

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO
COUNTY OF SUMMIT
CITY OF TALLMADGE

CASE NO. **12-2-1856**

Plaintiff-Appellee

ON APPEAL FROM THE
SUMMIT COUNTY COURT
OF APPEALS, 9TH
APPELLATE DISTRICT

VS

ZACHARY L. RAGLE

COURT OF APPEALS
CASE NO. 2010-25706

Defendant-Appellant

**ZACHARY L. RAGLE'S
MEMORANDUM IN SUPPORT OF JURISDICTION**

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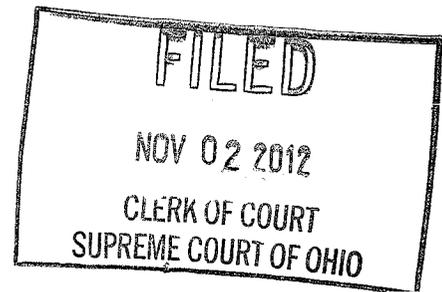


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**State v. Zachary L. Ragle, Decision and Journal Entry, Summit
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**EXPLANATION OF WHY THIS APPEAL INVOLVES
SUBSTANTIAL CONSTITUTIONAL QUESTIONS
AND IS ONE OF PUBLIC OR GREAT GENERAL INTEREST**

This appeal of the Ninth District Appellate Court's decision in this case involves substantial constitutional questions and is one of public or great general interest. The Appellate Court's rulings in this case have made possible a denial of Appellant's rights afforded him by *the Constitution of the United States*. Appellant is entitled to "equal protection of the laws" and "due process of law" by *the Fourteenth Amendment of the Constitution of the United States*.

Appellant, in appealing the tainted evidence of the BAC charge, *City of Tallmadge ord. 333.01(A)(1)(E)* and the probable cause of arrest issue in this case, has allowed the Ninth District Court Court of Appeals to rule not only on the two issues of his appeal, but also affirm his other convictions without a supportive record of Appellant's sentence hearing. The audio or transcribed audio record of Appellant's sentence hearing was not needed for the Appellate Court to rule on Appellant's two issues of appeal, 1) Probable Cause to Arrest & 2) Validity of Appellant's BAC Test. These two issues of appeal were the result of pretrial motions that had been denied by the Trial Court.

At Appellant's sentence hearing on 11/02/2010, Appellant changed his pleas of not guilty to all the charges against him and plead no contest to all the charges against him in this case. Without the entire record of this sentence hearing, the Appellate Court had no basis for their affirming Appellant's other three convictions in this case. They

were not privy to what colloquy took place between the Trial Court, the State, Appellant, and his attorney during Appellant's sentence hearing. Without this audio or transcribed audio record of Appellant's sentence hearing, the Appellate Court also was not privy as to what explanation of the circumstances for Appellant's remaining two misdemeanors was given by the State to support such convictions.

The Appellate Court, without this record, could not know whether or not the tainted BAC evidence was given or not given as; or whether or not the tainted BAC evidence was the only evidence that was given or not given as the explanation of the circumstances, as noted in (*Section 2937.07 of the O.R.C.*), by the State for Appellant's conviction of "*Operating a motor vehicle under the influence of alcohol*", ("*OVP*"), in violation of *City of Tallmadge ord. 333.01(A)(1)(A)*. They could not know what the State gave as the explanation of circumstances that supported a conviction and they could not know what the Trial Court might have read into the record concerning this conviction.

As for the other two remaining charges, the Appellate Court could not know whether the Trial Court allowed or disallowed Appellant to give his side of the story relating to these charges and what explanation of circumstances was given by the State for Appellant's *Possession of Alcohol Involving Underage Persons: State section 4301.69E1* conviction. It might have been possible that the Trial Court might have, for good reason, kept him from expounding on what might have caused him to veer from the highway in this terrible accident he was in. Appellant, if he might have spoke

or might have been kept from speaking at this hearing, might have or might not have wanted to tell the Trial Court who might or might not have bought the unopened beer that was in the truck and who the owner of this truck might or might not have been. The Trial Court might or might not have given consideration to what Appellant might or might not have said relating to these offenses. That is a lot of "mights" and there are a whole lot of other "mights" that might have or might not have taken place, but, the fact is that the Appellate Court did not have a record of what was spoken by any of the parties that were present at Appellant's sentence hearing.

What was spoken or not spoken at Appellant's sentence hearing does have bearing on Appellant's convictions of "*Operating a vehicle under the influence of alcohol*", ("OVI"), (*Tallmadge ord. 333.01(A)(1)(A)*), "*Underage possession or consumption*" (*R.C.4301.69(E)(1)*), and "*Failure to maintain reasonable control*" (*Tallmadge ord. 333.08*). It also might have bearing on whether or not these convictions, now, could or could not, and should or should not, be affirmed or dismissed.

Such an act as the Appellate Court affirming these three aforementioned convictions without a supporting record of Appellant's sentence hearing is an abuse of discretion and is a reversible error. The Appellate Court ruling on unappealed issues without a supporting record is not good for the public or great general interest and does not assure Appellant of "*equal protection of the laws*" and "*due process of law*" that is afforded all Americans by the *Fourteenth Amendment of the Constitution of the United States*.

STATEMENT OF CASE AND FACTS

On May 29th, 2010, Appellant, Zachary Ragle, was involved in a terrible crash in what appeared to be a one vehicle accident which left him unconscious inside the truck that he apparently was driving (Tr. at 44-45). A bystander heard the crash and called the Tallmadge Police (Tr. At 59). Two of at least three Tallmadge Police officers, after arriving on the scene, looked for an Eric Hillard in the general area of the accident (Tr. at 61-62). Mr. Ragle was transported to the hospital by EMS (Tr. At 49).

