

BEFORE THE SUPREME COURT OF OHIO

STATE OF OHIO

PLAINTIFF-APPELLANT

-vs-

JESSICA DEROV

DEFENDANT-APPELLEE

CASE NOS.: 2008-0853  
2008-0858

ON APPEAL FROM CASE NO. 07 MA 71  
BEFORE THE COURT OF APPEALS FOR  
THE SEVENTH APPELLATE DISTRICT

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REPLY BRIEF OF APPELLANT-THE STATE OF OHIO

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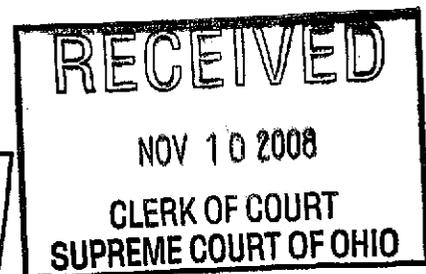
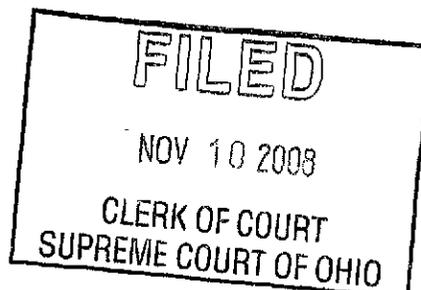
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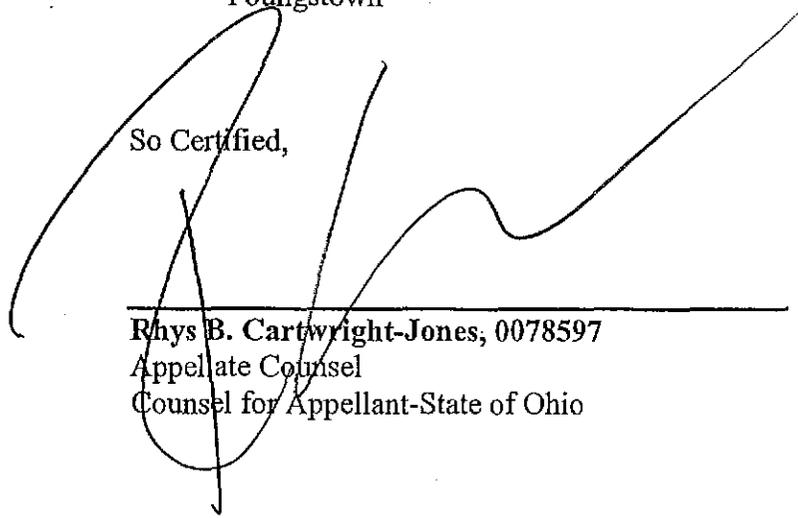
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## Statement of the Case, Facts, and Introduction

As stated in the State's Merit Brief, this case involves a routine OVI arrest. On August 12, 2006, at approximately 2:30 a.m., Trooper Shawn Martin of the Ohio State Highway Patrol noticed Ms. Derov's car and saw that the tags on the license plates were expired.<sup>1</sup> He checked the license plate number through LEADS and it came back as being registered to a different vehicle than which Ms. Derov was driving.<sup>2</sup> Thereafter, Trooper Martin initiated a traffic stop and approached the stopped vehicle.<sup>3</sup>

Martin could smell a *strong* odor of alcohol on Derov's breath<sup>4</sup> and observed that her eyes were glassy and red.<sup>5</sup> Martin requested that Derov exit her vehicle<sup>6</sup> and subsequently had her perform field sobriety tests<sup>7</sup> and a portable breath test.<sup>8</sup> Derov failed all but one of these tests.<sup>9</sup> Derov admitted then, in response to inquiry by Martin, that she had consumed alcohol

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<sup>1</sup> Tr. at 6-7.

<sup>2</sup> Id.

<sup>3</sup> Id. at 7.

<sup>4</sup> Id. at 8 and 15; see, e.g., *State v. Osborn*, 9<sup>th</sup> Dist. No. 07CA0054, 2008-Ohio-3051, ¶ 9, quoting, *State v. Toler* (Jan. 30, 1998), 2<sup>nd</sup> Dist. No. 97 CA 47, unreported, 1998 WL 32564, at \*2, and stating, "the strong odor of alcohol alone is sufficient to provide an officer with reasonable suspicion of alcohol impairment." See, also, *State v. Marshall*, 2<sup>nd</sup> Dist. No. 2001-CA-35, 2001-Ohio-7081; *State v. Haucke* (Mar. 17, 2000), 2<sup>nd</sup> Dist. No. 99 CA 77, unreported, 2000 WL 282304; *State v. Turner* (Jan. 11, 1993), 4<sup>th</sup> Dist. No. 812, unreported, 1993 WL 3524.

<sup>5</sup> Tr. at 15.

<sup>6</sup> Id. at 9.

<sup>7</sup> Id. at 10.

<sup>8</sup> Id. at 26.

<sup>9</sup> Id. at 19, 22-23 and 26.

that evening.<sup>10</sup> Martin arrested Derov following the field sobriety tests,<sup>11</sup> and admission to alcohol consumption, and transported her to the patrol post.<sup>12</sup> Once there, Martin gave Derov breath test.<sup>13</sup> Her test registered at .134.<sup>14</sup> This is well over the legal limit. And this satisfies the two necessary elements: drunkenness and driving.<sup>15</sup>

On appeal, the Seventh District vacated Derov's conviction, and remanded the matter, holding among other things that the police lacked probable cause to arrest Derov. In support, the Seventh District conclude that the Trooper Martin's use of a portable breath test was inadmissible to support probable cause, and that the police's use the horizontal gaze nystagmus test did not effect substantial compliance with Ohio's standards for the same.

The State appealed to this Court, and now files its reply brief, urging reversal, in three propositions of law:

- (1) An Odor of Alcohol Coupled with Glassy Eyes and Failed Sobriety Tests can Support Probable Cause to Arrest.**
- (2) A Portable Breathalyzer Test Can Support Probable Cause to Arrest for Driving Under the Influence.**
- (3) There is No 68-Second Minimum Time Requirement for Substantial Compliance with the HGN Test.**

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<sup>10</sup> Id. at 26-28.

<sup>11</sup> Id. at 26.

<sup>12</sup> Id. at 28.

<sup>13</sup> Id. at 31 and 53.

<sup>14</sup> Id at 54.

<sup>15</sup> Id.

## Law and Discussion

As stated in the State's Merit Brief and the various *amicus curiae* briefs, clear and concise OVI laws are the antidote that law enforcement officers need to effectively and efficiently remove those impaired and intoxicated drivers from our streets and highways to clear the path for innocent travelers. The U.S. Supreme Court recognized the seriousness of driving while intoxicated and the tragedy that inevitably follows some twenty-five years ago: "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."<sup>16</sup>

### **First Proposition of Law: An Odor of Alcohol Coupled with Glassy Eyes and Failed Sobriety Tests can Support Probable Cause to Arrest.**

First, the State's Memorandum in Support of Jurisdiction contained an obvious typographical error, to which this Honorable Court accepted jurisdiction to hear the merits of that argument. And even Appellee and its *amicus* points out, the original wording contained in the first proposition of law is circular and self-contradictory. The State is obviously aware that the standard to initiate field sobriety tests is a reasonable, articulable suspicion, not probable cause.<sup>17</sup> With that in mind, failed sobriety tests cannot support the initiation of the same. It is clear that

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<sup>16</sup> South Dakota v. Neville (1983), 459 U.S. 553, 558-59, citations omitted. See, also, Breithaupt v. Abram (1957), 352 U.S. 432, 439, stating "The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield." Accord Tate v. Short (1971), 401 U.S. 395, 401, deploring "traffic irresponsibility and the frightful carnage it spews upon our highways."

<sup>17</sup> See State v. Hill (June 25, 2008), 7<sup>th</sup> Dist. No. 07 CO 12, 2008 Ohio 3249, ¶ 15, citing State v. Wilson (Mar. 7, 2003), 7<sup>th</sup> Dist. No. 01 CA 241, 2003 Ohio 1070, at ¶ 17.

this Honorable Court accepted jurisdiction to hear the merits of the State's argument, and not necessarily the exact verbiage contained in that proposition.

Second, if Appellee had true contention with the procedural error, and not necessarily the actual argument that the State has raised, it would have filed a motion to strike the argument at the moment that she had learned of this error. And not when she filed her merit brief. The argument set forth in the State's Memorandum in Support of Jurisdiction mirrors its argument now in its merit brief. This is the same argument that this Honorable Court accepted jurisdiction on, and wishes to hear the merits of, and not solely on the proposition's heading.

As to the State's argument, "[t]he United States Supreme Court has repeatedly emphasized that the probable cause standard is a practical, non-technical conception. Probable cause deals with probabilities, which are not technical, but factual and practical considerations of everyday life on which reasonable and prudent people, not legal technicians act."<sup>18</sup> Thus, the basic understanding of probable cause must look to the facts that an officer encounters, and apply those facts to the existing law.

Specific to drunk driving, "[i]n determining whether the police had probable cause to arrest an individual for DUI," 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]

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<sup>18</sup> United States v. Chase (Aug. 9, 2006), D. Nev. No. 206-CR-0065-PMP-PAL, unreported, 2006 WL 2347726, at \*3, internal quotations omitted, quoting *Brinegar v. United States* (1949), 338 U.S. 160, 175-76. U.S. Const. Amend. IV, V, VI, XIV; Oh. Const. Art. 1, sec. 14.

influence.”<sup>19</sup> Probable cause, however, “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.”<sup>20</sup> And the U.S. Supreme Court has cautioned that “... because the mosaic which is analyzed for a reasonable-suspicion or probable-cause inquiry is multi-faceted, one determination will seldom be a useful precedent for another.”<sup>21</sup> Hence, “[a] court makes this determination based on the totality of facts and circumstances surrounding the arrest.”<sup>22</sup> And the “[r]esolution of whether the facts establish sufficient probable cause to arrest is a question of law.”<sup>23</sup>

Chief Justice John Marshall stated that probable cause is established with less evidence than is required to secure a conviction: “the term ‘probable cause,’ according to its usual acceptation, means less than evidence which would justify condemnation; and, in all cases of seizure, has a fixed and well known meaning.”<sup>24</sup> And the U.S. Supreme Court long ago

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<sup>19</sup> *State v. Homan* (2000), 89 Ohio St.3d 421, 427, superseded by statute on other grounds, citing *Beck v. Ohio* (1964), 379 U.S. 89, 91; *State v. Timson* (1974), 38 Ohio St.2d 122, 127.

<sup>20</sup> *State v. Morgan*, 10<sup>th</sup> Dist. No. 05AP-552, 2006-Ohio-5297, ¶ 26, quoting *State v. Anez* (C.P. 2000), 108 Ohio Misc.2d 18, 27, citing *Ornelas v. United States* (1996), 517 U.S. 690, 698.

<sup>21</sup> *Ornelas*, 517 U.S. at 698, quoting *Illinois v. Gates* (1983), 462 U.S. 213, 238, internal quotations omitted.

<sup>22</sup> *State v. Crotty*, 12<sup>th</sup> Dist. No. CA2004-05-051, 2005-Ohio-2923, ¶ 14, citing *State v. Homan* (2000), 89 Ohio St.3d 421, 427.

<sup>23</sup> *Crotty* supra at ¶ 14, citing *State v. Deters* (1<sup>st</sup> Dist. 1998), 128 Ohio App.3d 329, 333.

<sup>24</sup> *Locke v. United States* (U.S. 1813), 7 Cranch 339, 348.

recognized that probable cause is a question of probability, not certainty; thus, it affords law enforcement officers an amount of leeway to effectively and efficiently protect the community:

These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice.<sup>25</sup>

Further, evidence supporting probable cause need not be legally competent to admit at trial.<sup>26</sup> As a matter of probabilities, an officer may ultimately be proven wrong, but nevertheless remains within the bounds of Fourth Amendment jurisprudence.

(I)

**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.**

It appears that Appellee has gone through great lengths to persuade this Honorable Court to avoid addressing the merits of the State's first proposition of law. And one can only wonder why this is. Appellee argues that the State failed to raise the argument concerning the factors necessary to support probable cause to arrest for an OVI offense. While the argument may be framed in different words, the issue remains the same. The issue argued in the trial court was

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<sup>25</sup> Brinegar v. United States (1949), 338 U.S. 160, 176.

<sup>26</sup> United States v. Ventresca (1965), 380 U.S. 102, 107, citing Draper v. United States (1959), 358 U.S. 307, 311.

whether probable cause supported Trooper Martin's decision to arrest Appellee on the night in question. In the Seventh District, the issue remained the same. And now before this Honorable Court, the issue—to no surprise—remains the same. To accept Appellee's contention that the State's merit brief must mirror its argument at every point, is to conclude that each party should submit the same brief throughout each stage of the process—from the trial court, to the appellate court, and finally to this Honorable Court. That proposition would ignore the function that each court is charged with, and the standard of review that each court must adhere to. Simply, the issue has not been waived, and—as the record indicates—has been argued at each stage throughout the proceeding of this case.

Appellee is correct in that the standard of probable cause has not changed, and will likely never change. But, the surrounding facts—"the totality of the circumstances"—will always change from case to case. And so too will the analysis. This Honorable Court cannot ignore the fact that a reduction in the prohibited BAC level undoubtedly changes the circumstances in a way that allows an officer to view the circumstances differently than before the law was amended. In drawing a comparison to this rationale, this Court should recognize that the same application of those enumerated factors used in determining one's level of intoxication and/or impairment is used in OVI cases dealing with persons under 21.

Courts already recognize this rationale in dealing with underage OVI cases. The legislature does not require any signs of impairment to support a conviction, nor an arrest. Why? Because the Revised Code set forth that a person under the age of 21 who consumes virtually *any* amount of alcohol and drives is guilty of a criminal offense.<sup>27</sup> And courts have concluded the same. Evidence of alcohol consumption by a person under the age of 21 supports probable

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<sup>27</sup> See R.C. 4511.19(B).

cause to arrest.<sup>28</sup> Consumption alone supports probable cause because of one basic fact: the prohibited BAC level is so minimal. An experienced officer knows that an underage person's BAC will in all probability, measure higher than 0.02 percent, regardless of the actual amount consumed. There simply is no need to observe any signs of impairment with underage persons.

The Third District reasoned that "because the prohibited amount of blood alcohol in an underage driver is so minimal, an arresting officer must look for more subtle evidence of drinking, and evidence of only very slight impairment of performance."<sup>29</sup> The court stated "that an officer must look for less obvious indicators of alcohol consumption when assessing an underage drinking driver, but not because there is a 'different' or 'lesser' probable cause standard to satisfy."<sup>30</sup> The standard itself does not change, but the law that courts apply to the surroundings facts and circumstances does change. And this is nothing more than common sense, as indicators of 0.02 percent per 210 liters of breath are more subtle than the indicators of 0.08 percent per 210 liters of breath. Thus, the facts which constitute probable cause to arrest an underage driver are much less than those necessary to constitute probable cause to arrest an adult driver.<sup>31</sup>

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<sup>28</sup> See *Kirtland Hills v. Fuhrman* (May 2, 2008), 11<sup>th</sup> Dist. No. 2007-L-151, 2008 Ohio 2123; *State v. Johnson* (Mar. 17, 2008), 3<sup>rd</sup> Dist. No. 5-07-43, 2008 Ohio 1147; *Columbus v. Weber* (Oct. 11, 2007), 10<sup>th</sup> Dist. No. 06AP-845, 2007 Ohio 5446; *State v. Polen* (Oct. 27, 2006), 1<sup>st</sup> Dist. Nos. C-050959, C-050960, 2006 Ohio 5599; *State v. Knight* (Dec. 27, 2005), 5<sup>th</sup> Dist. No. 2005-CA-140, 2005 Ohio 6951; *State v. Gibson* (Mar. 17, 2000), 4<sup>th</sup> Dist. No. 99 CA 2516, unreported, 2000 WL 303134; *Stidham*, *supra*; but see *State v. Hurley* (Nov. 17, 2003), 3<sup>rd</sup> Dist. No. 8-03-14, 2003 Ohio 6100.

<sup>29</sup> *State v. Stidham* (Mar. 27, 1998), 3<sup>rd</sup> Dist. No. 8-97-34, unreported, 1998 WL 135800, at \*2.

