

BEFORE THE SUPREME COURT OF OHIO

STATE OF OHIO : CASE NOS. 2008-0853
: 2008-0858
PLAINTIFF-APPELLANT :
-vs.- : ON APPEAL FROM CASE NO. 07 MA 71
: BEFORE THE COURT OF APPEALS FOR
JESSICA DEROV : THE SEVENTH APPELLATE DISTRICT
: DEFENDANT-APPELLEE :

MOTION OF *AMICUS CURIAE*, CITY OF YOUNGSTOWN, OPPOSING
APPELLEE'S "MOTION FOR CLARIFICATION AND/OR RECONSIDERATION"

(S.Ct.Prac.R. XI, Section 3.)

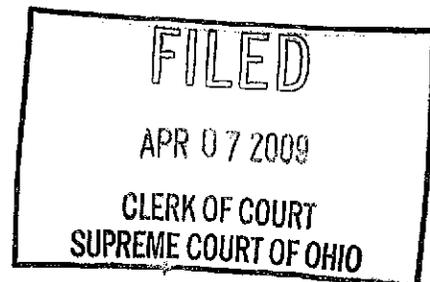
JOSEPH R. MACEJKO (0070222)
CITY PROSECUTOR

YOUNGSTOWN PROSECUTOR'S OFFICE
26 S. PHELPS STREET, 4TH FLOOR
YOUNGSTOWN, OHIO 44503
TEL. (330) 742-8791
FAX (330) 742-8794

COUNSEL FOR *AMICUS CURIAE*,
CITY OF YOUNGSTOWN

ROBERT C. KOKOR (0062236)
394 ST. RT. 7, S.E.
BROOKFIELD, OHIO 44403-0236
TEL. (330) 448-1133
FAX (330) 448-1133

COUNSEL FOR APPELLEE,
JESSICA DEROV



NOW COMES, *Amicus Curiae*, the City of Youngstown, by and through the undersigned Counsel, to move this Court in opposition to the appellee's "Motion for Clarification and/or Reconsideration" that was filed on March 30, 2009¹.

As cause for this Motion, Counsel submits that the appellee's request is untimely. The docket reveals that this Court issued its Opinion on March 18, 2009. (A copy of that decision is attached hereto as Appendix A.) Counsel for the appellee filed his motion with this Court on March 30, 2009. (A date-stamped copy of that motion is attached hereto as Appendix B.)

S.Ct.R.Prac.R. XI, Section 2 provides, in pertinent part:

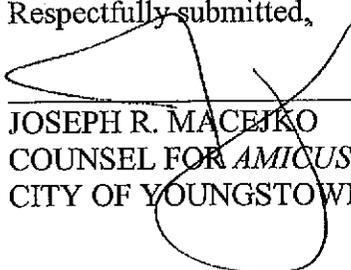
Motion for Reconsideration.

(A) Except in expedited cases under S.Ct.Prac.R. X, Section 9, a motion for reconsideration may be filed within 10 days after the Supreme Court's judgment entry of order is filed with the Clerk...

(Emphasis added.)

Accordingly, the appellee's motion is untimely by two days and should not be acted upon or considered by this Court and should be stricken from the record. *See, e.g., State v. Baird (2005), 106 Ohio St.3d 1552, 2005 -Ohio- 5532, State v. Franklin (2004), 101 Ohio St. 3d 1462, 2004 -Ohio- 823.*

Respectfully submitted,



JOSEPH R. MACEJKO
COUNSEL FOR *AMICUS CURIAE*,
CITY OF YOUNGSTOWN

¹ Please note that Counsel could not find authority for "clarification" and will address the appellee's request as if it were one solely for reconsideration.

