

In the
Supreme Court of Ohio

STATE OF OHIO, : Case Nos. 2008-0853;
 : 2008-0858
 :
 Plaintiff-Appellant, :
 :
 : On Appeal from the
 v. : Mahoning County
 : Court of Appeals,
 JESSICA DEROV, : Seventh Appellate District
 :
 :
 Defendant-Appellee. : Court of Appeals Case
 : No. 07 MA 71
 :

MERIT BRIEF OF *AMICUS CURIAE*
OHIO ATTORNEY GENERAL NANCY H. ROGERS
IN SUPPORT OF PLAINTIFF-APPELLANT STATE OF OHIO

PAUL J. GAINS (0020323)
Mahoning County Prosecutor

NANCY H. ROGERS (0002375)
Attorney General of Ohio

RALPH M. RIVERA* (000082063)
Assistant Prosecutor
**Counsel of Record*
21 West Boardman Street, 6th Floor
Youngstown, Ohio 44503
330-740-2330
330-740-2008 fax

BENJAMIN C. MIZER* (0083089)
Solicitor General
**Counsel of Record*

MICHAEL DOMINIC MEUTI (*pro hac vice*
application pending)

Deputy Solicitor
JASON PATRICK SMALL (0080151)
Assistant Solicitor

30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980

614-466-5087 fax
bmizer@ag.state.oh.us

Counsel for Plaintiff-Appellant
State of Ohio

Counsel for *Amicus Curiae*
Ohio Attorney General Nancy H. Rogers

ROBERT C. KOKOR (0062326)
394 State Route 7
P.O. Box 236
Brookfield, Ohio 44403
330-448-1133

Counsel for Defendant-Appellee
Jessica Derov

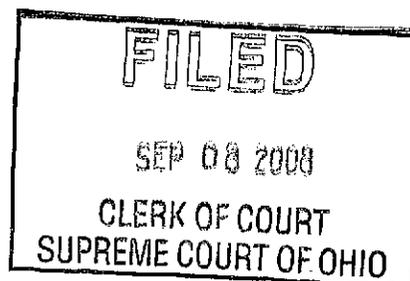


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INTRODUCTION

Law enforcement officers must employ effective tools to remove drunk drivers from Ohio's roads. When administered in the field, portable breath test ("PBT") devices detect the presence of alcohol on persons suspected of drunk driving. Alone, the results of a PBT cannot substantiate that an individual drove under the influence of alcohol. But when considered along with all the circumstances present during a traffic stop, such as field sobriety tests, PBT results are a factor in establishing probable cause for an arrest for driving under the influence of alcohol (a "DUI" offense). Officers may administer PBTs to confirm suspicions that an individual drove under the influence of alcohol. In this way, PBT devices work in concert with various instruments at law enforcement's disposal, and these tools should not be removed piecemeal from an officer's toolbox.

The issue in this case is whether the State can introduce PBT results to establish probable cause to arrest an individual for driving under the influence of alcohol. The answer is yes. Like any factor supporting probable cause for a DUI arrest, courts should consider PBT results as part of the totality of the circumstances present during the arrest.

The Seventh District was wrong to reverse the trial court and to exclude the results of Jessica Derov's PBT as a matter of law. The problem with the appellate court's reasoning is that the court asked the wrong question. True enough, PBT results might not be sufficiently reliable to be admitted at trial as substantive evidence of a suspect's blood alcohol content. But PBTs *are* probative of whether the officer *reasonably believed* that the suspect committed a DUI violation. Accordingly, PBT results are admissible—as one factor among several in the applicable totality-of-the-circumstances test—to help establish probable cause for a DUI arrest. The Seventh District's exclusion of PBT results as "inherently unreliable" misses the point and must be reversed.

The Court also should clarify the search-and-seizure analysis applicable in DUI cases by adopting the Eleventh District's three-step approach in *State v. Evans* (11th Dist. 1998), 127 Ohio App. 3d 56. More specifically, the Court should instruct lower courts to consider separately the issues of (1) whether law enforcement had reasonable suspicion of unlawful activity to justify the stop; (2) whether the officer had reasonable suspicion of a DUI offense sufficient to warrant further investigation, such as initiating field sobriety tests and a PBT; and (3) whether the totality of the circumstances gave the officer probable cause of a DUI violation to arrest the defendant. Explicitly adopting this three-step framework will provide guidance to lower courts and ultimately prevent errant decisions like the one below.

