

BEFORE THE SUPREME COURT OF OHIO

STATE OF OHIO

PLAINTIFF-APPELLANT

-vs-

JESSICA DEROV

DEFENDANT-APPELLEE

CASE NO.: **08-0853**

AN APPEAL FROM CASE NO. 07 MA 71
BEFORE THE SEVENTH DISTRICT
COURT OF APPEALS AT MAHONING
COUNTY

CONFLICT CERTIFIED

STATE'S MEMORANDUM IN SUPPORT OF JURISDICTION

PAUL J. GAINS, 0020323

RHYS B. CARTWRIGHT-JONES, 0078597
(C/R)

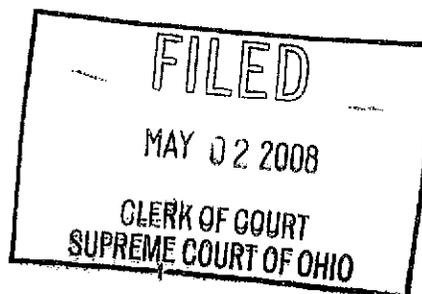
MAHONING COUNTY ADMIN. BLDG.
21 W BOARDMAN ST., FL. 6
YOUNGSTOWN OH 44503-1426
TEL.: (330) 740-2330, EXT. 7227
FAX: (330) 740-2008

FOR THE STATE OF OHIO

ROBERT C. KOKOR, 0062326

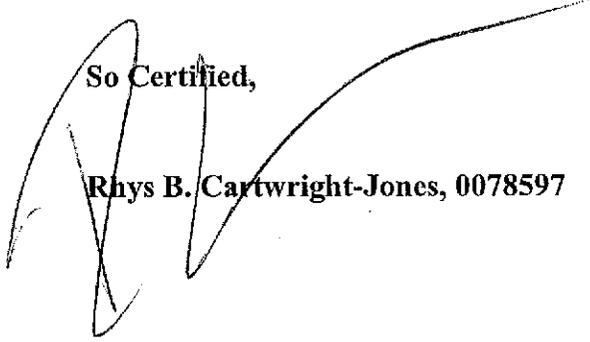
394 ST. RT. 7, S.E
BROOKFIELD, OH 44403-0236
TEL.: (330) 448-1133
FAX: (330) 448-1133

FOR MS. JESSICA DEROV



Proof of Service

I sent a copy of this jurisdictional brief to opposing counsel, above, on May 1, 2008 by regular mail.



So Certified,

Rhys B. Cartwright-Jones, 0078597

Table of Contents

	Page No.:
Proof of Service	ii
Statement of why this is a Case of Great Public or General Interest that Involves a Substantial Constitutional Question.....	1
Statements of the Case, Facts and Introduction.....	2
Law and Discussion.....	4
Proposition of Law No. 1: An odor of alcohol coupled with glassy eyes and failed field sobriety tests can support probable cause to initiate field sobriety tests.	4
Proposition of Law No. 2: A portable breathalyzer test can support probable cause to arrest for driving under the influence.....	5
Proposition of Law No. 3: There is no 68-second time requirement for substantial compliance with the HGN test.	6
Conclusion.....	7
	Appx. Pg.
Journal Entry, March 28, 2008.....	A
Journal Entry Errata, April 2, 2008.....	B
Opinion, March 28, 2008	C
Entry Certifying Conflict, April 29, 2008	D

Statement of why this is a Case of Great Public or General Interest that Involves a Substantial Constitutional Question

Under the Seventh District's opinion, the following scenario is possible. A police officer sees a vehicle drive by with an equipment violation. He follows it and pulls over the vehicle. The driver rolls down the window. After talking to the driver for a few seconds, the police officer discovers that she reeks of alcohol. Should he initiate field sobriety tests—if for no other reason than to ensure driver's safety and that of anyone else on the road? According to the Seventh District, the answer to this question is an unequivocal "no." Without a moving violation, one cannot investigate a drunk driving offense; so holds the Seventh District. One must let the obviously intoxicated driver drive on?

The constitutional case here is basic: what constitutes probable cause to investigate for a drunk driving offense? But the public interest, here, is severe. If this Court allows the Seventh District's opinion in this case to stand, then Ohio will have a drunk-driving free-fire zone that stretches from Mahoning to Noble County. Sobriety checkpoints will be—under the Seventh District's opinion—illegal, despite the fact the U.S. Supreme Court has long held them constitutional.¹ (The investigating officer would not have seen any moving violations as vehicles crept through the checkpoint.) If an officer overtakes a vehicle for a non-moving violation then finds the driver out of her mind on drugs—according to the Seventh District—the bare fact that she managed not to commit a moving violation within the officer's gaze requires the officer to let her drive on.

Beyond the constitutional and public interest thresholds, this case presents at least three conflicts among Ohio's reviewing districts. This first, already mentioned, is whether an odor of

¹ See, e.g., *City of Indianapolis v. Edmond* (2000), 531 U.S. 32; *Michigan Dept. of State Police v. Sitz* (1990), 496 U.S. 444, ruling on sobriety checkpoints.

alcohol provides probable cause to investigate. The Seventh District differs from the rest of Ohio on this point. The second issue, upon which the Seventh District certified conflict, is between the Seventh and Fourth districts as to whether a portable breath test can support, among the totality of the circumstances, probable cause to arrest for drunk driving.² The final issue, pending conflict review, is between the Seventh and Fifth Districts relative to the amount of time required to perform the Horizontal Gaze Nystagmus field sobriety test.³ According the Fifth District, 48 seconds suffices. But according to the Seventh District, the test requires 68 seconds.⁴

The state prays this Court take jurisdiction over this case, hear it on its full merits, and overrule the Seventh District's judgment entry and opinion.

