

IN THE SUPREME COURT OF OHIO

State of Ohio

Plaintiff-Appellant,

vs.

Jessica Derov

Defendant-Appellee.

Case Nos. 2008-0853
2008-0858

On Appeal from the Seventh District
Court of Appeals, Mahoning County
Appeal No. 07 MA 71

MERIT BRIEF OF THE APPELLEE, JESSICA DEROV

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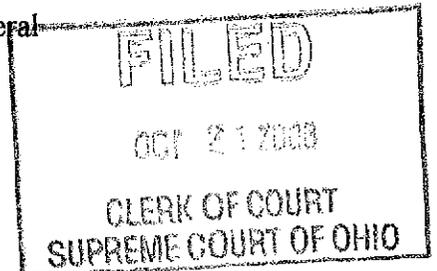


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COMBINED STATEMENT OF CASE AND FACTS

On August 12, 2006, Ms. Derov was stopped by a state trooper due to expired tags on her license plate. (T.p. 6-7). After approaching Ms. Derov, the arresting officer noticed a strong odor of alcohol emanating from her and noted her eyes were red and glassy. (T.p. 8, 15). When asked to exit her vehicle, Ms. Derov had no difficulty and demonstrated no physical signs of alcohol consumption. (T.p. 9, 62). She eventually admitted to consuming one beer. (T.p. 26-27) The officer gave Ms. Derov a portable breath test and had her perform an HGN test, the walk-and-turn test, and the one leg stand test. (T.p. 10, 26). The officer testified Ms. Derov passed the one-leg stand test (T.p. 62), but failed the other tests her administered on her, and was therefore placed under arrest. (T.p. 19, 22-23, 26).

The State seems to place some weight on the alleged BAC reading of Ms. Derov. Obviously, the BAC reading cannot be included in the probable cause calculation for the purposes of this appeal. This is demonstrated in the State's merit brief, where it continually referred to BAC results in its cited cases. This Court is aware that Ms. Derov challenged the admission of the BAC result in her appeal to the Seventh District. The Seventh did not rule on the assignment as it was rendered moot by the success of the first assignment regarding the probable cause determination. The State seems to think that a BAC reading should be considered in the determination of whether the officer has the right to arrest a motorist and require a BAC test. Ms. Derov contends that had the Seventh District reached the BAC assignment of error, it clearly would have declared the BAC results inadmissible, just as it did the three of the field sobriety tests for the reasons stated in her brief to the Seventh District..

Ms. Derov was charged with operating a vehicle while intoxicated (OVI) in violation of

R.C. 4511.19(A)(1)(a) and (d), expired tags, and invalid license plate. Ms. Derov filed a motion to suppress evidence, which the trial court overruled after a lengthy hearing. Ms. Derov entered a no contest plea, and was found guilty of, OVI in violation of R.C. 4511.19(A)(1)(a), OVI in violation of R.C. 4511.19(A)(1)(d), as well as the expired tags and fictitious plate registration 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 from other Ohio appellate districts, held that portable breath tests (PBT) were inadmissible due to their inherent unreliability. *Id.* at ¶11-12 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 protocols. *Id.* at ¶ 13-19. The court also ruled the arresting officer's administration of the walk-and-turn test did not comply with the NHTSA guidelines to the extent he failed to properly instruct appellant on how to complete the test. *Id.* at ¶24. The court ruled that the State proved only that Ms. Derov scored one clue on the walk-and-turn test. *Id.* at ¶24-25. One must score two clues to fail the walk-and-turn test, therefore, the State failed to demonstrate that Ms. Derov failed the test. The court, consequently, 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.

The State subsequently sought certification of a conflict to this Court, pursuant to App.R. 25, relating to the use of PBTs, the Seventh District certified the conflict and the certification was accepted by this Court. The State also filed a memorandum in support of jurisdiction for a discretionary appeal, pursuant to Rule III, Section 6(C)(2), Rules of Practice of the Supreme Court, asserting the underlying matter is a case of great public or general interest involving a

substantial constitutional question. This Court granted the State's memorandum, accepting jurisdiction over the State's three propositions of law, each of which shall be addressed in turn.

Law and Discussion

Before addressing the specific merits of the State's appeal, Ms. Derov initially points out that the State's First Proposition of Law in its merit brief differs from its First Proposition of Law set forth in its jurisdictional memorandum. In its merit brief, the state asserts as its first proposition of law "An odor of alcohol coupled with glassy eyes and failed sobriety tests can support probable cause *to arrest*." However, the State's memorandum in support of jurisdiction proposed as its first principle of law the proposition that "An odor of alcohol coupled with glassy eyes and failed sobriety tests can support probable cause to initiate *field sobriety tests*." In its merit brief, the state dismisses this alteration via footnote as an "obvious typographical error." However, Ms. Derov takes issue with the State's attempt to modify a proposition of law previously accepted by this Court.

