

BEFORE THE SUPREME COURT OF OHIO

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

***AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT, STATE OF OHIO
(S.Ct.Prac.R. VI, § 6)**

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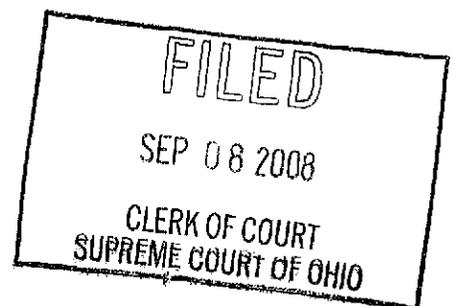


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STATEMENT OF THE CASE, FACTS, AND INTRODUCTION

The factual scenario underlying this case is likely the most common scenario encountered by law enforcement officers involved in the enforcement of the State's laws forbidding drunken driving. 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. After checking the plate through dispatch, he also learned that it came back as being registered to a vehicle different than the one on which it was displayed. Prior to the stop, Trooper Martin witnessed no erratic driving.

Trooper Martin identified the driver of the vehicle as Jessica Derov. Upon initial contact, he noticed a strong odor 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 also had red, glassy eyes. These were common indicators of impairment to him.

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 portable breathalyzer test (PBT). Upon questioning whether she had consumed any alcohol, she replied that she had consumed one beer. Ms. Derov was placed under 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. On March 28, 2008, the Seventh District reversed the trial

court's decision, vacated the conviction, and remanded the matter to the trial court.¹ The Mahoning County Prosecutor's Office filed a memorandum in support of jurisdiction to this Court on May 2, 2008 seeking review of the intermediate appellate court's decision. Mahoning County was joined by *amicus curiae* in support of this Court accepting jurisdiction, including the City of Youngstown on May 9, 2008. Additionally, the Seventh District Court of Appeals certified a conflict to this Court on April 29, 2008 regarding the admissibility of results shown by a PBT for purposes of determining probable cause.

This Court accepted the discretionary appeal on July 9, 2008 and *sua sponte* consolidated that appeal with the conflict certified by the Seventh District. On or about July 22, 2008, the Clerk of Courts for Mahoning County certified and transmitted the record on appeal to the Clerk of the Supreme Court of Ohio. The Office of the Clerk filed the record on July 29, 2008 and notified all parties.

Amicus curiae, the City of Youngstown, urges this Court to reverse the decision of the Seventh District in all respects. In doing so, this Court will permit law enforcement officers to take meaningful steps towards the efficient and effective enforcement of the State's drunken driving laws.

¹ State v. Derov (2008), 176 Ohio App.3d 43.

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 not²). 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*.³ 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,

² *State v. Taylor* (1981), 3 Ohio App.3d 197, syllabus ("...the act of only nominally exceeding the speed limit coupled with the arresting officer's perception of the odor of alcohol (not characterized as pervasive or strong) and nothing more, does not furnish probable cause to arrest an individual for driving under the influence of alcohol.") Contrast *Willoughby v. Tuttle* (Aug. 11, 2006), 11th Dist. No. 2005-L-216, 2006-Ohio-4170 (Police officer's observations of a strong odor of alcohol, bloodshot and glassy eyes, and slurred speech can form the basis of probable cause to arrest for DUI).

³ *State v. Evans* (1998), 127 Ohio App.3d 56.

may be taken into account by a reviewing court in determining whether the officer acted reasonably. No single factor is determinative.⁴

The quagmire in which good and well-intentioned law enforcement officers find themselves should be readily apparent.⁵ The problem is compounded when reviewing courts themselves render conflicting opinions.⁶

Reasonable suspicion that a driver is intoxicated is all that is required to support further investigation by an officer.⁷ Requesting that a driver submit to standardized field sobriety tests (SFSTs) is not overly intrusive if the officer possesses a reasonable

⁴ Id. at 63.

