

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STATE OF MISSOURI

v.

ANDREW J. OSTDIEK

RESPONDENT,

APPELLANT.

DOCKET NUMBER WD72397 cons/WD72398, WD72399
**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DATE: August 30, 2011

Appeal From:

Clay County Circuit Court
The Honorable Janet Lodwick Sutton, Judge

Appellate Judges:

Division Two: James M. Smart, Jr., P.J., Mark D. Pfeiffer and Cynthia L. Martin, JJ.

Attorneys:

Ellen Greenberg Jacobs and Scott A. Ison, Kansas City, MO, for **respondent**.
Jeffrey Scott Eastman, Gladstone, MO, for **appellant**.

MISSOURI APPELLATE COURT OPINION SUMMARY

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WESTERN DISTRICT**

STATE OF MISSOURI,

RESPONDENT,

v.

ANDREW J. OSTDIEK,

APPELLANT.

No. WD72397 cons/WD72398, WD72399

Clay County

Before Division Two: James M. Smart, Jr., P.J., Mark D. Pfeiffer and Cynthia L. Martin, JJ.

On April 17, 2009, Deputy Alyssa Ryder (hereafter, "Deputy") of the Clay County Sheriff's Department was patrolling the area of 72nd Street and Brighton Avenue, an area within the City of Kansas City, and Clay County, Missouri. While on patrol, she stopped Andrew Ostdiek for speeding.

After stopping Ostdiek, Deputy ran his license plate and determined there was a warrant out for Ostdiek's arrest in Gladstone, Missouri. Upon making contact with Ostdiek, Deputy noticed a strong odor of alcohol emanating from Ostdiek and his vehicle. She also noticed that Ostdiek's eyes were bloodshot. Deputy placed Ostdiek under arrest for the Gladstone warrant, and began to look inside his vehicle. While searching, she observed pills in the center console and found a glass pipe commonly used to smoke marijuana.

Having found pills and a pipe, and smelling alcohol on Ostdiek, Deputy decided to conduct some standard field sobriety tests. Finding the location of the stop dangerous and unsuitable for administering all of the standard field tests, she decided to conduct only the horizontal gaze nystagmus ("HGN") test on Ostdiek. While administering the HGN test, Deputy noticed nystagmus in each of Ostdiek's eyes. She therefore concluded that Ostdiek was intoxicated and handcuffed him for a second time, arresting him for driving while intoxicated.

Once back at the Sheriff's Department, Ostdiek told Deputy he had consumed two glasses of whiskey around 9:00 p.m. Ostdiek had been stopped by Deputy at 10:22 p.m. He also admitted smoking three grams of marijuana and taking Hydrocodone pills earlier in the day. Deputy administered a breathalyzer test on Ostdiek, which revealed a blood alcohol concentration of .114 percent. Subsequently, Ostdiek was charged with driving while intoxicated, exceeding the posted speed limit, and possession of drug paraphernalia.

Ostdiek filed a Motion to Suppress challenging the legality of the stop, contending Deputy lacked authority to make the speeding stop on a city street. The court conducted a suppression hearing and denied the motion to suppress. The court then conducted a bench trial on February 24, 2010, and found Ostdiek guilty of all of charges. Ostdiek was sentenced to 180 days in the

Clay County Jail for the driving while intoxicated charge and fined \$200.00 and \$78.50 for the possession of drug paraphernalia and speeding convictions respectively.

Ostdiek challenges the trial court's denial of his motion to suppress all evidence obtained by Deputy during the traffic stop, arguing Deputy, as a member of the county sheriff's department, lacked authority to effect a traffic stop on a city street for speeding in violation of section 304.010, RSMo. Ostdiek also challenges his conviction for speeding as the only evidence presented was the "uncorroborated opinion testimony" of Deputy, because the radar results were not allowed into evidence, and this alone was insufficient evidence as to his speed. Further, Ostdiek claims the trial court erred in admitting into evidence the results of the HGN test because a proper foundation for Deputy's qualifications to administer the test was not presented. And finally, Ostdiek challenges the trial court's admission of his breathalyzer test results contending the Sergeant, who maintained the breath-testing device, and Deputy, who performed the test, did not possess the requisite permits or authorization required to perform such tasks because Executive Order 07-05, which was in effect at the time of his arrest, transferred authority and power over Missouri's Breath Alcohol Program ("BAP") from the Department of Health and Senior Services ("DHSS") to the Department of Transportation ("MoDOT"), and the permits issued by the DHSS to the Sergeant and Deputy were therefore invalid when his breathalyzer test was administered.

AFFIRMED IN PART; REVERSED IN PART.

Division Two holds: The trial court did not err in denying Ostdiek's Motion to Suppress. Deputy had authority under section 304.010, RSMo. to stop Ostdiek for speeding on a city street because even if a municipal ordinance exists establishing the speed limit, and not a state law, section 304.010 makes it a violation of state law to exceed that posted speed limit. Nor did the trial court err in admitting the HGN test or breathalyzer test results into evidence. Deputy testified that she had performed Ostdiek's HGN test in accordance with the training she had received and that Ostdiek exhibited all three clues of nystagmus, laying a sufficient foundation for the trial court to admit the Deputy's testimony regarding the HGN test results. In regards to the breathalyzer test, Executive Order 07-05 did not result in an immediate transfer of BAP-related authority from DHSS to MoDOT. Instead, the order merely authorized the process of the transfer, which was never fully implemented by the agencies. Thus, the fact that Deputy and Sergeant's permits were issued by DHSS rather than MoDOT did not render Ostdiek's implied consent to breathalyzer testing invalid as a matter of law and admission of the results was proper.

The trial court did err, however, in finding Ostdiek guilty of speeding. Deputy's testimony that Ostdiek's vehicle "just appeared" to be going faster than her vehicle and the other vehicles on the road was not sufficient to authorize a finding of guilt beyond a reasonable doubt in the absence of other evidence and thus, the verdict of guilt must be reversed.

Opinion by James M. Smart, Jr., Judge

August 30, 2011

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