

BEFORE THE SUPREME COURT OF OHIO

STATE OF OHIO

PLAINTIFF-APPELLANT

-vs-

JESSICA DEROV

DEFENDANT-APPELLEE

CASE NO.: 08-0858

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

DISCRETIONARY APPEAL PENDING

NOTICE OF CERTIFIED CONFLICT

PAUL J. GAINS, 0020323

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

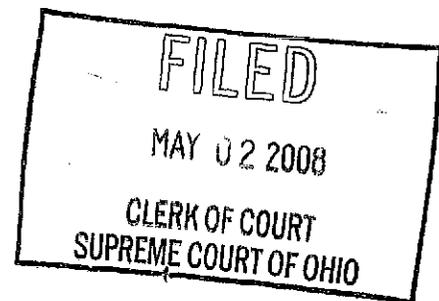
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FOR THE STATE OF OHIO

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FOR MS. JESSICA DEROV

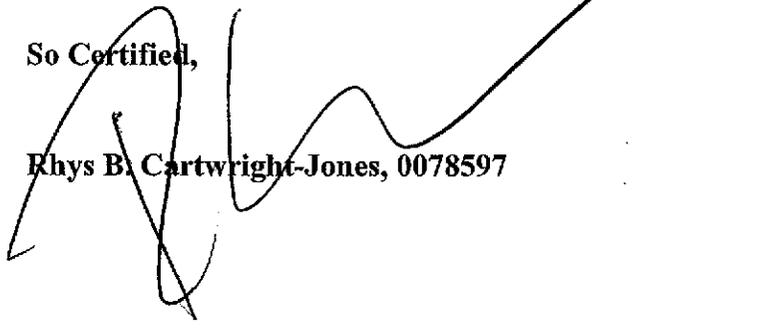


Proof of Service

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

So Certified,

Rhys B. Cartwright-Jones, 0078597



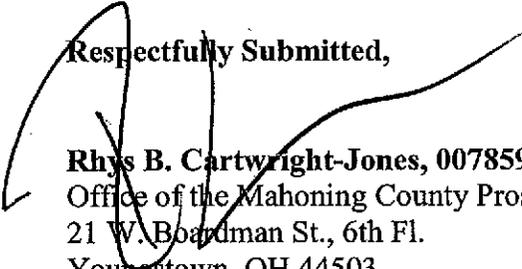
Notice

The State timely gives notice to this Court and to all interested parties that on April 29, 2007 the Seventh District Court of Appeals sitting in Mahoning County certified a conflict in this matter.

The Seventh District's judgment entries and opinion in this case are attached, as are the entry certifying conflict and the opinion as to which the Seventh District certified conflict. Further, the state gives notice that conflict is pending on one remaining issue.

Wherefore, the state prays this Court take notice of the conflict below and assume jurisdiction over this matter so that this Court may decide this case on its full merits.

Respectfully Submitted,


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Counsel for Appellant, The State of Ohio

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 Rigenaro
Gene Conopio
C. J. Waite

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



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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.)

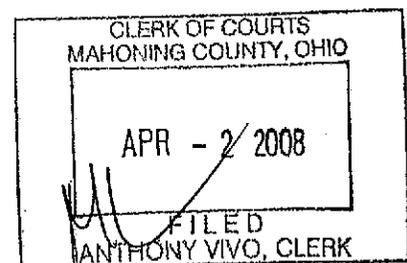
The following entry replaces the entry filed on March 28, 2008 in error.

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 DeSena

John DeSena

John Waite



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Opinion, March 28, 2008

STATE OF OHIO, MAHONING COUNTY
MAHONING COUNTY COURT
IN THE COURT OF APPEALS AREA 4

SEVENTH DISTRICT

2008 APR -1 P 2:11

ANTHONY VIVO, CLERK

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

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
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For Defendant-Appellant:

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Brookfield, OH 44403

JUDGES:
Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Cheryl L. Walte

Dated: March 28, 2008

CLERK OF COURT'S
MAHONING COUNTY, OHIO
MAR 28 2008
FILED
ANTHONY VIVO, CLERK

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).