<sup>30</sup> *Id.*

<sup>31</sup> *See id.*

As the Ohio legislature lowers the BAC limit required to legally be convicted of an OVI, so too should the number of factors or indicia of intoxication needed to establish probable cause to arrest one for an OVI—whether it be for a *per se* violation or for simply being under the influence (impaired). The cases cited in the State’s merit brief serve as a clear illustration that a person’s BAC is often times directly related to factors a person displays. We know this because the main function and purpose of the NHTSA field sobriety tests is to estimate one’s BAC and level of impairment by the officer’s observations.

Because of the lowered alcohol concentration allowed by law in one’s blood, a person’s driving and motor skills are of less significance than it was five years ago when the legal limit was 0.10 percent per 210 liters of breath, and certainly less than when the prohibited BAC level was 0.15 percent per 210 liters of breath. Just as one can be convicted of driving or operating a vehicle while under the influence of alcohol without his or her motor and driving skills actually being impaired, one can display minimal indicia of impairment with his BAC being over the legal limit of 0.08 percent per 210 liters of breath.<sup>32</sup>

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<sup>32</sup> See, e.g., *State v. Buckley* (Mar. 7, 1994), 12<sup>th</sup> Dist. No. CA93-09-076, unreported 1994 WL 71242, at \*2, stating, “However, indicia of impaired driving or impaired motor coordination is not necessary to support an arrest for DUI under R.C. 4511.19(A)(3), the “per se” section of the DUI statute. This is because section (A)(3) is violated merely by operating a motor vehicle with a prohibited alcohol concentration level (over .100), regardless of whether one’s driving or motor skills are actually impaired.”

See, also, *State v. Boyd* (1985), 18 Ohio St.3d 30, syllabus, holding, “In order to sustain a conviction under R.C. 4511.19(A)(3), there must be proof beyond a reasonable doubt that the defendant was operating a vehicle within this state and that at the time he had a concentration of ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath. The relevant evidence is limited to that evidence having any tendency to make the existence of either or both of these facts more probable or less probable.”

The totality of the circumstances encompasses both the law and facts. Thus, as the law changes, so too does the analysis that goes into determining whether the facts and circumstances cause a prudent man to believe that a suspect is committing a criminal offense—driving while under the influence of alcohol. How could it not?

(II)

**Trooper Martin Observed a Strong Odor of Alcohol and Red Glassy Eyes, Appellee Derov Failed the Horizontal Gaze Nystagmus (HGN) Test,<sup>33</sup> 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.**

More than fifty years ago, this Court recognized that an individual's level of intoxication is easily detectable:

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. It follows that, where one says that in his opinion a person is intoxicated, he is really stating it as a fact rather than an expert opinion.<sup>34</sup>

Thus, it stands to reason that even a minimal level of indicia of intoxication will support the officer's decision to arrest an individual for driving under the influence of alcohol. And this arrest may lead to the person being charged either under R.C. §4511.19(A)(1)(a) or (A)(1)(d), or both. The law does not require an arresting officer to pronounce under which subsection the person is being arrested for.

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<sup>33</sup> The resolution of Appellant-State of Ohio's Third Proposition of Law is determinative in whether the trial court properly considered the results of this field sobriety test, or merely the trooper's observation.

<sup>34</sup> City of Columbus v. Mullins (1954), 162 Ohio St. 419, 421-22.

Even a layperson with a minimal amount of life experiences can detect an intoxicated individual, so too can an experienced officer, specifically trained to detect such individuals who are under the influence of alcohol. The officer sits in the best position to judge the probability of impairment and/or excessive levels of consumption at the moment of arrest.

First, the Seventh District based its decision on the fact that the trooper did not observe any erratic driving.<sup>35</sup> But this Court has previously concluded that an arresting officer does not have to actually witness erratic driving to effect an arrest for driving a vehicle while impaired.<sup>36</sup> Thus, the officer may establish probable cause to arrest a person for either driving while impaired, or for a *per se* violation. They are both criminal offenses, to which an officer has the legal authority to effectuate an arrest.

Second, Appellee contends that probable cause was lacking because she passed the one-leg stand—the only field sobriety test left standing. The Fourth District, however, concluded that the satisfactory performances on some field sobriety tests do not negate the officer's finding of probable cause based upon the factors present.<sup>37</sup> And this Court has previously recognized that the HGN test is the most accurate field sobriety test for determining whether a person's blood alcohol concentration is above or below 0.10 percent.<sup>38</sup> Further, this Court recognized that unlike other field sobriety tests, the suspect has no voluntary control over the results:

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<sup>35</sup> Derov *supra* at ¶ 27.

<sup>36</sup> See *City of Oregon v. Szakovits* (1972), 32 Ohio St.2d 271; but see *Finch supra* at, 40; *State v. Hughart* (Feb. 23, 1990), 4<sup>th</sup> Dist. No. 88 CA 21, unreported, 1990 WL 34266.

<sup>37</sup> *State v. Chelikowsky* (Aug. 18, 1992), 4<sup>th</sup> Dist. No. 91 CA 27, unreported, 1992 WL 208899, at \*5.

<sup>38</sup> *State v. Bresson* (1990), 51 Ohio St.3d 123, 126, fn.4.

It has been stated that the HGN test is especially useful in detecting drivers who have a BAC level between 0.10 and 0.14 percent. **Frequently, traditional field sobriety tests are not sensitive enough to detect a driver who has a BAC level below .14 percent.** Traditional field sobriety tests such as the one-leg stand and walk-and-turn tests "... give the officer an indication of the suspect's condition. However, to some degree the results of these tests can be controlled voluntarily by the suspect. Performance can improve with practice and the test results may vary depending upon the suspect's drinking habits, physical stature, and natural coordination. (internal citation omitted).<sup>39</sup>

The fact that Appellee passed the one-leg stand is not determinative in Trooper Martin's conclusion that the facts and circumstances would have warranted a prudent man in believing that she was committing an offense—driving drunk.

Again, evidence needed to support a conviction is much less than that what is needed to support a finding of probable cause. And just because probable cause was established, doesn't mean that a conviction will always follow. If this were true, a conviction would follow every indictment by a grand jury. This Court concluded that probable cause does not require a conviction to result from every arrest, nor that the officer to have memorized every line of the Ohio Revised Code:

Probable cause does not require the officer to correctly predict that a conviction will result. We agree with the sentiment expressed in a federal case involving an officer who had stopped a vehicle based on the mistaken belief that the windows were tinted darker than the law permitted. The court observed that the officer 'was not taking the bar exam. The issue is not how well [the officer] understood California's window tinting laws, but whether he had objective, probable cause to believe that these windows were, in fact, in violation.'<sup>40</sup>

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<sup>39</sup> Id., citing Good & Augsburger, Use of Horizontal Gaze Nystagmus as a Part of Roadside Sobriety Testing (1986), 63 Am.J.Optomety & Physiological Optics 467.

<sup>40</sup> Bowling Green v. Godwin (2006), 110 Ohio St.3d 58, 62, quoting United States v. Wallace (C.A.9, 2000), 213 F.3d 1216, 1220.

Thus, the existence of probable cause depends on whether an objectively reasonable police officer would believe that appellee was driving while under the influence of alcohol, based on the totality of the circumstances known to the officer at the time of the stop—not whether the person is ultimately convicted of that offense.

Again, “... the probable cause standard is a practical, non-technical conception. Probable cause deals with ‘probabilities which are not technical, but factual and practical considerations of everyday life on which reasonable and prudent people, not legal technicians act.’”<sup>41</sup> Thus, it stands to reason that even a minimal level of indicia of intoxication will support the officer’s decision to arrest an individual for driving under the influence of alcohol. Therefore, probable cause to arrest is established where an arresting officer observes a strong odor of alcohol, red glassy eyes, a failed HGN test,<sup>42</sup> and an admission of alcohol consumption. The above observations would cause a reasonable and prudent person—let alone an experienced and specially trained state highway trooper—to detect that Appellee was under the influence of alcohol.<sup>43</sup>

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<sup>41</sup> United States v. Chase (Aug. 9, 2006), D. Nev. No. 206-CR-0065-PMP-PAL, unreported, 2006 WL 2347726, at \*3, quoting Brinegar supra at 175-76, quotations omitted.

<sup>42</sup> Again, the resolution of Appellant-State of Ohio’s Third Proposition of Law is determinative in whether the trial court properly considered the results of this field sobriety test, or merely the trooper’s observation.

<sup>43</sup> See Chase supra at \*3, quoting Brinegar, 338 U.S. at 175-76.

**Second Proposition of Law: A Portable Breathalyzer Test Can Support Probable Cause to Arrest for Driving Under the Influence.**

As discussed above, to find probable cause to arrest an individual for a violation of R.C. 4511.19(A), the arresting officer must have “knowledge from a reasonably trustworthy source of facts and circumstances sufficient to cause a prudent person to believe that the suspect was driving while under the influence of alcohol.”<sup>44</sup> And “it is clear that [the evidence necessary to establish probable cause for arrest] never need rise to the level required to prove guilt beyond a reasonable doubt.”<sup>45</sup> Thus, “probable cause [is a] nontechnical, commonsense conceptions dealing with ‘the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.’”<sup>46</sup>

In establishing probable cause, portable breath tests (PBTs) are utilized by officers to determine whether an individual is likely to be under the influence of alcohol. Within the totality of circumstances, a police officer can take into account that a suspect had an odor of alcohol on her breath to establish probable cause to arrest. So it stands to reason that within the totality of those same circumstances one could use what is essentially a digital confirmation of the fact that one has alcohol on her breath. (Indeed it might work out to the defendant’s advantage.)

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<sup>44</sup> State v. Medcalf (4<sup>th</sup> Dist. 1996), 111 Ohio App.3d 142, 147, citing Beck, 379 U.S. at 91; State v. Timson (1974), 38 Ohio St.2d 122, ¶ 1 of the syllabus.

<sup>45</sup> Carter v. City of Philadelphia (Oct. 13, 2000), E.D. Pa. No. 97-CV-4499, unreported, 2000 WL 1578495, at \*1, fn. 1, quoting United States v. Watson (1976), 423 U.S. 411, 432, fn. 4, Powell, J. concurring.

<sup>46</sup> State v. Bing (9<sup>th</sup> Dist. 1999), 134 Ohio App.3d 444, 448, quoting Gates supra at 231, quoting Brinegar v. United States (1949), 338 U.S. 160, 175.

(I)

**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.**

First, the Seventh District held that a trial court could not consider the results of a PBT for purposes of determining probable cause, because “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.”<sup>47</sup> The case law, however, cited above by the Seventh District actually holds that PBTs can be used to establish probable cause to arrest.<sup>48</sup> Appellee fails to recognize that the Fourth District’s reasoning was only limited to the exclusion of PBTs at trial, not in establishing probable cause to arrest:

[W]e have previously allowed the results of a PBT as a valid factor upon which to base probable cause. We recently recognized our adherence to this practice in *State v. Gunther*, (citation omitted). Our openness to employing PBT results as a factor to be used in determining probable cause, however, has never extended into a practice of admitting PBT results as evidence at trial.<sup>49</sup>

And the Fourth District draws a clear distinction between why a PBT may be used to establish probable cause, but not as evidence at trial that a person’s breath is above the prohibited level.

The Fourth District’s reasoning highlights that a PBT is unreliable as to the exact level of alcohol concentration found on one’s breath; and therefore, would be unreliable in establishing one’s guilt beyond a reasonable doubt. But as stated above, probable cause is a much lesser standard of proof, and it stands to reason that a PBT may be used to determine the likelihood that

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<sup>47</sup> Derov supra at ¶ 11, quotations omitted, quoting Shuler supra at, 186-87, citing *State v. Zell* (Iowa App. 1992), 491 N.W.2d 196, 197.

<sup>48</sup> *State v. Shuler* (4<sup>th</sup> Dist. 2006), 168 Ohio App.3d 183, 186.

<sup>49</sup> *Id.*, citing *Gunther* supra at ¶ 23.

an individual is suspected of driving while impaired. And further, evidence supporting probable cause need not be legally competent to admit at trial.<sup>50</sup> Simply because evidence is excluded from trial, does not equate with the fact that the same evidence is necessarily unreliable for establishing probable cause.

While certain conditions—diabetes, acid reflux disease, certain cancers, or even the presence of ethyl alcohol—may cause an inaccurate reading,<sup>51</sup> it does not equate to a justification to exclude the results of a PBT at a suppression hearing. It would be hard to imagine a scenario where a PBT result would be deemed unreliable where a person with diabetes registered a level of consumption above the legal limit, after the officer observed a strong odor of alcohol, red bloodshot eyes, and she admitted to have consumed alcohol. Appellee’s argument that certain conditions may render false positives only holds water if police officers were arbitrarily pulling persons out of their vehicles and subjecting them to PBTs. This situation would not exist, and does not exist.

A PBT is not used to determine one’s alcohol concentration beyond a reasonable doubt, but merely used to establish probable cause to arrest a person for driving a vehicle while impaired, based on the totality of the circumstances. The Sixth District reasoned that “although a portable breath test may not be accurate enough for a per se violation as under R.C. 4511.19(A)(1)(d), that appellant registered a .087 percent on this device is certainly a measure that an officer is entitled to consider in weighing whether there exists probable cause to arrest.”<sup>52</sup>

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<sup>50</sup> See *United States v. Ventresca* (1965), 380 U.S. 102, 107, citing *Draper* supra at 311.

<sup>51</sup> See *id.* at 186-87.

<sup>52</sup> *Masters* supra at ¶ 16.

Second, the Seventh District reasoned that “PBT devices are not among those instruments listed in O.A.C. 3701-53-02 as approved evidential breath-testing instruments for determining the concentration of alcohol on the breath of individuals potentially in violation of R.C. 4511.19.”<sup>53</sup> The fact that the Ohio Department of Health does not list a PBT as an approved device to establish one’s BAC for a motor vehicle offense is not evident of the Department of Health’s determination that they are unreliable. Appellee points to nothing promulgated by the Department of Health itself, but only to a few opinions by the various courts of appeal. The simple fact that the Department of Health allows a PBT to determine alcohol content in watercraft offenses illustrates their reliability.<sup>54</sup> Or at the very least, pulls the bottom from underneath Appellee’s argument that the Department of Health has deemed them unreliable.

Again, this Court has defined probable cause as “... whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the ... (defendant) had committed or was committing an offense.”<sup>55</sup> Certainly, it stands to reason that an officer may use a digital reading to merely confirm his belief, based upon the totality of the circumstances present, that an individual is under the influence of alcohol.

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<sup>53</sup> Derov supra at ¶ 11, quoting Shuler supra at ¶ 10.

<sup>54</sup> See O.A.C. 3701-53-02(B); see R.C. 45.11.19(A) and c.f. R.C. 1547.11(A).

<sup>55</sup> Heston supra at 155-56, quoting Beck, 379 U.S. at 91.

**Third Proposition of Law: There is No 68-Second Minimum Time Requirement for Substantial Compliance with the HGN Test.**

Courts across the state reach vastly different conclusions about how long the HGN should take. According to the Seventh District's opinion in this case, "[t]he guidelines do not state a total minimum amount of time required for properly conducting all three phases of the exam. However, those minimums in the guidelines can be added up and total 68 seconds[.]"<sup>56</sup> But the Fifth District has concluded that "the [HGN] test requires a minimum of 48 seconds to complete the various elements with respect to both eyes."

The Seventh District arbitrarily came to the conclusion that the HGN requires a minimum of 68-seconds based on Trooper Martin's testimony alone. And the court's decision that Trooper Martin did not substantially comply with the NHTSA requirements is based solely on the fact that he took 44 seconds to administer the HGN test on Appellee. The record is devoid of any evidence that Trooper Martin failed to conduct any of the three phases for the required four seconds.

First, neither *Embry* nor *Mai*—cited by the Seventh District—concluded that the NHTSA manual requires a minimum total time that the HGN should be conducted before the state has satisfied its burden of showing substantial compliance. Simply, there is no 68-second minimum time requirement for substantial compliance with the HGN test in accordance with the NHTSA manual. The Seventh District arbitrarily concluded that the NHTSA manual requires the HGN

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<sup>56</sup> Derov *supra* at ¶ 35, Waite, J., concurring in judgment only, stating "We do not need to issue new pronouncements of law regarding whether portable breath tests can be used at suppression hearings, or whether the HGN test must take at least 68 seconds even though the NHTSA manual makes no mention of this[.]"

test to be conducted for a minimum of 68 seconds before the arresting officer can substantially comply with the guidelines.<sup>57</sup>

Other Jurisdictions—using the same NHTSA manual as Ohio—also find no 68-second minimum time requirement.<sup>58</sup> Therefore, as the concurring opinion in this case points out, “[w]e do not need to issue new pronouncements of law regarding ... whether the HGN test must take at least 68 seconds even though NHTSA manual makes no mention of this, [thereby] imposing a minimum time requirement on the HGN test above and beyond the requirements of the NHTSA manual.”<sup>59</sup> And this Court should not “agree with establishing a new rule of law regarding the HGN test when the officer’s testimony establishes that he conformed to the NHTSA time requirements in performing the test.”<sup>60</sup> If NHTSA had determined that the HGN should be conducted within a certain minimum time period, rest assure that one would have certainly been includedl.