Appellant, Zachary Ragle, was charged with the offenses of **Possession of Alcohol Involving Underage Persons: State section 4301.69E1, OVI: City of Tallmadge section 333.01A1A, BAC: City of Tallmadge section 333.01A1E**, all first degree misdemeanors, and **Failure to Maintain Reasonable Control: City of Tallmadge section 333.08**, a minor misdemeanor, as a result of this aforementioned event. At two arraignments that followed this event, Appellant entered Pleas of Not Guilty to all of the aforementioned charges.

On July 8, 2010, Appellant filed a motion to suppress the BAC evidence and a motion questioning whether there was probable cause for his arrest, which both came before the Trial Court for a hearing on August 3, 2010. On September 29, 2010, the Trial Court issued a written order which denied both motions.

On November 2, 2010, Appellant entered Pleas of No Contest to all of the aforementioned charges. The Trial Court imposed sentences on all of these four charges, but held Appellant's sentences in abeyance pending his appeal of the Trial Court's

ruling on Appellant's motion to suppress the BAC evidence and on his motion questioning whether the arresting officer had probable cause for arrest.

On November 29, 2010 Appellant filed a timely appeal to the 9th District Court of Appeals regarding the Trial Court's order which had denied Appellant's motions.

On November 16, 2011, the Appellate Court affirmed that the police officer had probable cause to arrest Appellant for driving under the influence and said that because the BAC count was eliminated by merger, any irregularity with the blood draw was harmless error.

On 11/28/2011, Appellant filed a motion for reconsideration to the Appeals Court, and on 01/03/12 Appellant filed an appeal to the Ohio Supreme Court. On 02/03/2012, the Appellate Court vacated their decision and granted Appellant's motion for reconsideration. The Ohio Supreme Court declined jurisdiction to hear Appellant's case and dismissed his appeal to their Court on 03/21/2012.

On 09/19/2012, the Appellate Court overruled Appellant's assignment of error regarding probable cause for his arrest and sustained his assignment of error regarding his BAC charge. They vacated Appellant's conviction for *operating a vehicle with a prohibited blood alcohol concentration ("BAC")* in violation of *T.C.O. 333.01(A)(1)(E)*. The Appellate Court additionally affirmed Appellant's convictions for *operating a motor vehicle while under the influence of alcohol ("OVI")* in violation of *T.C.O. 333.01(A)(1)(A)*, *failure to maintain reasonable control* in violation of *T.C.O. 333.08*, and *underage possession or consumption* in violation of *R.C 4301.69(E)*. This appeal follows.

ARGUMENT

First Proposition of Law

RC.2937.07 Court action on pleas of guilty and no contest in misdemeanor cases.

A plea to a misdemeanor offense of “no contest” or words of similar import shall constitute an admission of the truth of the facts alleged in the complaint and that the judge or magistrate may make a finding of guilty or not guilty from the explanation of the circumstances of the offense. If the offense to which the accused is entering a plea of “no contest” is a minor misdemeanor, the judge or magistrate is not required to call for an explanation of the circumstances of the offense, and the judge or magistrate may base a finding on the facts alleged in the complaint. If a finding of guilty is made, the judge or magistrate shall impose the sentence or continue the case for sentencing accordingly. A plea of “no contest” or words of similar import shall not be construed as an admission of any fact at issue in the criminal charge in any subsequent civil or criminal action or proceeding.

When a defendant pleads no contest to a misdemeanor charge, the method by which the State must prove his guilt changes dramatically. The State, rather than having the burden of proving guilt beyond a reasonable doubt, now must only recite into the record *the explanation of circumstances*, (cited in 2937.07), that support a guilty finding for each misdemeanor charge. For a minor misdemeanor charge, with a plea of no contest, the trial court is *not required to call for an explanation of the circumstances of the offense* as noted in, 2937.07, and the judge of the trial court *may base a finding on the facts alleged in the complaint* as stated in *Section 2937.07*.

When accepting pleas of no contest from a defendant with respect to misdemeanor charges, a trial court judge “*may make a finding of guilty or not guilty from the explanation of the circumstances of the offense*” per *Section 2937.07*. The Trial Court in this case did accept Appellant's no contest pleas and did find him guilty of these misdemeanor charges as indicated by the written record of this case that was available to the Appellate Court following Appellant's appeal in this case. In order for the Trial

Court to find Appellant guilty of the misdemeanor charges , there had to be an explanation of circumstances for each misdemeanor charge to support a finding of guilty to the each corresponding misdemeanor charge. No explanation of circumstances was required for the Trial Court to make a finding of guilty to Appellant's *Failure to Maintain Reasonable Control T.C.O. 333.08*, which was a minor misdemeanor and the only charge that was not a misdemeanor. This finding of guilty was also in the written record of the Trial Court and it was available to the Appellate Court following Appellant's appeal. It should be noted that whatever explanation of circumstances read into the record by the State regarding all these offenses and any colloquy between the parties present at Appellant's sentence hearing was not in the written record that was supplied to the Appellate Court following Appellant's appeal and the Appellate Court had no other record of Appellant's sentence hearing.

The Ohio Supreme Court stated in their opinion regarding *Cuyahoga Falls v. Bowers (1984), 9 Ohio St. 3d 148*, "We find the Springdale court's reasoning to be persuasive and hereby adopt its conclusion that *R.C.2937.07* confers a substantive right. Therefore, a no contest plea may not be the basis for a finding of guilty without an explanation of circumstances. " The understanding of *R.C.2937* with respect to Appellant's pleas in this case at hand emphasizes the importance of the record of appellant's sentence hearing. Whatever the State's explanations of circumstances were for Appellant's misdemeanors that he plead no contest to at his sentence hearing on 11/02/2010, those explanations would be absolutely essential for the Appellate Court to

have knowledge of in order to affirm Appellant's remaining convictions.