Statements of the Case, Facts and Introduction

This case started with a routine OVI arrest.⁵ According to the suppression transcript, Trooper Shawn Martin noticed Ms. Derov's vehicle and observed that the tags on the license plates were expired. He checked the license plate number through LEADS and it came back as being registered to a different vehicle than that which it was displayed. No one disputes that this was probable cause to pull over the vehicle.

Thereafter, Trooper Martin initiated a traffic stop and approached the stopped vehicle. Martin could smell a strong odor of alcohol on Ms. Derov's breath and observed that her eyes

² Attached.

³ Described below.

⁴ C.f. State v. Maguire (July 30, 2001), 5th Dist. No.2000CA374, unreported, 2001 WL 881784.

⁵ The following facts come from the Seventh District's opinion and are not under serious dispute.

were glassy and red. Martin requested that she exit her vehicle and subsequently had her perform field sobriety tests and a portable breath test. Ms. Derov failed all but one of these tests.

Following the psychomotor tests, Ms. Derov admitted—Miranda is not at issue here—that she had consumed alcohol that evening. Martin arrested her and transported her to the patrol post. Once there, Martin gave Ms. Derov a breath test. Her test registered at .134. This is well over the legal limit. And this satisfies the two necessary elements of a drunk driving charge: drunkenness and driving.

Derov moved to suppress the results of all the tests. The County Court overruled the motion, and Derov plead no contest, preserving her appeal.

Derov appealed, but did not take exception with the officer's probable cause to arrest. The first time that issue bubbled up was during oral arguments. And ultimately the Seventh District reversed the trial court's decision on grounds of probable cause, alleging that where the officer reported no moving violation but found a driver steaming with alcohol vapors, the officer had no justification for investigating a drunk driving charge. In doing so, the Seventh District could have stopped simply with that conclusion. Nevertheless, the majority also proceeded to relate dicta on the admissibility of portable breath tests and to order a 68-second time requirement for the horizontal gaze nystagmus (HGN) test, which exists nowhere in the literature defining that test.⁶

⁶ The HGN test is one of several field sobriety tests used by police officers in detecting whether a driver is intoxicated. Nystagmus is an involuntary jerking of the eyeball. Horizontal gaze nystagmus refers to a jerking of the eyes as they gaze to one side. The position of the eye as it gazes to one side is called maximum deviation. In administering the test, an officer takes some object, a pen for example, and places it approximately twelve to fifteen inches in front of the suspect's nose. The officer then observes the suspect's eyes as they follow the object to determine at what angle nystagmus occurs. The more intoxicated a person becomes, the less the eyes have to move toward to the side before nystagmus begins.

Law and Discussion

Proposition of Law No. 1: An odor of alcohol coupled with glassy eyes and failed field sobriety tests can support probable cause to initiate field sobriety tests.

Some courts find that an odor of alcohol alone is not probable cause for a drunk driving arrest; some courts find that a *strong* odor of alcohol is probable cause to arrest for drunk driving.⁷ For example, according to the Fifth District, addressing *State v. Taylor*, “[t]he act of only nominally exceeding the speed limit coupled with the arresting officers’ perception of the odor of alcohol (not characterized as pervasive or *strong*)...does not furnish probable cause to *arrest* an individual for driving under the influence of alcohol.”⁸ But according to Hamilton County, “the odor of alcohol and admission of recent consumption of alcohol constituted probable cause to detain [the defendant] to administer field sobriety tests.”⁹ And once a suspect has failed a field sobriety test or otherwise provided further cause to believe that she is intoxicated, then an officer has probable cause to arrest. In other words, as articulable suspicion increases, so increases the government’s right to intrude on a person’s time.¹⁰

Here, the Seventh District’s majority jumped from odor to arrest but did not address the connection between the two: investigation. Following the officer’s noticing that Ms. Derov

See, e.g., Cohen & Green, *Apprehending and Prosecuting the Drunk Driver: A Manual for Police and Prosecution* (1997), Section 4.04 [2][a]. Other signs of intoxication include distinct nystagmus at maximum deviation and the inability of the suspect’s eyes to smoothly follow the object. 1 Erwin, *Defense of Drunk Driving Cases* (3 Ed.1997), Sections 10.04[5] and 10.06[1].

⁷ See, e.g., *State v. Taylor* (5th Dist. 1981), 3 Ohio App.3d 197, emphasis added, at syl; and c.f. *State v. Carmical* (Hamilton Mun. 2000), 110 Ohio Misc.2d 4, 8.

⁸ *Taylor supra*, emphasis added, at syl.

⁹ *Carmical supra*, emphasis added, at 8.