First, the State's purported justification flies in the face of requiring jurisdictional memoranda for discretionary review. In order to have an informed conception of the case at issue, this Court requires, pursuant to its rules of practice, concise and unambiguous propositions of law which, if an appealing party were to prevail, could serve as a syllabus. *Drake v. Bucher* (1966), 6 Ohio St.2d 37, at paragraph three of the syllabus. This Court accepted discretionary jurisdiction over the State's appeal based upon the merits of the stated propositions of law set forth in the State's memorandum. As jurisdiction over the proposition of law set forth in the State's merit brief was never granted, Ms. Derov urges this Court to strike the State's argument as it is a product of a retooled and unaccepted proposition of law.

Moreover, the State's passing footnote "justifying" its decision to reconfigure its original proposition of law suggests it is entitled to excuse itself for its purported failure to proofread with neither notice nor leave of this Court. The State essentially dismisses its inattentiveness as though the accuracy of a propositions of law upon which this Court (at least partially) premised its acceptance of jurisdiction were irrelevant to the proceedings. Furthermore, and perhaps more significantly, the State's approach undercuts this Court's authority and autonomy to determine whether such a modification is permissible. Should the State have desired to make corrections to its Memorandum in Support of Jurisdiction, it would have had to have done so pursuant to S. Ct. Prac. R. VIII Sec. 7. Failing the State's compliance with this rule, Ms. Derov requests this Court to strike the State's first proposition of law.

Nevertheless, given the State's unilateral decision to change the phraseology (and complete import) of its first proposition of law, Ms. Derov believes it is necessary for her to respond to each version submitted. Accordingly, Ms. Derov shall first respond to the State's original proposition of law as set forth in its jurisdictional memorandum, which provided:

State's Original First Proposition of Law: An Odor of Alcohol Coupled with Glassy Eyes and Failed Field Sobriety Tests can Support Probable Cause to Initiate Field Sobriety Tests.

Appellee's Response to State's Original First Proposition of Law: An Odor of Alcohol Coupled with Glassy Eyes and Failed Field Sobriety Tests can Support Probably Cause to Initiate Field Sobriety Tests.

Under its original first proposition of law, the State misunderstands both the underlying holding of the Seventh Appellate District as well as 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, the Seventh District in *Derov* adhered 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.

The record clearly supports the Seventh District’s well-reasoned decision and therefore, the State’s original first proposition of law therefore has no merit.

State's Revised First Proposition of Law: An Odor of Alcohol Coupled with Glassy Eyes and Failed Field Sobriety Tests can support probable cause to arrest.

Appellee's Response to State's Revised First Proposition of Law: An Odor of Alcohol Coupled with Glassy Eyes and an Admission to Consuming One Drink Does not Support Probably Cause to Arrest.

Under its revised initial proposition of law, the State argues the facts and circumstances of this case were sufficient to establish probable cause to arrest.

As discussed briefly above, an officer has probable cause to arrest when he or she has “sufficient information, derived from a reasonably trustworthy source, to warrant a prudent [individual] in believing that [an offense] has been committed and that it has been committed by the accused.” *State v. Timson* (1974), 38 Ohio St.2d 122. In essence, probable cause requires “a reasonable ground for belief of guilt.” *State v. Moore*, 90 Ohio St.3d 47, 49, 2000-Ohio-10. Probable cause is a question of law for a court to determine whether, given the facts known at the time of the arrest, the police possessed probable cause. See, e.g., *Beck v. Ohio* (1964), 379 U.S. 89, 85.

Here, although the officer maintained, at the time of the arrest, he had reasonable grounds to believe Ms. Derov was guilty of OVI, the appellate court reviewed the evidence and concluded the process the officer used to formulate this belief was legally flawed and therefore unreliable.

Preliminarily, the arresting officer, after noticing a “strong odor” of alcohol emanating from Ms. Derov’s vehicle and eventually observing she had “red, glassy” eyes, administered several field sobriety tests, viz., the walk-and-turn, the HGN, the one leg stand, and a PBT. The officer testified the Ms. Derov passed one and failed three of these tests.

On appeal, 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

walk-and-turn and HGN tests and concluded that the administration of these tests did not meet the requisite standards set forth in the NHTSA manual and the Ohio Revised Code. That is, because the officer did not substantially comply with the NHTSA manual on the walk-and-turn test (not an issue on appeal to this court) and the HGN test, he did not have independent probable cause to arrest Ms. Derov for OVI.

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 provide a reasonable, articulable suspicion that a motorist is over the legal limit, may initiate field sobriety tests. Here, the only viable indicia of intoxication was the odor of alcohol, "red, glassy" eyes, and Ms. Derov's admission to consuming one beer. Further, Ms. Derov passed the only viable field sobriety test given. As will be developed further *infra*, such indicators are fundamentally insufficient to establish probable cause to arrest a motorist for OVI under the current statutory scheme. The holding of the Seventh Appellate District followed a well-worn path of Fourth Amendment jurisprudence in arriving at its conclusion and therefore this Court should sustain its determination.