There are numerous cases in Ohio's Appellate Courts where convictions have been overturned and reversed because trial courts have imposed sentences without the proof of creditable explanations of circumstances that support findings of guilty following defendants' no contest pleas. In *Cuyahoga Falls v. Bowers* (1984), 9 Ohio St. 3d 148, the Ohio Supreme Court reversed the judgment of the appellate court's decision and remanded the cause to the trial court for further proceedings consistent with their opinion due to no explanation of circumstances being given following a no contest plea. In *State v. Stewart*, Montgomery App. No. '9971,2004-Ohio-3103, the 2nd District Appeals Court stated, "Under R.C. 2937.07, when a no-contest plea is accepted in a misdemeanor case, the explanation of circumstances serves as the evidence upon which the trial court is to base its finding of guilty or not guilty. Here, that evidence was insufficient to support a conviction. When a conviction is reversed for insufficiency of the evidence, jeopardy has attached, and a remand for a new determination of guilt or innocence is barred by double jeopardy. *Burks v. United States* (1978), 437 U.S. 1,98 S.Ct. 2141.57 L.Ed.2d. 1. Thus, Stewart is entitled to the reversal of his conviction, and to be discharged."

State v. Keplinger (Nov 23, 1998), *Greene App. No.98-CA-24*, *State v. Fordenwalt* (June 21,2010) *Wayne App.No.09-CA-0021*, *State v. Myers*, *Marion App. Nos. 9-02-65, 9-2-66* 2003-Ohio-2936, *State v. Hoskins*, 12th Dist. No.CA98-07-143, 1999 WL 527796 at*3(June 14, 1999), *State v. Valentine*, 1st Dist.No. C-070388, 2008-Ohio-1842, at 9,

and State v. Spence, Clemont App. No. 2002-02-12, 2002-Ohio-3600, 2002 WL 1495341
all are appealed cases involving no contest pleas where the explanation of circumstances was either non-existent or lacked enough evidence and the convictions were reversed as a result.

*Appellant apologizes to the Court for perhaps overindulging in cases where the State erred in the explanation of circumstances as they relate to no contest pleas. What Appellant wants to emphasize to the Court in relation to his case is that the State's explanation of circumstances as they relate to the misdemeanor convictions in his case might have been greatly affected since he prevailed in preventing the State use of the tainted BAC evidence. These explanations of circumstances along with the record of colloquy between those parties in attendance at his sentence hearing, must be known by the Appellate Court in order for them to affirm Appellant's remaining convictions in this case. As demonstrated in the aforementioned cases involving no contest plea convictions, the knowledge of these explanations of circumstances is paramount in determining guilt from innocence. As the case at hand now stands, since the Appellate Court has affirmed all of Appellant's remaining convictions, this will prevent the Trial Court from reevaluating this very important information of record.

Second Proposition of Law

Appellate R 9 The record on appeal

(B)(1) It is the obligation of the appellant to ensure that the proceedings the appellant considers necessary for inclusion in the record, however those proceedings were recorded, are transcribed in a form that meets the specifications of App. R. 9(B)(6).

Appellant filed the brief of his appeal with the Appellate Court on 02/14/2011 and stated two assignments of error: 1) Motion to suppress BAC evidence and 2) Motion questioning probable cause of arrest. Appellee filed the State's corresponding brief on 03/25/2011 and also argued only these two specific issues. The transcript of the motion to suppress hearing along with most of the Trial Court records had previously been received by the Appellate Court on 01/5/2011 and 12/10/10. The Trial Court documentation of Appellant's convictions and sentences was fully supplied to the Appellate Court by 06/17/2011. No record of Appellant's sentence hearing was needed other than what was provided to the Appellate Court. The records transferred did indicate Appellant's no contest pleas and the corresponding guilty findings and sentences that the Trial Court gave for each corresponding conviction. The State did not request or indicate that a transcript of the colloquy between all parties present at Appellant's sentence hearing should accompany this file and the Appellate Court did not order such. It was not needed for these two aforementioned pretrial motions that had been denied by the Trial Court and were now being appealed to the Appellate Court.

Third Proposition of Law

An appellate court cannot affirm a misdemeanor conviction that is a result of a no contest plea without having record of whether the trial court and the prosecutor in that case complied with the requirements of R.C. 2937.07 as it applies to misdemeanor and minor misdemeanor cases.

In *State v. Render* (1975), 43 Ohio St. 2d 17, 330 N.E.2d 690, the Ohio Supreme Court concluded their opinion in this case by stating, "In the absence of any record of proceedings in the trial court, upon which to predicate reversal in the Court of Appeals,

the judgment of the Court of Appeals, in so doing, must be reversed.” In this case at hand, the Appellate Court affirmed judgments of the Trial Court in the absence of any record supporting such judgments in addition to these issues of judgment having not been appealed to them by Appellant.

¹In *Cleveland Elect, Illum. Co. v. Pub. Util. Comm.* (1996), 76 Ohio St. 3d 163, 666 N.E.2d 1372, the Ohio Supreme Court states in the fifth paragraph of their opinion, “A legion of cases establish that the commission abuses its discretion if it renders an opinion on an issue without record support.”, when referencing past Public Utilities Commission decisions. So, like these decisions referenced by the Ohio Supreme Court, the Appellate Court, in this case at hand, has abused their discretion by rendering an opinion concerning Appellant's non appealed convictions without record support.

