

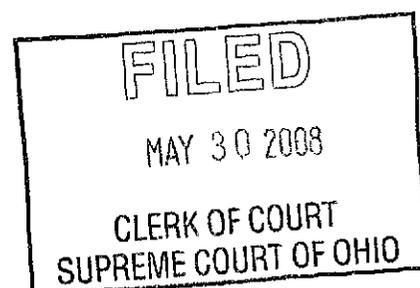
IN THE SUPREME COURT OF OHIO

State of Ohio	:	Case No. 2008-0853
	:	
Plaintiff-Appellant,	:	
	:	On Appeal from the Seventh District
vs.	:	Court of Appeals, Mahoning County
	:	
Jessica Derov	:	Appeal No. 07 MA 71
	:	
Defendant-Appellee.	:	

**MEMORANDUM IN OPPOSITION TO JURISDICTION
OF THE DEFENDANT-APPELLEE, JESSICA DEROV**

Robert C. Kokor (#0062326)
P.O. Box 236
Brookfield, Ohio 44403
Phone no. (330) 448-1133
Fax no. (330) 448-1133
Counsel for Defendant-Appellee
Jessica Derov

Paul J. Gains (#0020323)
Rhys B. Cartwright-Jones (#0078597)
Mahoning County Prosecutor's Office
21 West Boardman Street 6th Floor
Youngstown, Ohio 44503-1426
Phone no. (330) 740-2330
Fax no. (216) 575-0911
Counsel for Plaintiff-Appellant
State of Ohio



COMBINED STATEMENT OF CASE AND FACTS

On August 12, 2006, Ms. Derov was stopped due to expired tags on her license plate. There was no traffic violations by Ms. Derov, nor any erratic driving noted by the officer. Upon approaching Ms. Derov, the arresting officer noticed a strong odor of alcohol and noted that her eyes were red and glassy. When asked to exit her vehicle, Ms. Derov had no difficulty exiting her vehicle, nor walking, and demonstrated no physical signs of impairment. The officer testified that Ms. Derov stated she had consumed one (1) beer.

The officer gave Ms. Derov a portable breath test ("PBT") and had her perform a horizontal gaze nystagmus test ("HGN"), the walk-and-turn test, and the one (1) leg stand test. The officer testified that Ms. Derov failed the PBT, HGN and the walk-and-turn test, and passed the one (1) leg stand. The officer placed Ms. Derov under arrest for OVI.. Ms. Derov timely filed a motion to suppress evidence, which the Trial Court overruled in toto. Ms. Derov entered pleas of "no contest" to the charges.

On appeal, in State v. Derov, 7th Dist. No. 07 MA 71, 2008-Ohio-1672 (Derov), the Seventh Appellate District, pursuant to the weight of authority in several other Ohio appellate districts, held that portable breath tests were inadmissible for purposes of establishing probable cause.

The Court further held the arresting officer significantly deviated from the NHTSA guidelines in his administration of the HGN test and thus, he failed to substantially comply with required protocol. *Id.* at ¶13-19. The Court also ruled the arresting officer's administration of the walk-and-turn test did not substantially comply with the NHTSA guidelines. *Id.* at ¶24. The

Court, therefore, concluded that the officer had no probable cause to arrest. As a result, the appellate court reversed and remanded the matter to the trial court.

In its Memorandum in Support of Jurisdiction, the State employs hyperbole and over-the-top “scorched earth” polemics in an attempt to portray the instant matter as a case of public or great general interest or involving a substantial constitutional question. The State’s decision to resort to such exaggerated rhetoric, whether by strategy or necessity, only underscores the unremarkable quality of the facts underlying this case. After objectively reviewing the facts and legal conclusions of the Seventh Appellate District, it is clear that this case is not a matter befitting review.

**STATEMENT AS TO WHY THIS CASE IS NOT A MATTER OF
PUBLIC OR GREAT GENERAL INTEREST, NOR A SUBSTANTIAL
CONSTITUTIONAL QUESTION**

In support of its position, the State first posits that the Seventh District’s opinion in Derov will preclude a police officer from initiating field sobriety tests where a motorist is stopped for an “equipment violation” who “reeks of alcohol.” The state clearly misunderstands the substantive import of the Court’s majority holding in Derov.