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of April 2009, a copy of the foregoing memorandum opposing reconsideration was sent to the following Counsel of Record via regular U.S. mail:

Ralph M. Rivera
Mahoning County Prosecutor's Office
21 W. Boardman Street, 6th Floor
Youngstown, Ohio 44503

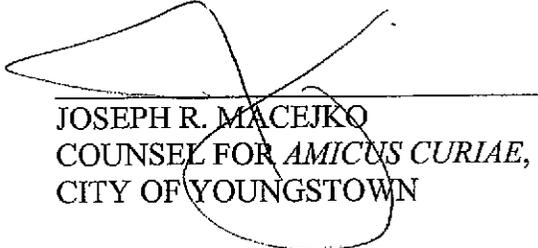
Robert C. Kokor
394 State Route 7, S.E.
Brookfield, Ohio 44403

Scott R. Cochran
Atway & Cochran, LLC
19 E. Front Street
Youngstown, Ohio 44503

D. Timothy Huey
3240 West Henderson Road
Columbus, Ohio 43220

Timothy Van Eman
Lamkin, Van Eman, Trimble, Beals, & Dougherty
500 South Front Street, Suite 200
Columbus, Ohio 43215

Benjamin Mizer
Ohio Attorney General Richard Cordray's Office
30 East Broad Street, 17th Floor
Columbus, Ohio 43215



JOSEPH R. MACEJKO
COUNSEL FOR *AMICUS CURIAE*,
CITY OF YOUNGSTOWN

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State v. Derov*, Slip Opinion No. 2009-Ohio-1111.]

NOTICE

This slip opinion is subject to formal revision before it is published in an advance sheet of the Ohio Official Reports. Readers are requested to promptly notify the Reporter of Decisions, Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, of any typographical or other formal errors in the opinion, in order that corrections may be made before the opinion is published.

SLIP OPINION NO. 2009-OHIO-1111

THE STATE OF OHIO, APPELLANT, v. DEROV, APPELLEE.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State v. Derov*, Slip Opinion No. 2009-Ohio-1111.]

Judgment of the court of appeals reversed in part and appeal dismissed in part as improvidently accepted — Notice of certified conflict dismissed for want of a conflict.

(Nos. 2008-0853 and 2008-0858 — Submitted February 4, 2009 — Decided March 18, 2009.)

APPEAL from and CERTIFIED by the Court of Appeals for Mahoning County,
No. 07 MA 71, 176 Ohio App.3d 43, 2008-Ohio-1672.

{¶ 1} The record in the trial court concerning the portable breathalyzer test used in this case is not sufficient to support either the statements in the opinion of the court of appeals regarding the use of the portable breathalyzer and the value of its test results or the judgment that the trial court should not have considered the results of the portable breath test. Accordingly, that portion of the

SUPREME COURT OF OHIO

judgment of the court of appeals is reversed, and the cause is remanded to the court of appeals for further proceedings.

{¶ 2} In view of the foregoing disposition of appellant's Proposition of Law No. II, the notice of certified conflict is dismissed for want of a conflict.

{¶ 3} Sua sponte, the appeal is dismissed as to appellant's Proposition of Law Nos. I and III as having been improvidently accepted.

{¶ 4} The opinion of the court of appeals may not be cited as authority except by the parties inter se.

MOYER, C.J., and LUNDBERG STRATTON, O'CONNOR, O'DONNELL, and CUPP, JJ., concur.

PFEIFER and LANZINGER, JJ., dissent in part and would dismiss the cause as having been improvidently accepted.

Paul J. Gains, Mahoning County Prosecuting Attorney, and Ralph M. Rivera, Assistant Prosecuting Attorney, for appellant.

Robert C. Kokor, for appellee.

Lamkin, Van Eman, Trimble, Beals & Dougherty, L.L.C., and Timothy L. Van Eman, urging reversal for amicus curiae Mothers Against Drunk Driving.

Joseph R. Macejko, Youngstown City Prosecutor, urging reversal for amicus curiae city of Youngstown.

Richard Cordray, Attorney General, Benjamin C. Mizer, Solicitor General, and Jason Patrick Small, Deputy Solicitor, urging reversal for amicus curiae Ohio Attorney General.

Timothy Huey, and Atway & Cochran, L.L.C., and Scott R. Cochran, urging affirmance for amicus curiae Ohio Association of Criminal Defense Lawyers.