¹⁰ *U.S. v. Montoya de Hernandez* (1985), 473 U.S. 531.

smelled of alcohol, he had Derov perform field sobriety tests including the walk and turn, the horizontal gaze nystagmus, the one leg stand, and a portable breath test (PBT).¹¹ The officer testified that Derov failed all but one of these tests, the one leg stand. Given the odor of alcohol, Ohio courts well recognize that the officer had probable cause to initiate the field sobriety tests. And given Derov's failure of the tests, upon that failure, the officer had probable cause to arrest her for drunk driving. As articulable suspicion of drunk driving increased, the officer's privilege to investigate continued.

Proposition of Law No. 2: A portable breathalyzer test can support probable cause to arrest for driving under the influence.

Probable cause to arrest is based on reasonable and articulable suspicion in the totality of circumstances. According to the Fourth District, most recently in *State v. Gunther*, the results are admissible to support probable cause.¹² According to the Seventh District District, most recently in *State v. Derov*, the results are not admissible so support probable cause. There is, then, a conflict.

¹¹ The walk-and-turn test requires the suspect to walk a given number of steps, heel-to-toe, in a straight line. The suspect is then told to turn around and walk back in the same manner. During the test, the suspect is told to keep his or her hands at his or her sides. The officer assesses a suspect's performance according to the degree to which the suspect exhibits a lack of balance or coordination. Erwin, at Section 10.03[2].

The one-leg-stand test requires the suspect to stand with his or her feet together and his or her arms at his or her sides. The suspect is then told to hold one leg straight and forward about eight to twelve inches off the ground for approximately thirty seconds. While in this position, the suspect counts off the number of seconds. At all times, the suspect is to keep his or her arms at his or her sides and to watch his or her raised foot. The officer demonstrates the test before administering it. Erwin, at Section 10.04[1].

¹² 4th Dist. No. 04 CA 27, 2005-Ohio-3492.

Obviously the state's position is that the results of a portable breathalyzer test are admissible to establish probable cause. And common sense supports this claim. The state is not, in this appeal, arguing that the results of a portable breathalyzer test are admissible at trial. Courts generally regard the results of portable breath tests to be too unreliable to be presented to a jury to support a conviction beyond a reasonable doubt.¹³ But probable cause is a far lesser standard of proof than proof beyond a reasonable doubt.

Within the totality of circumstances, to effect probable cause to arrest, a police officer can take into account that a suspect had an odor of alcohol on her breath. So it stands to reason that within the totality of those same circumstances one could use what is essentially a digital confirmation of the fact that one has alcohol on her breath. (Indeed it might work out to the defendant's advantage.)

Proposition of Law No. 3: There is no 68-second time requirement for substantial compliance with the HGN test.

Courts across the state reach vastly different conclusions about how long the HGN should take. According to the Seventh District's opinion in this case, "[t]he guidelines do not state a total minimum amount of time required for properly conducting all three phases of the exam. However, those minimums in the guidelines can be added up and total 68 seconds[.]"¹⁴ According to the Fifth District's opinion in *State v. Maguire*, "the [HGN] test requires a

¹³ *State v. Shuler* (2006), 168 Ohio App.3d 183.

¹⁴ C.f. the dissent, stating "We do not need to issue new pronouncements of law regarding whether portable breath tests can be used at suppression hearings, or whether the HGN test must take at least 68 seconds even though the NHTSA manual makes no mention of this[.]"

minimum of 48 seconds to complete the various elements with respect to both eyes.” There is, then, a conflict.

Ohio law requires substantial compliance with the NHSTA manual for the HGN and all field sobriety tests. And the only times mentioned in the NHSTA manual add up to 40 seconds. According to the manual, there are three parts to the test: smooth pursuit, maximum deviation, and non-maximum deviation (also known as “distinct nystagmus prior to 45 degrees.”)¹⁵ Smooth pursuit takes 16 seconds. Maximum deviation takes 16 seconds. And non-maximum deviation takes 8 seconds. That adds up to a total of 40 seconds.

Conclusion

Wherefore, the state prays this Court hold this case for review pending certification of the second conflict, and otherwise take jurisdiction over this case, hear it on its full merits, and overrule the Seventh District’s judgment entry and opinion.

Respectfully Submitted,

Rhy B. Cartwright-Jones, 0078597
Office of the Mahoning County Prosecutor
21 W. Boardman St., 6th Fl.
Youngstown, OH 44503
Tel: (330) 740-2330
Fax: (330) 740-2008
Counsel for Appellant, The State of Ohio

¹⁵ Description of the administration of the HGN test is taken from National Highway Traffic Safety Administration, U.S. Department of Transportation(1995) , DWI Detection and Standardized Field Sobriety Testing Student Manual, VIII-14 –18.

Journal Entry, March 28, 2008

STATE OF OHIO) IN THE COURT OF APPEALS OF OHIO
MAHONING COUNTY) SS: SEVENTH DISTRICT

STATE OF OHIO,)
PLAINTIFF-APPELLEE,) CASE NO. 07 MA 71
-VS-) JOURNAL ENTRY
JESSICA DEROV,)
DEFENDANT-APPELLANT.)