⁵ The true problem that has developed is the examination of these scenarios as purely “questions of law.” That is, the courts of this State seem to have lost their way in applying the standard. The issue of probable cause itself is a “question of law.” *State v. Crotty* (June 13, 2005), 12th Dist. No. CA2004-05-051, 2005-Ohio-2923. However, the assessment of the underlying facts is not.

Because the mosaic which is analyzed for a reasonable suspicion or probable cause determination is multifaceted, one determination will seldom be a useful precedent for another. *Ornelas v. United States* (1976), 517 U.S. 690, 698 (quoting *Illinois v. Gates* (1983), 462 U.S. 213, 238).

Yet, and notwithstanding this pronouncement of the nation’s highest court, this is exactly what has happened. 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 from *Evans* are the most significant. They recognize that the determination comes down to the individual officer and that no single factor carries the day. This Court must seize this opportunity to clarify these guiding principles.

⁶ The *Derov* decision was rendered on March 28, 2008. Less than three months later, the Seventh District Court of Appeals issued its decision in *State v. Hill* (June 25, 2008), 7th Dist. No. 07-CO-12, 2008-Ohio-3249. In that case, an officer stopped a driver for traveling 38 and 40 MPH in a 25 MPH zone. Upon approaching the vehicle, the officer detected a moderate odor of alcohol. He further noticed that the driver had bloodshot and glassy eyes, and that his speech was slurred and his movements slow. The officer subjected the driver to SFSTs. The driver refused to complete the HGN after exhibiting two clues, failed the walk and turn, and discontinued the one-leg stand for safety reasons. The officer did not utilize a PBT and did not question the driver regarding consumption of alcohol. The driver refused to submit to a breathalyzer exam, explaining, “there is no way I can pass the new limit of point zero eight.” Id. at ¶46.

The Seventh District, with no mention of *Derov*, found that the officer did have probable cause to arrest the driver. It bears mentioning that two of the three jurists on *Hill* served on the *Derov* panel. So, prosecutors and law enforcement officers are left to wonder exactly what the state of the law is in the Seventh District? This mishmash of conflicting case law drives home the point that counsel is trying to make – the misapplication of individualized legal principles and the resulting decisions are placing the public at risk. *Amicus* again urges this Court to issue a clear pronouncement that determinations of reasonable suspicion and probable cause are to be made on individualized bases and, rarely, will one case serve as precedent for another. The instincts, training, and experience of the officer in the field must be paramount.

⁷ *State v. Gustin* (1993), 87 Ohio App.3d 859, 860 (citing *State v. Bobo* (1988), 37 Ohio St.3d 177).

and articulable suspicion that the driver is illegally intoxicated.⁸ 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.⁹

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."¹⁰

The latter statement borders on outrageous. The scenario as reported by Trooper Martin fits neatly into several of the factors set forth in *Evans*. The time of the stop, her physical condition, the odor of alcohol, and her admission of consumption – all then coupled with her failed SFSTs and positive PBT – weigh in the trooper's and the State's favor. At the very least, Trooper Martin set forth a reasonable and articulable basis for subjecting Ms. Derov to further scrutiny, including subjecting her to SFSTs. And, the absence of "erratic driving," the linchpin of the Seventh District's decision¹¹, is only one factor of many and is not singularly dispositive.¹²

⁸ *State v. Sanders* (1998), 130 Ohio App.3d 789, 794.

⁹ *State v. Reed* (Dec. 19, 2006), 7th Dist. No. 05 BE 31, 2006-Ohio-7075.

¹⁰ *Derov* at ¶25.

¹¹ *Derov* at ¶3 and ¶27.

¹² Moreover, this Court has previously determined that an officer need not actually witness erratic driving to arrest a suspected drunken driver. *City of Oregon v. Szakovits* (1972), 32 Ohio St.2d 271.