Second, if the NHTSA manual would ever establish such a minimum total time required, that minimum time would establish strict compliance, not substantial compliance. That is basic common sense. If a test requires a minimum time for compliance, something short of that time would establish substantial compliance. The basic and elementary meaning of the word

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<sup>57</sup> Derov supra at ¶ 16.

<sup>58</sup> See *Strickland v. City of Dothan, AL* (M.D. Ala. 2005), 399 F. Supp2d 1275, 1288, stating the “NHTSA standards for [the HGN] test require a minimum administration time of 32 seconds for accurate results;” *Compton v. State* (Tex. App. 2003), 120 S.W.3d 375, 378-79, finding that the officer’s administration of the HGN for approximately 19 seconds was sufficient. *Id.*; see also *United States v. Hernandez-Gomez* (Apr. 22, 2008), D. Nev. No. 2:07-CR-0277-RLH-GWR, unreported, 2008 WL 1837255, at \*8, rejecting the argument that the HGN test had certain “built in” time requirements. *Id.*

<sup>59</sup> Derov, supra at ¶ 35 (Waite, J., concurring in judgment only).

<sup>60</sup> *Id.*

“substantial” means “being largely but not wholly that which is specified.”<sup>61</sup> Thus, in the context of substantial compliance—as required by Ohio courts—the relevant inquiry should be whether the arresting officer conducted each individual phase in substantial compliance with the NHTSA manual; therefore, the total minimum time the officer conducted the HGN is irrelevant if he substantially complied with each of the three individual phases.

Here, the Seventh District failed to find that Trooper Martin did not substantially comply with the NHTSA manual in conducting the HGN test, aside from its conclusion that he took 44 seconds instead of 68.<sup>62</sup> But at no time did the appellate court find that Trooper Martin failed to conduct the HGN in substantial compliance by failing to conduct each individual phase in less than the required minimum times. Thus, Trooper Martin substantially complied with all three individual phases of the HGN test, and the results should have been considered in determining the existence of probable cause.

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<sup>61</sup> Merriam-Webster Online, at <http://www.merriam-webster.com/dictionary/substantial>.

<sup>62</sup> Derov supra at ¶¶ 16-19.

**Conclusion**

Wherefore, the State of Ohio prays this Court reverse the Seventh District's judgment in whole, reinstating the decision of the trial court.

Respectfully Submitted,

**Paul J. Gains, 0020323**  
Mahoning County Prosecutor

**Ralph M. Rivera, 0082063**  
Assistant Prosecutor

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Counsel for Appellant-State of Ohio

**Notice of Appeal to the Ohio Supreme Court**

BEFORE THE SUPREME COURT OF OHIO

STATE OF OHIO

PLAINTIFF-APPELLANT

-vs-

JESSICA DEROV

DEFENDANT-APPELLEE

CASE NO.:

08-0853

AN APPEAL FROM CASE NO. 07 MA 71  
BEFORE THE SEVENTH DISTRICT  
COURT OF APPEALS AT MAHONING  
COUNTY

CONFLICT CERTIFIED

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NOTICE OF APPEAL

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PAUL J. GAINS, 0020323

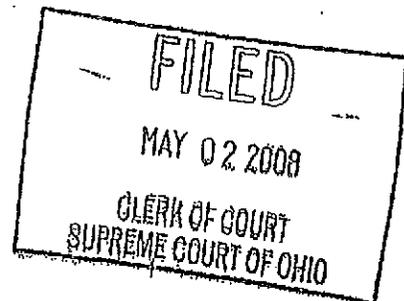
RHYS B. CARTWRIGHT-JONES, 0078597  
(C/R)

MAHONING COUNTY ADMIN. BLDG.  
21 W BOARDMAN ST., FL. 6  
YOUNGSTOWN OH 44503-1426  
TEL.: (330) 740-2330, EXT. 7227  
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FOR THE STATE OF OHIO

ROBERT C. KOKOR, 0062326  
394 ST. RT. 7, S.E  
BROOKFIELD, OH 44403-0236  
TEL.: (330) 448-1133  
FAX: (330) 448-1133

FOR MS. JESSICA DEROV



**Proof of Service**

I sent a copy of this notice to opposing counsel, above, on May 1, 2008 by regular mail.

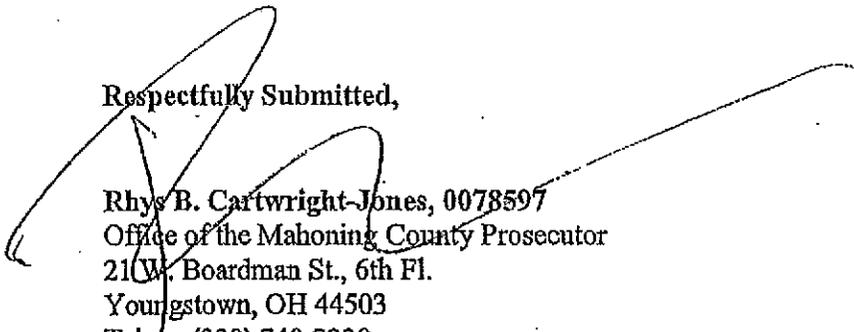
**So Certified,**

**Rhys B. Cartwright-Jones, 0078597**

Notice

The state gives notice that it appeals the decision of the Seventh District Court of Appeals at Mahoning County in the case of State v. Derov, 07 MA 71, issued March 28, 2008. This case is one of great public and/or general interest that contains a substantial constitutional question. Conflict as to one issue is certified.

Respectfully Submitted,



Rhys B. Cartwright-Jones, 0078597  
Office of the Mahoning County Prosecutor  
21 W. Boardman St., 6th Fl.  
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Tel: (330) 740-2330  
Fax: (330) 740-2008  
Counsel for Appellant, The State of Ohio

**Notice of Certified Conflict**

BEFORE THE SUPREME COURT OF OHIO

STATE OF OHIO

PLAINTIFF-APPELLANT

-vs-

JESSICA DEROV

DEFENDANT-APPELLEE

CASE NO.:

08-0858

AN APPEAL FROM CASE NO. 07 MA 71  
BEFORE THE SEVENTH DISTRICT  
COURT OF APPEALS AT MAHONING  
COUNTY

DISCRETIONARY APPEAL PENDING

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NOTICE OF CERTIFIED CONFLICT

---

PAUL J. GAINS, 0020323

RHYS B. CARTWRIGHT-JONES, 0078597  
(C/R)

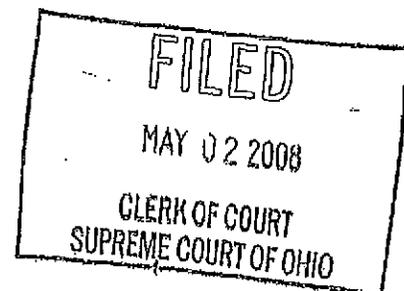
MAHONING COUNTY ADMIN. BLDG.  
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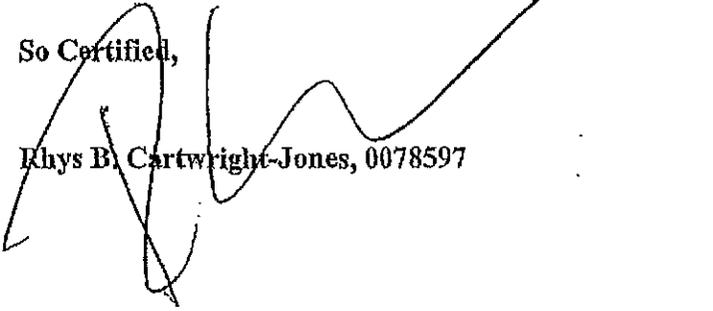


**Proof of Service**

I sent a copy of this notice to opposing counsel, above, on May 1, 2008 by regular mail.

**So Certified,**

**Rhys B. Cartwright-Jones, 0078597**



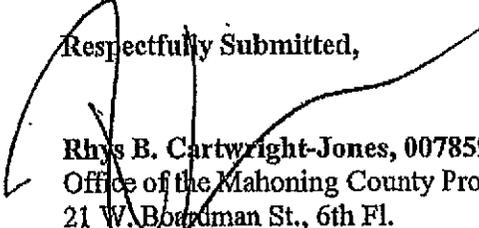
Notice

The State timely gives notice to this Court and to all interested parties that on April 2, 2007 the Seventh District Court of Appeals sitting in Mahoning County certified a conflict in this matter.

The Seventh District's judgment entries and opinion in this case are attached, as are the entry certifying conflict and the opinion as to which the Seventh District certified conflict. Further, the state gives notice that conflict is pending on one remaining issue.

Wherefore, the state prays this Court take notice of the conflict below and assume jurisdiction over this matter so that this Court may decide this case on its full merits.

Respectfully Submitted,

  
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Counsel for Appellant, The State of Ohio

## Judgment Entry

CLERK OF COURTS  
 MAHONING COUNTY, OHIO  
 APR 29 2008  
 FILED  
 ANTHONY VIVO, CLERK

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STATE OF OHIO ) IN THE COURT OF APPEALS OF OHIO  
 )  
 MAHONING COUNTY ) SS: SEVENTH DISTRICT

STATE OF OHIO, )  
 ) CASE NO. 07 MA 71  
 PLAINTIFF-APPELLEE, )  
 )  
 - 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. Deroov*, 7th Dist. No.07 MA 071, 2008-Ohio-1672, is in conflict with the Fourth District's decision in *State v. Ganther*, 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 *Deroov*, 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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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. )

For the reasons stated in the opinion rendered herein, Appellant's first assignment of error is meritless and Appellant's second and third assignments of error are rendered moot. It is the final judgment and order of this Court that the judgment of the County Court No. 4, Mahoning County, Ohio, is reversed, Appellant's conviction is vacated and this case is remanded to the trial court for further proceedings according to law and consistent with this Court's opinion. Costs taxed against Appellee. Walte, J., concurring in judgment only with concurring in judgment only opinion.

*Mary DiGenaro*  
*Gene Conopio*  
*C. J. White*

CLERK OF COURTS  
MAHONING COUNTY, OHIO  
MAR 28 2008  
FILED  
ANTHONY VIVO, CLERK



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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, ) ERRATA  
DEFENDANT-APPELLANT. )

The following entry replaces the entry filed on March 28, 2008 in error.

For the reasons stated in the opinion rendered herein, Appellant's first assignment of error is meritorious and Appellant's second and third assignments of error are rendered moot. It is the final judgment and order of this Court that the judgment of the County Court No. 4, Mahoning County, Ohio, is reversed, Appellant's conviction is vacated and this case is remanded to the trial court for further proceedings according to law and consistent with this Court's opinion. Costs taxed against Appellee. Waite, J., concurring in judgment only with concurring in judgment only opinion.

*Mary DeSena*

*John ...*

*John White*

CLERK OF COURTS  
MAHONING COUNTY, OHIO  
APR - 2 / 2008  
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## Opinion

STATE OF OHIO, MAHONING COUNTY  
MAHONING COUNTY COURT  
IN THE COURT OF APPEALS AREA 4  
SEVENTH DISTRICT 2008 APR -1 P 2:11

ANTHONY VIVO, CLERK

STATE OF OHIO,  
PLAINTIFF-APPELLEE,  
- VS -  
JESSICA DEROV,  
DEFENDANT-APPELLANT.

CASE NO. 07 MA 71

OPINION

CHARACTER OF PROCEEDINGS:

Criminal Appeal from County Court  
No. 4, Case No. 06 TRC 5717.

JUDGMENT:

Reversed. Conviction Vacated  
and Remanded.

APPEARANCES:  
For Plaintiff-Appellee:

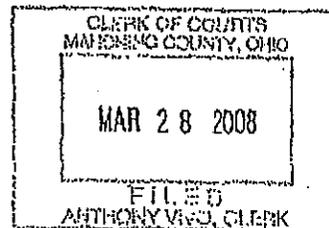
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For Defendant-Appellant:

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JUDGES:  
Hon. Mary DeGenaro  
Hon. Gene Donofrio  
Hon. Cheryl L. Walte

Dated: March 28, 2008



DeGenaro, P.J.

{¶1} This timely appeal comes for consideration upon the record in the trial court, the parties' briefs and their oral arguments to this Court. Appellant, Jessica Derov, appeals the decision of Mahoning County Court Number 4 denying her Motion to Suppress and finding her guilty of one count of driving under the influence in violation of R.C. 4511.19(A)(1)(a); one count of per se driving with a prohibited blood alcohol level in excess of 0.08 in violation of R.C. 4511.19(A)(1)(d); one count of use of unauthorized plates in violation of R.C. 4549.08; and, one count of an expired registration in violation of R.C. 4503.11.

{¶2} Derov challenges the trial court's denial of her motion to suppress the results of field sobriety tests, the results of the BAC test, and her admission to consuming alcohol. Because the results of the field sobriety tests should have been suppressed and because there is not enough other evidence to support a finding of probable cause to arrest, we reverse the judgment of the trial court, we vacate Derov's conviction and we remand this matter to the trial court for further proceedings.

{¶3} On August 12, 2006 at 2:30 A.M., Officer Martin of the Ohio State Highway Patrol initiated a stop of Derov's car based upon the expired tags on her license plate. Prior to the stop, the officer had witnessed no erratic driving. During the stop, however, the officer noticed a strong smell of alcohol emanating from Derov's vehicle. The officer had Derov exit the vehicle. He then determined that the smell of alcohol was coming from Derov. He also noticed that she had red, glassy eyes. The officer admitted that Derov had no difficulty exiting her car and demonstrated no physical signs of alcohol consumption.

{¶4} The officer then had Derov perform field sobriety tests including the walk and turn, the horizontal gaze nystagmus, the one leg stand, and a portable breath test. The officer testified that Derov failed all but one of these tests, the one leg stand. After completing the tests, the officer asked Derov whether she had consumed any alcohol to which she responded that she had consumed one beer. Derov was placed under arrest and taken to the control post where she was given a breath test which indicated her blood

alcohol content to be 0.134. After filing a motion to suppress which was denied by the trial court, Derov was convicted of one count of driving under the influence in violation of R.C. 4511.19(A)(1)(a), and one count of driving with a prohibited blood alcohol level in excess of 0.08 in violation of R.C. 4511.19(A)(1)(d).

{¶5} In her first of three assignments of error, Derov argues:

{¶6} "The trial court committed reversible error by overruling the motion to suppress three of the field sobriety tests performed by the Defendant/Appellant."

{¶7} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. McNamara* (1997), 124 Ohio App.3d 706, 710. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. Accepting these facts as true, the appellate court conducts a *de novo* review of whether the facts satisfy the applicable legal standards at issue in the appeal. *State v. Williams* (1993), 86 Ohio App.3d 37, 41.

{¶8} The Ohio Supreme Court has recognized that since the amendment of R.C. 4511.19 by the Ohio Legislature in 2003, field sobriety tests are no longer required to be conducted in strict compliance with standardized testing procedures. *State v. Schmitt*, 101 Ohio St.3d 79, 2004-Ohio-0037, at ¶9. "Instead, an officer may now testify concerning the results of a field sobriety test administered in substantial compliance with the testing standards." *Id.* This holding further enforces R.C. 4511.19(D)(4)(b), which provides in part, that evidence and testimony of the results of a field sobriety test may be presented "if it is shown by clear and convincing evidence that the officer administered the test in substantial compliance with the testing standards for any reliable, credible, and generally accepted field sobriety tests that were in effect at the time the tests were administered, including, but not limited to, any testing standards then in effect that were set by the national highway traffic safety administration."