For the reasons stated in the opinion rendered herein, Appellant's first assignment of error is meritless and Appellant's second and third assignments of error are rendered moot. It is the final judgment and order of this Court that the judgment of the County Court No. 4, Mahoning County, Ohio, is reversed, Appellant's conviction is vacated and this case is remanded to the trial court for further proceedings according to law and consistent with this Court's opinion. Costs taxed against Appellee. Waite, J., concurring in judgment only with concurring in judgment only opinion.

Mary Rigeness
Anthony Vivo
Cliff Waite

CLERK OF COURTS
MAHONING COUNTY, OHIO
MAR 28 2008
FILED
ANTHONY VIVO, CLERK



2007 MA
00071
00042221779
JUDENT

589
5327

Journal Entry Errata, April 2, 2008

STATE OF OHIO) IN THE COURT OF APPEALS OF OHIO
MAHONING COUNTY) SS: SEVENTH DISTRICT

STATE OF OHIO,)
PLAINTIFF-APPELLEE,) CASE NO. 07 MA 71
- VS -) JOURNAL ENTRY
JESSICA DEROV,) ERRATA
DEFENDANT-APPELLANT.)

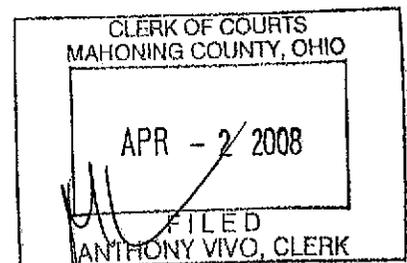
The following entry replaces the entry filed on March 28, 2008 in error.

For the reasons stated in the opinion rendered herein, Appellant's first assignment of error is meritorious and Appellant's second and third assignments of error are rendered moot. It is the final judgment and order of this Court that the judgment of the County Court No. 4, Mahoning County, Ohio, is reversed, Appellant's conviction is vacated and this case is remanded to the trial court for further proceedings according to law and consistent with this Court's opinion. Costs taxed against Appellee. Waite, J., concurring in judgment only with concurring in judgment only opinion.

Mary DeGenaro

John J. White

John J. White



2007 MA
00071
00083176102
JOUENT

J89
P0335

Opinion, March 28, 2008

Appendix - C

STATE OF OHIO, MAHONING COUNTY
MAHONING COUNTY COURT
IN THE COURT OF APPEALS AREA 4
SEVENTH DISTRICT 2008 APR -1 P 2:11

STATE OF OHIO,)
)
 PLAINTIFF-APPELLEE,)
)
 - VS -)
)
 JESSICA DEROV,)
)
 DEFENDANT-APPELLANT.)

ANTHONY VIVO, CLERK

CASE NO. 07 MA 71

OPINION

CHARACTER OF PROCEEDINGS:

Criminal Appeal from County Court
No. 4, Case No. 06 TRC 5717.

JUDGMENT:

Reversed. Conviction Vacated
and Remanded.

APPEARANCES:

For Plaintiff-Appellee:

Attorney Paul J. Gains
Prosecuting Attorney
Attorney Jennifer Paris
Assistant Prosecuting Attorney
21 W. Boardman St., 6th Floor
Youngstown, OH 44503

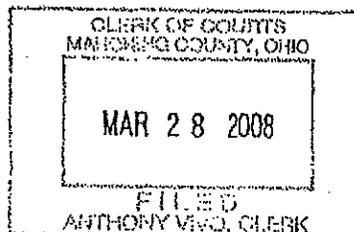
For Defendant-Appellant:

Attorney Robert C. Kokor
394 State Route 7, SE
P.O. Box 236
Brookfield, OH 44403

JUDGES:

Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: March 28, 2008



DeGenaro, P.J.

{¶1} This timely appeal comes for consideration upon the record in the trial court, the parties' briefs and their oral arguments to this Court. Appellant, Jessica Derov, appeals the decision of Mahoning County Court Number 4 denying her Motion to Suppress and finding her guilty of one count of driving under the influence in violation of R.C. 4511.19(A)(1)(a); one count of per se driving with a prohibited blood alcohol level in excess of 0.08 in violation of R.C. 4511.19(A)(1)(d); one count of use of unauthorized plates in violation of R.C. 4549.08; and, one count of an expired registration in violation of R.C. 4503.11.

{¶2} Derov challenges the trial court's denial of her motion to suppress the results of field sobriety tests, the results of the BAC test, and her admission to consuming alcohol. Because the results of the field sobriety tests should have been suppressed and because there is not enough other evidence to support a finding of probable cause to arrest, we reverse the judgment of the trial court, we vacate Derov's conviction and we remand this matter to the trial court for further proceedings.

{¶3} On August 12, 2006 at 2:30 A.M., Officer Martin of the Ohio State Highway Patrol initiated a stop of Derov's car based upon the expired tags on her license plate. Prior to the stop, the officer had witnessed no erratic driving. During the stop, however, the officer noticed a strong smell of alcohol emanating from Derov's vehicle. The officer had Derov exit the vehicle. He then determined that the smell of alcohol was coming from Derov. He also noticed that she had red, glassy eyes. The officer admitted that Derov had no difficulty exiting her car and demonstrated no physical signs of alcohol consumption.