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

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

{17} 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.

{18} 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

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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

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

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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.

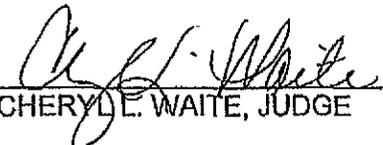
This is where our analysis should end. We do not need to issue new pronouncements of law regarding whether portable breath tests can be used at suppression hearings, or whether the HGN test must take at least 68 seconds even though the NHTSA manual makes no mention of this, or that an officer does not 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.

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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

bk

CLERK OF COURTS
 MAHONING COUNTY, OHIO

APR 29 2008

FILED
 ANTHONY VIVO, CLERK

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. Dero*, 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 *Dero*, 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



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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

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PG479

Opinion in Conflict, State v. Gunther, 4th Dist. No. 04 CA 25

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PICKAWAY COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case No. 04CA25
 :
 vs. : **Released: July 5, 2005**
 :
 BRET GUNTHER, : DECISION AND JUDGMENT
 : ENTRY
 Defendant-Appellant. :

APPEARANCES:

Gary Dumm, Young, Tootle and Dumm, Circleville, Ohio, for Appellant.

David L. Owens, Washington C.H., Ohio, for Appellee.

McFarland, J.

{¶1} Defendant/Appellant Bret Gunther appeals from the judgment rendered by the Municipal Court of Circleville, Ohio, on his motion to suppress and his subsequent plea of no contest entered August 27, 2004. Appellant argues that the trial court erred in finding probable cause for his initial stop and subsequent arrest. He also argues that the trial court erred in admitting the portable breath test (PBT) results into evidence for the establishment of probable cause when the trooper misrepresented the

admissibility of the results. We find that probable cause existed not only for Appellant's stop, but also for his subsequent arrest and therefore, affirm the trial court's denial of Appellant's motion to suppress. Additionally, because the trooper's arguable misstatement of the law regarding admissibility of PBT results did not amount to either a statutory or a constitutional violation requiring application of the exclusionary rule, we affirm the trial court's decision.

{¶2} On April 10, 2004, around midnight, Appellant was stopped by an Ohio Highway Patrolman. Appellant was southbound on Ashville Pike in Pickaway County, along with two other vehicles. The trooper initially was northbound, but turned around to follow the three vehicles heading south. The trooper observed Appellant's vehicle cross the center line of the road at least one time, as verified by the cruiser video footage. The trooper pursued Appellant's vehicle, eventually signaling for him to pull over into a nearby business parking lot. Ultimately, Appellant was arrested and charged with violations of R.C. 4511.25 and 4511.19 (A) (1) and (A)(4), a marked lanes violation and driving under the influence of a drug or alcohol, respectively.

{¶3} The trooper filed a statement of facts with the Circleville Municipal Court on April 12, 2004, which provided as follows:

{¶4} "Your Honor, on April 10, 2004, at 0029 hours Bret Gunther was stopped for a lane violation. I observed the defendant to be traveling

southbound on Ashville Pike Rd. He drove left of center two times before I activated my overhead lights. He pulled into the bank parking lot at Ashville Pike and SR 752.

{¶5} Speaking to the defendant his eyes was (sic) bloodshot and glassy. An odor of an alcoholic beverage was omitting from his person. He advised that he had three drinks in commercial point and was heading to the trackside bar in Ashville. The defendant was given the field sobriety tests. (See the Impaired Drivers Report for the results to the field sobriety tests). He was given a PBT test and tested .121.

{¶6} The defendant was subsequently arrested for OVI, read his rights, and secured in the patrol car. His vehicle was secured at the scene and he was transported to the OSP Circleville Post for a chemical test. Upon arrival the defendant was read his rights and the BMV 2255. He was offered a breath test and accepted. He tested a .121.

{¶7} He was transported to the Circleville Police Department and slated. He was given a court date of April 14, 2004, at 0830 hours. He was cited for OVI and left of center."