STATEMENT OF AMICUS INTEREST

Ohio Attorney General Nancy H. Rogers acts as Ohio's chief law officer. R.C. 109.02. Accordingly, she has a strong interest in ensuring rigorous and consistent enforcement of Ohio's criminal laws prohibiting drunk driving. Relatedly, the Attorney General has a strong interest in defending the means by which law enforcement officers conduct DUI arrests. If PBT results are not admissible to establish probable cause, the incentive to administer PBT devices is lost, rendering worthless a valuable tool against drunk drivers. The admissibility of PBT results at issue in this case affects highway safety in Ohio and the imposition of appropriate sanctions—civil and criminal—against drunk drivers.

STATEMENT OF THE CASE AND FACTS

A. A combination of lay observations, failed field sobriety tests, and PBT results supported Derov's arrest for a DUI violation.

Around 2:30 a.m. on August 12, 2006, Ohio State Trooper Shawn Martin stopped Jessica Derov's car for displaying expired license plate tags. Transcript of Proceedings (Tr.) 4–6, 32. When Trooper Martin approached the vehicle, he smelled alcohol emanating from inside. Tr. 8.

Because the car had two occupants, Trooper Martin asked the driver, Derov, to exit the vehicle. Tr. 8-9. Once away from the car, Trooper Martin determined that Derov was the source of the alcohol smell. Tr. 8. Upon conducting a horizontal gaze nystagmus (“HGN”) test, Trooper Martin noticed that Derov’s eyes were “glassy and red.” Tr. 15. After administering two additional field sobriety tests for coordination, the “walk and turn” and “one-leg stand” tests, Trooper Martin asked Derov to take a PBT. Tr. 20-25. Derov failed all but the “one-leg stand” test and Trooper Martin placed her under arrest for DUI. Tr. 27-28. Derov then admitted she had consumed one beer. Tr. 26-27. While detained at the State Highway Patrol post, Derov received a second breath test (not a PBT), which measured her blood-alcohol level at 0.134. Tr. 31, 51-55.

B. Derov unsuccessfully moved the trial court to suppress the results of the field sobriety tests and the PBT.

Several months after moving to suppress the evidence supporting her arrest, Derov moved to exclude the results of the PBT. Supplement to the Mot. to Suppress Evidence by Def.; Req. for Hr’g, filed Jan. 9, 2007, R. 28. She argued that the PBT’s results should not be admissible to demonstrate probable cause because the Ohio Department of Health has not approved PBTs as testing devices. Derov further argued that PBTs are inaccurate and that the device was not calibrated properly. *Id.* In offering this argument, Derov focused on standards that were promulgated for stationary breathalyzers, not PBTs. *Id.*

At the hearing on Derov’s motion, Trooper Martin testified that the PBT device administered to Derov could determine whether an individual had ingested alcohol. Tr. 26. He stated that the results of Derov’s PBT indicated she consumed alcohol and that this outcome “corroborated” his observations of Derov and her performance on the field sobriety tests. Tr. 26. Trooper Martin testified that the PBT results did not form the sole basis of her arrest. Tr. 96.

The trial court denied Derov's motion, admitted the results of her PBT, and found that the totality of the circumstances (including the results of the PBT and the field sobriety tests) established probable cause for her arrest. *State v. Derov* (7th Dist.), 176 Ohio App. 3d, 2008-Ohio-1672, ¶¶ 4, 10 ("App. Op."). Derov then pleaded no contest to the charges against her, and as relevant here, the trial court convicted her of driving under the influence and driving with a prohibited blood-alcohol level. *Id.* at ¶ 4.

C. The Seventh District reversed the trial court's finding of probable cause entirely and excluded the results of Derov's PBT as a matter of law, contributing to a split among the appellate districts on the question of admissibility.

On appeal, the Seventh District reversed the trial court, concluding that Trooper Martin failed to perform the field sobriety tests consistently with National Highway Traffic Safety Administration ("NHTSA") guidelines, and also that the PBT was inadmissible to establish probable cause to arrest Derov for drunk driving. Noting the "inherent unreliability" of PBTs, the appeals court concluded that the trial court should not have considered the results of Derov's PBT, basing this conclusion on precedent from other appellate districts. App. Op. ¶¶ 10-12.

