

BEFORE THE SUPREME COURT OF OHIO

STATE OF OHIO)	CASE NOS. 08-0853
)	08-0858
PLAINTIFF-APPELLANT)	
)	AN APPEAL FROM CASE NO.
-vs.-)	07 MA 71 BEFORE THE COURT
)	OF APPEALS, SEVENTH DISTR.,
JESSICA DEROV)	MAHONING COUNTY
)	
DEFENDANT-APPELLEE)	CONFLICT CERTIFIED

***AMICUS CURIAE* IN SUPPORT OF JURISDICTION**
(S.Ct.Prac.R. III, § 5)

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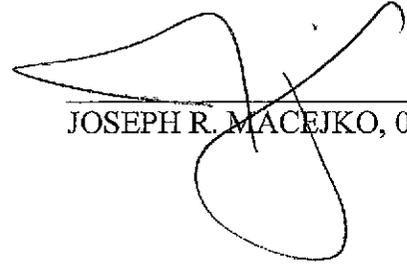
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FOR MS. JESSICA DEROV

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SUPREME COURT OF OHIO

PROOF OF SERVICE

I hereby certify that on this 8th day of May 2008, a copy of this Memorandum was sent to opposing counsel via regular U.S. mail.



JOSEPH R. MACEJKO, 0070222

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

On March 28, 2008, the Seventh District Court of Appeals rendered a decision that effectively emasculates a law enforcement officer's ability to deal with drunken drivers. The *Derov* decision has turned instinct, training, and the investigation of suspected drunken drivers into a nullity and represents a categorical departure from common sense. Basically, the Seventh District has held that an officer may not initiate Standardized Field Sobriety Tests (SFSTs) in the absence of "erratic driving," despite other clues or indicators that may be present. This is certainly not consistent with the training of law enforcement officers, judicial precedent, or the desire of the People of this State as reflected in Ohio's ever-increasing penalties for convicted offenders. Absent a full review and appreciation of the decision at issue here, no one can truly comprehend what an abomination *Derov* represents and the shockwave that is being felt in each of the law enforcement agencies within the Seventh appellate district.

Counsel of Record for the Mahoning County Prosecutor's Office opens his Statement with an example of an encounter between an officer and a motorist. He later parenthetically mentions the consequences this decision will have on DUI checkpoints. The latter is more illustrative of the consequences and is worthy of expounding. During a checkpoint, vehicles are directed into a zone where the encounter between law enforcement and the motorist occurs. When the motorist rolls down the window, the officer detects the strong odor of alcohol and red and glassy eyes. The motorist admits to consuming one drink, registers over the legal limit on a portable breathalyzer test (PBT), and fails two of three SFSTs. No erratic driving is witnessed. The *Derov* decision holds that the officer does not have probable cause to arrest the motorist and even questioned

whether the driver should have been subjected to SFSTs. So, in spite of the officer's instincts, observations, and training, the Seventh District tells us that the officer should send that motorist on his or her way¹.

Beyond the substantial constitutional and public interest concerns, this case presents at least three conflicts among Ohio's reviewing courts. The first, already offered by way of example, is whether the facts set forth above are sufficient for reasonable suspicion to subject a motorist to SFSTs and probable cause to arrest for DUI. The Seventh District differs from most other reviewing courts in this State, including the Ohio Supreme Court. The second issue is a conflict between the Seventh and Fourth appellate districts as to the use of PBTs for purposes of probable cause. The Fourth District has ruled the results of a PBT admissible for purposes of probable cause but that the results cannot be used at trial². The Seventh District has ruled the PBT inadmissible for any purpose. The Seventh District has certified a conflict on this issue. The final issue, pending conflict review, is between the Seventh and Fifth Districts relative to the amount of time required by the NHTSA manual to perform the Horizontal Gaze Nystagmus test. According to the Fifth District, the HGN should take forty-eight seconds³. But, according to the Seventh District, the test requires sixty-eight seconds⁴. Further compounding this question is the fact that the National Highway Traffic Safety

¹ This scenario is identical to that presented in *Derov* save and except for the fact that Jessica Derov subsequently registered 0.134% BAC.