Without a record of supporting evidence for a decision, a reviewing court cannot possibly affirm or disaffirm that decision. The Appellate Court in this case gave no consideration to the rules of R.C. 2937.07 when they affirmed Appellant's remaining convictions. There is no record of any colloquy between the Trial Court, the State, Appellant, or his attorney that the Appellate Court had before them that could justify them affirming Appellant's two misdemeanor and one minor misdemeanor convictions. As stated in R.C. 2937.07, *the judge or magistrate may base a finding on the facts alleged in the complaint* with respect to a minor misdemeanor. But, there was no record before the Appellate Court, in this case, that the Trial Court did this. There was no record of what the Trial Court based its decision on concerning this minor misdemeanor.

R.C. 2937.07, in referencing a misdemeanor conviction states, *the judge or magistrate may make a finding of guilty or not guilty from the explanation of the circumstances of the offense*. The Appellate Court had no record before them of any explanation of circumstances regarding Appellant's two misdemeanor convictions. The Appellate Court had no record from which to base their affirming Appellant's remaining three convictions in this case.

CONCLUSION

The Appellate Court cannot affirm Appellant's remaining convictions in this case without having a record of what was said at Appellant's sentence hearing with respect to these convictions.

The Appellate Court, in deciding the issues of appeal in this case and further affirming the remaining unappealed convictions, has refused to consider any possibility that the tainted BAC evidence in Appellant's case might have had any effect on Appellant's other three no contest convictions. When they affirmed Appellant's remaining three convictions in this case, without a supporting record, they abused their discretion and stripped Appellant of any chance he now might have had of proving his innocence of these charges. They denied him his right of "*equal protection of laws*" and they denied him his right of "*due process of law*", each of which are afforded all Americans by *the Fourteenth Amendment of the United States Constitution*.

Appellant respectfully requests and prays that the Ohio Supreme Court accepts

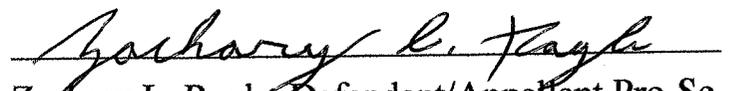
jurisdiction over this matter and agrees with Appellant that the supplemented judgment of the Appellate Court to affirm Appellant's remaining three convictions should be vacated and the cause should be remanded to the Trial Court for further proceedings consistent with "*due process of law*", *Fourteenth Amendment of the United States Constitution*. Appellant believes this would be good for the public and great general interest and would afford Appellant "*equal protection of the law*". *Fourteenth Amendment of the United States Constitution*.

Respectfully submitted,


ZACHARY L. RAGLE
DEFENDANT/APPELLANT PRO-SE

CERTIFICATE OF SERVICE

I hereby certify that a copy of this notice of appeal was sent to Megan Raber, City of Tallmadge Law Director and Prosecutor in this case at City of Tallmadge, 46 North Avenue, Tallmadge, Ohio 44278 via regular US Mail on November 1st, 2012.


Zachary L. Ragle, Defendant/Appellant Pro-Se

STATE OF OHIO
COUNTY OF SUMMIT

COURT OF APPEALS
DANIEL M. ...
)SS:
2012 SEP 19 AM 8:54

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

SUMMIT COUNTY
CLERK OF COURTS

C.A. No. 25706

Appellee

v.

ZACHARY L. RAGLE

Appellant

APPEAL FROM JUDGMENT
ENTERED IN THE
STOW MUNICIPAL COURT
COUNTY OF SUMMIT, OHIO
CASE No. 2010 TRC 4803

DECISION AND JOURNAL ENTRY

Dated: September 19, 2012

MOORE, Presiding Judge.

{¶1} Defendant-Appellant, Zachary L. Ragle, appeals from the November 2, 2010 sentencing order and the September 29, 2010 order of the Stow Municipal Court denying his motion to suppress. For the following reasons, we affirm in part, and reverse in part.

I.

{¶2} In May of 2010, Mr. Ragle was involved in a one-car accident in the City of Tallmadge. As a result of the accident, he was charged with one count of operating a motor vehicle while under the influence of alcohol ("OVI") in violation of Tallmadge Codified Ordinance ("T.C.O.") 333.01(a)(1)(A); one count of failure to maintain reasonable control in violation of T.C.O. 333.08; one count of operating a vehicle with a prohibited blood alcohol concentration ("BAC") in violation of T.C.O. 333.01(a)(1)(C); and underage possession or consumption in violation of R.C. 4301.69(E). Mr. Ragle pleaded not guilty to all charges.

{¶3} He then filed a motion to suppress and/or dismiss alleging that (1) the arresting officer lacked probable cause to arrest him for OVI, (2) the injuries he sustained in the accident rendered him unable to consent to a blood draw, and (3) the blood draw was not done in compliance with the Ohio Administrative Code (“OAC”) and the applicable Ohio Department of Health Regulations. The trial court held a hearing on the motion and, in denying it, found that (1) there was probable cause to arrest Mr. Ragle for OVI, (2) he voluntarily consented to the blood draw, and there was no Fourth Amendment violation, and (3) the State substantially complied with OAC 3701-53-05, and Mr. Ragle failed to demonstrate any prejudice.

{¶4} Mr. Ragle changed his plea to “no contest” and the trial court found him guilty of all charges. The trial court sentenced him to 180 days in jail, with 174 days suspended upon the conditions that he complete a driver intervention program, serve three days in jail, and obey all laws for one year.