THE STATE'S FIRST ARGUMENT: As the Ohio Legislature Lowers the Prohibited Level of Alcohol that One's Body Should Possess, It Stands to Reason that an Officer May Observe Less Factors or Indicia of Intoxication than Before the Legislature Lowered the Prohibited BAC.

THE APPELLEE'S RESPONSE TO STATE'S FIRST ARGUMENT: The Standard for Probable Cause Should not be Changed Simply Because the Ohio Legislature Slightly Lowers the Prohibited Level of Alcohol that One's Body Should Possess.

Under the rubric of its first proposition of law, the State sets forth two issues. The State's first issue essentially contends that the burden necessary to establish probable cause should be lessened whenever the Ohio General Assembly lowers the amount of alcohol an individual may have in their system to merit an OVI charge. This argument is asserted now for the first time on the State's discretionary appeal to this Court.

Although this is the first stage at which the State is an appellant, it is nonetheless obligated, like any party, to allow the trial court to pass on each and every argument in support of its position or waive the same at a later stage. It is well established that the failure to promptly object or assert any argument before the trial court, at a time when it could have been addressed, amounts to a waiver of all but plain error. *State v. Williams* (1977), 51 Ohio St.2d 112, at paragraph one of the syllabus; see, also, *State v. Molek*, 11th Dist. No. 2002-P-0147, 2002-Ohio-7159, at ¶21 (holding, on appeal of a ruling granting a defendant's motion to suppress, the state waives all but plain error when it argues issue for the first time in appellate court).

Not only did the state fail to assert its initial argument at the trial level, it also neglected to raise the issue before the appellate court. See *State v. Williams*, 74 Ohio St.3d 569, 579, 1996-Ohio-91 (holding a defendant who failed to object to issue in trial court and again failed to raise the issue in the court of appeals *waived* the issue and the waiver did not necessarily trigger a plain error analysis.)

This argument could have been, and therefore should have been, asserted at both the trial and intermediate appellate levels. It was not. The State's failure to do so is "a deviation from this state's orderly procedure" and, consequently, this Court need not entertain the State's argument regarding what is sufficient for probable cause. *State v. Awan* (1986), 22 Ohio St.3d 129, at the syllabus. Ms. Derov contends that the State has waived this argument, and that this Court must not consider same.

However, should this Court indulge the State by addressing its position, Ms. Derov asserts the argument is without merit regardless. Merely because the General Assembly downwardly revises, by a minimal amount, the amount of alcohol an individual may have in his or her system for purposes Ohio's OVI statute, it still does not prohibit an individual from having some alcohol in his or her system while driving. As long as the individual does not exhibit impairment and the amount of alcohol is below the legal limit, the individual may not be arrested. Ms. Derov recognizes that the odor of alcohol, in conjunction with additional factors indicating intoxication, may trigger an officer's ability to conduct further investigation (via administration of field sobriety tests) into whether the suspect is impaired. However, such an investigation must be premised upon a reasonable, articulable suspicion that the suspect is impaired. See, e.g., *Terry v. Ohio* (1968), 392 U.S. 1, 20-21. If and when impairment is disconfirmed, the individual's liberty may not be further compromised. Ms. Derov contends that is the entire purpose of field sobriety tests, to confirm or dissuade the officer's suspicions about the motorists impairment.

The State argues, however, that something tantamount to reasonable suspicion of intoxication should be sufficient for probable cause. The State's argument represents an attempt to effectively eradicate the Fourth Amendment's requirement that true probable cause be a

condition precedent to an arrest. It is undisputed that the General Assembly has not completely banned the consumption of alcohol prior to driving. Accordingly, an officer *must* have, pursuant to the Constitution of the United States and the Ohio Constitution, reasonable grounds, supported by circumstances sufficiently strong in themselves to warrant the believe that the individual is guilty of OVI to arrest. The grounds must objectively indicate the subject is committing the crime of OVI. Ms. Derov submits the evidence upon which the arresting officer premised his seizure fell well short of this standard.

Here, the officer possessed the following: a strong smell of alcohol, "red, glassy" eyes, and an admission of consuming one beer. The odor of alcohol and admission to consuming one beer are merely an indication that a subject had, perhaps recently, consumed *a single* beer. Further, fatigue, time of night, smoky environments, as well as many other factors, could reasonably account for Ms. Derov's red, glassy eyes as conceded by the trooper at the suppression hearing. (T.p. at 61). Ms. Derov further takes issue with the adjective "glassy" as an indicator of intoxication. Ms. Derov is hard pressed to recognize a mammal that whose eyes are not "glassy" under normal circumstances. Human eyes are natural wet and glassy at any given time by their very nature. The trooper, again, conceded as much. *Id.* Thus, without some independently clear indicia of intoxication, the adjective "glassy" should be afforded no weight in a probable cause determination. It is obvious that such observations are not sufficient, standing alone, to establish probable cause that Ms. Derov was intoxicated.