{¶9} In determining whether the State has shown by clear and convincing evidence that the officer administered the tests in substantial compliance with testing standards, the allocation of burden of proof for a motion to suppress must be determined. In order to suppress evidence or testimony concerning a warrantless search, a defendant must "raise the grounds upon which the validity of the search or seizure is challenged in such a manner as to give the prosecutor notice of the basis for the challenge." *Xenia v. Wallace* (1988), 37 Ohio St.3d 216, paragraph one of the syllabus. The defendant is required to set forth the basis for the challenge "only with sufficient particularity to put the prosecution on notice of the nature of the challenge." *State v. Purdy*, 6th Dist. No. H-04-008, 2004-Ohio-7069, at ¶15, citing *State v. Shindler*, 70 Ohio St.3d 54, 57-58, 1994-Ohio-0452. After the defendant sets forth a sufficient basis for a motion to suppress, the burden shifts to the state to demonstrate proper compliance with the regulations involved. *Id.* citing *State v. Johnson* (2000), 137 Ohio App.3d 847, 851.

{¶10} As part of the State's proof that the officer had probable cause to arrest Derov, the State introduced the result of a portable breath test which Derov took prior to the arrest. Derov challenges the admission of the portable breath test results as evidence at the suppression hearing. Several courts have determined that the results of a portable breath test are not admissible, even for probable cause purposes. See *State v. Ferguson*, 3d Dist. No. 4-01-34, 2002-Ohio-1763, *Cleveland v. Sanders*, 8th Dist. No. B3073, 2004-Ohio-4473, *State v. Delarosa*, 11th Dist. No. 2003-P-0129, 2005-Ohio-3399, *State v. Mason* (Nov. 27, 2000) 12 Dist. No. CA99-11-033. Even the Fourth District, which has concluded that portable breath tests are admissible for purposes of a probable cause determination, admits that these tests are highly unreliable.

{¶11} "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.' See *State v. Zell* (Iowa App. 1992), 491

N.W.2d 196, 197. 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. See Tebo, *New Test for DUI Defense: Advances In Technology and Stricter Laws Create Challenges for Lawyers*, Jan. 28, 2005, [www.7/8dulcentral.7/8com/7/8aba.7/8journal/](http://www.7/8dulcentral.7/8com/7/8aba.7/8journal/), *State v. Shuler*, 168 Ohio App.3d 183, 2006-Ohio-4336, at ¶ 10.

{¶12} Given the inherent unreliability of these kinds of tests, we agree with the majority of our sister districts and conclude that the trial court should not have considered the results of the portable breath test.

{¶13} Derov next challenges the trial court's failure to suppress the results of the Horizontal Gaze Nystagmus (HGN) test. More specifically, Derov claims that the officer did not spend the required amount of time on each portion of the test, and thus did not substantially comply with the guidelines.

{¶14} After giving the appropriate instructions to a test subject, the NHTSA guidelines instruct the examiner to conduct the actual test in three phases. First, the examiner is instructed to have the subject focus on a stimulus while the examiner moves the stimulus from left to right. While moving the stimulus, the examiner checks for smooth pursuit of the test subject's eyes. The examiner then tracks each eye again, checking for horizontal nystagmus at maximum deviation. Finally, the examiner tracks each eye from left to right while looking for the onset of nystagmus before the eye has tracked 45 degrees.

{¶15} The NHTSA guidelines list certain approximate and minimum time requirements for the various portions of the three phases of the exam. For instance, when checking for distinct nystagmus at maximum deviation, the examiner must hold the stimulus at maximum deviation for a minimum of four seconds. When checking for

smooth pursuit, the time to complete the tracking of one eye should take approximately four seconds. When checking for the onset of nystagmus prior to 45 degrees, the time for tracking left to right should also be approximately four seconds.

{¶16} The guidelines do not state a total minimum amount of time required for properly conducting all three phases of the exam. However, those minimums in the guidelines can be added up and total 68 seconds, which agrees with Officer Martin's testimony at the suppression hearing. Courts have found that falling significantly short of the time limits would render the results of the test inadmissible to demonstrate probable cause to arrest.

{¶17} For example, in *State v. Embry*, 12th Dist. No. CA2003-11-110, 2004-Ohio-6324, during the cross-examination of the arresting officer, the defendant added up all the approximate and minimum times called-for in the guidelines. He then compared that total time to the total time that elapsed on the video that recorded the performance of the HGN test. A comparison of the two total times revealed that the total time the officer used to conduct the HGN test on the defendant fell significantly short of the total of all the time requirements listed in the guidelines. Therefore, the Twelfth District concluded that the officer did not substantially comply with the guidelines and upheld the trial court's decision to exclude the test from evidence.

{¶18} Likewise, in *State v. Mai*, 2d Dist. No. 2005-CA-115, 2006-Ohio-1430, the officer testified that he conducted the three phases of the HGN test much faster than the four-second minimums set forth in the NHTSA. For example, the officer testified that with respect to the maximum deviation component of the test, he held the stimulus to the side for a period of only one to two seconds, while the NHTSA manual required a minimum of at least four seconds. In light of these deficiencies in the administration of the HGN test, the Second District found a lack of substantial compliance with the NHTSA guidelines.

{¶19} Here, it was established at the suppression hearing that Officer Martin only took 44 seconds to perform the HGN test. This is a significant deviation from the minimum time specified in the guidelines, which makes this case analogous to both *Embry* and *Mai*. We agree with those courts that such a significant difference calls the

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reliability of the results into question. Accordingly, the State had failed to show substantial compliance by clear and convincing evidence and the results of the HGN test should have been suppressed by the trial court.

{¶20} Finally, Derov challenges the trial court's failure to suppress the results of the "walk and turn" test. The NHTSA manual requires that the officer give instructions regarding "initial positioning" of the suspect prior to the suspect taking the test. The officer should instruct the suspect to place their left foot on the line and then place their right foot on the line ahead of the left foot. The heel of the right foot should be against the toe of the left foot. The officer should then instruct the suspect to keep their arms down at their sides and maintain that position until the officer has completed the instructions for the walk and turn test.

{¶21} The officer is then to instruct the suspect, that once he tells the suspect to begin, to take nine heel-to-toe steps, turn and take nine heel-to-toe steps back. When they turn, they should keep the front foot on the line and turn by making a series of small steps with the other foot. He should further instruct the suspect to keep their arms at their sides while walking and watch their feet at all times. Once they start walking, they should not stop until they have completed the test.

{¶22} In this case, the officer stated that Derov failed three of the eight factors used to determine whether a person has failed the walk and turn test: 1) she moved her feet to maintain her balance during the instruction phase of the test, 2) she raised her arms during the demonstration phase of the test, and 3) she failed to place her feet heel to toe during the demonstration phase of the test.

{¶23} Derov claims that the officer improperly considered the fact that she raised her arms while she performed her test and she is correct. During his testimony, the officer stated that he did tell her during the instruction stage that she should keep her arms down. However, he did not tell her to keep her arms down for the walking or demonstration stage of the test. Despite the officer's failure to instruct Derov to keep her arms down, he scored the raising of her arms during the test as a clue against her when determining that she failed the test. This was improper. It is fundamentally unfair to hold

a person's failure to complete a test properly against them if the person has not been properly instructed on how to complete the test.

{¶24} Derov also contends that the officer improperly counted the fact that she moved her feet during the instruction phase since he did not testify that her feet actually broke apart. The guidelines state that a factor an officer should consider is if a suspect moves her feet to keep her balance while listening to the instructions. However, the guidelines specifically state that this factor only counts against a suspect if the suspect's feet actually break apart. In this case, the officer never testified that Derov's feet actually broke apart. Instead, he only testified that she moved her feet to keep her balance during the instruction phase. Thus, it is, at the very least, questionable whether this factor should have been counted against Derov.

{¶25} Given the fact that the State has only clearly and convincingly proved that Derov failed one clue out of eight on one field sobriety test in the absence of other evidence, we cannot say the officer had probable cause to arrest Derov. Moreover, it is unclear whether the officer should have even administered field sobriety tests in this case.

{¶26} In the past, courts have held that an officer does not have the right to have a suspect submit to field sobriety tests if the only evidence of impairment is that it is early in the morning, that the suspect had glassy, bloodshot eyes, that he had an odor of alcohol about his person, and that he admitted that he had consumed one or two beers. See *State v. Dixon* (Dec. 1, 2000), 2d Dist. No. 2000-CA-30; see also *State v. Downen* (Jan. 12, 2000), 7th Dist. No. 97-BA-53 (Even a "pervasive" or "strong" odor of alcohol "is no more an indication of intoxication than eating a meal is of gluttony."). This is because it is still legal to drink and drive in Ohio; it is only illegal to drive while impaired or while over the legal limit.

{¶27} In this case, most of the evidence the officer could rely on when deciding whether to arrest Derov was similar to that discussed in *Dixon*, i.e. the time of the stop, the smell of alcohol, the red glassy eyes, Derov's admission to drinking one beer. Derov had not been driving erratically, the officer did not testify at the suppression hearing that Derov was slurring her speech, and the officer admitted that Derov had no problem

walking to his car. Indeed, the only possible indication of any physical impairment was the Derov's highly questionable failure of the walk and turn test. These facts are simply insufficient to establish probable cause to believe that a particular person was driving under the influence of alcohol. Accordingly, Officer Martin did not have probable cause to arrest Derov and any evidence obtained after her arrest should have been suppressed. Derov's first assignment of error is meritorious.

{¶28} In her other two assignments of error, Derov argues:

{¶29} "The trial Court committed reversible error by overruling the Motion to Suppress the breath-alcohol test of the Defendant-Appellant."

{¶30} "The trial court committed reversible error by overruling the Motion to Suppress the Pre-Miranda statements of the Defendant-Appellant."

{¶31} Given our resolution of Derov's first assignment of error, the remaining two assignments of error are rendered moot. Accordingly, the judgment of the trial court is reversed, Derov's conviction is vacated, and this case is remanded for further proceedings.

Donofrio, J., concurs.

Walte, J., concurs in judgment only with concurring opinion.

APPROVED:

  
MARY DeGENARO, PRESIDING JUDGE.

Waite, J., concurring in judgment only.

Although I agree that this case should be reversed, I cannot agree with most of the analysis in the majority opinion regarding the manner in which the field sobriety tests were conducted. The majority appears to be holding Trooper Martin to a strict compliance standard on the field sobriety tests, even with regard to aspects of the tests that are not defined in the NHTSA manual. The standard for conducting field sobriety tests is substantial compliance, and there is competent and credible evidence in the record that Trooper Martin substantially complied in conducting the tests. In reversing this case, I believe we do not need to discuss the particulars of the field sobriety tests. My basis for reversing the ruling on the motion to suppress is that the officer did not have a sufficient reason to conduct field sobriety tests in the first place. Although an officer needs only a reasonable suspicion that a traffic violation has occurred to effect a traffic stop, that does not automatically justify further investigation into other crimes unless there are additional reasonable and articulable suspicions supporting further investigation. *State v. Evans* (1998), 127 Ohio App.3d 56, 62, 711 N.E.2d 761.

Trooper Martin testified that he initiated the field sobriety tests based on a strong smell of alcohol coming from Appellant. (Tr., pp. 9-10.) There was no erratic driving. The trooper did not observe anything about Appellant's behavior when she exited her vehicle that might indicate intoxication. He did not even observe whether she had glassy and red eyes until he was already performing the horizontal gaze nystagmus ("HGN") test. Appellant did not confess to drinking any particular amount

of alcohol, according to Trooper Martin's testimony. He believed she said she had one beer, but he was not even sure of that. (Tr., p. 27.) My interpretation of the evidence presented at the suppression hearing is that Trooper Martin conducted the field sobriety tests on the sole basis that he smelled alcohol.

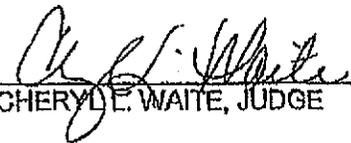
The majority cites a case we have previously cited that places some limits on the facts that might satisfy the "reasonable and articulable" requirement in order to support an officer's decision to conduct field sobriety tests. In *State v. Dixon* (Dec. 1, 2000), 2nd Dist. No. 2000-CA-30, the Second District Court of Appeals found no reasonable and articulable suspicion to conduct field sobriety tests based on an odor of alcohol, red glassy eyes at 2:20 a.m., and an admission from the defendant that he had consumed one or two beers. We cited *Dixon* in approval in a very recent case, *State v. Reed*, 7th Dist. No. 05 BE 31, 2006-Ohio-7075. In *Reed*, we determined that there was no justification for conducting field sobriety tests based merely on a slight odor of alcohol, red glassy eyes at 1:05 a.m., and an admission from the defendant that he had consumed two beers. We have previously held that an odor of alcohol alone cannot justify conducting field sobriety tests. *State v. Downen* (Jan. 12, 2000), 7th Dist. No. 97-BA-53. I cannot see how we can be consistent with our recent *Reed* and *Downen* cases unless we rule that an officer does not have reasonable and articulable suspicion to conduct field sobriety tests merely on the basis of a strong odor of alcohol. Even if we include the red glassy eyes as a factor, which I am not inclined to do given the trooper's testimony, we have already concluded in *Reed* that

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Finally, the majority's statement that, "it is only illegal to drive while impaired," in Ohio is inaccurate. It is true that R.C. 4511.19(A)(1)(a) prohibits driving while under the influence of alcohol. On the other hand, R.C. 4511.19(A)(1)(b)-(h) prohibit driving while having certain concentrations of alcohol in one's blood, blood serum, blood plasma, breath, or urine. No impairment need be proven under R.C. 4511.19(A)(1)(b)-(h). There are a multitude of fact patterns by which a person could be successfully prosecuted for OMVI that involve no evidence at all that the person was "impaired."

It is clear to me that Trooper Martin should not have conducted the field sobriety tests based primarily, if not exclusively, on a strong odor of alcohol. Therefore, while I cannot agree with the reasoning used by the majority, I agree with the result that the majority has reached. I concur in judgment only.

APPROVED:

  
CHERYL E. WAITE, JUDGE

Minn. Stat. 169A.41

**C**

Minnesota Statutes Annotated Currentness

Transportation (Ch. 160-174A)

↳ Chapter 169A, Driving While Impaired

↳ Procedural Provisions

→ 169A.41. Preliminary screening test

**Subdivision 1. When authorized.** When a peace officer has reason to believe from the manner in which a person is driving, operating, controlling, or acting upon departure from a motor vehicle, or has driven, operated, or controlled a motor vehicle, that the driver may be violating or has violated section 169A.20 (driving while impaired), 169A.31 (alcohol-related school bus or Head Start bus driving), or 169A.33 (underage drinking and driving), the officer may require the driver to provide a sample of the driver's breath for a preliminary screening test using a device approved by the commissioner for this purpose.

**Subd. 2. Use of test results.** The results of this preliminary screening test must be used for the purpose of deciding whether an arrest should be made and whether to require the tests authorized in section 169A.51 (chemical tests for intoxication), but must not be used in any court action except the following:

- (1) to prove that a test was properly required of a person pursuant to section 169A.51, subdivision 1;
- (2) in a civil action arising out of the operation or use of the motor vehicle;
- (3) in an action for license reinstatement under section 171.19;
- (4) in a prosecution for a violation of section 169A.20, subdivision 2 (driving while impaired; test refusal);
- (5) in a prosecution or juvenile court proceeding concerning a violation of section 169A.33 (underage drinking and driving), or 340A.503, subdivision 1, paragraph (a), clause (2) (underage alcohol consumption);
- (6) in a prosecution under section 169A.31, (alcohol-related school or Head Start bus driving); or 171.30 (limited license); or
- (7) in a prosecution for a violation of a restriction on a driver's license under section 171.09, which provides that the license holder may not use or consume any amount of alcohol or a controlled substance.

**Subd. 3. Additional tests.** Following the screening test additional tests may be required of the driver pursuant to the provisions of section 169A.51 (chemical tests for intoxication).

Subd. 4. Repealed by Laws 2006, c. 260, art. 2, § 20.

**CREDIT(S)**

Laws 2000, c. 478, art. 1, § 22. Amended by Laws 2001, 1st Sp., c. 8, art. 12, § 6.