Viewing this scenario through the “eyes of a reasonable and prudent officer” as any court must do can only lead to the conclusion that Ms. Derov was intoxicated and likely above the legal limit. To pronounce otherwise is simply a prime example of a reviewing court misapplying the applicable legal principles and entering the pitfall that has developed – the reviewing court viewed it like a pure “question of law.”

Continuing along the path forged by courts, including the Seventh District, leads to undesirable results in at least two scenarios aside from the typical roadside encounter. First, 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.”¹³

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 intoxicated! This case 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 (or, the officer would only be permitted to offer a lay opinion). Any individual, whether wearing a badge or not can tell when someone is too drunk to drive and does not need NHTSA training to do so.¹⁴ In short,

¹³ *City of Columbus v. Mullins* (1954), 162 Ohio St. 419, 421-22.

¹⁴ 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.”

drunkenness is within the common human experience. SFSTs are merely more reliable tools available to the officer but they do not supplant common sense and experience.

The second scenario involves checkpoints.¹⁵ Officers operating a checkpoint within the jurisdiction of the Seventh District could not order a suspected drunk driver from the vehicle and subject him or her to SFSTs absent some indication of erratic driving. According to the Seventh District and *Deroy*, the officer would have to send that person on his or her way regardless of the number or indicators present.¹⁶

Notwithstanding all of the foregoing, the last several decades have seen continual reform and revision to Ohio's drunken driving statutes. The legal limit has been lowered to the present threshold of 0.08 grams per 210 liters of breath from 0.150 grams per 210 liters of breath in a relatively short period of time, with the current level coming into existence within the last five years. It only stands to reason that as the legal limit is lowered, the corresponding level of impairment to one's motor skills and the clues exhibited will be minimal. Accordingly, the applicability of precedent that arose during the time of the higher limits will become minimal. The new standards cry out for new

¹⁵ The appropriateness of a checkpoint stop is well established and not implicated in this appeal. However, *Deroy* does clearly implicate the officer's ability to order a driver suspected of impaired driving from the vehicle and subject him or her to SFSTs.

¹⁶ Twenty five years ago, the U.S. Supreme Court recognized the seriousness of driving while intoxicated, and the tragedy that inevitably follows:

The situation underlying this case—that of the drunk driver—occurs with tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented and needs no detailed recitation here. This Court, although not having the daily contact with the problem that the state courts have, has repeatedly lamented the tragedy. See *Breithaupt v. Abram* (1957), 352 U.S. 432, 439 (“The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield”); *Tate v. Short* (1971), 401 U.S. 395, 401 (Blackmun, J., concurring) (deploring “traffic irresponsibility and the frightful carnage it spews upon our highways”); *Perez v. Campbell* (1971), 402 U.S. 637, 657 and 672, (Blackmun, J., concurring) (“The slaughter on the highways of this Nation exceeds the death toll of all our wars”); *Mackey v. Montrym* (1979), 443 U.S. 1, 17-18, (recognizing the “compelling interest in highway safety”).

bodies of case law as fewer indicators may now support probable cause. But, abominations such as *Derov* should not lead the way.

This Court should reverse this ruling of the Seventh District and issue a clear pronouncement based upon *Ornelas, supra* – One determination of reasonable suspicion or probable cause will seldom be a useful precedent for another. These scenarios must be examined on a case-by-case basis utilizing the totality of the circumstances and through the eyes of a reasonable and prudent officer. *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: The results of a PBT should be considered as a factor supporting probable cause to arrest a suspect for a drunk driving offense.

The Seventh District Court of Appeals ruled on March 28, 2008 that the results of PBTs were inadmissible for any purpose, including the assessment of an officer's probable cause determination.¹⁷ This decision stood in conflict with a decision from the Fourth Appellate District.¹⁸ The Seventh District couched its decision as an agreement "with the majority of our sister districts" and looked to the Third, Eighth, Eleventh, and Twelfth Appellate Districts for support.¹⁹ This characterization has lost some support in recent months.