The decision below widened the split among appellate districts that have considered the admissibility of PBT results to establish probable cause for DUI arrests. Much like the Seventh District in this case, the Third, Eighth, and Eleventh Districts held PBT results to be inadmissible as a matter of law. See *State v. Ferguson* (3d Dist.), 2002 Ohio App. Lexis 1697, 2002-Ohio-1763, *5-*6; *City of Cleveland v. Sanders* (8th Dist.), 2004 Ohio App. Lexis 4057, 2004-Ohio-4473, ¶ 24, *overruled on other grounds*, *City of Strongsville v. Spoonamore* (8th Dist.), 2006 Ohio App. Lexis 4802, 2006-Ohio-4884; *State v. Smith* (11th Dist.), 2008 Ohio App. Lexis 2806, 2008-Ohio-3251, ¶ 2 n.1. Along with the Fourth District, the First and Sixth Districts equate PBT results to other factors weighed to determine if probable cause exists for DUI arrests. See *State v. Polen* (1st Dist.), 2006 Ohio App. Lexis 5613, 2006-Ohio-5599, ¶ 18; *State v. Masters*

(6th Dist.), 2007 Ohio App. Lexis 6208, 2007-Ohio-7100, ¶ 16. Other appellate districts have yet to consider the issue directly.

The Seventh District certified a conflict between its decision and the decision in *State v. Gunther* (4th Dist.), 2005 Ohio App. Lexis 3251, 2005-Ohio-3492, which held that the results of PBTs are admissible to establish probable cause for DUI arrests. See Journal Entry Certifying Conflict, April 29, 2008, attached as Ex. 1. This Court then granted discretionary review and also agreed to resolve the following certified question: “whether the results of a portable breath test are admissible to establish probable cause to arrest a suspect for a drunk driving offense.” *7/9/2008 Case Announcements*, 2008-Ohio-3369.

ARGUMENT

Amicus Curiae Attorney General’s Proposition of Law:

Courts may admit portable breath test results to show a factor supporting probable cause for a DUI arrest—namely, that a suspect had consumed alcohol.

A. DUI arrests generally require courts to apply a three-step analysis.

As the Eleventh District explained in *State v. Evans* (11th Dist. 1998), 127 Ohio App. 3d 56, 60, DUI arrests¹ require a three-step search-and-seizure analysis. First, the court must determine whether the officer’s initial stop of the vehicle was reasonable—that is, whether the officer had reasonable suspicion of criminal activity, or that the driver was operating the vehicle in violation of a traffic law. *Id.*

Second, if the stop was reasonable, then the court must determine whether the officer had a basis to initiate sobriety tests or a PBT—in other words, whether the officer had reasonable

¹ For simplicity, the Attorney General refers to both violations for driving under the influence under R.C. 4511.19(A)(1)(a) and violations for driving with a prohibited blood alcohol level under R.C. 4511.19(A)(1)(d) as “DUI offenses.”

suspicion of a DUI violation based on specific, articulable facts to justify a further investigation.

Id. at 62-64. Various factors can inform this inquiry, including lay observations such as:

- (1) the time and day of the stop (Friday or Saturday night as opposed to, say, 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 a cognizable report exists 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 consumed, and the amount of time spent drinking, if given.

Id. at 63 n.2. As the *Evans* court recognized, "[a]ll 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."

Id.

Third, and finally, if the officer's initial investigation was reasonable, then the court must determine whether the officer had probable cause to arrest the driver for a DUI violation. This inquiry requires courts to examine the totality of the circumstances surrounding the arrest. *State*

v. Homan (2000), 89 Ohio St. 3d 421, 427, *superseded by statute as stated in State v. Boczar* (2007), 113 Ohio St. 3d 148, 2007-Ohio-1251, ¶ 22 (holding that amendments to R.C. 4511.19 replaced admissibility standards announced in *Homan*). Put differently, courts consider “whether, at the moment of arrest, the police had sufficient information, derived from a reasonably trustworthy source of facts and circumstances, sufficient to cause a prudent person to believe that the suspect was driving under the influence.” *Id.* (citing *Beck v. Ohio* (1964), 379 U.S. 89, 91). Probable cause is inherently a fact-specific inquiry that rests on all the facts known to the officer at the time of the arrest and generally includes the results of field sobriety tests, as well as lay observations.

Of course, this three-step inquiry is not rigid. In some cases, officers might have probable cause to arrest for a DUI violation even without conducting field sobriety tests. As this Court recognized in *Homan*, “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.” Instead, “[t]he 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.” 89 Ohio St. 3d at 427. Thus, the *Homan* Court held that the driver’s erratic driving, red eyes, odor of alcohol, and admission of alcohol consumption supported probable cause for a DUI arrest. *Id.*; see also *Ferguson*, 2002 Ohio App. Lexis 1697 at *9 (holding that the defendant’s red eyes, slurred speech, swaying from side to side, and strong odor of alcohol established probable cause to arrest the defendant for a DUI violation).