Current with laws of the 2008 Regular Session effective through June 30, 2008, except for Laws 2008, Chapter 366. Statutes Chapters 119 through 143 are current through all laws of the 2008 Regular Session

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Mo. Stat. 577.021

V.A.M.S. 577.021



VERNON'S ANNOTATED MISSOURI STATUTES  
TITLE XXXVIII. CRIMES AND PUNISHMENT; PEACE OFFICERS AND PUBLIC DEFENDERS  
CHAPTER 577. PUBLIC SAFETY OFFENSES

→ 577.021. Chemical testing, when--evidence of probable cause

1. Any state, county or municipal law enforcement officer who has the power of arrest for violations of section 577.010 or 577.012 and who is certified pursuant to chapter 590, RSMo, may, prior to arrest, administer a chemical test to any person suspected of operating a motor vehicle in violation of section 577.010 or 577.012.
2. Any state, county, or municipal law enforcement officer who has the power of arrest for violations of section 577.010 or 577.012 and who is certified under chapter 590, RSMo, shall make all reasonable efforts to administer a chemical test to any person suspected of driving a motor vehicle involved in a collision which resulted in a fatality or serious physical injury as defined in section 565.002, RSMo.
3. A test administered pursuant to this section shall be admissible as evidence of probable cause to arrest and as exculpatory evidence, but shall not be admissible as evidence of blood alcohol content. The provisions of sections 577.019 and 577.020 shall not apply to a test administered prior to arrest pursuant to this section. The provisions changing chapter 577 are severable from this legislation. The general assembly would have enacted the remainder of this legislation without the changes made to chapter 577, and the remainder of the legislation is not essentially and inseparably connected with or dependent upon the changes to chapter 577.

Statutes are current with emergency legislation approved through July 10, 2008, of the 2008 Second Regular Session of the 94th General Assembly.  
Constitution is current through the November 7, 2006 General Election.

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O.A.C. 3701-53-02



OH ADC 3701-53-02  
OAC 3701-53-02

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Ohio Admin. Code § 3701-53-02

**C**

**BALDWIN'S OHIO ADMINISTRATIVE CODE ANNOTATED  
3701 HEALTH DEPARTMENT  
DIRECTOR OF HEALTH**

**CHAPTER 3701-53. ALCOHOL AND DRUG TESTING; PERMITS FOR PERSONNEL**

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Rules are complete through August 17, 2008;  
Appendices are current to June 30, 2008

**3701-53-02 Breath tests**

(A) The instruments listed in this paragraph are approved as evidential breath testing instruments for use in determining whether a person's breath contains a concentration of alcohol prohibited or defined by sections 4511.19, 1547.11, 2903.06, 2903.08, 4506.15, and/or 4506.17 of the Revised Code, or any other statute or local ordinance equivalent to those in this paragraph prescribing a defined or prohibited breath-alcohol concentration. The approved evidential breath testing instruments are:

- (1) BAC DataMaster, BAC DataMaster cdm;
- (2) Intoxilyzer model 5000 series 66, 68 and 68 EN.

(B) The instruments listed in this paragraph are approved as additional evidential breath testing instruments for use in determining whether a person's breath contains a concentration of alcohol prohibited or defined by sections 1547.11 and/or 1547.111 of the Revised Code, or any other statute or local ordinance equivalent to those defined by sections 1547.11 and/or 1547.111 of the Revised Code prescribing a defined or prohibited breath alcohol concentration. The approved evidential breath testing instruments are;

- (1) Alco-sensor RBT III; and
- (2) Intoxilyzer model 8000.

(C) Breath samples of deep lung (alveolar) air shall be analyzed for purposes of determining whether a person has a prohibited breath alcohol concentration with instruments approved under paragraphs (A) and (B) of this rule. Breath samples shall be analyzed according to the operational checklist for the instrument being used and checklist forms recording the results of subject tests shall be retained in accordance with paragraph (A) of rule 3701-53-01 of the Administrative Code. The results shall be recorded on forms prescribed by the director of health.

HISTORY: 2007-08 OMR pam. #2 (RRD); 2002-03 OMR 597 (A), eff. 9-30-02; 1996-97 OMR 2489 (A), eff. 7-7-97; 1994-95 OMR 929 (A), eff. 12-12-94; 1994-95 OMR 424 (A\*), eff. 9-14-94; 1989-90 OMR 1313 (A), eff. 5-5-90; 1986-87 OMR 616 (R-E), eff. 1-1-87; 1982-83 OMR 1383 (A), eff. 6-13-83; 1982-83 OMR 1043 (A), eff. 3-15-83; prior HD-1-02

RC 119.032 rule review date(s): 8-29-12; 9-1-07; 8-29-07; 7-1-02

<General Materials (GM) - References, Annotations, or Tables>

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Oh. Const. Art. 1, sec. 14

Westlaw

OH Const. Art. I, § 14

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C

Baldwin's Ohio Revised Code Annotated Currentness

Constitution of the State of Ohio (Refs & Annos)

▣ Article I. Bill of Rights (Refs & Annos)

→ O Const I Sec. 14 Search and seizure

The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the person and things to be seized.

CREDIT(S)

(1851 constitutional convention, adopted eff. 9-1-1851)

Current through 2008 File 129 of the 127th GA (2007-2008), apv. by 8/26/08, and filed with the Secretary of State by 8/26/08.

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R.C. 1547.11



Baldwin's Ohio Revised Code Annotated Currentness

Title XV. Conservation of Natural Resources

Chapter 1547. Watercraft, Vessels, and Waterways (Refs & Annos)

Operating Regulations

→ 1547.11 Operating under influence of alcohol or drugs prohibited; evidence; immunity from liability for person drawing blood; testimony and evidence regarding field sobriety test

<Note: See also version(s) of this section with later effective date(s).>

(A) No person shall operate or be in physical control of any vessel underway or shall manipulate any water skis, aquaplane, or similar device on the waters in this state if, at the time of the operation, control, or manipulation, any of the following applies:

- (1) The person is under the influence of alcohol, a drug of abuse, or a combination of them.
- (2) The person has a concentration of eight-hundredths of one per cent or more by weight of alcohol per unit volume in the person's whole blood.
- (3) The person has a concentration of ninety-six-thousandths of one per cent or more by weight per unit volume of alcohol in the person's blood serum or plasma.
- (4) The person has a concentration of eleven-hundredths of one gram or more by weight of alcohol per one hundred milliliters of the person's urine.
- (5) The person has a concentration of eight-hundredths of one gram or more by weight of alcohol per two hundred ten liters of the person's breath.
- (6) Except as provided in division (H) of this section, the person has a concentration of any of the following controlled substances or metabolites of a controlled substance in the person's whole blood, blood serum or plasma, or urine that equals or exceeds any of the following:
  - (a) The person has a concentration of amphetamine in the person's urine of at least five hundred nanograms of amphetamine per milliliter of the person's urine or has a concentration of amphetamine in the person's whole blood or blood serum or plasma of at least one hundred nanograms of amphetamine per milliliter of the person's whole blood or blood serum or plasma.
  - (b) The person has a concentration of cocaine in the person's urine of at least one hundred fifty nanograms of cocaine per milliliter of the person's urine or has a concentration of cocaine in the person's whole blood or blood serum or plasma of at least fifty nanograms of cocaine per milliliter of the person's whole blood or blood serum or plasma.
  - (c) The person has a concentration of cocaine metabolite in the person's urine of at least one hundred fifty nanograms of cocaine metabolite per milliliter of the person's urine or has a concentration of cocaine metabolite in

the person's whole blood or blood serum or plasma of at least fifty nanograms of cocaine metabolite per milliliter of the person's whole blood or blood serum or plasma.

(d) The person has a concentration of heroin in the person's urine of at least two thousand nanograms of heroin per milliliter of the person's urine or has a concentration of heroin in the person's whole blood or blood serum or plasma of at least fifty nanograms of heroin per milliliter of the person's whole blood or blood serum or plasma.

(e) The person has a concentration of heroin metabolite (6-monoacetyl morphine) in the person's urine of at least ten nanograms of heroin metabolite (6-monoacetyl morphine) per milliliter of the person's urine or has a concentration of heroin metabolite (6-monoacetyl morphine) in the person's whole blood or blood serum or plasma of at least ten nanograms of heroin metabolite (6-monoacetyl morphine) per milliliter of the person's whole blood or blood serum or plasma.

(f) The person has a concentration of L.S.D. in the person's urine of at least twenty-five nanograms of L.S.D. per milliliter of the person's urine or has a concentration of L.S.D. in the person's whole blood or blood serum or plasma of at least ten nanograms of L.S.D. per milliliter of the person's whole blood or blood serum or plasma.

(g) The person has a concentration of marihuana in the person's urine of at least ten nanograms of marihuana per milliliter of the person's urine or has a concentration of marihuana in the person's whole blood or blood serum or plasma of at least two nanograms of marihuana per milliliter of the person's whole blood or blood serum or plasma.

(h) Either of the following applies:

(i) The person is under the influence of alcohol, a drug of abuse, or a combination of them, and, as measured by gas chromatography mass spectrometry, the person has a concentration of marihuana metabolite in the person's urine of at least fifteen nanograms of marihuana metabolite per milliliter of the person's urine or has a concentration of marihuana metabolite in the person's whole blood or blood serum or plasma of at least five nanograms of marihuana metabolite per milliliter of the person's whole blood or blood serum or plasma.

(ii) As measured by gas chromatography mass spectrometry, the person has a concentration of marihuana metabolite in the person's urine of at least thirty-five nanograms of marihuana metabolite per milliliter of the person's urine or has a concentration of marihuana metabolite in the person's whole blood or blood serum or plasma of at least fifty nanograms of marihuana metabolite per milliliter of the person's whole blood or blood serum or plasma.

(i) The person has a concentration of methamphetamine in the person's urine of at least five hundred nanograms of methamphetamine per milliliter of the person's urine or has a concentration of methamphetamine in the person's whole blood or blood serum or plasma of at least one hundred nanograms of methamphetamine per milliliter of the person's whole blood or blood serum or plasma.

(j) The person has a concentration of phencyclidine in the person's urine of at least twenty-five nanograms of phencyclidine per milliliter of the person's urine or has a concentration of phencyclidine in the person's whole blood or blood serum or plasma of at least ten nanograms of phencyclidine per milliliter of the person's whole blood or blood serum or plasma.

(B) No person under twenty-one years of age shall operate or be in physical control of any vessel underway or

shall manipulate any water skis, aquaplane, or similar device on the waters in this state if, at the time of the operation, control, or manipulation, any of the following applies:

(1) The person has a concentration of at least two-hundredths of one per cent, but less than eight-hundredths of one per cent by weight per unit volume of alcohol in the person's whole blood.

(2) The person has a concentration of at least three-hundredths of one per cent but less than ninety-six-thousandths of one per cent by weight per unit volume of alcohol in the person's blood serum or plasma.

(3) The person has a concentration of at least twenty-eight one-thousandths of one gram, but less than eleven-hundredths of one gram by weight of alcohol per one hundred milliliters of the person's urine.

(4) The person has a concentration of at least two-hundredths of one gram, but less than eight-hundredths of one gram by weight of alcohol per two hundred ten liters of the person's breath.

(C) In any proceeding arising out of one incident, a person may be charged with a violation of division (A)(1) and a violation of division (B)(1), (2), (3), or (4) of this section, but the person shall not be convicted of more than one violation of those divisions.

(D)(1) In any criminal prosecution or juvenile court proceeding for a violation of division (A) or (B) of this section or for an equivalent violation, the court may admit evidence on the concentration of alcohol, drugs of abuse, controlled substances, metabolites of a controlled substance, or a combination of them in the defendant's or child's whole blood, blood serum or plasma, urine, or breath at the time of the alleged violation as shown by chemical analysis of the substance withdrawn, or specimen taken within three hours of the time of the alleged violation. The three-hour time limit specified in this division regarding the admission of evidence does not extend or affect the two-hour time limit specified in division (C) of section 1547.111 of the Revised Code as the maximum period of time during which a person may consent to a chemical test or tests as described in that section.

When a person submits to a blood test, only a physician, a registered nurse, or a qualified technician, chemist, or phlebotomist shall withdraw blood for the purpose of determining the alcohol, drug, controlled substance, metabolite of a controlled substance, or combination content of the whole blood, blood serum, or blood plasma. This limitation does not apply to the taking of breath or urine specimens. A person authorized to withdraw blood under this division may refuse to withdraw blood under this division if, in that person's opinion, the physical welfare of the defendant or child would be endangered by withdrawing blood.

The whole blood, blood serum or plasma, urine, or breath shall be analyzed in accordance with methods approved by the director of health by an individual possessing a valid permit issued by the director pursuant to section 3701.143 of the Revised Code.

(2) In a criminal prosecution or juvenile court proceeding for a violation of division (A) of this section or for a violation of a prohibition that is substantially equivalent to division (A) of this section, if there was at the time the bodily substance was taken a concentration of less than the applicable concentration of alcohol specified for a violation of division (A)(2), (3), (4), or (5) of this section or less than the applicable concentration of a listed controlled substance or a listed metabolite of a controlled substance specified for a violation of division (A)(6) of this section, that fact may be considered with other competent evidence in determining the guilt or innocence of the defendant or in making an adjudication for the child. This division does not limit or affect a criminal pro-

secution or juvenile court proceeding for a violation of division (B) of this section or for a violation of a prohibition that is substantially equivalent to that division.

(3) Upon the request of the person who was tested, the results of the chemical test shall be made available to the person or the person's attorney immediately upon completion of the test analysis.

The person tested may have a physician, a registered nurse, or a qualified technician, chemist, or phlebotomist of the person's own choosing administer a chemical test or tests in addition to any administered at the direction of a law enforcement officer, and shall be so advised. The failure or inability to obtain an additional test by a person shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer.

(E)(1) In any criminal prosecution or juvenile court proceeding for a violation of division (A) or (B) of this section or for an equivalent violation, if a law enforcement officer has administered a field sobriety test to the operator or person found to be in physical control of the vessel underway involved in the violation or the person manipulating the water skis, aquaplane, or similar device involved in the violation and if it is shown by clear and convincing evidence that the officer administered the test in substantial compliance with the testing standards for reliable, credible, and generally accepted field sobriety tests for vehicles that were in effect at the time the tests were administered, including, but not limited to, any testing standards then in effect that have been set by the national highway traffic safety administration, that by their nature are not clearly inapplicable regarding the operation or physical control of vessels underway or the manipulation of water skis, aquaplanes, or similar devices, all of the following apply:

(a) The officer may testify concerning the results of the field sobriety test so administered.

(b) The prosecution may introduce the results of the field sobriety test so administered as evidence in any proceedings in the criminal prosecution or juvenile court proceeding.

(c) If testimony is presented or evidence is introduced under division (E)(1)(a) or (b) of this section and if the testimony or evidence is admissible under the Rules of Evidence, the court shall admit the testimony or evidence, and the trier of fact shall give it whatever weight the trier of fact considers to be appropriate.

(2) Division (E)(1) of this section does not limit or preclude a court, in its determination of whether the arrest of a person was supported by probable cause or its determination of any other matter in a criminal prosecution or juvenile court proceeding of a type described in that division, from considering evidence or testimony that is not otherwise disallowed by division (E)(1) of this section.

(F)(1) Subject to division (F)(3) of this section, in any criminal prosecution or juvenile court proceeding for a violation of this section or for an equivalent violation, the court shall admit as prima-facie evidence a laboratory report from any laboratory personnel issued a permit by the department of health authorizing an analysis as described in this division that contains an analysis of the whole blood, blood serum or plasma, breath, urine, or other bodily substance tested and that contains all of the information specified in this division. The laboratory report shall contain all of the following:

(a) The signature, under oath, of any person who performed the analysis;

(b) Any findings as to the identity and quantity of alcohol, a drug of abuse, a controlled substance, a metabolite

of a controlled substance, or a combination of them that was found;

(c) A copy of a notarized statement by the laboratory director or a designee of the director that contains the name of each certified analyst or test performer involved with the report, the analyst's or test performer's employment relationship with the laboratory that issued the report, and a notation that performing an analysis of the type involved is part of the analyst's or test performer's regular duties;

(d) An outline of the analyst's or test performer's education, training, and experience in performing the type of analysis involved and a certification that the laboratory satisfies appropriate quality control standards in general and, in this particular analysis, under rules of the department of health.

(2) Notwithstanding any other provision of law regarding the admission of evidence, a report of the type described in division (F)(1) of this section is not admissible against the defendant or child to whom it pertains in any proceeding, other than a preliminary hearing or a grand jury proceeding, unless the prosecutor has served a copy of the report on the defendant's or child's attorney or, if the defendant or child has no attorney, on the defendant or child.

(3) A report of the type described in division (F)(1) of this section shall not be prima-facie evidence of the contents, identity, or amount of any substance if, within seven days after the defendant or child to whom the report pertains or the defendant's or child's attorney receives a copy of the report, the defendant or child or the defendant's or child's attorney demands the testimony of the person who signed the report. The judge in the case may extend the seven-day time limit in the interest of justice.