{¶4} The officer then had Derov perform field sobriety tests including the walk and turn, the horizontal gaze nystagmus, the one leg stand, and a portable breath test. The officer testified that Derov failed all but one of these tests, the one leg stand. After completing the tests, the officer asked Derov whether she had consumed any alcohol to which she responded that she had consumed one beer. Derov was placed under arrest and taken to the control post where she was given a breath test which indicated her blood

alcohol content to be 0.134. After filing a motion to suppress which was denied by the trial court, Derov was convicted of one count of driving under the influence in violation of R.C. 4511.19(A)(1)(a), and one count of driving with a prohibited blood alcohol level in excess of 0.08 in violation of R.C. 4511.19(A)(1)(d).

{¶5} In her first of three assignments of error, Derov argues:

{¶6} "The trial court committed reversible error by overruling the motion to suppress three of the field sobriety tests performed by the Defendant/Appellant."

{¶7} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. McNamara* (1997), 124 Ohio App.3d 706, 710. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. Accepting these facts as true, the appellate court conducts a de novo review of whether the facts satisfy the applicable legal standards at issue in the appeal. *State v. Williams* (1993), 86 Ohio App.3d 37, 41.

{¶8} The Ohio Supreme Court has recognized that since the amendment of R.C. 4511.19 by the Ohio Legislature in 2003, field sobriety tests are no longer required to be conducted in strict compliance with standardized testing procedures. *State v. Schmitt*, 101 Ohio St.3d 79, 2004-Ohio-0037, at ¶9. "Instead, an officer may now testify concerning the results of a field sobriety test administered in substantial compliance with the testing standards." *Id.* This holding further enforces R.C. 4511.19(D)(4)(b), which provides in part, that evidence and testimony of the results of a field sobriety test may be presented "if it is shown by clear and convincing evidence that the officer administered the test in substantial compliance with the testing standards for any reliable, credible, and generally accepted field sobriety tests that were in effect at the time the tests were administered, including, but not limited to, any testing standards then in effect that were set by the national highway traffic safety administration."

{¶9} In determining whether the State has shown by clear and convincing evidence that the officer administered the tests in substantial compliance with testing standards, the allocation of burden of proof for a motion to suppress must be determined. In order to suppress evidence or testimony concerning a warrantless search, a defendant must "raise the grounds upon which the validity of the search or seizure is challenged in such a manner as to give the prosecutor notice of the basis for the challenge." *Xenia v. Wallace* (1988), 37 Ohio St.3d 216, paragraph one of the syllabus. The defendant is required to set forth the basis for the challenge "only with sufficient particularity to put the prosecution on notice of the nature of the challenge." *State v. Purdy*, 6th Dist. No. H-04-008, 2004-Ohio-7069, at ¶15, citing *State v. Shindler*, 70 Ohio St.3d 54, 57-58, 1994-Ohio-0452. After the defendant sets forth a sufficient basis for a motion to suppress, the burden shifts to the state to demonstrate proper compliance with the regulations involved. *Id.* citing *State v. Johnson* (2000), 137 Ohio App.3d 847, 851.

{¶10} As part of the State's proof that the officer had probable cause to arrest Derov, the State introduced the result of a portable breath test which Derov took prior to the arrest. Derov challenges the admission of the portable breath test results as evidence at the suppression hearing. Several courts have determined that the results of a portable breath test are not admissible, even for probable cause purposes. See *State v. Ferguson*, 3d Dist. No. 4-01-34, 2002-Ohio-1763, *Cleveland v. Sanders*, 8th Dist. No. 83073, 2004-Ohio-4473, *State v. Delarosa*, 11th Dist. No. 2003-P-0129, 2005-Ohio-3399, *State v. Mason* (Nov. 27, 2000) 12 Dist. No. CA99-11-033. Even the Fourth District, which has concluded that portable breath tests are admissible for purposes of a probable cause determination, admits that these tests are highly unreliable.

{¶11} "PBT devices are not among those instruments listed in Ohio Adm.Code 3701-53-02 as approved evidential breath-testing instruments for determining the concentration of alcohol in the breath of individuals potentially in violation of R.C. 4511.19. PBT results are considered inherently unreliable because they 'may register an inaccurate percentage of alcohol present in the breath, and may also be inaccurate as to the presence or absence of any alcohol at all.' See *State v. Zell* (Iowa App.1992), 491

N.W.2d 196, 197. PBT devices are designed to measure the amount of certain chemicals in the subject's breath. The chemicals measured are found in consumable alcohol, but are also present in industrial chemicals and certain nonintoxicating over-the-counter medications. They may also appear when the subject suffers from illnesses such as diabetes, acid reflux disease, or certain cancers. Even gasoline containing ethyl alcohol on a driver's clothes or hands may alter the result. Such factors can cause PBTs to register inaccurate readings, such as false positives. See Tebo, *New Test for DUI Defense: Advances in Technology and Stricter Laws Create Challenges for Lawyers*, Jan. 28, 2005, www.7/8dulcentral.7/8com/7/8aba.7/8journal/, *State v. Shuler*, 168 Ohio App.3d 183, 2006-Ohio-4336, at ¶ 10.

{¶12} Given the inherent unreliability of these kinds of tests, we agree with the majority of our sister districts and conclude that the trial court should not have considered the results of the portable breath test.

{¶13} Derov next challenges the trial court's failure to suppress the results of the Horizontal Gaze Nystagmus (HGN) test. More specifically, Derov claims that the officer did not spend the required amount of time on each portion of the test, and thus did not substantially comply with the guidelines.