Regardless of an officer's experience in addressing OVI cases and no matter how attune that officer's olfactory senses may be, he or she cannot assume, let alone reliably surmise, from smell and the otherwise innocuous qualities of "red and glassy" eyes, that a subject is committing

the crime of OVI. Until the General Assembly outlaws driving a vehicle after consuming any quantity of alcohol, the smell of alcohol, strong or otherwise, along with the eyes condition, and the admission of consuming one beer, are inadequate to establish probable cause to arrest a motorist for OVI in Ohio. In this case, the officer had no other accepted and reliable indicators of intoxication at the time he seized the person of Ms. Derov. Further, Ms. Derov did pass the only viable field sobriety test, the one-leg-stand, indicating that she was not impaired. A fact that the trooper seemed to not take into account at all. He therefore did not have probable cause to arrest Ms. Derov.

In an attempt to find support for its position that a statutory decrease in the prohibitive BAC implies the probable cause standard should be lowered, the State sets forth, or more appropriately lists, a litany of cases, all of which are fundamentally distinguishable from the instant matter. Ms. Derov wishes to alert this Court to the fact that the State gives the BAC result for each of the cases it cites in its brief. This is confusing, as the BAC result obtained after arrest clearly has absolutely nothing to do with a probable cause to arrest determination. It appears that the State is attempting to justify an "end justifies the means" argument that is inappropriate in American jurisprudence or trying to deflect the Court's attention to matters outside this appeal. Essentially, the State is putting the cart before the horseless carriage.

The State first points to various cases from the Eleventh Appellate District in which that court has held a strong odor of alcohol coupled with bloodshot and glassy eyes, and slurred speech provided sufficient basis for probable cause. See *Willoughby v. Tuttle*, 11th Dist. No. 2005-L-216, 2006-Ohio-4170; *State v. Tripi*, 11th Dist. Nos. 2005-L-130 and 2005-L-131, 2006-Ohio-1687; *State v. Hancock*, 11th Dist. No. 2004-A-0046, 2005-Ohio-4478. While Ms. Derov

projected a strong odor of alcohol and had red, glassy eyes, the officer testified she did not exhibit any physical signs of impairment during their encounter. Without the slurred speech component, the State's attempt to analogize this matter with the rule set forth in the Eleventh District fails.

The State next cites a factual scenario in which a motorist was stopped for failure to use his turn signal. *State v. Sneed*, 4th Dist. No. 06CA18, 2007-Ohio-853. After approaching the suspect's vehicle, the officer noticed a strong odor of alcohol and, after poorly performing various field sobriety tests, the motorist was arrested. These indicators led the Fourth District to conclude the officer possessed probable cause. Here, Ms. Derov did not engage in any erratic driving, the only competent, reliable field sobriety test, the one-leg-stand, was passed by Ms. Derov. Again, *Sneed* is factually distinguishable and cannot be intelligibly compared with the underlying matter.

Next, in *State v. Stout*, 5th Dist. No. 07-CA-51, 2008-Ohio-2397, a motorist was in an accident after purportedly swerving to avoid a deer. In light of the accident, indicating erratic driving, the Fifth District concluded probable cause existed where the driver emitted a strong smell of alcohol, had bloodshot eyes and conducted field sobriety tests. In the case sub judice, Ms. Derov was not in an accident and, in fact, there was nothing unusual about her driving and she passed the only credible field sobriety test, the one-leg-stand.. *Stout* is not sound analogy to this case, the State failed to mention that the defendant in Stout had failed field sobriety tests as well.

The State also cites *State v. Turner*, 11th Dist. No. 2007-P-0090, 2008-Ohio-3898, in which the Eleventh District found probable cause after the arresting officer observed an odor of alcohol, bloodshot eyes, and slurred speech. The motorist further admitted to consuming "a

couple beers” and performed poorly on various field sobriety tests. This case bears no similarity to the instant matter. Here, while Ms. Derov had a strong odor of alcohol on her person and possessed red, glassy eyes, her speech was not slurred, she admitted to consuming only one beer. Moreover, again the only viable field sobriety test, the one-leg-stand, was passed by Ms. Derov. The facts in *Turner* do not remotely match those in this case.

The State next points to *State v. Salsbury*, 10th Dist. No. 07AP-321, 2007-Ohio-6857 in which the Tenth Appellate District determined probable cause was present where a motorist drove erratically, had bloodshot eyes, projected a strong odor of alcohol, and had poor dexterity. The motorist admitted to having a couple drinks, had difficulty exiting her vehicle, and performed poorly on field sobriety tests. Once again, the facts of the instant case bear no resemblance to those in *Salsbury*. Ms. Derov was not driving erratically, she exited her vehicle without difficulty and by the officer’s own admission, appeared physically unimpaired. There are no reliable field sobriety test indicating Ms. Derov was intoxicated, in fact as discussed above, quite the opposite was indicated from the only reliable field sobriety test. Clearly, *Salsbury* cannot be reasonably compared with the underlying matter.