(G) Except as otherwise provided in this division, any physician, registered nurse, or qualified technician, chemist, or phlebotomist who withdraws blood from a person pursuant to this section, and a hospital, first-aid station, or clinic at which blood is withdrawn from a person pursuant to this section, is immune from criminal and civil liability based upon a claim of assault and battery or any other claim that is not a claim of malpractice, for any act performed in withdrawing blood from the person. The immunity provided in this division is not available to a person who withdraws blood if the person engages in willful or wanton misconduct.

(H) Division (A)(6) of this section does not apply to a person who operates or is in physical control of a vessel underway or manipulates any water skis, aquaplane, or similar device while the person has a concentration of a listed controlled substance or a listed metabolite of a controlled substance in the person's whole blood, blood serum or plasma, or urine that equals or exceeds the amount specified in that division, if both of the following apply:

(1) The person obtained the controlled substance pursuant to a prescription issued by a licensed health professional authorized to prescribe drugs.

(2) The person injected, ingested, or inhaled the controlled substance in accordance with the health professional's directions.

(I) As used in this section and section 1547.111 of the Revised Code:

(1) "Equivalent violation" means a violation of a municipal ordinance, law of another state, or law of the United States that is substantially equivalent to division (A) or (B) of this section.

(2) "National highway traffic safety administration" has the same meaning as in section 4511.19 of the Revised

Code.

(3) "Operate" means that a vessel is being used on the waters in this state when the vessel is not securely affixed to a dock or to shore or to any permanent structure to which the vessel has the right to affix or that a vessel is not anchored in a designated anchorage area or boat camping area that is established by the United States coast guard, this state, or a political subdivision and in which the vessel has the right to anchor.

(4) "Controlled substance" and "marihuana" have the same meanings as in section 3719.01 of the Revised Code.

(5) "Cocaine" and "L.S.D." have the same meanings as in section 2925.01 of the Revised Code.

CREDIT(S)

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R.C. 4511.19



Baldwin's Ohio Revised Code Annotated Currentness

Title XLV. Motor Vehicles--Aeronautics--Watercraft

Chapter 4511. Traffic Laws--Operation of Motor Vehicles (Refs & Annos)

Operation of Motor Vehicle While Intoxicated

→ 4511.19 Driving while under the influence of alcohol or drugs; tests; presumptions; penalties; immunity for those withdrawing blood

<Note: See also version(s) of this section with later effective date(s).>

(A)(1) No person shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, any of the following apply:

- (a) The person is under the influence of alcohol, a drug of abuse, or a combination of them.
- (b) The person has a concentration of eight-hundredths of one per cent or more but less than seventeen-hundredths of one per cent by weight per unit volume of alcohol in the person's whole blood.
- (c) The person has a concentration of ninety-six-thousandths of one per cent or more but less than two hundred four-thousandths of one per cent by weight per unit volume of alcohol in the person's blood serum or plasma.
- (d) The person has a concentration of eight-hundredths of one gram or more but less than seventeen-hundredths of one gram by weight of alcohol per two hundred ten liters of the person's breath.
- (e) The person has a concentration of eleven-hundredths of one gram or more but less than two hundred thirty-eight-thousandths of one gram by weight of alcohol per one hundred milliliters of the person's urine.
- (f) The person has a concentration of seventeen-hundredths of one per cent or more by weight per unit volume of alcohol in the person's whole blood.
- (g) The person has a concentration of two hundred four-thousandths of one per cent or more by weight per unit volume of alcohol in the person's blood serum or plasma.
- (h) The person has a concentration of seventeen-hundredths of one gram or more by weight of alcohol per two hundred ten liters of the person's breath.
- (i) The person has a concentration of two hundred thirty-eight-thousandths of one gram or more by weight of alcohol per one hundred milliliters of the person's urine.
- (j) Except as provided in division (K) of this section, the person has a concentration of any of the following controlled substances or metabolites of a controlled substance in the person's whole blood, blood serum or plasma, or urine that equals or exceeds any of the following:
  - (i) The person has a concentration of amphetamine in the person's urine of at least five hundred nanograms of amphetamine per milliliter of the person's urine or has a concentration of amphetamine in the person's whole

blood or blood serum or plasma of at least one hundred nanograms of amphetamine per milliliter of the person's whole blood or blood serum or plasma.

(ii) The person has a concentration of cocaine in the person's urine of at least one hundred fifty nanograms of cocaine per milliliter of the person's urine or has a concentration of cocaine in the person's whole blood or blood serum or plasma of at least fifty nanograms of cocaine per milliliter of the person's whole blood or blood serum or plasma.

(iii) The person has a concentration of cocaine metabolite in the person's urine of at least one hundred fifty nanograms of cocaine metabolite per milliliter of the person's urine or has a concentration of cocaine metabolite in the person's whole blood or blood serum or plasma of at least fifty nanograms of cocaine metabolite per milliliter of the person's whole blood or blood serum or plasma.

(iv) The person has a concentration of heroin in the person's urine of at least two thousand nanograms of heroin per milliliter of the person's urine or has a concentration of heroin in the person's whole blood or blood serum or plasma of at least fifty nanograms of heroin per milliliter of the person's whole blood or blood serum or plasma.

(v) The person has a concentration of heroin metabolite (6-monoacetyl morphine) in the person's urine of at least ten nanograms of heroin metabolite (6-monoacetyl morphine) per milliliter of the person's urine or has a concentration of heroin metabolite (6-monoacetyl morphine) in the person's whole blood or blood serum or plasma of at least ten nanograms of heroin metabolite (6-monoacetyl morphine) per milliliter of the person's whole blood or blood serum or plasma.

(vi) The person has a concentration of L.S.D. in the person's urine of at least twenty-five nanograms of L.S.D. per milliliter of the person's urine or a concentration of L.S.D. in the person's whole blood or blood serum or plasma of at least ten nanograms of L.S.D. per milliliter of the person's whole blood or blood serum or plasma.

(vii) The person has a concentration of marihuana in the person's urine of at least ten nanograms of marihuana per milliliter of the person's urine or has a concentration of marihuana in the person's whole blood or blood serum or plasma of at least two nanograms of marihuana per milliliter of the person's whole blood or blood serum or plasma.

(viii) Either of the following applies:

(I) The person is under the influence of alcohol, a drug of abuse, or a combination of them, and, as measured by gas chromatography mass spectrometry, the person has a concentration of marihuana metabolite in the person's urine of at least fifteen nanograms of marihuana metabolite per milliliter of the person's urine or has a concentration of marihuana metabolite in the person's whole blood or blood serum or plasma of at least five nanograms of marihuana metabolite per milliliter of the person's whole blood or blood serum or plasma.

(II) As measured by gas chromatography mass spectrometry, the person has a concentration of marihuana metabolite in the person's urine of at least thirty-five nanograms of marihuana metabolite per milliliter of the person's urine or has a concentration of marihuana metabolite in the person's whole blood or blood serum or plasma of at least fifty nanograms of marihuana metabolite per milliliter of the person's whole blood or blood serum or plasma.

(ix) The person has a concentration of methamphetamine in the person's urine of at least five hundred nano-

grams of methamphetamine per milliliter of the person's urine or has a concentration of methamphetamine in the person's whole blood or blood serum or plasma of at least one hundred nanograms of methamphetamine per milliliter of the person's whole blood or blood serum or plasma.

(x) The person has a concentration of phencyclidine in the person's urine of at least twenty-five nanograms of phencyclidine per milliliter of the person's urine or has a concentration of phencyclidine in the person's whole blood or blood serum or plasma of at least ten nanograms of phencyclidine per milliliter of the person's whole blood or blood serum or plasma.

(2) No person who, within twenty years of the conduct described in division (A)(2)(a) of this section, previously has been convicted of or pleaded guilty to a violation of this division, division (A)(1) or (B) of this section, or a municipal OVI offense shall do both of the following:

(a) Operate any vehicle, streetcar, or trackless trolley within this state while under the influence of alcohol, a drug of abuse, or a combination of them;

(b) Subsequent to being arrested for operating the vehicle, streetcar, or trackless trolley as described in division (A)(2)(a) of this section, being asked by a law enforcement officer to submit to a chemical test or tests under section 4511.191 of the Revised Code, and being advised by the officer in accordance with section 4511.192 of the Revised Code of the consequences of the person's refusal or submission to the test or tests, refuse to submit to the test or tests.

(B) No person under twenty-one years of age shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, any of the following apply:

(1) The person has a concentration of at least two-hundredths of one per cent but less than eight-hundredths of one per cent by weight per unit volume of alcohol in the person's whole blood.

(2) The person has a concentration of at least three-hundredths of one per cent but less than ninety-six-thousandths of one per cent by weight per unit volume of alcohol in the person's blood serum or plasma.

(3) The person has a concentration of at least two-hundredths of one gram but less than eight-hundredths of one gram by weight of alcohol per two hundred ten liters of the person's breath.

(4) The person has a concentration of at least twenty-eight one-thousandths of one gram but less than eleven-hundredths of one gram by weight of alcohol per one hundred milliliters of the person's urine.

(C) In any proceeding arising out of one incident, a person may be charged with a violation of division (A)(1)(a) or (A)(2) and a violation of division (B)(1), (2), or (3) of this section, but the person may not be convicted of more than one violation of these divisions.

(D)(1)(a) In any criminal prosecution or juvenile court proceeding for a violation of division (A)(1)(a) of this section or for an equivalent offense, the result of any test of any blood or urine withdrawn and analyzed at any health care provider, as defined in section 2317.02 of the Revised Code, may be admitted with expert testimony to be considered with any other relevant and competent evidence in determining the guilt or innocence of the defendant.

(b) In any criminal prosecution or juvenile court proceeding for a violation of division (A) or (B) of this section

or for an equivalent offense, the court may admit evidence on the concentration of alcohol, drugs of abuse, controlled substances, metabolites of a controlled substance, or a combination of them in the defendant's whole blood, blood serum or plasma, breath, urine, or other bodily substance at the time of the alleged violation as shown by chemical analysis of the substance withdrawn within three hours of the time of the alleged violation. The three-hour time limit specified in this division regarding the admission of evidence does not extend or affect the two-hour time limit specified in division (A) of section 4511.192 of the Revised Code as the maximum period of time during which a person may consent to a chemical test or tests as described in that section. The court may admit evidence on the concentration of alcohol, drugs of abuse, or a combination of them as described in this division when a person submits to a blood, breath, urine, or other bodily substance test at the request of a law enforcement officer under section 4511.191 of the Revised Code or a blood or urine sample is obtained pursuant to a search warrant. Only a physician, a registered nurse, or a qualified technician, chemist, or phlebotomist shall withdraw a blood sample for the purpose of determining the alcohol, drug, controlled substance, metabolite of a controlled substance, or combination content of the whole blood, blood serum, or blood plasma. This limitation does not apply to the taking of breath or urine specimens. A person authorized to withdraw blood under this division may refuse to withdraw blood under this division, if in that person's opinion, the physical welfare of the person would be endangered by the withdrawing of blood.

The bodily substance withdrawn under division (D)(1)(b) of this section shall be analyzed in accordance with methods approved by the director of health by an individual possessing a valid permit issued by the director pursuant to section 3701.143 of the Revised Code.

(2) In a criminal prosecution or juvenile court proceeding for a violation of division (A) of this section or for an equivalent offense, if there was at the time the bodily substance was withdrawn a concentration of less than the applicable concentration of alcohol specified in divisions (A)(1)(b), (c), (d), and (e) of this section or less than the applicable concentration of a listed controlled substance or a listed metabolite of a controlled substance specified for a violation of division (A)(1)(j) of this section, that fact may be considered with other competent evidence in determining the guilt or innocence of the defendant. This division does not limit or affect a criminal prosecution or juvenile court proceeding for a violation of division (B) of this section or for an equivalent offense that is substantially equivalent to that division.

(3) Upon the request of the person who was tested, the results of the chemical test shall be made available to the person or the person's attorney, immediately upon the completion of the chemical test analysis.

If the chemical test was obtained pursuant to division (D)(1)(b) of this section, the person tested may have a physician, a registered nurse, or a qualified technician, chemist, or phlebotomist of the person's own choosing administer a chemical test or tests, at the person's expense, in addition to any administered at the request of a law enforcement officer. The form to be read to the person to be tested, as required under section 4511.192 of the Revised Code, shall state that the person may have an independent test performed at the person's expense. The failure or inability to obtain an additional chemical test by a person shall not preclude the admission of evidence relating to the chemical test or tests taken at the request of a law enforcement officer.

(4)(a) As used in divisions (D)(4)(b) and (c) of this section, "national highway traffic safety administration" means the national highway traffic safety administration established as an administration of the United States department of transportation under 96 Stat. 2415 (1983), 49 U.S.C.A. 105.

(b) In any criminal prosecution or juvenile court proceeding for a violation of division (A) or (B) of this section,

of a municipal ordinance relating to operating a vehicle while under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, or of a municipal ordinance relating to operating a vehicle with a prohibited concentration of alcohol, a controlled substance, or a metabolite of a controlled substance in the blood, breath, or urine, if a law enforcement officer has administered a field sobriety test to the operator of the vehicle involved in the violation and if it is shown by clear and convincing evidence that the officer administered the test in substantial compliance with the testing standards for any reliable, credible, and generally accepted field sobriety tests that were in effect at the time the tests were administered, including, but not limited to, any testing standards then in effect that were set by the national highway traffic safety administration, all of the following apply:

- (i) The officer may testify concerning the results of the field sobriety test so administered.
  - (ii) The prosecution may introduce the results of the field sobriety test so administered as evidence in any proceedings in the criminal prosecution or juvenile court proceeding.
  - (iii) If testimony is presented or evidence is introduced under division (D)(4)(b)(i) or (ii) of this section and if the testimony or evidence is admissible under the Rules of Evidence, the court shall admit the testimony or evidence and the trier of fact shall give it whatever weight the trier of fact considers to be appropriate.
- (c) Division (D)(4)(b) of this section does not limit or preclude a court, in its determination of whether the arrest of a person was supported by probable cause or its determination of any other matter in a criminal prosecution or juvenile court proceeding of a type described in that division, from considering evidence or testimony that is not otherwise disallowed by division (D)(4)(b) of this section.
- (E)(1) Subject to division (E)(3) of this section, in any criminal prosecution or juvenile court proceeding for a violation of division (A)(1)(b), (c), (d), (e), (f), (g), (h), (i), or (j) or (B)(1), (2), (3), or (4) of this section or for an equivalent offense that is substantially equivalent to any of those divisions, a laboratory report from any laboratory personnel issued a permit by the department of health authorizing an analysis as described in this division that contains an analysis of the whole blood, blood serum or plasma, breath, urine, or other bodily substance tested and that contains all of the information specified in this division shall be admitted as prima-facie evidence of the information and statements that the report contains. The laboratory report shall contain all of the following:
- (a) The signature, under oath, of any person who performed the analysis;
  - (b) Any findings as to the identity and quantity of alcohol, a drug of abuse, a controlled substance, a metabolite of a controlled substance, or a combination of them that was found;
  - (c) A copy of a notarized statement by the laboratory director or a designee of the director that contains the name of each certified analyst or test performer involved with the report, the analyst's or test performer's employment relationship with the laboratory that issued the report, and a notation that performing an analysis of the type involved is part of the analyst's or test performer's regular duties;
  - (d) An outline of the analyst's or test performer's education, training, and experience in performing the type of analysis involved and a certification that the laboratory satisfies appropriate quality control standards in general and, in this particular analysis, under rules of the department of health.
- (2) Notwithstanding any other provision of law regarding the admission of evidence, a report of the type de-

scribed in division (E)(1) of this section is not admissible against the defendant to whom it pertains in any proceeding, other than a preliminary hearing or a grand jury proceeding, unless the prosecutor has served a copy of the report on the defendant's attorney or, if the defendant has no attorney, on the defendant.

(3) A report of the type described in division (E)(1) of this section shall not be prima-facie evidence of the contents, identity, or amount of any substance if, within seven days after the defendant to whom the report pertains or the defendant's attorney receives a copy of the report, the defendant or the defendant's attorney demands the testimony of the person who signed the report. The judge in the case may extend the seven-day time limit in the interest of justice.

(F) Except as otherwise provided in this division, any physician, registered nurse, or qualified technician, chemist, or phlebotomist who withdraws blood from a person pursuant to this section, and any hospital, first-aid station, or clinic at which blood is withdrawn from a person pursuant to this section, is immune from criminal liability and civil liability based upon a claim of assault and battery or any other claim that is not a claim of malpractice, for any act performed in withdrawing blood from the person. The immunity provided in this division is not available to a person who withdraws blood if the person engages in willful or wanton misconduct.