{¶14} After giving the appropriate instructions to a test subject, the NHTSA guidelines instruct the examiner to conduct the actual test in three phases. First, the examiner is instructed to have the subject focus on a stimulus while the examiner moves the stimulus from left to right. While moving the stimulus, the examiner checks for smooth pursuit of the test subject's eyes. The examiner then tracks each eye again, checking for horizontal nystagmus at maximum deviation. Finally, the examiner tracks each eye from left to right while looking for the onset of nystagmus before the eye has tracked 45 degrees.

{¶15} The NHTSA guidelines list certain approximate and minimum time requirements for the various portions of the three phases of the exam. For instance, when checking for distinct nystagmus at maximum deviation, the examiner must hold the stimulus at maximum deviation for a minimum of four seconds. When checking for

smooth pursuit, the time to complete the tracking of one eye should take approximately four seconds. When checking for the onset of nystagmus prior to 45 degrees, the time for tracking left to right should also be approximately four seconds.

{¶16} The guidelines do not state a total minimum amount of time required for properly conducting all three phases of the exam. However, those minimums in the guidelines can be added up and total 68 seconds, which agrees with Officer Martin's testimony at the suppression hearing. Courts have found that falling significantly short of the time limits would render the results of the test inadmissible to demonstrate probable cause to arrest.

{¶17} For example, in *State v. Embry*, 12th Dist. No. CA2003-11-110, 2004-Ohio-6324, during the cross-examination of the arresting officer, the defendant added up all the approximate and minimum times called-for in the guidelines. He then compared that total time to the total time that elapsed on the video that recorded the performance of the HGN test. A comparison of the two total times revealed that the total time the officer used to conduct the HGN test on the defendant fell significantly short of the total of all the time requirements listed in the guidelines. Therefore, the Twelfth District concluded that the officer did not substantially comply with the guidelines and upheld the trial court's decision to exclude the test from evidence.

{¶18} Likewise, in *State v. Mai*, 2d Dist. No. 2005-CA-115, 2006-Ohio-1430, the officer testified that he conducted the three phases of the HGN test much faster than the four-second minimums set forth in the NHTSA. For example, the officer testified that with respect to the maximum deviation component of the test, he held the stimulus to the side for a period of only one to two seconds, while the NHTSA manual required a minimum of at least four seconds. In light of these deficiencies in the administration of the HGN test, the Second District found a lack of substantial compliance with the NHTSA guidelines.

{¶19} Here, it was established at the suppression hearing that Officer Martin only took 44 seconds to perform the HGN test. This is a significant deviation from the minimum time specified in the guidelines, which makes this case analogous to both *Embry* and *Mai*. We agree with those courts that such a significant difference calls the

reliability of the results into question. Accordingly, the State had failed to show substantial compliance by clear and convincing evidence and the results of the HGN test should have been suppressed by the trial court.

{¶20} Finally, Derov challenges the trial court's failure to suppress the results of the "walk and turn" test. The NHTSA manual requires that the officer give instructions regarding "initial positioning" of the suspect prior to the suspect taking the test. The officer should instruct the suspect to place their left foot on the line and then place their right foot on the line ahead of the left foot. The heel of the right foot should be against the toe of the left foot. The officer should then instruct the suspect to keep their arms down at their sides and maintain that position until the officer has completed the instructions for the walk and turn test.

{¶21} The officer is then to instruct the suspect, that once he tells the suspect to begin, to take nine heel-to-toe steps, turn and take nine heel-to-toe steps back. When they turn, they should keep the front foot on the line and turn by making a series of small steps with the other foot. He should further instruct the suspect to keep their arms at their sides while walking and watch their feet at all times. Once they start walking, they should not stop until they have completed the test.

{¶22} In this case, the officer stated that Derov failed three of the eight factors used to determine whether a person has failed the walk and turn test: 1) she moved her feet to maintain her balance during the instruction phase of the test, 2) she raised her arms during the demonstration phase of the test, and 3) she failed to place her feet heel to toe during the demonstration phase of the test.

{¶23} Derov claims that the officer improperly considered the fact that she raised her arms while she performed her test and she is correct. During his testimony, the officer stated that he did tell her during the instruction stage that she should keep her arms down. However, he did not tell her to keep her arms down for the walking or demonstration stage of the test. Despite the officer's failure to instruct Derov to keep her arms down, he scored the raising of her arms during the test as a clue against her when determining that she failed the test. This was improper. It is fundamentally unfair to hold

a person's failure to complete a test properly against them if the person has not been properly instructed on how to complete the test.

{¶24} Derov also contends that the officer improperly counted the fact that she moved her feet during the instruction phase since he did not testify that her feet actually broke apart. The guidelines state that a factor an officer should consider is if a suspect moves her feet to keep her balance while listening to the instructions. However, the guidelines specifically state that this factor only counts against a suspect if the suspect's feet actually break apart. In this case, the officer never testified that Derov's feet actually broke apart. Instead, he only testified that she moved her feet to keep her balance during the instruction phase. Thus, it is, at the very least, questionable whether this factor should have been counted against Derov.