One of the cases cited as support for the exclusion of PBT results was the Eleventh District's decision in *State v. Delarosa*.²⁰ On March 28, 2008, – the same day as the *Derov* decision – the Eleventh District issued *State v. Maloney*, in which it accepted the results of a PBT for purposes of probable cause.²¹ Thus, *Derov* now stands in conflict with a second appellate district.

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" analysis²².

¹⁷ *Derov* at ¶12.

¹⁸ *State v. Gunther* (July 5, 2005), 4th Dist. No. 04 CA 27, 2005-Ohio-3492.

¹⁹ *Derov* at ¶10.

²⁰ *State v. Delarosa* (June 30, 2005), 11th Dist. No. 2003-P-0129, 2005-Ohio-3399.

²¹ *State v. Maloney* (Mar. 28, 2009), 11th Dist. No. 2007-G-2788, 2008-Ohio-1492, at ¶58.

²² Appellate decisions have repeatedly characterized PBTs as inaccurate and unreliable. Indeed, the *Derov* court devoted a portion of its decision to a discussion of the "inherently unreliable" nature of PBTs and the fact that PBTs are "not among those instruments listed in Ohio Adm. Code 3701-53-02 as approved evidential breath testing instruments..." *Derov* at ¶10. The removal of PBTs from the Administrative

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.²³ The crux of this argument, then, is whether results from a PBT can be considered as one factor among many in a law enforcement officer's initial determination of probable cause to arrest an individual suspected of drunken driving. The answer must be, "Yes."

Probable cause to arrest for an OVI offense is examined under a totality of the circumstances.²⁴ As previously discussed, the courts of this State have set forth lists of factors to consider when examining this determination along with the experience of the officer, but that list is not exhaustive and no single factor is dispositive. PBTs must be included in any consideration and future assessment.

Code in 1997 did not imply that the Department of Health did not recognize or sanction the use of a PBT for a probable cause determination, but, rather, that the PBTs were not under the "evidential" regulative authority of the Director. (R.C. 3701.143) As permits are not issued by the Director of Health for "non-evidential" purposes under Ohio Administrative Code 3701-53-09, PBTs were determined not to be under the regulative authority of the Director of Health.

As an aside, these decisions discount the fact that such an "unreliable" result could inure to the benefit of the defendant. Moreover, the Fourth District case cited in *Derov* as proof of "unreliability" actually stands for its admissibility for probable cause and certainly implies that such results might be admissible at trial if the prosecution were to offer proof of the instrument's accuracy and reliability.

In keeping with the theme of investigative techniques that may or may not be reliable, it is worth noting that 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 also 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, no one here 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 in the field.

²³ A number of other states permit the use of PBTs in the assessment of probable cause. See *State v. Pollman* (Kan. Aug. 8, 2008), No. 93,947, unreported, 2008 WL 3165663, at *3; *State v. Bielmeier* (Aug. 7, 2008), Wis. App. No. 2008AP122-CR, unreported, 2008 WL 3090182, ¶ 9, quoting *County of Jefferson v. Renz* (1999) 231 Wis.2d 293, 317; see also *State v. Feldman* (June 26, 2008), Wis. App. No. 2007AP2736-CR, unreported, 2008 WL 2522320, ¶ 10; *State v. McGuigan* (Vt. Aug. 14, 2008), Nos. 2006-437, 2006-501, unreported, 2008 WL 3491526, ¶ 14; *Greene v. Commonwealth* (Ky. App. 2008), 244 S.W.3d 128, 135; *State v. Reavely* (2007), 338 Mont. 151, 161, citing *State v. Ditton* (2006), 333 Mont. 483, ¶ 54.

²⁴ *Homan*, 89 Ohio St.3d 427.