{¶8} On May 19, 2004, Appellant filed a motion to suppress the evidence against him, claiming that the event was a warrantless seizure. On August 3, 2004, a suppression hearing was held and the arresting trooper was present. The trooper testified that he observed Appellant's vehicle travel left of center two times and when asked if it would appear on the video tape, he responded "[Y]es, it should be. It should be on there." While viewing the video, in court, the following testimony occurred:

"PROSECUTOR: Officer you viewed the tape did we capture the left of center on this tape?

WITNESS 1: Yes you should have it was right . .

JUDGE: Right in the beginning.

WITNESS 1: Right after I passed that car."

{¶9} The trooper further testified that once he stopped Appellant, he noticed "bloodshot and glassy eyes, [and] an odor of alcoholic beverage coming from the vehicle." The trooper also testified that Appellant told him he had three drinks. He then testified about performing field sobriety tests in which Appellant scored six clues on the horizontal gaze nystagmus test and three clues on the walk and turn test. During his testimony, the trooper noted that Appellant performed well on the one legged stand test. The trooper testified he then asked Appellant to submit to a PBT. Although not explored by either Appellant or Appellee during the hearing, it appears that upon inquiry by Appellant, the trooper advised that the results of the PBT could not be used against him. Appellant agreed to take the test, which indicated a reading of .120.¹

{¶10} After hearing arguments by counsel, the trial court overruled the motion to suppress in its entirety, making several findings regarding probable cause to stop and arrest Appellant and also the admissibility of the PBT results, including the following:

- 1) that the PBT is not an evidentiary device like the Datamaster, but is a fact to be weighed among all other things, but given no scientific credibility; 2)

¹ Although the trooper's written statement indicated a PBT reading of .121, the Impaired Driver Report, as well as the testimony offered at the suppression hearing, indicated a reading of .120.

that the video tape showed a more than a foot left of center violation with a relatively jerky correction, which probably got the officer's attention; 3) that the officer noticed glassy, bloodshot eyes and a strong odor of alcohol upon approaching Appellant; 4) that the Appellant told the officer that he had consumed alcohol that evening; and 5) that he received a strong reading on the HGN test and failed the PBT, and that Appellant even indicated to the officer that he thought he would fail the PBT test. The trial court reasoned that based upon these facts and circumstances, a reasonable officer would have taken Appellant in for a Datamaster test and as such, there was probable cause for the arrest.

{¶11} On August 27, 2004, Appellant entered pleas of no contest to both the OMVI and left of center charges, violations of R.C. 4511.19(A)(1) and (A)(4) and 4511.25 respectively. On September 15, 2004, he was sentenced to thirty days incarceration, with sentence suspended, mandatory three days in jail or three day driver intervention program, fines, costs, license suspension and probation. It is from this entry that Appellant now appeals, assigning the following errors:

{¶12} "I. THE TRIAL COURT ERRED IN FINDING PROBABLE CAUSE FOR THE STOP OF THE DEFENDANT.

{¶13} II. THE TRIAL COURT ERRED IN FINDING PROBABLE CAUSE FOR THE ARREST OF THE DEFENDANT.

{¶14} III. THE COURT ERRED IN ADMITTING THE PORTABLE BREATH TESTING DEVICE INTO EVIDENCE FOR PURPOSE OF THE PROBABLE CAUSE HEARING BECAUSE THE OFFICER MISREPRESENTED THE PBT'S LEGAL STATUS TO THE DEFENDANT TO GET HIM TO TAKE THE TEST."