{¶25} Given the fact that the State has only clearly and convincingly proved that Derov failed one clue out of eight on one field sobriety test in the absence of other evidence, we cannot say the officer had probable cause to arrest Derov. Moreover, it is unclear whether the officer should have even administered field sobriety tests in this case.

{¶26} In the past, courts have held that an officer does not have the right to have a suspect submit to field sobriety tests if the only evidence of impairment is that it is early in the morning, that the suspect had glassy, bloodshot eyes, that he had an odor of alcohol about his person, and that he admitted that he had consumed one or two beers. See *State v. Dixon* (Dec. 1, 2000), 2d Dist. No.2000-CA-30; see also *State v. Downen* (Jan. 12, 2000), 7th Dist. No. 97-BA-53 (Even a "pervasive" or "strong" odor of alcohol "is no more an indication of intoxication than eating a meal is of gluttony."). This is because it is still legal to drink and drive in Ohio; it is only illegal to drive while impaired or while over the legal limit.

{¶27} In this case, most of the evidence the officer could rely on when deciding whether to arrest Derov was similar to that discussed in *Dixon*, i.e. the time of the stop, the smell of alcohol, the red glassy eyes, Derov's admission to drinking one beer. Derov had not been driving erratically, the officer did not testify at the suppression hearing that Derov was slurring her speech, and the officer admitted that Derov had no problem

walking to his car. Indeed, the only possible indication of any physical impairment was the Derov's highly questionable failure of the walk and turn test. These facts are simply insufficient to establish probable cause to believe that a particular person was driving under the influence of alcohol. Accordingly, Officer Martin did not have probable cause to arrest Derov and any evidence obtained after her arrest should have been suppressed. Derov's first assignment of error is meritorious.

{¶28} In her other two assignments of error, Derov argues:

{¶29} "The trial Court committed reversible error by overruling the Motion to Suppress the breath-alcohol test of the Defendant-Appellant."

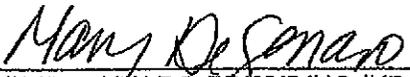
{¶30} "The trial court committed reversible error by overruling the Motion to Suppress the Pre-Miranda statements of the Defendant-Appellant."

{¶31} Given our resolution of Derov's first assignment of error, the remaining two assignments of error are rendered moot. Accordingly, the judgment of the trial court is reversed, Derov's conviction is vacated, and this case is remanded for further proceedings.

Donofrio, J., concurs.

Waite, J., concurs in judgment only with concurring opinion.

APPROVED:


MARY DeGENARO, PRESIDING JUDGE.

Waite, J., concurring in judgment only.

Although I agree that this case should be reversed, I cannot agree with most of the analysis in the majority opinion regarding the manner in which the field sobriety tests were conducted. The majority appears to be holding Trooper Martin to a strict compliance standard on the field sobriety tests, even with regard to aspects of the tests that are not defined in the NHTSA manual. The standard for conducting field sobriety tests is substantial compliance, and there is competent and credible evidence in the record that Trooper Martin substantially complied in conducting the tests. In reversing this case, I believe we do not need to discuss the particulars of the field sobriety tests. My basis for reversing the ruling on the motion to suppress is that the officer did not have a sufficient reason to conduct field sobriety tests in the first place. Although an officer needs only a reasonable suspicion that a traffic violation has occurred to effect a traffic stop, that does not automatically justify further investigation into other crimes unless there are additional reasonable and articulable suspicions supporting further investigation. *State v. Evans* (1998), 127 Ohio App.3d 56, 62, 711 N.E.2d 761.

Trooper Martin testified that he initiated the field sobriety tests based on a strong smell of alcohol coming from Appellant. (Tr., pp. 9-10.) There was no erratic driving. The trooper did not observe anything about Appellant's behavior when she exited her vehicle that might indicate intoxication. He did not even observe whether she had glassy and red eyes until he was already performing the horizontal gaze nystagmus ("HGN") test. Appellant did not confess to drinking any particular amount

-2-

of alcohol, according to Trooper Martin's testimony. He believed she said she had one beer, but he was not even sure of that. (Tr., p. 27.) My interpretation of the evidence presented at the suppression hearing is that Trooper Martin conducted the field sobriety tests on the sole basis that he smelled alcohol.

The majority cites a case we have previously cited that places some limits on the facts that might satisfy the "reasonable and articulable" requirement in order to support an officer's decision to conduct field sobriety tests. In *State v. Dixon* (Dec. 1, 2000), 2nd Dist. No. 2000-CA-30, the Second District Court of Appeals found no reasonable and articulable suspicion to conduct field sobriety tests based on an odor of alcohol, red glassy eyes at 2:20 a.m., and an admission from the defendant that he had consumed one or two beers. We cited *Dixon* in approval in a very recent case, *State v. Reed*, 7th Dist. No. 05 BE 31, 2006-Ohio-7075. In *Reed*, we determined that there was no justification for conducting field sobriety tests based merely on a slight odor of alcohol, red glassy eyes at 1:05 a.m., and an admission from the defendant that he had consumed two beers. We have previously held that an odor of alcohol alone cannot justify conducting field sobriety tests. *State v. Downen* (Jan. 12, 2000), 7th Dist. No. 97-BA-53. I cannot see how we can be consistent with our recent *Reed* and *Downen* cases unless we rule that an officer does not have reasonable and articulable suspicion to conduct field sobriety tests merely on the basis of a strong odor of alcohol. Even if we include the red glassy eyes as a factor, which I am not inclined to do given the trooper's testimony, we have already concluded in *Reed* that

-3-

facts limited to the smell of alcohol and red glassy eyes at a late hour do not permit an officer to conduct field sobriety tests.