Next, in *State v. Ecton*, 2nd Dist. No. 21388, 2006-Ohio-6069, the Second District found probable cause to arrest where a motorist engaged in a hit and skip and, after being apprehended stated he was “too drunk” to perform field sobriety tests. In the course of their interaction, the officer observed a strong odor of alcohol, slurred speech, and poor physical abilities. Further, the officer noted that the motorist had apparently urinated on himself. *Ecton* represents a striking departure from the generally benign facts of Ms. Derov’s case. Ms. Derov never admitted to being drunk, let alone “too drunk” to perform field sobriety tests. Her physical demeanor and

speech were ostensibly unimpaired and there is no evidence indicating Ms. Derov wet herself. It is unclear to Ms. Derov how the State could possibly contend that *Ecton* somehow bears any factual similarity at all to the case at bar. Citing the *Ecton* case in this manner is misleading by the State at best.

The remaining cases cited by the State are similarly distinguishable. They include facts in which motorists were, inter alia, speeding and/or driving erratically, had performed poorly on field sobriety tests, had notable physical impairment. See *State v. Cook*, 6th Dist. No. WD-04-029, 2006-Ohio-6062; *State v. Crotty*, 12th Dist. No. CA200405-051, 2005-Ohio-2923; *State v. Morgan*, 10th Dist. No. 05AP-552, 2006-Ohio-5297. In each of these cases, there were facts, beyond those in the underlying matter, lending to the conclusion that the arresting officers under those circumstances, had probable cause. In the instant matter, the officer simply did not have sufficient indicia of intoxication to establish probable cause to arrest, the State's poor analogies only serve to underscore this conclusion.

The State's position that the threshold for probable cause has been lowered by the General Assembly's reduction of the prohibited BAC for motorists is not supported by the foregoing "authority" upon which it relies for the proposition. In each of the above cases, the facts and circumstances established that, at the time of the arrests, the various officers could reasonably believe the motorists were driving under the influence. The factual scenarios of these cases reveal the officers would have probable cause irrespective of the statutory legal limit.

Probable cause "is a fluid concept revolving on the assessment of probabilities and particular factual contexts not readily or even usefully reduced to a neat set of legal rules." *Ornelas v. United States* (1996), 517 U.S. 690, 698. The probable cause calculus will always

depend upon the specific facts and circumstances surrounding a particular case. The analysis does not change or devolve simply because the prohibited statutory BAC level is reduced. Until driving after consuming any quantity of alcohol is completely prohibited by statute, an officer will be required by our Constitution to point to sufficient, objective indicators that a motorist is driving impaired in order to establish probable cause, regardless of how low the prohibited BAC is statutorily set. The officer in this case was only able to point to two ambiguous indicators which, when coupled with his recognition that Ms. Derov was not driving erratically and exhibited no apparent physical impairments, does not establish probable cause under Ohio's current OVI law.

THE STATE'S SECOND ARGUMENT: Trooper Martin Observed a Strong Odor of Alcohol and Red[,] Glassy Eyes, Appellee Derov Fail[ed] Two of Three Standardized Field Sobriety Tests, and Admitted to Consuming One Beer; Thus, the Trial Court Properly Found that the Trooper Had Sufficient Probable Cause to Arrest for Driving Under the Influence of Alcohol.

THE APPELLEE'S RESPONSE TO STATE'S SECOND ARGUMENT: A Strong Odor of Alcohol, Glassy Eyes and an Admission to Consuming One Beer are Insufficient to Establish Probable Cause to Arrest for OVI.

Initially, Ms. Derov draws this Court's attention to the manner in which the foregoing issue (as well as the manner in which the State's first proposition of law, both original and modified) is styled. Both include the unwarranted presumption that Ms. Derov failed two of three field sobriety tests. Although the arresting officer testified Ms. Derov failed the walk and turn test, the Seventh District concluded he did not substantially comply with the NHTSA guidelines in administering this test. *Derov*, supra, at ¶20-25. This holding is not an issue challenged by the State in the instant appeal. Therefore, the State is misstating the evidence against Ms. Derov before this Court.

Further, even though the State takes issue with the Seventh District's determination that

the PBTs are not competent for a probable cause calculation, as well as the arresting officer's failure to substantially comply with the NHTSA standards pertaining to HGN testing, at this point in the proceedings, the State may not argue Ms. Derov "failed" these tests. Because the current controlling opinion held these results should have been suppressed, the State may not rely upon their results as a foundation for probable cause to arrest. As of the date this Court accepted jurisdiction, any field sobriety test results that were taken in this case were either passed by Ms. Derov or thrown out by the Seventh District.