{¶15} In his first assignment of error, Appellant argues that the trial court erred in overruling his motion to suppress. Initially, we note that appellate review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Featherstone*, 150 Ohio App.3d 24, 2002-Ohio-6028, 778 N.E.2d 1124 at paragraph 10, citing *State v. Vest*, Ross App. No. 00CA2576, 2001-Ohio-2394; *State v. Long* (1998), 127 Ohio App.3d 328, 332, 713 N.E.2d 1. In a motion to suppress, the trial court assumes the role of trier of fact, and as such, is in the best position to resolve questions of fact and evaluate witness credibility. See, e.g., *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972, citing *State v. Fanning* (1982), 1 Ohio St.3d 19, 20, 437 N.E.2d 583; see, also, *State v. Williams* (1993), 86 Ohio App.3d 37, 41, 619 N.E.2d 1141. Accordingly, in our review, we are bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594, 621 N.E.2d 726. Accepting those facts as true, we must independently determine as a matter of law, without deference to the trial court's conclusion, whether they meet the applicable legal standard. *Ornelas v. United States* (1996),

517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911; *State v. Klein* (1991), 73 Ohio App.3d 486, 488, 597 N.E.2d 1141; *Williams, Guysinger*, supra.

{¶16} Appellant argues that the trooper's testimony only established one, not two, lane violations and that the testimony regarding the lane violation failed to include a description as to the size or general nature and character of the violation. Appellant challenges the trial court's reasoning that probable cause existed for the stop, based upon a lack of description of the event, a lack of articulation of the event by the trooper and no video back-up of the event. Appellant argues that the present case is similar to *State v. Brite* (1997), 120 Ohio App.3d 517, 698 N.E.2d 478 and *Williams*, supra, apparently failing to recognize that *Brite* and *Williams* have effectively been overruled and are no longer followed by this court.

{¶17} Both *Williams* and *Brite* were part of a line of cases holding that de minimus traffic violations do not constitute reasonable suspicion to effect an investigatory traffic stop. However, this court has abandoned the precedent of *Williams* and *Brite*, and instead relies on the reasoning of *Whren v. United States* (1996), 517 U.S. 806, 116 S.Ct 1769, 135 L.Ed.2d 89 and *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, 1996-Ohio-431, 665 N.E.2d 1091, where the Supreme Court of Ohio explicitly concluded "that where an officer has an articulable reasonable suspicion or probable cause to

stop a motorist for any criminal violation, including a minor traffic violation, the stop is constitutionally valid * * *." In *Dayton*, the court reasoned that the officer "clearly had probable cause to stop appellee based on the traffic violation (failure to signal a turn) which occurred in the officer's presence. Thus the stop was constitutionally valid." *Dayton* at 5.

{¶18} We adopted this reasoning in *State v. Woodrum*, Athens App. No. 00CA50, 2001-Ohio-2650, where an officer initiated a stop after observing an appellant driving outside of his lane. The reasoning in *Woodrum* drew a distinction between investigative stops and non-investigative stops, reasoning that an officer must have reasonable suspicion based upon specific and articulable facts in order to make an investigative stop, but must have probable cause in order to make a non-investigative traffic-offense stop. *Id.* We held that "[i]t is clearly the current status of the law that a *de minimus* violation of a traffic offense constitutes probable cause to stop a vehicle." (Citations omitted). We recently adhered to the reasoning of *Woodrum* in *State v. Kellough*, Pickaway App. No. 02CA14, 2003-Ohio-4552, where we held that an officer who observed a left of center violation had probable cause to effect a stop of a vehicle.

{¶19} Here, the trooper testified that he observed Appellant travel left of center two times. The video from the cruiser showed at least one left of

center violation. The trial court, based upon the testimony and a review of the video found that there was a "substantial, like I would say more than a foot left of center and a relatively jerky correction which I'm sure is what got the officer's attention." Based upon these facts and findings we find that the trial court reasonably concluded that probable cause existed for Appellant's stop and, as a result, we find Appellant's first assignment of error to be without merit.