{¶5} On November 29, 2010, Mr. Ragle appealed raising two assignments of error for our consideration. In his first assignment of error, he argued that the trial court erred in denying his motion to suppress because the State failed to prove that his blood was drawn and tested in accordance with the requirements set forth in OAC 3701-53-05(C), (E) and (F). In his second assignment of error, Mr. Ragle argued that there was no probable cause to arrest him for OVI.

{¶6} On November 16, 2011, a majority of this Court issued a decision and journal entry overruling Mr. Ragle’s second assignment of error based upon our determination that probable cause existed to arrest him for OVI, and rendering his first assignment of error moot because the BAC count was eliminated by merger with the OVI count.

{¶7} Mr. Ragle filed an application for reconsideration alleging that we erred in (1) vacating his sentence on the BAC count because the State was required to elect the count on

which to move forward, and (2) we erred in concluding that any irregularity with the blood draw is harmless. On February 3, 2012, we granted Mr. Ragle's application for reconsideration, reinstated the appeal, and vacated our November 16, 2011 decision and journal entry.

{¶8} We now address Mr. Ragle's two assignments of error on the merits.

II.

ASSIGNMENT OF ERROR I

[MR. RAGLE'S] MOTION TO SUPPRESS THE RESULTS OF A BLOOD ALCOHOL TEST SHOULD HAVE BEEN SUSTAINED BECAUSE THE [STATE] FAILED TO PROVE THAT [HIS] BLOOD WAS DRAWN AND TESTED IN ACCORDANCE WITH THE REQUIREMENTS AS SET FORTH IN [OAC] 3701-53-05(C), (E) AND (F).

{¶9} "An appellate court's review of a trial court's ruling on a motion to suppress presents a mixed question of law and fact." (Citation omitted.) *State v. Campbell*, 9th Dist. No. 05CA0032-M, 2005-Ohio-4361, ¶ 6. "The trial court acts as the trier of fact during a suppression hearing, and is therefore best equipped to evaluate the credibility of witnesses and resolve questions of fact." (Citation omitted.) *Id.* This Court will accept the factual findings of the trial court if they are supported by some competent, credible evidence. *See State v. Balog*, 9th Dist. No. 08CA0001-M, 2008-Ohio-4292, ¶ 7, citing *State v. Searls*, 118 Ohio App.3d 739, 741 (5th Dist.1997). "However, the application of the law to those facts will be reviewed de novo." *Balog* at ¶ 7.

{¶10} In his first assignment of error, Mr. Ragle argues that the State failed to prove that his blood was drawn and tested in accordance with regulations set forth in OAC 3701-53-05(C), (E) and (F), and therefore, the results of the blood test should be suppressed.

{¶11} "The General Assembly established the threshold criteria for the admissibility of alcohol-test results in prosecutions for driving under the influence and driving with a prohibited

concentration of alcohol in R.C. 4511.19(D).” *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 9. R.C. 4511.19(D)(1)(b) states, in relevant part, that “[t]he 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.” Further, “R.C. 3701.143 requires the director of health to ‘determine, or cause to be determined, techniques or methods for chemically analyzing a person’s [whole] blood[.]’” *Burnside* at ¶ 9. Accordingly, those techniques or methods are set forth in OAC 3701-53-05.

{¶12} OAC 3701-53-05 provides, in relevant part, that:

(C) Blood shall be drawn with a sterile dry needle into a vacuum container with a solid anticoagulant, or according to the laboratory protocol as written in the laboratory procedure manual based on the type of specimen being tested.

* * *

(E) Blood and urine containers shall be sealed in a manner such that tampering can be detected and have a label which contains at least the following information:

- (1) Name of suspect;
- (2) Date and time of collection;
- (3) Name or initials of person collecting the sample; and
- (4) Name or initials of person sealing the sample.

(F) While not in transit or under examination, all blood and urine specimens shall be refrigerated.

{¶13} In *Burnside* at ¶ 24, citing *State v. Brown*, 109 Ohio App.3d 629, 632 (4th Dist.1996), the Supreme Court of Ohio explained the burden-shifting procedure used in challenges to the admissibility of alcohol-test results, stating:

The defendant must first challenge the validity of the alcohol test by way of a pretrial motion to suppress; failure to file such a motion ‘waives the requirement

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on the [S]tate to lay a foundation for the admissibility of the test results.' After a defendant challenges the validity of test results in a pretrial motion, the [S]tate has the burden to show that the test was administered in substantial compliance with the regulations prescribed by the Director of Health. Once the [S]tate has satisfied this burden and created a presumption of admissibility, the burden then shifts to the defendant to rebut that presumption by demonstrating that he was prejudiced by anything less than strict compliance.

(Internal citations omitted.)

{¶14} First, Mr. Ragle argues that the State failed to demonstrate substantial compliance with OAC 3701-53-05(C) because there was no evidence that his blood was drawn "with a sterile dry needle" and placed "into a vacuum container with a solid anticoagulant."

{¶15} Anna Streator, RN, a nurse at Akron City Hospital, testified on behalf of the State as follows:

* * *

Q: [Nurse] Streator, were you working, do you recall on * * * Saturday May 29, 2010 into Sunday May 30, 2010?

* * *

A: Yes.

* * *

Q: Okay. Now, on that particular day when you are in charge of the floor, do you then do any blood draws requested by the police?

A: Yes.

Q: And on that particular day, according to your review of the medical chart, was there a blood draw taken?

A: Yes.

* * *

Q: Whenever you perform a blood draw at the request of a police officer, do you do it in a particular manner?

A: Yes.

A-5

Q. What do you do specifically?

A: Put on a tourniquet, get a sterile white gauze, wet it with water, clean the site and then draw.

Q: You use the water rather than alcohol, is that correct?

A: Yes.