With this in mind, the only remaining legally valid indicia of intoxication was the strong odor of alcohol, the condition of Ms. Derov's eyes, and her admission that she had consumed one beer. Militating against a finding of probable cause was the *absence* of indicators regarding Ms. Derov such as (1) erratic driving and/or a moving violation; (2) overt or obvious physical impairment; (3) slurred speech; and (4) reliable field sobriety tests indicating intoxication. Some or all of these factors were present in each case submitted by the State in support of its argument that the arresting officer had probable cause in the instant matter.

Ms. Derov recognizes that probable cause may be established without regard to field sobriety test results, where the totality of the circumstances otherwise indicate a motorist is impaired. However, this case does not possess that circumstance. As discussed above, the strong odor of alcohol in conjunction with red, glassy eyes and an admission to consuming one beer are factors, which are neither necessary nor sufficient to establish probable cause. While these factors are relevant to the inquiry, alone they are inadequate to establish the requisite threshold for a constitutionally valid arrest.

Accordingly, Ms. Derov urges this court to uphold the Seventh Appellate District's well-

reasoned conclusion that, under the totality of the circumstances, the arresting officer did not have probable cause to arrest Ms. Derov for OVI. The cases cited by the State are fundamentally disanalogous, and do not inform the discussion as to whether the arresting officer possessed probable cause to arrest Ms. Derov given the totality of the circumstances of this case.

Moreover, the surrounding facts of Ms. Derov's case coupled with the lack of any reasonable indication that Ms. Derov was impaired demonstrates the officer did not possess sufficient evidence to meet the well-established standards necessary for finding probable cause to arrest. For these reasons, the State's modified first proposition of law must be overruled.

State's Second Proposition: A Portable Breathalyzer Test Can Support Probable Cause to Arrest for Driving Under the Influence.

Appellee's Response to State's Second Proposition of Law: A Portable Breathalyzer Test Cannot be Considered when Determining Probable Cause to Arrest for OVI.

In support of its second proposition of law, the State argues that results from portable breath tests should be admissible for proof of probable cause. As a basis for its position, the State principally relies upon the holdings of the Fourth, Sixth, and Ninth appellate districts. See *State v. Gunther*, 4th Dist. No. 04CA27; see, also, *State v. Masters*, 6th Dist. No. WE-06-045, 2007-Ohio-7100; *State v. Rinard*, 9th Dist. No. 02CA0060, 2003-Ohio-3157. Although these three districts support the State's position, as discussed in greater detail below however, the majority of Ohio Appellate Court's have rejected the State's Proposition of Law.

The State further argues this Court should endorse its position on this matter, because certain other states have allowed PBTs for purposes of a probable cause determination. Again, however, many other states wisely have not.

Ms. Derov maintains that PBTs should not be permitted as a means to establish probable

cause in Ohio. PBTs are notoriously unreliable and are not instruments approved by the Ohio Department of Health for testing amount of alcohol in an individual's breath. The Ohio Department of Health is the agency statutorily mandated and entitled to promulgate such regulations, pursuant to R.C. 3701.143. The Department of Health had formerly acknowledged PBTs as an approved method of testing, but it has since removed this method of testing from its list of approved devices. As PBTs are no longer approved as a viable testing device, there exists no standards for assessing whether an officer, who utilizes them, has complied (substantially or otherwise) with preferred or required methods of administration. In light of these points, Ms. Derov maintains the Health Department's role as the sole authority for promulgating approved devices for testing precludes this Court from judicially endorsing a procedure, which has been consciously disapproved by the Department. Ms. Derov asserts a contrary holding would involve judicial legislation in violation of the principle of separation of powers.

Finally, various cases have commented upon the inherent unreliability of PBTs. Allowing an officer to utilize unreliable instrumentation as a basis for depriving an individual of his or her guaranteed freedom amounts to more than just a coincidental inconvenience for that person. Such an arbitrary exercise of state power is contrary to our United States Constitution and the Ohio Constitution, as well as general principles of ordered liberty.

THE STATE'S FIRST ARGUMENT: A Majority of District Courts in Ohio Either Hold that Portable Breath Tests (PBT) May be used as One Factor in Determining Probable Cause, or Have Declined to Address the Issue.

THE APPELLEE'S RESPONSE TO THE STATE'S FIRST ARGUMENT: A Majority of Ohio Appellate Courts that have Addressed the use of PBTs to Establish Probable Cause Have Concluded that PBTs are Inadmissible for Determining Probable Cause.

THE STATE'S SECOND ARGUMENT: A Number of Other States Allow PBTs to be Used in Determining Probable Cause, and Recognize Their Reliability.

THE APPELLEE'S RESPONSE TO THE STATE'S SECOND ARGUMENT: Other States have Rejected the use of PBTs for Determining Probable Cause.

As the issues raised by the State under its Second Proposition of Law are related, Ms. Derov shall respond to them simultaneously for ease of discussion.

