the horizontal-gaze-nystagmus test. Madden found six out of six possible clues. Because Gerhardt remained belligerent, Madden could not perform other field-sobriety tests that would have required the removal of the handcuffs. During this time, Madden asked Gerhardt if he had been drinking, and he said that he had. Madden also asked Gerhardt if he had used marijuana, and he said he had. Madden then placed Gerhardt under arrest

for suspected OVI and informed him of his *Miranda* rights. After being read his rights, Gerhardt again admitted to drinking and using marijuana.

Madden brought Gerhardt to the post and gave him a breathalyzer test. When the results came back much lower than Madden thought possible, he asked Gerhardt to submit a urine sample for chemical testing, which he did. The results of the chemical test were not made part of this record.

Gerhardt was charged with driving under the influence of alcohol or a drug of abuse in violation of R.C. 4511.19(A)(1)(a) and failure to control his vehicle in violation of R.C. 4511.202. He was also charged with possession of marijuana as a minor misdemeanor, but that charge is not part of this appeal. Gerhardt filed a motion to suppress, in which he claimed that there was insufficient probable cause to support his arrest, that his pre-*Miranda* statements should be suppressed, and that the urine test should also be suppressed because it was ordered due to Gerhardt's pre-*Miranda* admission to marijuana use. After a hearing on the motion, the trial court granted the motion to suppress as it related to the statements made prior to Madden informing Gerhardt of his *Miranda* rights, and denied it in all other respects.

After the trial court's ruling, Gerhardt entered no-contest pleas to the OVI charge, and the physical-control charge. Gerhardt was found guilty of both charges and sentenced to 180 days in jail, a one-year driving suspension, and payment of fines. In two assignments of error, Gerhardt appeals.

In his first assignment of error, Gerhardt claims that the police lacked probable cause to arrest him for OVI. According to the transcript, the trial court determined that Gerhardt had been arrested by the time that Madden arrived at the scene. Assuming this to be true, we must decide whether there was probable cause on the record to support that arrest at that time.

Probable cause to arrest exists when an officer is aware of facts that would lead a reasonable person to believe that the suspect has committed or is committing

a crime. *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964). The facts in this case are similar to those in a case in which this court found probable cause existed. *See State v. Hall*, 2016-Ohio-783, 60 N.E.3d 675 (1st Dist.). In *Hall*, this court found that the following factors constituted in probable cause: Hall had been involved in a single-car accident, she had trouble with balance, she had a strong odor of alcohol, she admitted drinking earlier that night, and she was belligerent to the point of kicking the windows of the police car. *Id.* at ¶ 31. In this case, Gerhardt was involved in a single-car accident, he had glassy red eyes, he had a strong odor of alcohol, there had been an odor of alcohol on his breath, numerous callers identified erratic driving, and he was so belligerent that he had to be restrained through the course of the investigation for officer safety and could not even be released to complete the field-sobriety tests.

The facts in this case are as indicative of probable cause as the facts that this court found sufficient in *Hall*. We hold that in light of the totality of these circumstances, Gerhardt's arrest was supported by probable cause, even absent the admissions to consuming alcohol or marijuana which the trial court excluded. *See id.* at ¶ 32, citing *State v. Homan*, 89 Ohio St.3d 421, 427, 732 N.E.2d 952 (2000), *State v. Bryant*, 1st Dist. Hamilton No. C-090546, 2010-Ohio-4474, ¶ 16, and *State v. Heitzenrater*, 12th Dist. Butler No. CA98-06-119, 1998 WL 842770 (Dec. 7, 1998). We overrule Gerhardt's first assignment of error.

In his second assignment of error, Gerhardt argues that Madden was not justified in seeking a urine test because his knowledge about Gerhardt's marijuana use was the fruit of his improper pre-*Miranda* questioning. But R.C. 4511.191(A)(2) states that Ohio drivers are deemed to have consented to the testing of their urine "if arrested for a violation of division (A) or (B) of section 4511.19 of the Revised Code." Gerhardt had been arrested for violating R.C. 4511.19(A)(1)(a), and we have determined that the arrest had been supported by probable cause. Since Gerhardt had been properly arrested for violating R.C. 4511.19(A)(1)(a), Madden was

OHIO FIRST DISTRICT COURT OF APPEALS

permitted by statute to ask for the urine sample. We overrule Gerhardt's second assignment of error and affirm the judgment of the trial court.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

MOCK, P.J., MYERS and WINKLER, JJ.

To the clerk:

Enter upon the journal of the court on April 29, 2020

per order of the court _____.

Presiding Judge

