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

APPELLANT-STATE OF OHIO'S MOTION IN OPPOSITION TO APPELLEE'S MOTION FOR CLARIFICATION AND/OR RECONSIDERATION

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Memorandum in Support

This case involved a routine OVI arrest. Appellee-Defendant Jessica Derov was stopped for expired license plate tags. Trooper Martin later arrested Appellee for OVI after he observed a strong odor of alcohol, red-glassy eyes, and her performance on three field sobriety tests. Appellee further admitted that she had consumed alcohol that evening. At the Highway Patrol barracks, Appellee's blood alcohol content registered at 0.134.

On appeal, the Seventh District vacated Appellee's conviction, and held that the trooper lacked probable cause to arrest Appellee. In support, the Seventh District concluded that Trooper Martin's use of a portable breath test (PBT) was inadmissible to support probable cause, and that the use of the horizontal gaze nystagmus (HGN) test did not substantially comply with standards set forth in the NHTSA manual.[1]

The Seventh District then certified a conflict to this Honorable Court concerning the use of portable breath test (PBT) results in establishing probable cause to make an OVI arrest. This Court accepted the certified conflict between the Seventh and Fourth Districts,[2] and further accepted the State's additional propositions of law.[3] The case was briefed and oral argument was heard on February 4, 2009.

Following oral argument, this Honorable Court, however, dismissed the State's Proposition of Law No. I. This Court concluded that a conflict did not exist between the Seventh and Fourth Districts concerning the use of portable breath tests (PBTs). And further, this Court

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[1] *See generally State v. Derov* (Mar. 28, 2008), 7th Dist. No. 07 MA 71, 2008 Ohio 1672.

[2] *See State v. Derov*, Sup. Ct. Ohio No. 2008-0853.

[3] *See State v. Derov*, Sup. Ct. Ohio No. 2008-0858.

sua sponte dismissed the State's Proposition of Law Nos. I & III "as having been improvidently granted."[4]

The State responds to Appellee's Motion for Clarification and/or Reconsideration, and prays this Honorable Court to Deny her motion. The Seventh District's opinion cannot be cited as authority, because its decision was based upon a record devoid of substantive facts concerning the reliability and use of portable breath tests (PBTs).

Law and Discussion

I. THIS COURT'S HOLDING IS CLEAR AND CONCISE, INFORMING LOWER COURTS THAT THE SEVENTH DISTRICT'S OPINION CANNOT BE CITED AS AUTHORITY, BECAUSE THIS COURT'S DISMISSAL FOR LACK OF CONFLICT RENDERS THE ENTIRE OPINION MEANINGLESS; THUS THERE IS NO NEED FOR CLARIFICATION AND/OR RECONSIDERATION.

This Court could not be any clearer that "[t]he the opinion of the court of appeals may not be cited as authority except by the parties inter se."[5] By finding that a conflict between the Seventh and Fourth Districts did not exist, this Honorable Court concluded that the Seventh District erroneously decided that the portable breath test (PBT) utilized was unreliable where the record was devoid of any facts that could reasonably lead the Seventh District to that conclusion.

To start, in dismissing the State's Proposition of Law No. II, this Court concluded that the Seventh District erroneously held that a trial court could not consider the results of a portable breath test (PBT) for purposes of determining probable cause, based upon the record before it. Further, the Seventh District erroneously concluded (based upon the record) that "PBT results are considered inherently unreliable because they may register an inaccurate percentage of

[4] *See State v. Derov* (Mar. 18, 2009), Ohio Nos. 2008-0853, 2008-0858, 2009 Ohio 1111, ¶¶ 3-4.

[5] *Id.* at ¶ 4.

alcohol present in the breath, and may also be inaccurate as to the presence or absence of any alcohol at all."[6] (Internal citations omitted.) The statement was clearly erroneous, and the court's entire opinion was rendered meaningless.

Furthermore, because this Honorable Court found that the Seventh District erred in reaching any conclusion concerning the reliability and admissibility of portable breath tests (PBTs), the Seventh District's entire opinion is now tainted. That is, the Seventh District's decision in finding that Trooper Martin lacked probable cause to arrest Appellee was based in-part on its conclusion that the trooper should not have considered the results of the portable breath test (PBT). Therefore, part of the court's analysis used in formulating that the trooper lacked probable cause to arrest Appellee was erroneously considered.

And the decision to address the reliability and admissibility of portable breath tests (PBTs), prove fatal to its entire opinion. It proves fatal, because 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] influence."[7] And "[a] court makes this determination based on the *totality* of facts and circumstances surrounding the arrest."[8]

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[6] *Derov*, 2008 Ohio 1672, supra at ¶ 11, quoting *State v. Shuler* (4th Dist. 2006), 168 Ohio App.3d 183, 186-87, citing *State v. Zell* (Iowa App. 1992), 491 N.W.2d 196, 197.

[7] *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.

[8] *State v. Crotty*, 12th Dist. No. CA2004-05-051, 2005 Ohio 2923, ¶ 14, citing *Homan*, 89 Ohio St.3d at 427.

Because the totality of the circumstances encompasses both the law and facts, the Seventh District's opinion cannot stand as proper authority concerning OVI arrests. Allowing the Seventh District's opinion to remain as proper authority, is imagining a tripod standing with only two legs. When one leg of a tripod is taken out, the tripod cannot remain standing. And like the tripod, the Seventh District's opinion quickly falls without the proper support.

Conclusion

WHEREFORE, the State of Ohio prays this Honorable Court to Deny Appellee's Motion of Clarification and/or Reconsideration.

Respectfully Submitted,

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Proof of Service

I certify that a copy of the State's Motion in Opposition to Appellee's Motion for Clarification and/or Reconsideration was sent by ordinary U.S. mail to the following counsel on April 3, 2009.

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