With respect to the first issue, the State argues the balance of appellate districts in Ohio have determined PBTs may be used in establishing probable cause or have yet to address the issue. While this may be accurate, out of the districts in this state that have addressed the issue, more appellate courts than not have held PBTs are inadmissible for establishing probable cause. 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. Smith*, 11th Dist. Nos. 2006-P-0101 and 2006-P-0102, 2008-Ohio-3251; *State v. Mason* (Nov. 27, 2000), 12th Dist. No. CA99-11-033, 2000 Ohio App. LEXIS 5472.

Alternatively, the Fourth, Sixth and Ninth Appellate Districts to support its position that PBTs are permissible for the probable cause determination. See *Gunther*, supra; *Masters*, supra; and *Rinard*, supra. The State also cites to the First District's decision in *State v. Polen*, 1st Dist. Nos. C-050959, C-050960, 2006-Ohio-5599 in support of its argument. Although the court in *Polen* utilized PBT results in its probable cause analysis, the issue of the propriety of its use

was not before that court. Finally, the State, for some reason, points to districts that have yet to conclusively address this issue to support its position. See *State v. Howard*, 2d Dist. No. 2007 CA 42, 2008-Ohio-2241; *State v. Crowe*, 5th Dist. No. 07CAC030015, 2008-Ohio-330. Contrary to the State's assertion, the weight of authority on this issue is congruent with Seventh Appellate District's holding in the underlying case.

Next, the State points to various state courts have ruled in favor of admitting PBTs for the probable cause analytic. See *State v. Pollman* (Kan. Aug. 8, 2008), No. 93,947, 2008 WL 3165663 (Kansas); Wisconsin Stat. 343.303; *State v. McGuigan* (Vt. Aug. 14, 2008), Nos. 2006-437 and 2006-501, 2008 WL 3491526 (Vermont); *Greene v. Commonwealth* (Ky. App. 2008), 244 S.W.3d 128; *State v. Reavelly* (Mont., 2007), 338 Mont. 151. Although the authority of other states may be academically interesting, it is hardly instructive as to whether PBTs should be permitted for establishing probable cause in Ohio. To wit, it is unknown whether the legislatures of the foregoing states (or their departments of health) expressly acknowledge, through codified law, the viability of PBTs. If they are a legally approved means of testing in these states, the rulings cited by the State are of no moment because, Ohio no longer lists PBTs as approved instruments (and arguably disapproves of their use). For instance, the Wisconsin statute cited by the State is misleading, as it requires the officer to use "a device approved by the department of this purpose." See Wis. Stat. 343.303. Ohio has no such authorization for PBT devices. Furthermore, both Iowa and Washington disapprove of the use of PBTs in the formulation of probable cause. See *Thompson v. Dept. of Licensing* (Wash., 1998), 91 Wn. App. 887 (Washington); *State v. Zell* (Ia, 1992), 491 N.W. 2d 196 (Iowa). Thus, the State's argument, is overshadowed by states which disagree.

Despite the State's mathematical accounting of which side has the most support, Ms. Derov maintains that the argument is inappropriate. Rather, Ms. Derov submits that this court should affirm the Seventh Appellate District's holding on this issue, because PBTs are inherently unreliable, and are not listed as approved instruments for testing a subject's breath for alcohol in the State of Ohio.

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." Accordingly, 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, the Department has not included PBTs on its list of approved methods. In fact, the court in *Ferguson* pointed out that the Department of Health has explicitly rejected portable breath test results for relating to OVI cases. *Id.* at 8. These premises, therefore, compel the conclusion that PBTs are not viable for use in any step of the criminal process in the State of Ohio.

Moreover, in *Ferguson, supra*, the Third District pointed out that "the Ohio Department of Health no longer recognizes the [portable breath] test." *Id.* at 8. The Ohio Department of Health did, at one time, approve PBTs for certain purposes. The fact that the Health Department now excludes PBTs as an approved technique for testing a subject's breath provides a strong foundation for upholding the Seventh District's ruling in this matter. The Department of Health has the sole authority to formulate and promulgate proper methods for testing an individual's breath *and* it actively removed PBTs as a valid method for such testing. One must conclude that the Department's action relating to the removal of the PBT as an approved method of testing was

a conscious, informed, and well-considered decision, which may not be questioned.

The Department has determined PBT results are not an acceptable means of ascertaining the amount of, or even the existence of, alcohol in a person's breath. It therefore follows that, irrespective of the foundation upon which the Fourth, Sixth, and Ninth Districts base their conclusions relating to the admissibility of the results, such tests may *not* be used. *Ferguson, supra; Derov, 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. Allowing a court act in this way would defy the General Assembly’s proclamation under the statute and permit the unconstitutional process of legislation from the bench.