Law enforcement officers have a wide array of investigative tools and techniques available to them. Some officers utilize cutting-edge technology, others utilize trickery or deception, and still others rely on informants, co-conspirators, or cooperating witnesses. Some techniques are met with swift approval while others are scrutinized or frowned upon or simply excluded from the courtroom. But, this is not a trial we are examining, it is a probable cause determination.

The courts of this State have expressly excluded polygraphs from admission at trial absent an agreement to the contrary due to their unreliable nature.²⁵ But, evidence such as hearsay, while not admissible at trial, is admissible to establish probable cause.²⁶ It is in this latter category where PBTs should find themselves.

Supporting this argument is the overriding concern of officer safety. 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 OVI statute was amended to include *per se* limits for the presence of illegal drugs or the metabolites of illegal drugs in addition to the traditional levels of alcohol. 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 driver and make the determination that a blood or urine test is

²⁵ State v. Jackson (1991), 57 Ohio St.3d 29, 37.

²⁶ Brinegar v. United States (1949), 338 U.S. 160; State v. Edwards (2005), 107 Ohio St.3d 169; State v. Cunningham (Nov. 24, 1986), 4th Dist. No. 1255, 1986 WL 13419.

necessary rather than a breath test.²⁷ 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 any likelihood of harm.

Finally, since 1985, Ohio courts have considered admission of consumption, albeit likely understatement, in their criteria for finding a totality of circumstances for probable cause to arrest.²⁸ All the Appellate Districts (7th, 3rd, 8th, 11th and 12th) cited in *Derov* for not allowing PBT testimony for probable cause are contained in this list. By excluding the results of a PBT, this Court would be sanctioning the spoken word of a suspected drunk over technology.

PBTs are no more or less reliable than the instincts and training of the individual officer that support his or her reasonable and articulable suspicion of drunken driving. But, they are useful tools that should be at the disposal of an officer that elects to use it in making a determination that a driver is intoxicated. PBTs are directly in line with other questionable forms of evidence that are routinely considered in probable cause assessments.

²⁷ 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 some officers will approach someone under the influence of drugs differently than someone under the influence of alcohol.

²⁸ See *Homan*, 89 Ohio St. 3d at 427; *State v. Boczar* (Dec. 23, 2005), 11th Dist. No. 2004-A-0063, 2005-Ohio-6910, at Par. 52; *State v. Maston* (June 4, 2003), 7th Dist. No. 02CA101, 2003-Ohio-3075, at Par. 7; *State v. Maloney* (Mar. 28, 2008), 11th Dist. No. 2007-G-2788, 2008-Ohio-1492, at par. 37; *State v. Thompson* (May 2, 2005), 3rd Dist. No. 14-04-34, 14-04-35, 2005-Ohio-2053, at par. 19; *State v. Menking* (Mar. 27, 2003), 4th Dist. No. 02CA66, 2003-Ohio-3515, at par. 16; *Village of Gates Mills v. Wazbinski* (Nov. 6, 2003), 8th Dist. No. 81863, 2003-Ohio-5919, at par. 23; *State v. Sandlin* (Oct. 23, 2000), 12th Dist. No. CA 2000-01-010, at p. 3 of 4; *Dutkiewicz v. Bur. of Motor Vehicles* (July 19, 1985), 6th Dist. No. L-85-071, 1985 WL 7535at p. 2 of 2.

In conclusion, reasonable and articulable suspicion is a lesser standard and is not synonymous with probable cause.²⁹ Probable cause has repeatedly been defined as a standard less than preponderance³⁰. 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.

²⁹ State v. Tarver (Sept. 7, 2007), 4th Dist. No. 07CA2950, 2007-Ohio-4659 (citing Alabama v. White (1990), 496 U.S. 325, 330).

³⁰ State v. Young (2001), 146 Ohio App.3d 245, 254, 2001-Ohio-4284 (citing State v. George (1989), 45 Ohio St.3d 325, 329.). 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, 329. A "preponderance," on the other hand, simply means the "greater weight of evidence." State v. Stumpf (1987), 32 Ohio St.3d 95, 102.