The Court should endorse explicitly the *Evans* framework for analyzing DUI cases. This framework provides useful guidance both to the lower courts and to Ohio’s law enforcement officials. The Seventh District’s opinion below is emblematic of the confusion that presently

reigns in this area among the lower courts. The Seventh District elided the latter two steps of the framework, confusing the question whether Trooper Martin “ha[d] the right to have a suspect submit to field sobriety tests,” App. Op. ¶ 26, with the question whether the facts “establish[ed] probable cause to believe that [Derov] was driving under the influence of alcohol,” App. Op. ¶ 27; see also *City of Cleveland v. Sanders* (8th Dist.), 2004 Ohio App. Lexis 4057, 2004-Ohio-4473, ¶¶ 18-19 (applying the *Evans* reasonable-suspicion-to-investigate-further factors to the question of probable cause to arrest). With clear guidance from this Court, such analytical errors can be avoided.

B. The results of PBTs are admissible to establish probable cause to arrest a suspect for a DUI violation.

The Seventh District erred by holding that PBT results are inadmissible to establish probable cause of a DUI violation. According to the lower court, PBTs are unreliable because factors unrelated to alcohol consumption (such as an odor of industrial chemicals, ingestion of non-intoxicating over-the-counter medicines, or diseases such as diabetes) may cause a false-positive reading, and because their results may be otherwise inaccurate. App. Op. at ¶ 11. While these criticisms may justify excluding a PBT result as *substantive evidence* of a DUI violation, they do not justify excluding the result as a factor supporting probable cause.

It is black-letter law that information that would be inadmissible at trial may be admissible at a suppression hearing to show probable cause to arrest. See, e.g., 2 Wayne R. LaFare, et al., *Criminal Procedure* § 3.3(b) at 89 (2d ed. 1999) (hearsay admissible to establish probable cause); *State v. Boczar*, 113 Ohio St. 3d 148, 2007-Ohio-1251, ¶ 17 (“[T]he Rules of Evidence do not apply to suppression hearings.”). This rule makes sense, for the issue of probable cause considers whether officers “had reasonably trustworthy information” that was “sufficient to warrant a prudent [person] in believing that the [defendant] had committed or was committing an

offense.” *Beck v. Ohio* (1964), 379 U.S. 89, 91. Because inquiries into probable cause ask only whether an officer had a *reasonable belief* that an offense had occurred—not whether the offense *actually occurred*—evidence that may not be sufficiently probative of the actual offense to warrant admission at trial (such as PBT results) can be sufficiently probative to justify the officer’s belief.

Importantly, PBTS are not field sobriety tests. Field sobriety tests—such as the walk-and-turn, one-leg-stand, and HGN tests—measure *whether* a motorist is impaired. See *State v. Bresson* (1990), 51 Ohio St. 3d 123, 125 (describing the HGN test as “the single most accurate field test to use in determining whether a person is impaired”). PBTS, by contrast, measure the *cause* of impairment. They thus provide information that is fundamentally different from that provided by field sobriety tests, and in many instances, this information is of paramount importance in establishing probable cause to arrest. For example, a suspect might perform poorly on a field sobriety test because of any number of factors unrelated to alcohol consumption, such as a bad back, a concussion, or some other ailment—and DUI suspects sometimes claim as much. In such instances, the PBT is a valuable tool that permits officers to confirm that alcohol consumption is the likely cause of impairment.

Finally, admitting PBT results to show probable cause corrects a contradiction in the case law—specifically, that refusal to submit to a PBT may itself give rise to probable cause. See *Westerville v. Cunningham* (1968), 15 Ohio St. 2d 121, 122. As the Court observed:

Where a defendant is being accused of intoxication and is not intoxicated, the taking of a reasonably reliable chemical test for intoxication should establish that he is not intoxicated. On the other hand, if he is intoxicated, the taking of such a test will probably establish that he is intoxicated. Thus, if he is not intoxicated, such a test will provide evidence for him; but, if he is intoxicated, the test will provide evidence against him. Thus, it is reasonable to infer that a refusal to take such a test indicates the defendant’s fear of the results of the test and his consciousness of guilt, especially

where he is asked his reason for such refusal and he gives no reason which would indicate that his refusal had no relation to such consciousness of guilt.

Id. As it stands, while some courts refuse to admit the results of PBTs, they still may consider a suspect's *refusal* to submit to a PBT as establishing probable cause. If a suspect's refusal to submit to a PBT is admissible because it is probative of alcohol consumption, then surely the *results* of a PBT are admissible because they are probative the same thing.

C. Trooper Martin complied with constitutional requirements in stopping Derov, investigating a possible DUI offense, and arresting Derov for the offense.

In this case, the entire exchange between Trooper Martin and Derov comported with constitutional requirements. As explained in Part A. above, courts typically apply a three-step search-and-seizure analysis to DUI cases. All three steps of that analysis demonstrate that the search and seizure were constitutional, and that the Seventh District therefore should not have suppressed any evidence.