This significant problem aside, where an issue 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 portable breath test results as an approved method of testing an individual’s breath. Because 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, nor consistent, way for the State to demonstrate substantial compliance. As a matter of procedural regularity, not to mention statutory deference, portable breath test 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 portable breath test results. Authority, including

that within the Fourth District, a district the State cites in support of its position, indicates the Department of Health's ultimate disapproval of PBTs is a function of their unreliability. See *State v. Shuler*, 168 Ohio App.3d 183, 2006-Ohio-4336, at ¶10. 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 P11, quoting *Shuler, supra*.

Clearly, there are multiple, completely innocuous (and legally permissible) scenarios under which a test could yield a false positive. 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 indication of the presence of alcohol, nor a measurement of that alcohol in an 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 and right to travel.

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 existence of, nor 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, Ms. Derov requests this Court to overrule the State's Second Proposition of Law.

State's Third Proposition of Law: There is no 68-second time requirement for substantial compliance with the HGN test.

Appellee's Response to the State's Third Proposition of Law: The Trooper Agreed that the Minimum Time He Should have Taken to Administer the HGN Was 68-seconds, therefore, his 44 Second Administration was not Substantial Compliance.

Under its Final Proposition of Law, the State essentially argues the Seventh Appellate District erred in suppressing the HGN test, when the court accepted the arresting officer's testimony that the test should take at least 68 seconds.

During the suppression hearing, the arresting officer testified he observed nystagmus prior to the onset of forty-five degrees, but failed to stop and verify that the jerking continued. (T.p. 69-70). The NHTSA manual requires an officer administering the test to stop and verify whether

the Nystagmus continues. See NHTSA Manual at VIII-7. The NHTSA requires two observations at this point for an administering officer to score a clue, observing the nystagmus prior to forty-five degrees and stopping to verify that the nystagmus continues. *Id.* The officer conceded he failed to comply with fifty percent of the NHTSA requirements for that portion of the HGN alone.

Upon further examination, the officer testified regarding the proper amount of time it takes to administer each aspect of the HGN test pursuant to the NHTSA Manual. (T.p. 63-88). Although the manual does not set forth a specific amount of time it takes to administer the test, it does specify how fast an administering officer is to move the stimulus, for how long, and how many times each phase should be completed. Pursuant to these figures, the officer agreed that *his* proper administration of the HGN should take a minimum of sixty-eight seconds. The officer also agreed, after viewing the dash-mounted video, his administration of the HGN test took only forty-four seconds. The trial record indicates that the officer either did not specifically adhere to the speed at which the stimulus must be moved, failed to stop and verify, and/or failed to perform each of the three phases twice as required by the manual.

With the foregoing evidence in mind, the Seventh District acknowledged that “[the guidelines do not state a total minimum amount of time required for properly conducting all three phases of the exam.” *Derov*, *supra*, at ¶16. However, the court concluded, based upon the officer’s testimony, that this HGN test represented a “significant deviation from the minimum time specified in the guidelines.” *Id.* at ¶19. According to the court, this called “the reliability of the results [of the HGN test] into question. *Id.*

The 68 second measurement was factual testimony developed over a lengthy and rigorous cross-examination of the arresting officer. The time frame of 68 seconds to which the officer

testified incorporated both the basic elements of the test as well as the amount of time 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. Consequently, the State’s Third Proposition of Law is a non-sequitur, i.e., the court in *Derov* 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 68 seconds. *Id.* at P16 (Emphasis added.) Further, the officer agreed to this calculation upon cross examination. That is the factual testimony, to which, there was no rehabilitation by the State. 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 language of the *Derov* opinion allows for a permissible factual inference of 68 seconds, not a mandatory legal conclusion. Accordingly, the State’s third proposition of law must be overruled.

CONCLUSION

Throughout its merit brief, the State goes to great lengths, using both hyperbole and “straw man” argumentation, to portray the Seventh Appellate District’s resolution of the underlying matter as a shocking and dangerous decision portending the collapse of order and predictability in Ohio’s OVI law. All that the State and the Amicus parties fear from the Seventh District’s ruling was dicta, not the actual operative opinion.

After peeling away the State’s rhetorical embroideries and conducting an objective review of the underlying matter, it is clear that the Seventh District’s decision is a well-reasoned decision

based upon an analysis of the law regarding the facts specific to Ms. Derov's case. It is far from an earth-shaking proclamation. Simply, the odor of alcohol, glassy, red eyes and an admission to consuming one drink and passing a field sobriety test is clearly not sufficient to establish probable cause to arrest. Further, the PBT is inherently unreliable, has been removed by the Department of Health as an approved device and cannot be utilized for probable cause. Finally, the timing of the HGN in this matter was developed by lengthy factual testimony of the trooper himself. The timing issue is a factual, not legal, standard.

The trooper did not have probable cause to arrest Ms. Derov, as the Seventh District recognized. Ms. Derov prays this Court affirm the well-reasoned ruling of the Seventh District in this matter.

Respectfully submitted,



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