² See *State v. Coates* (Feb. 25, 2002), *Athens App. No. 01 CA 21, 2002-Ohio-2160*; *State v. Gibson* (March 17, 2000), *4th Dist. No. 99 CA 2516, unreported, 2000 WL 303134*; *State v. Ousley* (Sept. 20, 1999), *4th Dist. No. 99 CA 2476, unreported, 2000 WL 769961*; *State v. Moore* (June 29, 1999), *4th Dist. No. 98 CA 44, unreported, 1999 WL 440411*.

³ *State v. Maguire* (July 30, 2001), *5th Dist. No. 2000CA374, unreported, 2001 WL 881784*.

⁴ *Derov* at ¶16.

Administration (NHTSA) manual sets forth no firm minimum time for completion of the test⁵.

The State prays that this Court take jurisdiction over this case, hear it on its full merits, and overrule the Seventh District's March 28, 2008⁶ entry and opinion in *Derov*.

Statement of the Case, Facts, and Introduction

This case stems from a routine traffic stop. On August 12, 2006 at 2:30 AM, Trooper Shawn Martin of the Ohio State Highway Patrol initiated a traffic stop of a vehicle bearing an expired registration sticker. Prior to the stop, Trooper Martin witnessed no erratic driving. He identified the driver of the vehicle as Jessica Derov. Upon initial contact, Trooper Martin noticed a strong smell of alcohol emanating from Ms. Derov's vehicle. She was ordered from the vehicle. At that point, Trooper Martin determined that the odor was emanating from Ms. Derov and that she had red, glassy eyes.

Trooper Martin asked Ms. Derov to perform SFSTs, including the HGN, walk and turn, and the one leg stand. Ms. Derov failed all but one of the tests, the one leg stand. The trooper also subjected her to a PBT. Upon questioning whether she had consumed any alcohol, she replied that she had consumed one beer. Ms. Derov was placed under

⁵ The specific procedure for utilizing the HGN test is set forth in the latest NHTSA student manual, *DWI Detection and Standardized Field Sobriety Testing (2006)*, Chapter VIII, pp. 6-8. HGN is one of three standardized field sobriety tests that are used by law enforcement officers to detect whether a driver is under the influence of alcohol or other drugs of abuse. Nystagmus is an involuntary jerking of the eyes that is present, *inter alia*, in persons who have consumed alcohol. The procedure requires that the officer instruct the person to track a stimulus, usually a pen, with their eyes. The officer then observes the subject's eyes as they follow the object to determine if nystagmus is present. The more intoxicated the person is the less the eyes move before nystagmus begins.

⁶ The Seventh District subsequently issued a Journal Entry on April 2, 2008 correcting a clerical mistake in the original Entry.

arrest and taken to the patrol post where she was given a breathalyzer test. It indicated that her blood alcohol content was 0.134%.

Counsel for Ms. Derov filed a motion to suppress the results of all of the tests. The trial judge overruled the motion and Ms. Derov then pled no contest thereby preserving her right to appeal. Ultimately, the Seventh District reversed the trial court's decision, vacated the conviction, and remanded the matter to the trial court.

All three judges of the Seventh District agreed that the case should be reversed for lack of probable cause to arrest Ms. Derov for DUI. In doing so, the Seventh District could have stopped but, instead, the two judges who offered the majority opinion engaged in judicial activism and touched upon the admissibility of PBTs and then propounded a 68-second time requirement for the HGN that appears nowhere in the NHTSA training material.

Law and Discussion

Proposition of Law No. 1: A strong odor of alcohol coupled with red, glassy eyes, failed field sobriety tests, and an admission of consuming alcohol can provide reasonable suspicion to initiate standardized field sobriety tests and the basis for probable cause to arrest for Operation While Under the Influence of Alcohol.

Courts around the state have wrestled with what set of facts is sufficient to provide an officer with probable cause to arrest a motorist for DUI. These cases have created a varied and tangled web of criteria for field officers (*e.g.* a strong odor of alcohol can be sufficient but the mere odor of alcohol is not). Rather than relying upon the law enforcement officer's instincts, training, and experience, courts around this state have nitpicked and substituted their judgment for those of the first-hand impressions of the officer in the field. These decisions are unnecessarily truncating an officer's discretion

and undermining his community caretaking function thereby placing the general public at an increased risk of harm from intoxicated drivers.