In Derov, the Court below concluded that the arresting officer did not have probable cause to arrest Ms. Derov. Notwithstanding this conclusion, the Seventh District observed, by way of *dicta* that: “it [was] *unclear* whether the officer should have even administered field sobriety tests in this case.” (emphasis added) *Id.* at ¶25. A careful reading of the case in its entirety reveals this statement was merely a passing observation and not a holding by the Court. The record reveals the arresting officer testified he noticed a “strong smell of alcohol emanating from Derov’s vehicle.” Derov, at ¶3. After pointing out it was “unclear” whether the arresting

officer had sufficient facts to initiate field sobriety tests, the Deroy Court cited State v. Dixon (Dec. 1, 2000), 2nd Dist. No. 2000-CA-30, 2000 Ohio App. LEXIS 5661, wherein the Second Appellate District held a slight odor of alcohol was insufficient to provide reasonable suspicion to initiate field sobriety tests. The Court then cited its own precedent in State v. Downen (Jan. 12, 2000), 7th Dist. No. 97-BA-53, 2000 Ohio App. LEXIS 300, for the proposition that a “strong odor of alcohol is not a necessary indication of *intoxication* because it is still legal to drink and drive in Ohio.” (Emphasis added). Deroy, at ¶6. The Deroy Court did not affirmatively conclude the officer lacked an adequate basis to initiate field sobriety tests; rather, it pointed out that the facts of the case were not so obvious to concede de facto reasonable suspicion. However, it also points out that a strong odor of alcohol is insufficient, in itself, to provide *probable cause* to arrest.

At base, Deroy neither holds nor implies that a motorist stopped for a non-moving violation and who “reeks of alcohol” is immune from being subjected to field sobriety tests. While a strong odor of alcohol may not be a sufficient indication of intoxication (which is illegal and therefore a basis for arrest), *it still could*, depending upon the facts and circumstances of the case, provide the reasonable, articulable suspicion adequate for initiating field sobriety tests. As a result, the court Deroy did not deviate from well-established standards necessary to trigger an officer’s ability to administer field sobriety tests and/or arrest a motorist for operating a vehicle while intoxicated (OVI).

In the wake of Deroy, an officer who has stopped a vehicle for a traffic offense may investigate the motorist for OVI via field sobriety tests if the officer has reasonable suspicion that the motorist may be intoxicated and/or over the “legal limit” based upon specific and articulable

facts, such as the strong odor of alcohol on a suspect's breath coupled with red, glassy eyes. *See, e.g., State v. Blackburn* (1996), 115 Ohio App.3d 678 (an oft cited Seventh District case holding an officer who stopped a motorist for lack of a license plate light had sufficient independent reasonable suspicion to administer field sobriety tests based upon the strong odor of alcohol projecting from the driver's person. *Id.* at 681.)

The Court below applied the same common constitutional standards applied by all Ohio (and federal) courts in arriving at its conclusion. An officer who observes evidence of intoxication, independent of the reasons justifying the original stop, that provides a reasonable, articulable suspicion that a motorist is over the legal limit, may initiate field sobriety tests. The holding of the Seventh Appellate District follows a well-worn path of Fourth Amendment jurisprudence and, therefore, the underlying matter is not a case of public or great general interest, certainly there is no substantial constitutional question.

The State's Propositions of Law

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.

Under its first proposition of law, the State not only misunderstands the holding of the Seventh Appellate District, but also woefully confuses the requisite standard for initiating field sobriety tests. The State appears to conflate the legal phrases "reasonable suspicion" and "probable cause." They are different and not interchangeable terms of art. The former is merely investigatory in nature and requires an officer "to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio* (1968), 392 U.S. 1, 20-21. An officer with reasonable, articulable suspicion that a motorist is intoxicated *may* initiate field sobriety tests. *See, e.g., State v. Bobo* (1998), 37 Ohio

St.3d 177. Alternatively, probable cause is a more heightened standard and requires “a reasonable ground for belief of guilt.” State v. Moore, 90 Ohio St.3d 47, 49, 2000-Ohio-10. A cursory review of the law reveals that a reasonable, articulable suspicion is all that is necessary for initiating an investigatory stop, *e.g.*, field sobriety tests, while probable cause, on the other hand, is the standard necessary for an arrest.