Q: And when you do the draw, is it—what container do you put that in?

A: What the officers provide.

Q: Okay.

A: It's either two gray or two red vials.

* * *

Further, on cross-examination, Nurse Streator testified:

Q: * * *Do the police bring a kit?

A: Yes.

Q. Okay. So in terms of the items in the kit, what do you use in the kit to draw the blood?

A: The two vials they bring.

Q: So the kit contains two vials?

A: Yes.

Q: All right. In terms of the needle, that's something that the hospital has?

A: Right.

* * *

Q: Okay. You mentioned two different types of capsules or vials. I wanted to ask you about that. * * *

A: Sometimes they're red, sometimes they're gray on the top.

Q: Okay. What's the difference?

A: I have no idea.

A-6

Q: Were these red or gray?

A: I have no idea.

* * *

Additionally, on redirect, Nurse Streator testified regarding her knowledge of whether the vials contained a solid anticoagulant as follows:

* * *

Q: [Nurse] Streator, you testified earlier that you weren't familiar with what was in the two vials. Would it be common that they were anticoagulants in there, in the vial?

A: You know, I don't have any idea what's in there.

* * *

{¶16} Officer Eichler, a police officer for the City of Tallmadge, also testified on behalf of the State regarding the blood test as follows:

* * *

Q: Were you on duty on the late hours of May 29th into the morning hours of May 30th?

A: On May 29th, yes.

* * *

Q: * * * And what steps did you take at that point?

A: After briefly surveying the scene, I left the scene and I went to the police department to get a blood and urine test kit.

Q: Okay: And is that test kit something that's standardized in the police department?

A: Yes, it is.

Q: And to your knowledge, is that test kit acceptable protocol for the Ohio Department of Health Regulations for a blood draw?

A: Yes.

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Q: And do you recall—do you do anything in particular when you grab that kit?

A: We have kits that have been put together by the hospital that are sealed in a bag with who put it together along with an expiration date on the bag.

Q: Did you check the expiration date on the bag?

A: Yes.

Q: And do you recall whether it was expired or not expired?

A: It was not expired.

Q: And to your knowledge, * * * do they have anticoagulants within those blood containers?

A: I believe so, yes.

Q: Okay. * * * [D]o they include a needle or just—what do they include?

A: There are two tubes for blood draws, there's one tube for a urine specimen.

Q: And that's all packaged together?

A: Yes, along with the Chain of Custody form.

* * *

On cross-examination, Officer Eichler further testified regarding the blood draw kit:

Q: Okay. How many test kits are laying around the Tallmadge Police Department?

A: We keep them all in our booking area right next to our intoxilyzer. It's in a desk drawer, and there's usually three to four in there.

Q: And who put together the particular test kit that you used on [Mr. Ragle]?

A: I don't know who in particular. I know that Summa Hospital sticker is on it with an expiration date.

Q: Okay. You didn't put the items in the test kit, correct?

A: That's correct.

Q: All right. You understand that it comes from Summa Hospital?

A: Right.

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* * *

This is the testimony upon which the State relied to establish compliance with the Ohio Administrative Code regarding the blood draw performed upon Mr. Ragle. As stated above, the State has the burden to demonstrate that it *substantially complied* with OAC 3701-53-05(C) by drawing Mr. Ragle's blood "with a sterile dry needle into a vacuum container with a solid anticoagulant* * *."

{¶17} We look to our recent decision in *State v. Thompson*, 9th Dist. No. 11CA0112-M, 2012-Ohio-2559, for guidance with the present matter. In *Thompson*, a state trooper, a nurse, and a criminalist testified on behalf of the State. The trooper testified that he provided the nurse with the blood draw kit and "witnessed the draw after the two opened the blood draw kit together." *Id.* at ¶ 10. The trooper further testified that the nurse (1) used a nonalcoholic iodine prep swab, (2) opened a package containing a fresh needle, (3) deposited the blood into two tubes from the kits, and (4) placed an evidence seal over each tube. *Id.* Additionally, the nurse testified that, although she could not remember this specific blood draw, she regularly uses the same procedures in practice, such as (1) using a non-alcoholic Povidone iodine prep swab, (2) removing a dry, sterile needle from the supply box, and (3) drawing the blood into the tubes provided by the Ohio State Highway Patrol which contain sodium chloride, a "dry, white powder anticoagulant that preserves the blood* * * and prevents it from clotting." *Id.* at ¶ 11. Finally, the criminalist testified that her lab is certified by the Ohio Department of Health and that "the blood samples her lab receives are immediately placed in secure refrigeration upon their arrival and remain there until testing can occur." *Id.* at ¶ 13-14.

{¶18} In affirming the trial court's denial of Thompson's motion to suppress, we stated:

The testimony in the record supports the conclusion that the State demonstrated *substantial compliance*. [The nurse] testified that she used an iodine-based, non-

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alcohol solution and sterile, dry needle on Thompson before she then transferred Thompson's blood to two vacuum sealed tubes containing a solid anticoagulant and closed the tubes with a tamper-proof seal. [The state trooper] witnessed the blood draw and corroborated [the nurse's] testimony. [The criminalist] testified that she had alcohol and toxicology procedural manuals authored by the director of toxicology at her work station, her lab was certified by the Health Department, she was certified by the Health Department, and her direct supervisor reviews all the results of her testing. She also testified that her lab refrigerates all samples at all times, except when the samples are being tested, and retains the remainder of positive blood samples after testing in semi-permanent storage. The samples were transferred directly from [the nurse] to [the state trooper] to the Ohio State Highway Patrol Crime Lab where they were logged into evidence with unique identifiers and immediately refrigerated.

Id. at ¶ 19.