BEFORE THE SUPREME COURT OF OHIO

STATE OF OHIO

**CASE NOS.: 2008-0853
2008-0858**

PLAINTIFF-APPELLANT

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

-vs-

JESSICA DEROV

DEFENDANT-APPELLEE

APPELLEE'S MOTION FOR CLARIFICATION AND/OR RECONSIDERATION

**PAUL J. GAINS, 0020323
MAHONING COUNTY PROSECUTOR**

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

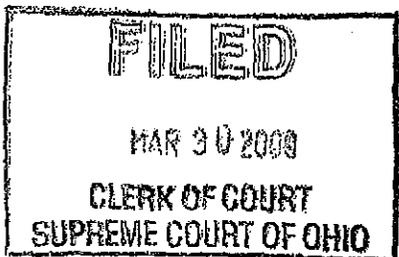
**RALPH M. RIVERA, 0082063, (C/R)
ASSISTANT PROSECUTOR**

**TIM HUEY #0023598
3240 WEST HENDERSON ROAD
COLUMBUS, OHIO 43220
TEL: (614) 487-8667
FAX: (614) 573-7232
CO-COUNSEL FOR AMICUS
CURIAE O.A.C.D.L. URGING
AFFIRMANCE FOR APPELLEE**

**OFFICE OF THE MAHONING COUNTY
PROSECUTOR
21 W. BOARDMAN ST., 6TH FL.
YOUNGSTOWN, OH 44503-1426
TEL: (330) 740-2330
FAX: (330) 740-2008**

**COUNSEL FOR APPELLANT-THE STATE
OF OHIO**

**SCOTT R. COCHRAN #0065497
ATWAY & COCHRAN, LLC
19 E. FRONT STREET
YOUNGSTOWN, OH 44503
TEL: (330) 743-6300
FAX: (330) 743-6323
CO-COUNSEL FOR AMICUS
CURIAE O.A.C.D.L. URGING
AFFIRMANCE FOR APPELLEE**



MOTION FOR CLARIFICATION AND/OR RECONSIDERATION

Now comes Appellee, Jessica Derov, who is supported in this motion by *Amicus Curiae*, Ohio Association of Criminal Defense Lawyers (OACDL), and moves this Honorable Court to reconsider and/or clarify its Judgment Entries issued on March 18, 2009, in the above cases, and the Slip Opinion issued said date as State v. Derov, Slip Opinion No. 2009-Ohio-1111.

This case involved consolidated cases. Case 2008-0853 was originally accepted as a conflict between two courts of appeals; the issue in that case was presented as Proposition of law II. Case No. 2008-0858 was accepted as a discretionary appeal and consolidated with the former case; the issues accepted for discretionary review were presented as Propositions of Law Nos. I and III. It is unfortunate that the latter issues were accepted as a great deal of the time at Oral Argument was spent on those issues.

I. Confusion about the Holdings relative to Propositions of Law Nos. I and III

It appears this Honorable Court ultimately dismissed Propositions of Law Nos. I and III as having been improvidently accepted. Thus the resolution of these issues in Court of Appeals remain intact. However, the wording of the Slip Opinion leaves the parties and lower courts in a quandary as to whether that is what the holdings of this Honorable Court actually mean. The paragraphs from the slip opinion which causes this confusion are as follows.

{¶ 3} Sua sponte, the appeal is dismissed as to appellant's Proposition of Law Nos. I and III as having been improvidently accepted.

{¶ 4} The opinion of the court of appeals may not be cited as authority except by the parties *inter se*.

Presumably ¶ 4 is intended to apply to a specific part of Proposition of Law No. II dealing with preliminary breath tests (see discussion below), which this Honorable Court did directly address in its Slip Opinion. However, the most common response counsel for movants has heard from colleagues who have read the Slip Opinion is "what does this mean?" Moreover since the Court of Appeals opinion regarding Propositions I and III remain intact it would seem illogical that the Court of Appeals decision could not be cited relative to its discussions or holdings in those Propositions. For this reason the movants herein request that this Honorable Court clarify its holdings relative to Propositions Nos. I and III.