That said, the Seventh District’s decision below does not indicate probable cause is necessary to initiate field sobriety tests. To the contrary, as discussed above, the court adheres to well-established constitutional principles requiring merely reasonable suspicion. Thus, Ms. Derov takes coincidental issue with the peculiar suggestion that probable cause is necessary to move forward with field sobriety tests. The underlying opinion in Derov neither states nor implies such an errant principle.

A plain reading of Derov indicates the Seventh District assumed, *arguendo*, that the officer had reasonable suspicion to initiate the tests. In doing so, it analyzed the arresting officer’s administration of the tests, and concluded that he did not substantially comply with the NHTSA manual, therefore he did not have probable cause to arrest Ms. Derov. The record clearly supports the Seventh District’s well-reasoned decision and the State has provided no compelling reason for this Court to revisit the same in the instant matter. The state’s first proposition of law, therefore, has no merit.

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

In support of its second proposition of law, the state argues that results from PBT should be admissible for proof of probable cause. As a basis for its position, the State cites the Fourth Appellate District’s decision in State v. Gunther, 4th Dist. No. 04CA27. In Gunther, the Fourth

District noted that portable breath test results are admissible for purposes of formulating probable cause to arrest. *Id.* at ¶23. Although the state correctly sets forth that district's position regarding the viability of portable breath test results relating to a probable cause analysis, the cogency of the opposite conclusion, supported by the weight of authority in several sister appellate districts, militates heavily against the Fourth District's view on the matter. See State v. Ferguson, 3d Dist. No. 4-01-34, 2002-Ohio-1763, 2002 Ohio App. LEXIS 1697; Derov, *supra*; 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), 12th Dist. No. CA99-11-033, 2000 Ohio App. LEXIS 5472.

Pursuant to R.C. §3701.143, the Department of Health "shall determine *** techniques or methods for chemically analyzing a person's *** breath *** in order to ascertain the amount of alcohol *** in the person's *** breath." The Court in Ferguson, et al., pointed out that the Department of Health has explicitly rejected portable breath test results for relating to OVI cases. *Id.* at ¶8. Further, authority, including that within the Fourth District, indicates the Department of Health's rejection of portable breath test results is a function of their unreliability. See State v. Shuler, 168 Ohio App.3d 183, 2006-Ohio-4336, at ¶10.

The General Assembly has vested authority in the Department of Health to promulgate regulations on acceptable techniques or methods of testing an individual's breath for the presence of alcohol. However, regardless of its reasons, that Department has determined portable breath tests results are not acceptable means of ascertaining the amount of alcohol in a person's breath. It therefore follows that, irrespective of the foundation upon which the Fourth District bases its conclusion relating to the admissibility of the results, such tests may *not* be used.. Ferguson,

supra; Derov, *supra*; Sanders, *supra*; Delarosa, *supra*; Mason, *supra*. Nothing in R.C.

§3701.143 permits the judicial branch to “stand in the shoes” of the Department of Health and declare a method of testing permissible where the Department has declined to do so.

That aside, where issues related to the “methods and techniques” promulgated by the Department of Health are raised, the State must show it substantially complied with the Ohio Administrative Code for any such test to be admissible in evidence against any criminal defendant. State v. Lake, 151 Ohio App.3d 378, 2003-Ohio-332, at ¶13. Here, the O.A.C. does not acknowledge PBT results as an approved method of testing an individual’s breath. As there is no codified rule enabling an officer to use a PBT as a method of determining the presence of alcohol in an individual’s system, there is no meaningful or consistent way for the State to demonstrate substantial compliance. As a matter of procedural regularity, not to mention statutory deference, PBT results cannot be admissible for proof of probable cause.

Finally, as alluded to above, there exists a reasonable, well-founded, and widely recognized concern relating to the reliability of PBT results. As the court below pointed out, “[e]ven the Fourth District *** admits that these tests are highly unreliable.

“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.” *** 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. ***" (Citations omitted.) Derov, supra, at ¶11, quoting Shuler, supra. In fact, the NHTSA manual itself states that two (2) common factors that could produce high results on a PBT are residual mouth alcohol and radio frequency interference. *NHTSA, DWI Detection and Standardized Field Sobriety Testing Student Manual (2006 Ed.)* at VII-8. Precautions are taken to attempt to eliminate those factors by testing and technology in the more sophisticated BAC Datamaster machine, but no such precautions are taken for the PBT.