{¶19} In the present matter, Mr. Ragle's attorney questioned Nurse Streator regarding the needle used to draw Mr. Ragle's blood by asking: "[i]n terms of the needle, that's something that the hospital has?" In response, Nurse Streator merely stated "[r]ight." However, the State did not attempt to further elicit any testimony regarding whether the needle was dry and sterile as required by OAC 3701-53-05(C). As to whether Mr. Ragle's blood was drawn into a vacuum container with a solid anticoagulant, the State asked Streator "[w]ould it be common they were anticoagulants in there, in the vial?" Streator responded, "[y]ou know, I don't have any idea what's in there." The State also queried Officer Eichler as to whether the vial contained an anticoagulant. Officer Eichler testified that he believed so. Additionally, the State asked the officer whether he had knowledge regarding whether the test kit used was acceptable protocol for the Ohio Department of Health Regulations for a blood draw. Officer Eichler simply responded, "[y]es." The State did not engage in any additional questioning regarding the needle or the presence of a solid anticoagulant in the vial. Further, the State did not ask any of its witnesses whether the vials contained a "solid anticoagulant" as required by OAC 3701-53-05(C).

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{¶20} In *State v. Slates*, 9th Dist. No. 25019, 2011-Ohio-295, ¶ 11, we also addressed whether the State substantially complied with OAC 3701-53-05(A), (B), (C), (E), and (F). We stated that, because Slates' motion to suppress failed to set forth any factual basis in support of this issue, and the fact that Slates challenged "the admissibility of his urine sample, where there is nothing in the record to demonstrate that he provided a urine sample," Slates' "bare bones recitation of the issue was nothing more than a boilerplate challenge which did not notify the State with sufficient particularity of the specific evidence it was obligated to present." *Id.* As such, we indicated that the State "needed only to demonstrate, in general terms, that it substantially complied with the regulations." *Id.*

{¶21} At Slates' suppression hearing, the State presented testimony from a registered nurse, a police officer, and a toxicologist with the Summit County Medical Examiner's Office. *Id.* at ¶ 12, 14. The nurse testified that "he used a brand new, sterile butterfly needle that he removed from its package," and that "all vials are vacuum tubes[.]" *Id.* at ¶ 14. Further, the toxicologist testified that "he provides the blood draw test kits to the [Akron Police Department] and that he puts the kits together to ensure compliance with state requirements." *Id.* Based upon this testimony, we concluded that, "[a]lthough there was no specific testimony regarding an anticoagulant, a vial in a kit which comports to the OAC requirements would necessarily contain an anticoagulant." *Id.*

{¶22} The present matter is easily distinguishable from both *Thompson* and *Slates* because (1) Mr. Ragle's motion to suppress set forth specific challenges regarding the blood draw, including whether the State followed appropriate procedures in collecting and handling his blood sample in accordance with OAC 3701-53-05(C), as well as an allegation that Officer Eichler failed to document the collection time on the blood vial, thus notifying the State with

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sufficient particularity of the specific evidence it was obligated to present at the suppression hearing, (2) Nurse Streator's vague testimony regarding the needle did not come close to the level of detailed testimony given by the nurses in *Thompson* and *Slates* regarding the needles used in their blood draws, (3) Nurse Streator admittedly had no idea if the vials contained a solid anticoagulant, whereas the nurse in *Thompson* provided detailed testimony regarding the solid anticoagulant present in the vials, and the nurse in *Slates* provided testimony regarding the vacuum sealed tubes, (4) Officer Eichler only stated that he *believed* the vials contained an anticoagulant, but did not specify that he *knew* this to be true, or that the anticoagulant was solid, (5) Officer Eichler answered "[y]es" to whether he knew if the test kit comported to Ohio Department of Health regulations, but expressed no actual knowledge of who assembled the test kits, and (6) unlike in *Thompson* and *Slates*, the State did not introduce testimony from the individuals responsible for assembling the test kits and/or testing Mr. Ragle's blood in order to demonstrate compliance with State regulations.

{¶23} Therefore, based upon the record before us and our decisions in *Thompson* and *Slates*, we cannot say that the State met its burden to prove that it substantially complied with OAC 3701-53-05(C). As such, the trial court erred in denying Mr. Ragle's motion to suppress the admissibility of the blood testing results. Because we conclude that the State failed to prove that it substantially complied with OAC 3701-53-05(C), we decline to further address Mr. Ragle's arguments with regard to whether the State also failed to prove that it complied with OAC 3701-53-05(E) and (F).

{¶24} Mr. Ragle's first assignment of error is sustained.

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ASSIGNMENT OF ERROR II

THE ARRESTING OFFICER DID NOT HAVE PROBABLE CAUSE TO ARREST [MR. RAGLE] FOR OVI AND ALL STATEMENTS AND EVIDENCE SEIZED THEREAFTER ARE INADMISSIBLE.

{¶25} In his second assignment of error, Mr. Ragle argues that Officer Eichler did not have probable cause to arrest him for OVI. We disagree.

{¶26} “In determining whether the police had probable cause to arrest an individual for [OVI], we 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.” *City of Tallmadge v. Barker*, 9th Dist. No. 24414, 2009-Ohio-1334, ¶ 12, quoting *State v. Homan*, 89 Ohio St.3d 421, 427 (2000), superceded by R.C. 4511.19(D)(4)(b) on other grounds as recognized by *State v. Schmitt*, 101 Ohio St.3d 79, 2004-Ohio-37. Additionally, “[e]ven without positive results on field sobriety testing, the totality of the facts and circumstances may support probable cause to arrest for a violation of Section 4511.19(A) of the Ohio Revised Code.” *State v. Walters*, 9th Dist. No. 11CA0039-M, 2012-Ohio-2429, ¶ 10. “The amount of evidence necessary for probable cause to suspect a crime is being committed is less evidence than would be necessary to support a conviction of that crime at trial.” *Id.*, quoting *State v. McGinty*, 9th Dist. No. 08CA0039-M, 2009-Ohio-994, ¶ 11. “It is necessary to show merely that a probability of criminal activity exists, not proof beyond a reasonable doubt, or even proof by a preponderance of evidence that a crime is occurring.” *Walters* at ¶ 10, quoting *McGinty* at ¶ 11.

