

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

STATE OF OHIO,	:	APPEAL NOS. C-170201
		C-170202
Plaintiff-Appellee,	:	C-170203
		TRIAL NOS. C16TRC-37355 A
vs.	:	C16TRC-37355 B
		C16TRC-37355 C
BOBBY BALL,	:	
		<i>JUDGMENT ENTRY.</i>
Defendant-Appellant.	:	

We consider these appeals 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.

A jury found Bobby Ball guilty of two counts of operating a vehicle while under the influence of alcohol (“OVI”) and a marked lanes violation. The trial court merged the OVI count charged under C16TRC-3755 A into the B charge for sentencing, and sentenced Ball to 180 days in jail—150 days suspended—two years of probation, a \$375 fine, and a three-year driver’s license suspension. The court remitted costs on the marked lanes violation in the case numbered C16TRC-37355. In one assignment of error, Ball asserts that his trial counsel was ineffective for failing to move to suppress field sobriety test results, and that counsel’s allegedly deficient performance resulted in Ball’s OVI conviction.

Ball, who was 71 years old at the time of his arrest, claims that counsel should have moved to suppress the results of his horizontal gaze nystagamus (“HGN”) test

and “finger dexterity” test because, allegedly, the tests are not approved for persons over the age of 65. Ball cites trial testimony from the arresting officer that the National Highway Traffic Safety Administration (“NHTSA”) manual limits the use of field sobriety tests to people between the ages of 18-65. Ball also cites several scientific articles. Ball further contends that the finger dexterity test “is not part of the NHTSA manual,” and therefore, would have been excluded from evidence had counsel moved to suppress its result.

Ball’s arguments are flawed. Most significantly, they are not supported by the record. The NHTSA manual was not admitted into evidence, nor were the scientific articles he now cites. It is well settled that this court will not decide an appeal based on evidence that was not before the trial court. *State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500 (1978), paragraph one of the syllabus. The state filed a motion to strike the citations to the NHTSA manual, as well as a scientific article attached to Ball’s brief, which we have granted.

Assuming arguendo that the NHTSA manual contains age restrictions, this court has held that such language is cautionary, only, and failing to abide by it is not grounds for exclusion of the test results. *State v. Kaczmarek*, 1st Dist. Hamilton No. C-140610, 2015-Ohio-3852, ¶ 10. Finally, Ball offers no legal support for his argument concerning exclusion of the finger dexterity test result based on the test not being a “part” of the NHTSA manual, and we find none.

We therefore hold that counsel was not ineffective for failing to move to suppress the results of Ball’s HGN and finger dexterity tests. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 141-142, 538 N.E.2d 373 (1989). Ball’s sole assignment of error is overruled.

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We are compelled to dismiss Ball's appeals from his OVI charge in C16TRC-37355 A and from his marked lanes violation in C16TRC-37355 C. Ball's C16TRC-3755 A charge was merged into his C16TRC-3755 B charge for sentencing. Since there was no sentence on the A charge, there is no final order. *See State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, ¶ 17. On the C charge, the trial court ordered costs to be remitted but did not explicitly impose a sanction. This does not constitute a final order. *See State v. Bennett*, 1st Dist. Hamilton Nos. C-140507 and C-140508, 2015-Ohio-3246; *but see State v. White*, 1st Dist. Hamilton Nos. C-160403 and C-160410 (June 14, 2017), *appeal accepted*, ___Ohio St.3d.___, 2018-Ohio-723, ___N.E.3d___ (appeal on the issue of whether, as part of the final order requirements, a trial court must impose a punishment for a minor misdemeanor offense).

We affirm the trial court's judgment in the appeal numbered C-170202 and dismiss the appeals numbered C-170201 and C-170203.

MOCK, P.J., ZAYAS and MILLER, JJ.

To the clerk:

Enter upon the journal of the court on March 28, 2018

per order of the court _____.

Presiding Judge