II. Confusion / Concern about the Holdings relative to Propositions of Law Nos. II

This Honorable Court dismissed Case 2008-0853 and Proposition of Law No. II on the grounds that no conflict existed. Indeed, the court found that the record in the trial court was so lacking that the matter could not be decided. The movants herein do not disagree with that holding or that resolution of the case and agree that the *prosecution* had not introduced enough evidence at the trial court relative to the Preliminary Breath Testing (PBT) device for either the appellate court or this Honorable Court to make a factual determination as to the scientific accuracy of PBTs in general or the specific device used in the instant case. The movants' confusion and concern arise as a result of certain language in the Slip Opinion. In the Slip Opinion this Honorable Court held:

{¶ 1} The record in the trial court concerning the portable breathalyzer test used in this case is not sufficient to support either the statements in the opinion of the court of appeals regarding the use of the portable breathalyzer and the value of its test results *or the judgment that the trial court should not have considered the results of the portable breath test.* Accordingly, that portion of the judgment of the court of appeals is reversed, and the cause is remanded to the court of appeals for further proceedings. (Emphasis added.)

{¶ 2} In view of the foregoing disposition of appellant's Proposition of Law No. II, the notice of certified conflict is dismissed for want of a conflict.

Again the movants do not take particular issue with the language "The record in the trial court concerning the portable breathalyzer test used in this case is not sufficient to support ... the statements in the opinion of the court of appeals regarding the ... the portable breathalyzer and the value of its test results." However the remainder of that sentence would seem to hold that where a party *fails submit sufficient evidence to a trial court* upon which that court can make a determination as to the scientific accuracy or *reliability of the evidence the party wishes to admit* into evidence the court of appeals is without authority to reverse -and indeed errs in reversing- the trial court where the trial court admitted the evidence.

In the instant case the burden was on the state -as the proponent of the PBT evidence- to present evidence (and legal arguments) in the trial court in support of the admissibility of the PBT results. Absent such evidence and a legal theory for admission of the evidence the trial court clearly *errs in admitting and/or considering the PBT evidence*. This Honorable Court and the movants agree that the State did not admit sufficient evidence in the trial court upon which any court could determine the admissibility of the PBT. For that reason the Court of Appeals was not in error in concluding that the trial court erred in admitting the PBT and the movants ask this Honorable so hold.

WHEREFORE, Appellee, moves this Honorable Court clarify and/or reconsider the Slip Opinion issued said in the above cases.

Respectfully submitted,



Robert C. Kokor (#0062326)
394 State Route 7, SE
P.O. Box 236
Brookfield, Ohio 44403
Phone/fax: (330) 448-1133
Attorney for Defendant-Appellee
Jessica Derov

PROOF OF SERVICE

This is to certify that a copy of the was served by regular U.S. Mail this 30th day of March, 2009, upon the following:

Paul J. Gains (#0020323)
Ralph M. Rivera (#0082063)
Mahoning County Prosecutor's Office
21 West Boardman Street 6th Floor
Youngstown, Ohio 44503-1426
Attorney for Plaintiff-Appellant

Tim Van Eman (#0002015)
500 South Front Street
Columbus, Ohio 43215
Attorney for Amicus Curiae
MADD

Joseph R. Macejko (#007022)
26 South Phelps Street, 4th Floor
Youngstown, Ohio 44503
Attorney for Amicus Curiae
City of Youngstown

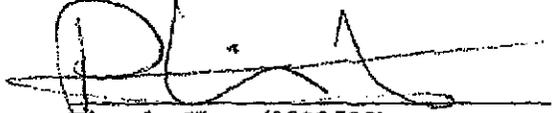
Nancy H. Rogers (#0002375)
Benjamin C. Mizer (#0083089)
30 East Broad Street
Columbus, Ohio 43215
Attorney for Amicus Curiae
Ohio Attorney General

Tim Huey (#0023598)
3240 West Henderson Road
Columbus, Ohio 43220
Attorney for Amicus Curiae
OACDL



Robert C. Kokor
Counsel for Defendant-Appellee

The Ohio Association of Criminal Defense Lawyers hereby support and
join in the Appellee's Motion For Clarification And/Or Reconsideration

A handwritten signature in black ink, appearing to read 'THUEY', written over a horizontal line.

Timothy Huey (0023598)

Scott R. Cochran (0065497)

Attorneys for Amicus Curiae

Ohio Association of Criminal Defense Lawyers