{¶27} In *Akron v. Norman*, 9th Dist. No. 22743, 2006-Ohio-769, ¶ 12, we stated that R.C. 4511.19(A)(1)(a), “does not necessitate any finding of a certain blood alcohol content to support a conviction, but rather only requires evidence that a defendant was operating a motor

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{¶29} Here, Officer Eichler's testimony indicated that Mr. Ragle's truck "had travelled off the left side of the roadway," striking several trees and a mailbox, "which put it sideways." Upon approaching the vehicle, Officer Eichler found Mr. Ragle, unconscious, "[lying] across the driver's seat." Officer Eichler explained that "[h]is seats were down—if you can picture, were down by where the driver's—pedals were for the operation of the vehicle. He was [lying] across the seat into the passenger side, and his head was [lying] on the passenger door." Officer Eichler observed a case of Coors Light beer inside the truck and also, "a strong odor of alcoholic beverage coming from inside the [truck]." Additionally, Officer Eichler testified that two cans were missing from the case of beer. When the EMS arrived and removed Mr. Ragle from the truck, Officer Eichler also observed "a very strong odor of alcoholic beverage coming from [Mr. Ragle's] breath." Officer Eichler also testified that Mr. Ragle's speech was slurred and that, at the hospital, he also smelled an odor of alcohol.

{¶30} In its order, the trial court stated that "[b]ased on the accident, the possession of alcohol in the vehicle with some cans missing, a strong smell of an alcoholic beverage and slurred speech of [Mr. Ragle], this Court finds there was probable cause to arrest [Mr. Ragle] for OVI* * *."

{¶31} Under the totality of the circumstances, and based upon the record before us, we conclude that the trial court correctly determined that Officer Eichler had probable cause to arrest Mr. Ragle for OVI.

{¶32} Mr. Ragle's second assignment of error is overruled.

III.

{¶33} In sustaining Mr. Ragle's first assignment of error, and overruling his second assignment of error, we vacate Mr. Ragle's conviction for operating a vehicle with a prohibited blood alcohol concentration ("BAC") in violation of T.C.O. 333.01(a)(1)(C), and affirm his convictions for operating a motor vehicle while under the influence of alcohol ("OVI") in violation of T.C.O. 333.01(a)(1)(A), failure to maintain reasonable control in violation of T.C.O. 333.08, and underage possession or consumption in violation of R.C. 4301.69(E). Because we vacate Mr. Ragle's BAC conviction, the issue of merger is moot. We remand to the trial court for further proceedings consistent with this decision.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

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Costs taxed equally to both parties.



CARLA MOORE
FOR THE COURT

CARR, J.
CONCURS.

DICKINSON, J.
CONCURRING IN JUDGMENT ONLY.

{¶34} I agree that Officer Dennis Eichler had probable cause to arrest Mr. Ragle for operating a vehicle under the influence of alcohol. Mr. Ragle was the sole occupant of a truck that was involved in a one-vehicle crash, his breath smelled strongly of alcoholic beverages, and there was a case of beer in the front area of the truck with him, with some of the cans missing.

{¶35} I also agree that this Court must vacate Mr. Ragle's conviction for operating a vehicle with a prohibited blood alcohol concentration because the court could not sentence him for that crime and for operating a vehicle under the influence of alcohol. As the lead opinion has noted, Officer Eichler cited Mr. Ragle for operating a vehicle "under the influence of alcohol" under Section 333.01(a)(1)(A) of the Codified Ordinances of the City of Tallmadge, Ohio, and for operating a vehicle while having "a concentration of seventeen-hundredths of one per cent or more by weight per unit volume of alcohol in [his] whole blood" under Section 333.01(a)(1)(F). Although the municipal court found him guilty of both offenses, it "merged" the blood-alcohol-content count with the operating-under-the-influence count because they were the "same offense."

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{¶36} Under the doctrine of merger, a defendant who has been found guilty of allied offenses may only be sentenced on one of the offenses. *State v. Damron*, 129 Ohio St. 3d 86, 2011-Ohio-2268, ¶17. In this case, even though the trial court merged the blood-alcohol-concentration offense with the operating-under-the-influence offense, it imposed sentences for both offenses. That was error. *Id.* As the Ohio Supreme Court explained in *Damron*, “[t]he imposition of concurrent sentences is not the equivalent of merging allied offenses.” *Id.*

{¶37} For purposes of the doctrine of merger, a “conviction” includes both the determination of guilt and the sentence or penalty. *State v. Damron*, 129 Ohio St. 3d 86, 2011-Ohio-2268, ¶ 17. The trial court found Mr. Ragle guilty of operating a vehicle with a prohibited blood alcohol concentration and imposed a sentence on it. Because the court had merged the blood-alcohol-concentration offense with the operating-under-the-influence offense, however, it was not allowed to impose a sentence for the blood-alcohol-concentration offense. Accordingly, I agree that Mr. Ragle’s conviction for operating a vehicle with a prohibited blood alcohol concentration must be vacated. I would overrule his first assignment of error as moot.

APPEARANCES:

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