This is where our analysis should end. We do not need to issue new pronouncements of law regarding whether portable breath tests can be used at suppression hearings, or whether the HGN test must take at least 68 seconds even though the NHTSA manual makes no mention of this, or that an officer does not substantially comply with walk and turn test unless the officer repeats certain instructions even though the NHTSA manual does not so mandate. If we were required to reach and discuss these issues, and we are not, here, I would disagree with all three of these bright-line holdings made by the majority, particularly in imposing a minimum time requirement on the HGN test above and beyond the requirements of the NHTSA manual. In both cases cited by the majority in support of this conclusion, the time factor was clearly not the only reason given for disqualifying the HGN test. See *State v. Embry*, 12th Dist. No. CA2003-11-10, 2004-Ohio-6324; *State v. Mai*, 2nd Dist. No. 2005-CA-115, 2006-Ohio-1430. Furthermore, in neither case can we determine the amount of time the officers actually took to perform the HGN tests. In *Mai*, the evidence showed that the officer only took 2 seconds to perform aspects of the test that should have taken approximately 4 seconds. In the instant case, Trooper Martin clearly testified that he took the full 4 seconds. I cannot agree with establishing a new rule of law regarding the HGN test when the officer's testimony establishes that he conformed to the NHTSA time requirements in performing the test.

-4-

Finally, the majority's statement that, "it is only illegal to drive while impaired," in Ohio is inaccurate. It is true that R.C. 4511.19(A)(1)(a) prohibits driving while under the influence of alcohol. On the other hand, R.C. 4511.19(A)(1)(b)-(h) prohibit driving while having certain concentrations of alcohol in one's blood, blood serum, blood plasma, breath, or urine. No impairment need be proven under R.C. 4511.19(A)(1)(b)-(h). There are a multitude of fact patterns by which a person could be successfully prosecuted for OMVI that involve no evidence at all that the person was "impaired."

It is clear to me that Trooper Martin should not have conducted the field sobriety tests based primarily, if not exclusively, on a strong odor of alcohol. Therefore, while I cannot agree with the reasoning used by the majority, I agree with the result that the majority has reached. I concur in judgment only.

APPROVED:



CHERYL L. WAITE, JUDGE

Entry Certifying Conflict, April 29, 2008

Appendix - D

CLERK OF COURTS
 MAHONING COUNTY, OHIO
 APR 29 2008
 FILED
 ANTHONY VIVO, CLERK

bk

STATE OF OHIO) IN THE COURT OF APPEALS OF OHIO
)
 MAHONING COUNTY) SS: SEVENTH DISTRICT

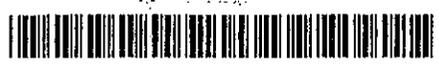
STATE OF OHIO,)
) CASE NO. 07 MA 71
 PLAINTIFF-APPELLEE,)
)
 - VS -) JOURNAL ENTRY
)
 JESSICA DEROV,)
)
 DEFENDANT-APPELLANT.)

This matter has come before us on a timely motion to certify a conflict under App. R. 25 filed by Appellee, State of Ohio. Appellee believes our decision in *State v. DeroV*, 7th Dist. No.07 MA 071, 2008-Ohio-1672, is in conflict with the Fourth District's decision in *State v. Gunther*, 4th Dist. No. 04 CA 27, 2005-Ohio-3492.

The standard for certification of a case to the Supreme Court of Ohio for resolution of a conflict is set out in paragraph one of the syllabus of *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594. "Pursuant to Section 3(B)(4), Article IV, of the Ohio Constitution and S.Ct.Prac.R. III, there must be an actual conflict between appellate judicial districts on a rule of law before certification of a case to the Supreme Court for review and final determination is proper." Three conditions must be met for certification. First, the certifying court must find that its judgment is in conflict with that of a court of appeals of another district and the conflict must be on the same question. Second, the conflict must be on a rule of law not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question of law by other district courts of appeals. *Whitelock*, at 596.

In *DeroV*, where Appellant was convicted of driving while under the influence, this court concluded that the results of a portable breathalyzer test were not admissible to establish probable cause to arrest whereas the Fourth District determined in

589
 PC478



2007 MA
 00071
 00047511724
 JOUENT

Gunther, where the Appellant was similarly convicted of driving under the influence, that the results from such tests were admissible. These decisions clearly are inapposite on a rule of law, not merely facts, and therefore it appears that a conflict does exist. Accordingly, we propose the following question to the Ohio Supreme Court for resolution:

"Whether the results of a portable breath test are admissible to establish probable cause to arrest a suspect for a drunk driving offense."

The motion to certify is granted and the above question is certified to the Supreme Court of Ohio for resolution of the conflict pursuant to Section 3(B)(4), Article IV, Ohio Constitution.


JUDGE GENE DONOFRIO

JUDGE CHERYL L. WAITE


JUDGE MARY DeGENARO

589
PC479