Reasonable suspicion that a driver is intoxicated is all that is required to support further investigation by an officer. *State v. Gustin (1993), 87 Ohio App.3d 859, 860 (citing State v. Bobo (1988), 37 Ohio St.3d 177)*. Requesting that a driver submit to SFSTs is not overly intrusive if the officer possesses a reasonable and articulable suspicion that the driver is illegally intoxicated. *State v. Sanders (1998), 130 Ohio App.3d 789, 794*. A reviewing court will analyze the reasonableness of the request under the totality of the circumstances as viewed through the eyes of a reasonable and prudent officer. *State v. Reed (Dec. 19, 2006), 7th Dist. No. 05 BE 31, 2006-Ohio-7075*.

In the present case, Trooper Martin was confronted with a driver at 2:30 AM who had a strong odor of alcohol emanating from her person, and red and glassy eyes. She admitted to consuming one beer, provided a positive sample on a PBT, and failed two of three SFSTs. Yet, the Seventh District has determined that the trooper lacked probable cause to arrest Ms. Derov and, indeed, the majority went on to opine that "...it is unclear whether the officer should have even administered field sobriety tests in this case." *Derov at ¶25*.

Evid.R. 701 governs opinions by individuals other than expert witnesses (*i.e.* lay people). An opinion with reference to intoxication "is probably one of the most familiar subjects of nonexpert evidence, and almost any lay witness, without having any special qualifications, can testify as to whether a person was intoxicated." *City of Columbus v. Mullins (1954), 162 Ohio St. 419, 421-22*.

Under the logic of *Derov*, absent erratic driving and/or the performance of SFSTs in substantial compliance with the NHTSA manual, a law enforcement officer is incapable of determining whether someone is intoxicated⁷! This case, and the line of cases mentioned at the outset of this discussion, leads to a scenario where a witness who is an officer could not testify with certainty as to intoxication while a lay witness could take the stand and do so. Any individual, whether wearing a badge or not can tell when someone is too drunk to drive and doesn't need NHTSA training to do so⁸. In short, drunkenness is within the common human experience. SFSTs are merely more reliable tools available to the officer but they do not supplant common sense. This Court should

⁷ Some courts have made gallant attempts to gather and enumerate the various factors to be considered by officers conducting roadside tests. One such effort is reflected in *State v. Evans (1998)*, 127 Ohio App.3d 56, 63. That court stated:

Without citing the numerous cases which have been canvassed, it may be said these factors include, but are not limited to (1) the time and day of the stop (Friday or Saturday night as opposed to, e.g., Tuesday morning); (2) the location of the stop (whether near establishments selling alcohol); (3) any indicia of erratic driving before the stop that may indicate a lack of coordination (speeding, weaving, unusual braking, etc.); (4) whether there is a cognizable report that the driver may be intoxicated; (5) the condition of the suspect's eyes (bloodshot, glassy, glazed, etc.); (6) impairments of the suspect's ability to speak (slurred speech, overly deliberate speech, etc.); (7) the odor of alcohol coming from the interior of the car, or, more significantly, on the suspect's person or breath; (8) the intensity of that odor, as described by the officer ("very strong," "strong," "moderate," "slight," etc.); (9) the suspect's demeanor (belligerent, uncooperative, etc.); (10) any actions by the suspect after the stop that might indicate a lack of coordination (dropping keys, falling over, fumbling for a wallet, etc.); and (11) the suspect's admission of alcohol consumption, the number of drinks had, and the amount of time in which they were consumed, if given. All of these factors, together with the officer's previous experience in dealing with drunken drivers, may be taken into account by a reviewing court in determining whether the officer acted reasonably. No single factor is determinative.

This list – coupled with the acknowledgement that it is not exhaustive – is illustrative of the quagmire in which officers find themselves. Courts have taken these guiding criteria that are appropriate for appellate review and turned them into a required checklist. But, the last two lines of the quoted passage are the most significant. They recognize that the determination comes down to the individual officer and that no single factor carries the day.