(G)(1) Whoever violates any provision of divisions (A)(1)(a) to (i) or (A)(2) of this section is guilty of operating a vehicle under the influence of alcohol, a drug of abuse, or a combination of them. Whoever violates division (A)(1)(j) of this section is guilty of operating a vehicle while under the influence of a listed controlled substance or a listed metabolite of a controlled substance. The court shall sentence the offender for either offense under Chapter 2929. of the Revised Code, except as otherwise authorized or required by divisions (G)(1)(a) to (e) of this section:

(a) Except as otherwise provided in division (G)(1)(b), (c), (d), or (e) of this section, the offender is guilty of a misdemeanor of the first degree, and the court shall sentence the offender to all of the following:

(i) If the sentence is being imposed for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory jail term of three consecutive days. As used in this division, three consecutive days means seventy-two consecutive hours. The court may sentence an offender to both an intervention program and a jail term. The court may impose a jail term in addition to the three-day mandatory jail term or intervention program. However, in no case shall the cumulative jail term imposed for the offense exceed six months.

The court may suspend the execution of the three-day jail term under this division if the court, in lieu of that suspended term, places the offender under a community control sanction pursuant to section 2929.25 of the Revised Code and requires the offender to attend, for three consecutive days, a drivers' intervention program certified under section 3793.10 of the Revised Code. The court also may suspend the execution of any part of the three-day jail term under this division if it places the offender under a community control sanction pursuant to section 2929.25 of the Revised Code for part of the three days, requires the offender to attend for the suspended part of the term a drivers' intervention program so certified, and sentences the offender to a jail term equal to the remainder of the three consecutive days that the offender does not spend attending the program. The court may require the offender, as a condition of community control and in addition to the required attendance at a drivers' intervention program, to attend and satisfactorily complete any treatment or education programs that comply with the minimum standards adopted pursuant to Chapter 3793. of the Revised Code by the director of alcohol and drug addiction services that the operators of the drivers' intervention program determine that the offender should attend and to report periodically to the court on the offender's progress in the programs. The court also

may impose on the offender any other conditions of community control that it considers necessary.

(ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) of this section, except as otherwise provided in this division, a mandatory jail term of at least three consecutive days and a requirement that the offender attend, for three consecutive days, a drivers' intervention program that is certified pursuant to section 3793.10 of the Revised Code. As used in this division, three consecutive days means seventy-two consecutive hours. If the court determines that the offender is not conducive to treatment in a drivers' intervention program, if the offender refuses to attend a drivers' intervention program, or if the jail at which the offender is to serve the jail term imposed can provide a driver's intervention program, the court shall sentence the offender to a mandatory jail term of at least six consecutive days.

The court may require the offender, under a community control sanction imposed under section 2929.25 of the Revised Code, to attend and satisfactorily complete any treatment or education programs that comply with the minimum standards adopted pursuant to Chapter 3793. of the Revised Code by the director of alcohol and drug addiction services, in addition to the required attendance at drivers' intervention program, that the operators of the drivers' intervention program determine that the offender should attend and to report periodically to the court on the offender's progress in the programs. The court also may impose any other conditions of community control on the offender that it considers necessary.

(iii) In all cases, a fine of not less than three hundred twenty-five and not more than one thousand seventy-five dollars;

(iv) In all cases, a class five license suspension of the offender's driver's or commercial driver's license or permit or nonresident operating privilege from the range specified in division (A)(5) of section 4510.02 of the Revised Code. The court may grant limited driving privileges relative to the suspension under sections 4510.021 and 4510.13 of the Revised Code.

(b) Except as otherwise provided in division (G)(1)(e) of this section, an offender who, within six years of the offense, previously has been convicted of or pleaded guilty to one violation of division (A) or (B) of this section or one other equivalent offense is guilty of a misdemeanor of the first degree. The court shall sentence the offender to all of the following:

(i) If the sentence is being imposed for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory jail term of ten consecutive days. The court shall impose the ten-day mandatory jail term under this division unless, subject to division (G)(3) of this section, it instead imposes a sentence under that division consisting of both a jail term and a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The court may impose a jail term in addition to the ten-day mandatory jail term. The cumulative jail term imposed for the offense shall not exceed six months.

In addition to the jail term or the term of house arrest with electronic monitoring or continuous alcohol monitoring or both types of monitoring and jail term, the court may require the offender to attend a drivers' intervention program that is certified pursuant to section 3793.10 of the Revised Code. If the operator of the program determines that the offender is alcohol dependent, the program shall notify the court, and, subject to division (I) of this section, the court shall order the offender to obtain treatment through an alcohol and drug addiction program authorized by section 3793.02 of the Revised Code.

(ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) of this section, except as otherwise provided in this division, a mandatory jail term of twenty consecutive days. The court shall impose the twenty-day mandatory jail term under this division unless, subject to division (G)(3) of this section, it instead imposes a sentence under that division consisting of both a jail term and a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The court may impose a jail term in addition to the twenty-day mandatory jail term. The cumulative jail term imposed for the offense shall not exceed six months.

In addition to the jail term or the term of house arrest with electronic monitoring or continuous alcohol monitoring or both types of monitoring and jail term, the court may require the offender to attend a driver's intervention program that is certified pursuant to section 3793.10 of the Revised Code. If the operator of the program determines that the offender is alcohol dependent, the program shall notify the court, and, subject to division (I) of this section, the court shall order the offender to obtain treatment through an alcohol and drug addiction program authorized by section 3793.02 of the Revised Code.

(iii) In all cases, notwithstanding the fines set forth in Chapter 2929. of the Revised Code, a fine of not less than four hundred seventy-five and not more than one thousand six hundred twenty-five dollars;

(iv) In all cases, a class four license suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(4) of section 4510.02 of the Revised Code. The court may grant limited driving privileges relative to the suspension under sections 4510.021 and 4510.13 of the Revised Code.

(v) In all cases, if the vehicle is registered in the offender's name, immobilization of the vehicle involved in the offense for ninety days in accordance with section 4503.233 of the Revised Code and impoundment of the license plates of that vehicle for ninety days.

(c) Except as otherwise provided in division (G)(1)(e) of this section, an offender who, within six years of the offense, previously has been convicted of or pleaded guilty to two violations of division (A) or (B) of this section or other equivalent offenses is guilty of a misdemeanor. The court shall sentence the offender to all of the following:

(i) If the sentence is being imposed for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory jail term of thirty consecutive days. The court shall impose the thirty-day mandatory jail term under this division unless, subject to division (G)(3) of this section, it instead imposes a sentence under that division consisting of both a jail term and a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The court may impose a jail term in addition to the thirty-day mandatory jail term. Notwithstanding the jail terms set forth in sections 2929.21 to 2929.28 of the Revised Code, the additional jail term shall not exceed one year, and the cumulative jail term imposed for the offense shall not exceed one year.

(ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) of this section, a mandatory jail term of sixty consecutive days. The court shall impose the sixty-day mandatory jail term under this division unless, subject to division (G)(3) of this section, it instead imposes a sentence under that division consisting of both a jail term and a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The court may impose a jail term in addition to the sixty-day mandatory jail term. Notwithstanding the jail terms set forth in sections

2929.21 to 2929.28 of the Revised Code, the additional jail term shall not exceed one year, and the cumulative jail term imposed for the offense shall not exceed one year.

(iii) In all cases, notwithstanding the fines set forth in Chapter 2929. of the Revised Code, a fine of not less than eight hundred and not more than two thousand seven hundred fifty dollars;

(iv) In all cases, a class three license suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(3) of section 4510.02 of the Revised Code. The court may grant limited driving privileges relative to the suspension under sections 4510.021 and 4510.13 of the Revised Code.

(v) In all cases, if the vehicle is registered in the offender's name, criminal forfeiture of the vehicle involved in the offense in accordance with section 4503.234 of the Revised Code. Division (G)(6) of this section applies regarding any vehicle that is subject to an order of criminal forfeiture under this division.

(vi) In all cases, participation in an alcohol and drug addiction program authorized by section 3793.02 of the Revised Code, subject to division (I) of this section.

(d) Except as otherwise provided in division (G)(1)(e) of this section, an offender who, within six years of the offense, previously has been convicted of or pleaded guilty to three or four violations of division (A) or (B) of this section or other equivalent offenses or an offender who, within twenty years of the offense, previously has been convicted of or pleaded guilty to five or more violations of that nature is guilty of a felony of the fourth degree. The court shall sentence the offender to all of the following:

(i) If the sentence is being imposed for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory prison term of one, two, three, four, or five years as required by and in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1413 of the Revised Code or, in the discretion of the court, either a mandatory term of local incarceration of sixty consecutive days in accordance with division (G)(1) of section 2929.13 of the Revised Code or a mandatory prison term of sixty consecutive days in accordance with division (G)(2) of that section if the offender is not convicted of and does not plead guilty to a specification of that type. If the court imposes a mandatory term of local incarceration, it may impose a jail term in addition to the sixty-day mandatory term, the cumulative total of the mandatory term and the jail term for the offense shall not exceed one year, and, except as provided in division (A)(1) of section 2929.13 of the Revised Code, no prison term is authorized for the offense. If the court imposes a mandatory prison term, notwithstanding division (A)(4) of section 2929.14 of the Revised Code, it also may sentence the offender to a definite prison term that shall be not less than six months and not more than thirty months and the prison terms shall be imposed as described in division (G)(2) of section 2929.13 of the Revised Code. If the court imposes a mandatory prison term or mandatory prison term and additional prison term, in addition to the term or terms so imposed, the court also may sentence the offender to a community control sanction for the offense, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

(ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) of this section, a mandatory prison term of one, two, three, four, or five years as required by and in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1413 of the Revised Code or, in the discretion of the court, either a mandatory term of local incarceration of one hundred twenty consecutive days in accordance with divi-

sion (G)(1) of section 2929.13 of the Revised Code or a mandatory prison term of one hundred twenty consecutive days in accordance with division (G)(2) of that section if the offender is not convicted of and does not plead guilty to a specification of that type. If the court imposes a mandatory term of local incarceration, it may impose a jail term in addition to the one hundred twenty-day mandatory term, the cumulative total of the mandatory term and the jail term for the offense shall not exceed one year, and, except as provided in division (A)(1) of section 2929.13 of the Revised Code, no prison term is authorized for the offense. If the court imposes a mandatory prison term, notwithstanding division (A)(4) of section 2929.14 of the Revised Code, it also may sentence the offender to a definite prison term that shall be not less than six months and not more than thirty months and the prison terms shall be imposed as described in division (G)(2) of section 2929.13 of the Revised Code. If the court imposes a mandatory prison term or mandatory prison term and additional prison term, in addition to the term or terms so imposed, the court also may sentence the offender to a community control sanction for the offense, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

(iii) In all cases, notwithstanding section 2929.18 of the Revised Code, a fine of not less than one thousand three hundred nor more than ten thousand five hundred dollars;

(iv) In all cases, a class two license suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(2) of section 4510.02 of the Revised Code. The court may grant limited driving privileges relative to the suspension under sections 4510.021 and 4510.13 of the Revised Code.

(v) In all cases, if the vehicle is registered in the offender's name, criminal forfeiture of the vehicle involved in the offense in accordance with section 4503.234 of the Revised Code. Division (G)(6) of this section applies regarding any vehicle that is subject to an order of criminal forfeiture under this division.

(vi) In all cases, participation in an alcohol and drug addiction program authorized by section 3793.02 of the Revised Code, subject to division (I) of this section.

(vii) In all cases, if the court sentences the offender to a mandatory term of local incarceration, in addition to the mandatory term, the court, pursuant to section 2929.17 of the Revised Code, may impose a term of house arrest with electronic monitoring. The term shall not commence until after the offender has served the mandatory term of local incarceration.

(e) An offender who previously has been convicted of or pleaded guilty to a violation of division (A) of this section that was a felony, regardless of when the violation and the conviction or guilty plea occurred, is guilty of a felony of the third degree. The court shall sentence the offender to all of the following:

(i) If the offender is being sentenced for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory prison term of one, two, three, four, or five years as required by and in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1413 of the Revised Code or a mandatory prison term of sixty consecutive days in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender is not convicted of and does not plead guilty to a specification of that type. The court may impose a prison term in addition to the mandatory prison term. The cumulative total of a sixty-day mandatory prison term and the additional prison term for the offense shall not exceed five years. In addition to the mandatory prison term or mandatory prison term and additional prison term the court imposes, the court also may sentence the offender to a

community control sanction for the offense, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

(ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) of this section, a mandatory prison term of one, two, three, four, or five years as required by and in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1413 of the Revised Code or a mandatory prison term of one hundred twenty consecutive days in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender is not convicted of and does not plead guilty to a specification of that type. The court may impose a prison term in addition to the mandatory prison term. The cumulative total of a one hundred twenty-day mandatory prison term and the additional prison term for the offense shall not exceed five years. In addition to the mandatory prison term or mandatory prison term and additional prison term the court imposes, the court also may sentence the offender to a community control sanction for the offense, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

(iii) In all cases, notwithstanding section 2929.18 of the Revised Code, a fine of not less than one thousand three hundred nor more than ten thousand five hundred dollars;

(iv) In all cases, a class two license suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(2) of section 4510.02 of the Revised Code. The court may grant limited driving privileges relative to the suspension under sections 4510.021 and 4510.13 of the Revised Code.

(v) In all cases, if the vehicle is registered in the offender's name, criminal forfeiture of the vehicle involved in the offense in accordance with section 4503.234 of the Revised Code. Division (G)(6) of this section applies regarding any vehicle that is subject to an order of criminal forfeiture under this division.

(vi) In all cases, participation in an alcohol and drug addiction program authorized by section 3793.02 of the Revised Code, subject to division (I) of this section.

(2) An offender who is convicted of or pleads guilty to a violation of division (A) of this section and who subsequently seeks reinstatement of the driver's or occupational driver's license or permit or nonresident operating privilege suspended under this section as a result of the conviction or guilty plea shall pay a reinstatement fee as provided in division (F)(2) of section 4511.191 of the Revised Code.

(3) If an offender is sentenced to a jail term under division (G)(1)(b)(i) or (ii) or (G)(1)(c)(i) or (ii) of this section and if, within sixty days of sentencing of the offender, the court issues a written finding on the record that, due to the unavailability of space at the jail where the offender is required to serve the term, the offender will not be able to begin serving that term within the sixty-day period following the date of sentencing, the court may impose an alternative sentence under this division that includes a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring.

As an alternative to a mandatory jail term of ten consecutive days required by division (G)(1)(b)(i) of this section, the court, under this division, may sentence the offender to five consecutive days in jail and not less than eighteen consecutive days of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The cumulative total of the five consecutive days in jail and the period of house arrest with electronic monitoring, continuous alcohol monitoring, or both

types of monitoring shall not exceed six months. The five consecutive days in jail do not have to be served prior to or consecutively to the period of house arrest.

As an alternative to the mandatory jail term of twenty consecutive days required by division (G)(1)(b)(ii) of this section, the court, under this division, may sentence the offender to ten consecutive days in jail and not less than thirty-six consecutive days of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The cumulative total of the ten consecutive days in jail and the period of house arrest with electronic monitoring, continuous alcohol monitoring, or both types of monitoring shall not exceed six months. The ten consecutive days in jail do not have to be served prior to or consecutively to the period of house arrest.

As an alternative to a mandatory jail term of thirty consecutive days required by division (G)(1)(c)(i) of this section, the court, under this division, may sentence the offender to fifteen consecutive days in jail and not less than fifty-five consecutive days of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The cumulative total of the fifteen consecutive days in jail and the period of house arrest with electronic monitoring, continuous alcohol monitoring, or both types of monitoring shall not exceed one year. The fifteen consecutive days in jail do not have to be served prior to or consecutively to the period of house arrest.

As an alternative to the mandatory jail term of sixty consecutive days required by division (G)(1)(c)(ii) of this section, the court, under this division, may sentence the offender to thirty consecutive days in jail and not less than one hundred ten consecutive days of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The cumulative total of the thirty consecutive days in jail and the period of house arrest with electronic monitoring, continuous alcohol monitoring, or both types of monitoring shall not exceed one year. The thirty consecutive days in jail do not have to be served prior to or consecutively to the period of house arrest.