First, Trooper Martin's decision to stop Derov was reasonable. Trooper Martin observed expired license plate tags on Derov's car. He thus had at least reasonable suspicion that Derov was driving in violation of the law, and Derov offers no argument to the contrary.

Second, Trooper Martin had reasonable suspicion of a DUI offense to justify further investigation. After the traffic stop, Trooper Martin noticed a strong smell of alcohol coming from Derov's car, and after removing Derov from the car, he pinpointed Derov as the source of that odor. Additionally, the stop occurred at 2:30 a.m. on a Saturday morning. These "specific, articulable facts" comprise a "reasonable basis" for further investigation, such as field sobriety tests and the PBT. *Evans*, 127 Ohio App. 3d at 62. Thus, Trooper Martin acted reasonably by subjecting Derov to such tests.²

² Some lower courts have held that such facts are insufficient to warrant imposition of field sobriety tests. See, e.g., *State v. Dixon* (2d Dist.), No. 2000-CA-30, 2000 Ohio App. Lexis 5661

Third, the totality of the circumstances reveals that Trooper Martin had probable cause to arrest Derov for a DUI offense. Beyond the specific, articulable facts supporting the field sobriety tests and the PBT, the results of these tests confirmed Trooper Martin's suspicion of a likely DUI violation. While administering the HGN test, Trooper Martin noticed that Derov's eyes were red and glassy—another factor indicating alcohol consumption. Additionally, Derov admitted to consuming alcohol, and the PBT confirmed that she had alcohol on her breath. These facts alone are sufficient “to cause a prudent person to believe that the suspect was driving under the influence,” *Homan*, 89 Ohio St. 3d at 427, regardless of whether Trooper Martin substantially complied with the NHTSA's guidelines for administering the field sobriety tests.

Because Trooper Martin's actions at each step of the search-and-seizure analysis were perfectly constitutional, the Seventh District erred by suppressing the results of Derov's blood-alcohol test at the Highway Patrol post. Accordingly, the Court should reverse the Seventh District's judgment.

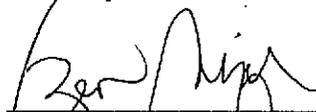
(holding that police lacked reasonable suspicion to initiate field sobriety tests when the defendant had glassy and bloodshot eyes, smelled of alcohol, and admitted to drinking two beers); *State v. Spillers* (2d Dist.), 2000 Ohio App. Lexis 1151 (holding that police lacked reasonable suspicion to initiate field sobriety tests after watching the defendant weave within his lane of traffic and cross over the right line, and after smelling alcohol on the defendant's breath). But these cases were decided wrongly, and the Court expressly should disapprove of them here.

CONCLUSION

For these reasons, the Court should reverse the judgment below and answer the certified question "yes."

Respectfully submitted,

NANCY H. ROGERS (0002375)
Attorney General of Ohio



BENJAMIN C. MIZER* (0083089)
Solicitor General

**Counsel of Record*

MICHAEL DOMINIC MEUTI (*pro hac vice*
application pending)

Deputy Solicitor

JASON PATRICK SMALL (0080151)

Assistant Solicitor

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

bmizer@ag.state.oh.us

Counsel for *Amicus Curiae*

Ohio Attorney General Nancy H. Rogers

CERTIFICATE OF SERVICE

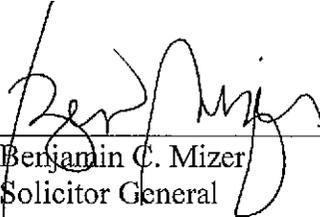
I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Nancy H. Rogers in Support of Plaintiff-Appellant State of Ohio was served by U.S. mail this 8th day of September, 2008, upon the following counsel:

Paul J. Gains
Mahoning County Prosecutor
Ralph M. Rivera
Assistant Prosecutor
21 West Boardman Street, 6th Floor
Youngstown, Ohio 44503

Counsel for Plaintiff-Appellant
State of Ohio

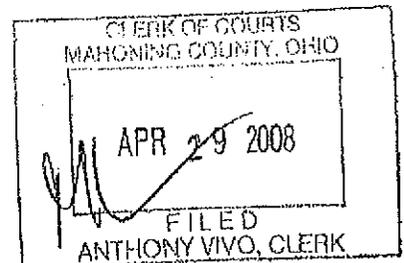
Robert C. Kokor
394 State Route 7
P.O. Box 236
Brookfield, Ohio 44403

Counsel for Defendant-Appellee
Jessica Derov



Benjamin C. Mizer
Solicitor General

bk



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.)

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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