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

According to the Fifth District, the HGN should take forty-eight seconds³¹. But, according to the Seventh District, the test requires sixty-eight seconds³². Further compounding this question is the fact that the National Highway Traffic Safety Administration (NHTSA) manual sets forth no firm minimum time for completion of the test.³³

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 deviation³⁴.” The *Maguire* court inadvertently paved this

³¹ State v. Maguire (July 30, 2001), 5th Dist. No. 2000CA374, unreported, 2001 WL 881784.

³² Derov at ¶16.

³³ 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.

³⁴ Even the cases relied upon by the majority, State v. Embry (Nov. 29, 2004), 12th Dist. No. CA2003-11-110, 2004-Ohio-6324 and State v. Mai (Mar. 24, 2006), 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.

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 seconds³⁵. However, it would be fallacious to do so because to do so ignores the important modifiers in the specific procedures.

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:

Other Ohio appellate courts have declined to adopt the approach utilized by the Seventh District. In *State v. Lange* (July 21, 2008), 12th Dist. No. CA2007-09-232, 2008-Ohio-3595, ¶¶10-11, the reviewing court reversed the trial court and held that there was substantial compliance when the arresting officer took two seconds to move the stimulus rather than the four seconds outlined in the NHTSA manual. The Eighth District, in *City of Cleveland Heights v. Schwabauer* (Jan. 6, 2005), 8th Dist. No. 84249, 2005-Ohio-24, ¶25, found compliance when the officer moved the stimulus at a speed of between two and three seconds and was still able to detect the onset of nystagmus prior to forty-five degrees.

³⁵ 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 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.

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 numbers.³⁶ 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 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.

The Seventh District excluded the HGN based upon their determination that Trooper Martin failed to comply with a standard that did not previously exist. Nowhere in the *Derov* decision did the court determine that Trooper Martin failed to correctly administer the test in substantial compliance with the NHTSA requirements. Adopting the 68-second standard enunciated in *Derov* would effectively create an environment

³⁶ 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.

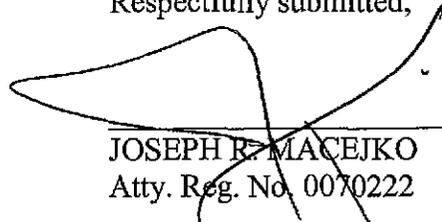
where strict compliance was the only standard and that is not the state of the law. This baseless and overt example of judicial activism cannot be permitted to stand.³⁷

³⁷ Courts in other jurisdictions using the same NHTSA manual have failed to find that a minimum time period of 68 seconds is required. A Texas Court of Appeals concluded that there was no minimum time required to conduct the HGN test. *Compton v. State* (Tex. App. 2003), 120 S.W.3d 375, 378-79. Likewise, in *United States v. Hernandez-Gomez* (Apr. 22, 2008), D. Nev. No. 2:07-CR-0277-RLH-GWR, unreported, 2008 WL 1837255, at *8, the court rejected the notion that the NHTSA manual requires a minimum time to conduct the HGN test.

CONCLUSION

Wherefore, counsel prays that this Court overrule the Seventh District's *Derov* decision in all respects and allow the sentence of the trial court to be carried out.

Respectfully submitted,

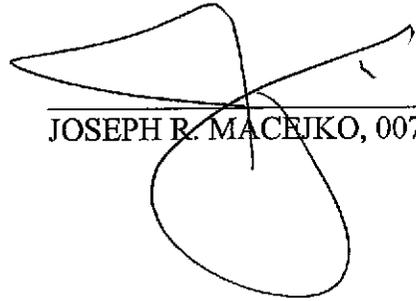


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PROOF OF SERVICE

I hereby certify that on this 5th day of September 2008, a copy of this Brief was sent to opposing counsel via regular U.S. mail.



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