(4) If an offender's driver's or occupational driver's license or permit or nonresident operating privilege is suspended under division (G) of this section and if section 4510.13 of the Revised Code permits the court to grant limited driving privileges, the court may grant the limited driving privileges in accordance with that section. If division (A)(7) of that section requires that the court impose as a condition of the privileges that the offender must display on the vehicle that is driven subject to the privileges restricted license plates that are issued under section 4503.231 of the Revised Code, except as provided in division (B) of that section, the court shall impose that condition as one of the conditions of the limited driving privileges granted to the offender, except as provided in division (B) of section 4503.231 of the Revised Code.

(5) Fines imposed under this section for a violation of division (A) of this section shall be distributed as follows:

(a) Twenty-five dollars of the fine imposed under division (G)(1)(a)(iii), thirty-five dollars of the fine imposed under division (G)(1)(b)(iii), one hundred twenty-three dollars of the fine imposed under division (G)(1)(c)(iii), and two hundred ten dollars of the fine imposed under division (G)(1)(d)(iii) or (e)(iii) of this section shall be paid to an enforcement and education fund established by the legislative authority of the law enforcement agency in this state that primarily was responsible for the arrest of the offender, as determined by the court that imposes the fine. The agency shall use this share to pay only those costs it incurs in enforcing this section or a municipal OVI ordinance and in informing the public of the laws governing the operation of a vehicle while under the influence of alcohol, the dangers of the operation of a vehicle under the influence of alcohol, and other

information relating to the operation of a vehicle under the influence of alcohol and the consumption of alcoholic beverages.

(b) Fifty dollars of the fine imposed under division (G)(1)(a)(iii) of this section shall be paid to the political subdivision that pays the cost of housing the offender during the offender's term of incarceration. If the offender is being sentenced for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section and was confined as a result of the offense prior to being sentenced for the offense but is not sentenced to a term of incarceration, the fifty dollars shall be paid to the political subdivision that paid the cost of housing the offender during that period of confinement. The political subdivision shall use the share under this division to pay or reimburse incarceration or treatment costs it incurs in housing or providing drug and alcohol treatment to persons who violate this section or a municipal OVI ordinance, costs of any immobilizing or disabling device used on the offender's vehicle, and costs of electronic house arrest equipment needed for persons who violate this section.

(c) Twenty-five dollars of the fine imposed under division (G)(1)(a)(iii) and fifty dollars of the fine imposed under division (G)(1)(b)(iii) of this section shall be deposited into the county or municipal indigent drivers' alcohol treatment fund under the control of that court, as created by the county or municipal corporation under division (N) of section 4511.191 of the Revised Code.

(d) One hundred fifteen dollars of the fine imposed under division (G)(1)(b)(iii), two hundred seventy-seven dollars of the fine imposed under division (G)(1)(c)(iii), and four hundred forty dollars of the fine imposed under division (G)(1)(d)(iii) or (e)(iii) of this section shall be paid to the political subdivision that pays the cost of housing the offender during the offender's term of incarceration. The political subdivision shall use this share to pay or reimburse incarceration or treatment costs it incurs in housing or providing drug and alcohol treatment to persons who violate this section or a municipal OVI ordinance, costs for any immobilizing or disabling device used on the offender's vehicle, and costs of electronic house arrest equipment needed for persons who violate this section.

(e) Seventy-five dollars of the fine imposed under division (G)(1)(a)(iii), one hundred twenty-five dollars of the fine imposed under division (G)(1)(b)(iii), two hundred fifty dollars of the fine imposed under division (G)(1)(c)(iii), and five hundred dollars of the fine imposed under division (G)(1)(d)(iii) or (e)(iii) of this section shall be transmitted to the treasurer of state for deposit into the indigent defense support fund established under section 120.08 of the Revised Code.

(f) The balance of the fine imposed under division (G)(1)(a)(iii), (b)(iii), (c)(iii), (d)(iii), or (e)(iii) of this section shall be disbursed as otherwise provided by law.

(6) If title to a motor vehicle that is subject to an order of criminal forfeiture under division (G)(1)(c), (d), or (e) of this section is assigned or transferred and division (B)(2) or (3) of section 4503.234 of the Revised Code applies, in addition to or independent of any other penalty established by law, the court may fine the offender the value of the vehicle as determined by publications of the national auto dealers association. The proceeds of any fine so imposed shall be distributed in accordance with division (C)(2) of that section.

(7) As used in division (G) of this section, "electronic monitoring," "mandatory prison term," and "mandatory term of local incarceration" have the same meanings as in section 2929.01 of the Revised Code.

(H) Whoever violates division (B) of this section is guilty of operating a vehicle after underage alcohol consumption and shall be punished as follows:

(1) Except as otherwise provided in division (H)(2) of this section, the offender is guilty of a misdemeanor of the fourth degree. In addition to any other sanction imposed for the offense, the court shall impose a class six suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(6) of section 4510.02 of the Revised Code.

(2) If, within one year of the offense, the offender previously has been convicted of or pleaded guilty to one or more violations of division (A) or (B) of this section or other equivalent offenses, the offender is guilty of a misdemeanor of the third degree. In addition to any other sanction imposed for the offense, the court shall impose a class four suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(4) of section 4510.02 of the Revised Code.

(3) If the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1416 of the Revised Code and if the court imposes a jail term for the violation of division (B) of this section, the court shall impose upon the offender an additional definite jail term pursuant to division (E) of section 2929.24 of the Revised Code.

(I)(1) No court shall sentence an offender to an alcohol treatment program under this section unless the treatment program complies with the minimum standards for alcohol treatment programs adopted under Chapter 3793. of the Revised Code by the director of alcohol and drug addiction services.

(2) An offender who stays in a drivers' intervention program or in an alcohol treatment program under an order issued under this section shall pay the cost of the stay in the program. However, if the court determines that an offender who stays in an alcohol treatment program under an order issued under this section is unable to pay the cost of the stay in the program, the court may order that the cost be paid from the court's indigent drivers' alcohol treatment fund.

(J) If a person whose driver's or commercial driver's license or permit or nonresident operating privilege is suspended under this section files an appeal regarding any aspect of the person's trial or sentence, the appeal itself does not stay the operation of the suspension.

(K) Division (A)(1)(j) of this section does not apply to a person who operates a vehicle, streetcar, or trackless trolley while the person has a concentration of a listed controlled substance or a listed metabolite of a controlled substance in the person's whole blood, blood serum or plasma, or urine that equals or exceeds the amount specified in that division, if both of the following apply:

(1) The person obtained the controlled substance pursuant to a prescription issued by a licensed health professional authorized to prescribe drugs.

(2) The person injected, ingested, or inhaled the controlled substance in accordance with the health professional's directions.

(L) The prohibited concentrations of a controlled substance or a metabolite of a controlled substance listed in division (A)(1)(j) of this section also apply in a prosecution of a violation of division (D) of section 2923.16 of the Revised Code in the same manner as if the offender is being prosecuted for a prohibited concentration of alcohol.

(M) All terms defined in section 4510.01 of the Revised Code apply to this section. If the meaning of a term defined in section 4510.01 of the Revised Code conflicts with the meaning of the same term as defined in section 4501.01 or 4511.01 of the Revised Code, the term as defined in section 4510.01 of the Revised Code applies to this section.

(N)(1) The Ohio Traffic Rules in effect on January 1, 2004, as adopted by the supreme court under authority of section 2937.46 of the Revised Code, do not apply to felony violations of this section. Subject to division (N)(2) of this section, the Rules of Criminal Procedure apply to felony violations of this section.

(2) If, on or after January 1, 2004, the supreme court modifies the Ohio Traffic Rules to provide procedures to govern felony violations of this section, the modified rules shall apply to felony violations of this section.

#### CREDIT(S)

(2008 S 209, eff. 3-26-08; 2006 H 461, eff. 4-4-07; 2006 S 8, eff. 8-17-06; 2004 H 163, eff. 9-23-04; 2003 H 87, § 4, eff. 1-1-04; 2003 H 87, § 1, eff. 6-30-03; 2002 S 163, § 3, eff. 1-1-04; 2002 S 163, § 1, eff. 4-9-03; 2002 H 490, eff. 1-1-04; 2002 S 123, eff. 1-1-04; 1999 S 22, eff. 5-17-00; 1994 S 82, eff. 5-4-94; 1990 H 837, eff. 7-25-90; 1990 S 131; 1986 S 262; 1982 S 432; 1974 H 995; 1971 S 14; 1970 H 874; 132 v H 380; 130 v S 41; 125 v 461; 1953 H 1; GC 6307-19)

Current through 2008 File 129 of the 127th GA (2007-2008), apv. by 8/26/08, and filed with the Secretary of State by 8/26/08.

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U.S. Const. Amend. IV



**C**

United States Code Annotated Currentness

Constitution of the United States

▣ Annotated

▣ Amendment IV. Searches and Seizures (Refs & Annos)

→ Amendment IV. Search and Seizure

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Current through P.L. 110-316 (excluding P.L. 110-234, 110-246, 110-289, 110-314, and 110-315) approved 8-14-08

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U.S. Const. Amend. V

United States Code Annotated Currentness  
Constitution of the United States

☐ Annotated

☐ Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property (Refs & Annos)

→ Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<This amendment is further displayed in five separate documents according to subject matter,>

<see USCA Const Amend. V-Capital Crimes>

<see USCA Const Amend. V-Double Jeopardy>

<see USCA Const Amend. V-Self Incrimination>

<see USCA Const Amend. V-Due Process>

<see USCA Const Amend. V-Just Compensation>

Current through P.L. 110-316 (excluding P.L. 110-234, 110-246, 110-289, 110-314, and 110-315) approved 8-14-08

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U.S. Const. Amend. VI

**C**

United States Code Annotated Currentness

Constitution of the United States

☞ Annotated

☞ Amendment VI. Jury Trial for Crimes, and Procedural Rights (Refs & Annos)

→ Amendment VI. Jury trials for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Current through P.L. 110-316 (excluding P.L. 110-234, 110-246, 110-289, 110-314, and 110-315) approved 8-14-08

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U.S. Const. Amend. XIV



## United States Code Annotated Currentness

## Constitution of the United States

## Annotated

Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement (Refs & Annos)

→ **AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT**

**Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Section 2.** Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

**Section 3.** No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

**Section 4.** The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

**Section 5.** The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

<Section 1 of this amendment is further displayed in separate documents according to subject matter,>

<see USCA Const Amend. XIV, § 1-Citizens>

<see USCA Const Amend. XIV, § 1-Privileges>

<see USCA Const Amend. XIV, § 1-Due Proc>

<see USCA Const Amend. XIV, § 1-Equal Protect>

<sections 2 to 5 of this amendment are displayed as separate documents,>

<see USCA Const Amend. XIV, § 2,>

<see USCA Const Amend. XIV, § 3,>

<see USCA Const Amend. XIV, § 4,>

<see USCA Const Amend. XIV, § 5,>

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Vt. Stat. tit. 23, 1203



This document has been updated. Use KEYCITE.

WEST'S VERMONT STATUTES ANNOTATED  
TITLE TWENTY-THREE. MOTOR VEHICLES  
CHAPTER 13. OPERATION OF VEHICLES  
SUBCHAPTER 13. DRUNKEN DRIVING

→ § 1203. Administration of tests; retention of test and videotape

(a) A breath test shall be administered only by a person who has been certified by the Vermont criminal justice training council to operate the breath testing equipment being employed. In any proceeding under this subchapter, a person's testimony that he or she is certified to operate the breath testing equipment employed shall be prima facie evidence of that fact.

(b) Only a physician, licensed nurse, medical technician, physician's assistant, medical technologist, or laboratory assistant acting at the request of a law enforcement officer may withdraw blood for the purpose of determining the presence of alcohol or other drug. This limitation does not apply to the taking of a breath sample.

(c) When a breath test which is intended to be introduced in evidence is taken with a crimper device or when blood is withdrawn at an officer's request, a sufficient amount of breath or blood, as the case may be, shall be taken to enable the person to have made an independent analysis of the sample, and shall be held for at least 45 days from the date the sample was taken. At any time during that period the person may direct that the sample be sent to an independent laboratory of the person's choosing for an independent analysis. The department of health shall adopt rules providing for the security of the sample. At no time shall the defendant or any agent of the defendant have access to the sample. A preserved sample of breath shall not be required when an infrared breath-testing instrument is used. A person tested with an infrared breath-testing instrument shall have the option of having a second infrared test administered immediately after receiving the results of the first test.

(d) In the case of a breath test administered using an infrared breath testing instrument, the test shall be analyzed in compliance with rules adopted by the department of health. The analyses shall be retained by the state. A sample is adequate if the infrared breath testing instrument analyzes the sample and does not indicate the sample is deficient. Analysis of the person's breath or blood which is available to that person for independent analysis shall be considered valid when performed according to methods approved by the department of health. The analysis performed by the state shall be considered valid when performed according to a method or methods selected by the department of health. The department of health shall use rule making procedures to select its method or methods. Failure of a person to provide an adequate breath sample constitutes a refusal.

(e) Repealed.

(f) When a law enforcement officer has reason to believe that a person may be violating or has violated section 1201 of this title, the officer may request the person to provide a sample of breath for a preliminary screening test using a device approved by the commissioner of health for this purpose. The person shall not have the right to consult an attorney prior to submitting to this preliminary breath alcohol screening test. The results of this preliminary screening test may be used for the purpose of deciding whether an arrest should be made and whether to request an evidentiary test and shall not be used in any court proceeding except on those issues. Following

the screening test additional tests may be required of the operator pursuant to the provisions of section 1202 of this title.

(g) The office of the chief medical examiner shall report in writing to the department of motor vehicles the death of any person as the result of an accident involving a vehicle and the circumstances of such accident within five days of such death.

(h) A Vermont law enforcement officer shall have a right to request a breath or blood sample in an adjoining state or country under this section unless prohibited by the law of the other state or country. If the law in an adjoining state or country does not prohibit an officer acting under this section from taking a breath or blood sample in its jurisdiction, evidence of such sample shall not be excluded in the courts of this state solely on the basis that the test was taken outside the state.

(i) The commissioner of health shall adopt emergency rules relating to the operation, maintenance and use of preliminary alcohol screening devices for use by law enforcement officers in enforcing the provisions of this title. The commissioner shall consider relevant standards of the National Highway Traffic Safety Administration in adopting such rules. Any preliminary alcohol screening device authorized for use under this title shall be on the qualified products list of the National Highway Traffic Safety Administration.

(j) A videotape made of the alleged offense and subsequent processing may be erased or destroyed by the law enforcement agency no earlier than 90 days after final judgment, or, if no civil or criminal action is filed, no earlier than 90 days after the date the videotape was made.

(k) A copy of a videotape made of the alleged offense shall be provided to the defendant within ten days after the defendant requests the copy and pays a \$15.00 fee for its reproduction. No fee shall be charged to a defendant whom the court has determined to be indigent.

Current through laws effective March 24, 2008. See scope for further information.

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Wis. Stat. 343.303



W.S.A. 343.303

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WEST'S WISCONSIN STATUTES ANNOTATED

VEHICLES (CH. 340 TO 351)

CHAPTER 343. OPERATORS' LICENSES

SUBCHAPTER III. CANCELLATION, REVOCATION AND SUSPENSION OF LICENSES

→ 343.303. Preliminary breath screening test

If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63(1) or (2m) or a local ordinance in conformity therewith, or s. 346.63(2) or (6) or 940.25 or s. 940.09 where the offense involved the use of a vehicle, or if the officer detects any presence of alcohol, a controlled substance, controlled substance analog or other drug, or a combination thereof, on a person driving or operating or on duty time with respect to a commercial motor vehicle or has reason to believe that the person is violating or has violated s. 346.63(7) or a local ordinance in conformity therewith, the officer, prior to an arrest, may request the person to provide a sample of his or her breath for a preliminary breath screening test using a device approved by the department for this purpose. The result of this preliminary breath screening test may be used by the law enforcement officer for the purpose of deciding whether or not the person shall be arrested for a violation of s. 346.63(1), (2m), (5) or (7) or a local ordinance in conformity therewith, or s. 346.63(2) or (6), 940.09(1) or 940.25 and whether or not to require or request chemical tests as authorized under s. 343.305(3). The result of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest, if the arrest is challenged, or to prove that a chemical test was properly required or requested of a person under s. 343.305(3). Following the screening test, additional tests may be required or requested of the driver under s. 343.305(3). The general penalty provision under s. 939.61(1) does not apply to a refusal to take a preliminary breath screening test.

Current through 2007 Act 242, published 06/06/2008

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