⁸ A former "problematic" case, *State v. Homan (2000)*, 89 Ohio St.3d 421, offers an interesting insight into the question at bar. In reviewing the probable cause determination, the Court in *Homan* noted: "[w]hile field sobriety tests must be administered in strict [now substantial] compliance with standardized procedures, probable cause to arrest does not necessarily have to be based, in whole or in part, upon a suspect's poor performance on one or more of these tests. The totality of the facts and circumstances can support a finding of probable cause to arrest even where no field sobriety tests were administered or where * * * the test results must be excluded for lack of strict [now substantial] compliance."

direct the other courts of this state to abandon this ridiculous line of conflicting precedent in favor of a case-by-case determination of the officer's observations.

In conclusion, reasonable and articulable suspicion is a lesser standard and is not synonymous with probable cause. *State v. Tarver* (Sept. 7, 2007), 4th Dist. No. 07CA2950, 2007-Ohio-4659 (citing *Alabama v. White* (1990), 496 U.S. 325, 330). Probable cause has repeatedly been defined as a standard less than preponderance⁹. *State v. Young* (2001), 146 Ohio App.3d 245, 254, 2001-Ohio-4284 (citing *State v. George* (1989), 45 Ohio St.3d 325, 329.). Thus, if probable cause is less than a preponderance and reasonable suspicion is less than probable cause, a law enforcement officer can be wrong more than he or she is right when dealing with a suspected drunk driver and still be within the confines of the law. *Derov* undermines this simple logic and leads trial courts to ignore the common sense and experience of officers simply because they are officers.

Proposition of Law No. 2: A portable breathalyzer test (PBT) can support probable cause to arrest for Operation While Under the Influence of Alcohol.

As previously discussed, probable cause to arrest for DUI is viewed under the totality of the circumstances. The most recent decision permitting the use of PBTs for the purpose of probable cause comes from the Fourth District in *State v. Gunther* (July 5, 2005), 4th Dist. No. 04 CA 27, 2005-Ohio-3492. *Derov*, and the decisions of several other appellate districts have reached the opposite conclusion thereby creating a certifiable conflict.

⁹ Probable cause only requires the existence of circumstances that warrant suspicion. *Id.* Probable cause requires evidence that establishes a fair probability, or likelihood, of criminal activity. *State v. George* (1989), 45 Ohio St.3d 325. A "preponderance," on the other hand, simply means the "greater weight of evidence." *State v. Stumpf* (1987), 32 Ohio St.3d 95, 102.

Although the Fourth District and Seventh District both touched upon the ~~perceived lack of reliability or accuracy of PBTs, that is not the core issue that must be~~ decided and, indeed, that issue may not even be relevant under a “totality” analysis¹⁰. The use of PBTs should merely be available to an officer as one tool of many to assist in the determination of whether a motorist is intoxicated. Indeed, the advent of Ohio’s newest version of R.C. 4511.19 almost necessitates the availability of PBTs as a tool for officers.

In 2007, Ohio’s DUI statute was amended to include *per se* limits for the presence of illegal drugs or the metabolites of illegal drugs. The use of PBTs would assist a law enforcement officer in at least two obvious ways. First, the officer may be dealing with an individual who has consumed an odorless alcohol such as vodka. Second, if the motorist appears intoxicated to the officer but the presence of alcohol is not otherwise obvious, a PBT would allow an officer to quickly make a determination that he is dealing with a drugged driver as opposed to a drunken driver¹¹.

¹⁰ Appellate decisions have repeatedly characterized PBTs as inaccurate and unreliable. However, these decisions discount the fact that such a result could inure to the benefit of the defendant. Likewise, these decisions ignore the fact that other inadmissible investigative tools such as polygraphs and voice stress analysis tests are available to officers during the investigative stages of their case. Several other courts have accepted the use of “non-standardized” field sobriety tests or other “techniques” available to officers to determine whether a motorist is intoxicated. This Court should be mindful that even the most accurate and already accepted SFST does not yield results beyond a 77% correlation.

As to the matter at issue, none is asking to be permitted to use PBTs alone to determine probable cause. We are asking that they be available should the officer choose to utilize it. One final thought as to officer safety. An appropriate number of indicators coupled with a positive PBT could operate to get that officer off of the roadside more expeditiously thereby reducing the likelihood of harm.