{¶20} Appellant argues in his second assignment of error that the trial court erred in denying his motion to suppress and in finding probable cause for his arrest. Probable cause exists where there is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious person in the belief that the individual accused is guilty of the offense with which he or she is charged. *Huber v. O'Neill* (1981), 66 Ohio St.2d 28, 30, 419 N.E.2d 10; *State v. Glasscock* (Sept. 20, 1990), Highland App. No. 726, 1990 WL 138494. For purposes of an arrest for driving under the influence, probable cause exists if, at the moment of the arrest, the totality of the facts and circumstances within the officer's knowledge and of which he had reasonably trustworthy information were sufficient to warrant a prudent person in believing that the suspect had violated R.C. 4511.19. *Bucyrus v. Williams* (1988), 46 Ohio App.3d 43, 45,

545 N.E.2d 1298; *State v. McCaig* (1988), 51 Ohio App.3d 94, 554 N.E.2d 925; *State v. Shelpmann* (May 23, 1991), Ross App. No 1632, 1991 WL 87312.

{¶21} The facts of *Woodrum*, supra, are nearly identical to the facts here. In *Woodrum*, the officer observed a lane violation, stopped appellant's vehicle, immediately noticed bloodshot eyes and the smell of alcohol, as well as appellant's general lack of coordination, administered field-sobriety tests and arrested appellant for OMVI. The trial court denied the appellant's motion to suppress and we affirmed, reasoning that based upon the totality of the circumstances, even without taking the field-sobriety tests into consideration, probable cause existed for the appellant's arrest. *Woodrum*, supra.

{¶22} Here, the trooper observed a lane violation, observed bloodshot and glassy eyes, noticed a smell of alcohol and had a conversation with Appellant regarding his alcohol consumption that evening. Based upon these facts, as well as Appellant's performance on the field-sobriety tests and PBT, the trial court reasonably concluded that probable cause existed for Appellant's arrest. Accordingly, we find Appellant's second assignment of error to be without merit.

{¶23} In his third assignment of error, Appellant contends the trial court erred in admitting the PBT results for purposes of establishing probable cause, claiming that the officer misrepresented the PBT's legal status to get Appellant to take the test (i.e. inferring police misconduct as a result of the misrepresentation). Appellant concedes that while other districts have refused to admit PBT results for purposes of establishing probable cause, this court has permitted their admission for probable cause purposes. See *State v. Coates*, Athens App. No. 01CA21, 2002-Ohio-2160, citing *State v. Gibson* (Mar. 17, 2000), Ross App. No. 99CA2516, 2000 WL 303134; *State v. Ousley* (Sept. 20, 1999), Ross App. No. 99CA2476, 1999 WL 769961; *State v. Moore* (June 29, 1999), Lawrence App. No. 98CA44, 1999 WL 440411. Appellant also concedes that officer misconduct has not traditionally been the basis for application of the exclusionary rule, but argues, presumably in the interests of fairness, that the trial court should not have considered the results when determining whether probable cause for arrest existed. We disagree.

{¶24} In the present case, the patrolman arguably misstated the law. There is no indication from a review of the video that the patrolman intentionally misstated the law in order to get Appellant to submit to the test.

Upon administering the PBT, the video identifies the following exchange between Appellant and the trooper:

"TROOPER: What I'm offering here is a PBT test okay? You can take it or not. * * *

APPELLANT: Well, I want to ask you just a question about that.

TROOPER: Okay.

APPELLANT: Now, I've have three beers and I know that's over the legal limit.

TROOPER: Okay.

APPELLANT: Well, according to my body weight and all that stuff.

TROOPER: Okay.

APPELLANT: So, what are my rights according to blowing in that and not blowing in that?

TROOPER: This here can't be used against you in court, okay?

APPELLANT: It can't?

TROOPER: This here just gives us another reason just to see where you're at * * * Alright. It just lets us know where you're at on this, okay?

APPELLANT: Alright.

TROOPER: Um, to be charged with DUI, charged wise, that's when we take you to the post.

APPELLANT: Alright.

TROOPER: And give you the BAC. That's what counts. Okay. This is just something that lets us know where you're at right now. So, are you willing to take that for me or not?

APPELLANT: What happens if I don't take it?

TROOPER: Well, we'll, you'll go through something here in a little bit, okay?

APPELLANT: Well, tell me what that is.