Clearly, there are multiple, completely innocuous (and legally permissible) scenarios under which a test could yield a false positive or exaggerated results. The constitution was designed to maximize individual freedom(s) within a context of "ordered liberty." Kolender v. Lawson (1983), 461 U.S. 351, 357. It further represents a shield protecting "fundamental rights of individual freedom and liberty from deprivation at the hands of arbitrary and capricious governmental action." State v. Small, 162 Ohio App.3d 375, 2005-Ohio-3813, P11, quoting Gutzwiller v. Fenic (C.A. 6), 860 F.2d 1317, 1328.

Ms. Derov submits that allowing any officer to use an instrument which does not yield a trustworthy measurement of the percentage of alcohol on a individual's breath as a basis for depriving that individual of her liberty flies in the face of one's right to be free from unreasonable seizures.

In sum, the state has an obligation to prove its means of formulating probable cause will not result in the arbitrary deprivation of liberty. The Department of Health has reasonably concluded that portable breath tests are not acceptable methods of ascertaining the amount of alcohol in an individual's breath for purposes of an OVI violation. To the extent the Department of Health had drawn this conclusion, the use of such tests would undermine statutory authority and, under many circumstances, act to arbitrarily deprive an individual of his or her liberty. The State's second proposition of law is contrary to established constitutional principles and statutory mandates. As a result, the State's argument is without merit.

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

In the underlying matter, the Seventh District acknowledged that "[t]he guidelines do not state a total minimum amount of time required for properly conducting all three phases of the exam." Deroy, *supra*, at ¶16. However, on cross-examination during the suppression hearing, the arresting officer was provided with the NHTSA's required minimum times for conducting each phase and agreed, the entire test should take a minimum of sixty-eight (68) seconds. The time frame of sixty-eight (68) seconds to which the officer testified incorporated not only the basic elements of each of the three (3) tests, but also the timing included the officer would need to move the stimulus before counting the minimum time necessary to achieve a reliable read for the "maximum deviation" of the eye. In fact, a trooper of the Ohio State Patrol testified in State v. Bailey 2008-Ohio-2254 at ¶ 8 and ¶27, "****that the police academy advises that the HGN test should be conducted for a minimum of sixty-eight [68] seconds."

The State in its Memorandum in Support of Jurisdiction clearly demonstrates a lack of understanding of the procedures involved in the HGN test. One need only review the transcript of the officer's testimony in this matter to discern how long it necessarily takes to conduct the HGN as delineated in the NHTSA manual. The trooper agreed upon cross-examination that his administration of the HGN should have taken at sixty-eight (68) seconds. The sixty-eight (68) second measurement was factual testimony developed over a lengthy and rigorous cross-examination of the arresting officer.

Consequently, the state's third proposition of law is a non-sequitur, *i.e.*, the Court in Deroy did not specifically hold there was a "68-second time requirement for substantial compliance with the HGN test." Rather, the Court below observed that the minimums in the guidelines "*can* be added up" to reach a total of sixty-eight (68) seconds. *Id.* at ¶16 (Emphasis added.).

The language of the Deroy opinion allows for a permissible factual inference of sixty-eight (68) seconds, not a mandatory legal conclusion. Accordingly, the State's third proposition of law must be overruled.

CONCLUSION

As this case is not a matter of public or great general interest, and does not involve a substantial constitutional question. This court should deny discretionary jurisdiction.

Respectfully submitted,



Robert C. Kokor (#0062326)
P.O. Box 236
Brookfield, Ohio 44403
Phone no. (330) 448-1133
Fax no. (330) 448-1133
Counsel for Defendant-Appellee
Jessica Derov

PROOF OF SERVICE

This is to certify that a copy of this Memorandum in Opposition to Jurisdiction was served by regular U.S. Mail this 29th day of May, 2008, upon the following:

Paul J. Gains (#0020323)
Rhys B. Cartwright-Jones (#0078597)
Mahoning County Prosecutor's Office
21 West Boardman Street 6th Floor
Youngstown, Ohio 44503-1426



Robert C. Kokor
Counsel for Defendant-Appellee