¹¹ This situation also touches upon officer safety as innumerable courts and other authorities have recognized that weapons and violence are associated with the possession or trafficking of illegal drugs and

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

The Seventh District determined that the NHTSA guidelines for the HGN “do not state a total minimum time for conducting all three phases of the exam. However, those minimums in the guidelines can be added up and total 68 second.” The Fifth District’s decision in *Maguire* held that “the [HGN] test requires a minimum of 48 seconds to complete the various elements with respect to both eyes.” Aside from the obvious conflict between the districts, the *Maguire* court opened the way for the varying interpretations of the guidelines and fostered a new and otherwise undefined standard of compliance – “significant deviation¹².” The *Maguire* court inadvertently paved this unfortunate path because it decided to take license with the clearly written NHTSA guidelines and interject a total time that the drafters did not see fit to do. There is a reason that the drafters did not do so.

The HGN consists of three distinct phases – (1) Smooth Pursuit; (2) Maximum Deviation; and, (3) Onset of Nystagmus Prior to 45° (Early Onset). If one wishes to view the times set forth in the specific procedures for the HGN as concrete times, the accurate total is forty-eight seconds¹³. However, it would be fallacious to do so because to do so ignores the important modifiers in the specific procedures.

some officers will approach someone under the influence of drugs differently than someone under the influence of alcohol.

¹² Even the cases relied upon by the majority, *State v. Embry*, 12th Dist. No. CA2003-11-110, 2004-Ohio-6324 and *State v. Mai*, 2nd Dist. No. 2005-CA-115, 2006-Ohio-1430 do not state in detail the times at issue. Also, as astutely pointed out by the concurring judge in *Derov*:

the time factor was clearly not the only reason given for disqualifying the HGN test. ... Furthermore, in neither case can we determine the amount of time the officers actually took to perform the HGN tests.

¹³ Smooth Pursuit recommends two seconds out then two seconds in for each eye (8 seconds). Maximum Deviation requires the officer to hold the eye at maximum deviation for a minimum of four seconds for

During the Smooth Pursuit phase, the NHTSA manual states, "Movement of the stimulus should take *approximately* two seconds out and two seconds back for each eye."

(Emphasis added.) During the Maximum Deviation phase, the NHTSA manual states:

... Simply move the object to the suspect's left side until the eye has gone as far to the side as possible. ... Hold the eye at that position for a *minimum* of four seconds and observe the eye for distinct and sustained nystagmus. Move the stimulus all the way across the suspect's face to check the right eye holding that position for a *minimum* of four seconds.

(Emphasis added.)

During the Early Onset phase, the NHTSA manual states:

Start moving the stimulus towards the right (suspect's left eye) at a speed that would take *approximately* four seconds for the stimulus to reach the edge of the suspect's shoulder. Watch the eye carefully for any sign of jerking. When you see it, *stop* and verify that the jerking continues. ...

(Emphasis added.)

The foregoing modifiers are emphasized in each of the phases because their presence is critically important to this analysis. The drafters of the NHTSA manual did not include concrete times because they recognized that real life scenarios do not adhere to bright lines and concrete numbers¹⁴. Accordingly, courts should not tread where these learned men would not go. Use of those words clearly suggests that these standards have some degree of flexibility built in. This flexibility places the burden on the individual officer performing the assessment of the motorist and the training that he or she has received. Despite the obvious reliance upon the individual officer and his training, the

each eye (8 seconds). Early Onset recommends that the officer take approximately four seconds for each eye to identify onset of nystagmus prior to 45° (8 seconds). The manual also requires the officer to repeat each procedure for each eye thereby doubling the time to 48 seconds.

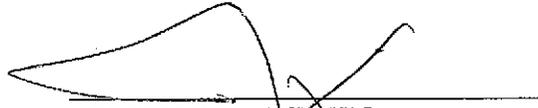
¹⁴ Note immediately that the maximum deviation phase makes no recommendation as to the "travel time" to reach maximum deviation where the officer then holds the stimulus for the minimum recommended time.

Seventh District and other Ohio courts have continually moved away from this inherent wisdom and we find ourselves in the mess that we are in. Simply put, there is no stated minimum time for the evaluation and there is not one that can be tallied.

Conclusion

Wherefore, counsel prays that this Court accept jurisdiction over all discretionary and certified issues, review all issues presented, and entertain arguments. Upon doing so, this Court should overrule the Seventh District's decision.

Respectfully submitted,



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