TROOPER: Well, I'll probably end up taking you in. Alright? probably will arrest you for DUI. This here is just to make sure, we'll see where you're at. So, you want to take it or not?

APPELLANT: Okay. So, what happens if I take it and my breath alcohol . . .

TROOPER: If you're way below then we'll kick you loose.

APPELLANT: Well, I know I'm not way below. I've had three beers in the last hour. I know I'm not below.

TROOPER: If you show up around 08 on this I'll be taking you in anyway.
APPELLANT: You'll probably be taking me in anyway then.
TROOPER: Well, you want to take it or not?
APPELLANT: Yeah. We can take it.
TROOPER: Okay."

{¶25} The above exchange illuminates great effort by the trooper advising Appellant of his rights regarding submission to the PBT test. In fact, what the trooper told Appellant is not completely inaccurate. As Appellant points out in his brief, PBT results are not admissible in many districts in Ohio, unlike this district, where they are used solely as a factor to consider in the totality of the circumstances for establishing probable cause. Ideally, the trooper should not have attempted to give Appellant legal advice regarding the admissibility of the test results; however, we find that this error does not amount to police misconduct that would give rise to a constitutional violation in the form of a deprivation of due process. Nor did the trooper coerce Appellant into submitting to the test, but rather, he gave Appellant the option of taking or not taking the test four different times.

{¶26} Ohio courts have held, in the context of confessions, that "deception on the part of the police in no way vitiates the voluntary nature of an otherwise valid statement." See *State v. Loza*, 71 Ohio St.3d 61, 67-68, 1994-Ohio-409, 641 N.E.2d, (holding that defendant's confession was valid, despite the police falsely telling him that the victim was alive when all other

circumstances surrounding the confession indicated it was made voluntarily); See, also, *State v. Baker* (Nov. 4, 1995), Athens App. No. 94CA1644, 1995 WL 650154, (stating that "trickery and deception" such as a false statement regarding "the type and quantum of evidence" against a defendant is by itself insufficient to render a confession involuntary). These cases involve intentional misrepresentations in order to secure confessions, unlike the present scenario where the patrolman arguably misstated the law and told Appellant he could either take or not take the test. Appellant decided, of his own free will, to submit to the test, knowing and admitting to the patrolman that he knew he would test over the legal limit.

{¶27} Further, as Appellant concedes, Ohio courts have held that evidence obtained through intentional misrepresentation by police is not excludable unless it amounts to a constitutional violation, even if the conduct constitutes a statutory violation. Appellant and Appellee both argue *Fairborn v. Mattachione* (1996), 72 Ohio St.3d 345, 1995-Ohio-207, 650 N.E.2d 426 is applicable to the present facts. In *Fairborn*, the appellant was denied the statutory right to confer with counsel as a result of an officer's intentional misrepresentation. Based upon those facts, the *Fairborn* court held that even such a statutory violation would not result in the application of the exclusionary rule unless it also amounted to a constitutional violation.

The *Fairborn* court excluded the evidence at issue because it was gained through police misconduct that amounted to a constitutional violation. Here, we know of no statutory violation, let alone a constitutional violation, that occurred because of the officer's arguable misstatement.

{¶28} In light of the foregoing, we find that the trial court did not err in admitting and considering the PBT results in its determination of the existence of probable cause for Appellant's arrest. Further, the facts of this case, without taking the PBT results into consideration, provide probable cause for arrest (i.e. traffic violation, red and bloodshot eyes, odor of alcohol, admission to consumption of alcohol, performance on horizontal gaze nystagmus test and walk and turn test). Thus, we find Appellant's third assignment of error also to be without merit.

{¶29} Based upon the foregoing, we affirm the decision of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellee recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Circleville Municipal Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Ohio Supreme Court an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Ohio Supreme Court in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.
Exceptions.

Abele, P.J. & Kline, J.: Concur in Judgment and Opinion to Assignment of Error II and III and Concur in Judgment only to Assignment of Error I.

For the Court,

BY:

Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.