

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)	CASE NO: 13-0186
)	
Plaintiff – Appellee	)	On Appeal from the Lorain County
	)	Court of Appeals, Ninth Appellate
-vs-	)	District
)	
CORRINE CODELUPPI,)	Court of Appeals
)	Case No. 11CA010133
Defendant – Appellant)	

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MERIT BRIEF OF DEFENDANT-APPELLANT CORRINE CODELUPPI

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iii
STATEMENT OF FACTS.....	1
ARGUMENT.....	9
A. Standard of Review.....	9
B. Proposition of Law No. I: When a defendant files a Motion to Suppress, a highly detailed pleading of facts and law is not required to satisfy the <i>Shindler</i> notice requirements and to trigger the right to a hearing, thus the trial court errs in dismissing the Motion without a hearing.....	10
1. Codeluppi’s Motion to Suppress met the <i>Shindler</i> requirements by setting forth the legal and factual bases of the OVI stop and arrest with sufficient particularity to place the prosecutor and Court on notice of the issues to be decided.....	10
2. For purposes of a Motion to Suppress in an OVI case, a more rigorous or onerous standard other than <i>Shindler</i> is neither feasible or practical.....	30
CONCLUSION.....	37
PROOF OF SERVICE.....	39
APPENDIX	
<i>State v. Codeluppi</i> , Ohio Supreme Court Case No. 13-0186 Notice of Appeal	Appendix 1
<i>State v. Codeluppi</i> , 9 th Dist. No. 11CA010133 (Dec. 10, 2012), <i>Decision and Journal Entry</i>	Appendix 4
<i>State v. Codeluppi</i> , Elyria Muni. Ct. No. 2011TRD05695, Court Order.....	Appendix 23
U.S. Constitution, Fourth Amendment.....	Appendix 24
U.S. Constitution, Fifth Amendment.....	Appendix 25

U.S. Constitution, Sixth Amendment.....	Appendix 26
U.S. Constitution, Fourteenth Amendment.....	Appendix 27
Ohio Constitution, Article 1, Section 14.....	Appendix 28
Crim R. 47.....	Appendix 29
R.C. 4511.19.....	Appendix 30
NHTSA “DWI Detection and Standardized Field Sobriety Testing”, Student Manual, 2006 Edition.....	Appendix 46

TABLE OF AUTHORITIES

Page

CASE LAW

<i>Aurora v. Hennessey</i> , Portage App. No. 89-P-2089 (Aug. 3, 1990).....	17
<i>Beck v. Ohio</i> , 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964).....	16
<i>Blakemore v. Blackmore</i> , 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).....	9
<i>Bowling Green v. O’Neal</i> , 113 Ohio App.3d 880, 682 N.E.2d 709 (1996).....	4, 22
<i>Florida v. Royer</i> , 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983).....	14
<i>Katz v. United States</i> , 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).....	6, 11, 28
<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).....	21, 22, 31
<i>Solon v. Mallion</i> , 10 Ohio App.3d 130, 460 N.E.2d 729 (1983).....	9
<i>Stansbury v. California</i> , 511 U.S. 318, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994).....	21
<i>State v. Boczar</i> , 113 Ohio St.3d 148, 2007-Ohio-1251, 863 N.E.2d 155.....	19
<i>State v. Brown</i> , 166 Ohio App.3d 638, 2006-Ohio-1172, 852 N.E.2d 1128.....	13, 19
<i>State v. Bryson</i> , 142 Ohio App.3d 397, 755 N.E.2d 964 (2001).....	9
<i>State v. Burnside</i> , 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71.....	9
<i>State v. Clark</i> , 12 th Dist. No. CA2009-10-039, 2010-Ohio-4567.....	9, 13
<i>State v. Codeluppi</i> , 9 th Dist. No. 11CA010133, 2012-Ohio-5812.....	7, 8, 10, 27
<i>State v. Cooper</i> , 120 Ohio App.3d 416, 698 N.E.2d 64 (1997).....	17
<i>State v. Dugan</i> , 12 th Dist. No. CA2012-04-081, 2013-Ohio-447.....	26
<i>State v. Embry</i> , 12 th Dist. No. CA200311110, 2004-Ohio-6324.....	24, 25, 26
<i>State v. Evans</i> , 127 Ohio App.3d 56, 711 N.E.2d 761 (1998).....	14
<i>State v. Finch</i> , 24 Ohio App.3d 38, 492 N.E.2d 1254 (1985).....	17

<i>State v. Gozdan</i> , 7 th Dist. No. 03-CA-792, 2004-Ohio-3209.....	9
<i>State v. Hensley</i> , 75 Ohio App.3d 822, 600 N.E.2d 849 (1992).....	28
<i>State v. Horner</i> , 4 th Dist. No. 01CA6 (Dec. 6, 2001).....	13, 23
<i>State v. Hill</i> , 8 th Dist. Nos. 83762, 83775, 2005-Ohio-3155.....	9, 24
<i>State v. Long</i> , 127 Ohio App.3d 328, 713 N.E.2d 1 (1998).....	9
<i>State v. Lyons</i> , 138 Ohio App.3d 614, 741 N.E.2d 974 (2000).....	21
<i>State v. Miller</i> , 117 Ohio App.3d 750, 691 N.E.2d 703 (1997).....	16
<i>State v. Mook</i> , 11 th Dist. Nos. 2001T0057 & 2001T0058, 2002-Ohio-7162.....	16
<i>State v. Nicholson</i> , 12 th Dist. No. CA2003-10-106, 2004-Ohio-6666.....	25
<i>State v. Palmer</i> , 2 nd Dist. No. 3085 (March 8, 1995).....	15
<i>State v. Purdy</i> , 6 th Dist. No. H-04-008, 2004-Ohio-7069.....	13, 26
<i>State v. Shindler</i> , 70 Ohio St.3d 54, 636 N.E.2d 319 (1994).....	7, 10, 11, 12, 13, 16, 20, 22, 25, 28, 29, 30, 31, 36
<i>State v. Slates</i> , 9 th Dist. No. 25019, 2011-Ohio-295.....	9, 20
<i>State v. Strobe</i> , 5 th Dist. No. 08 CA 50, 2009-Ohio-3849.....	14
<i>State v. Timson</i> , 38 Ohio St.2d 122, 311 N.E.2d 16 (1974).....	15
<i>State v. Wetherill</i> , 5 th Dist. No. 05P090062, 2006-Ohio-5687.....	13
<i>State v. Yeaples</i> , 180 Ohio App.3d 720, 2009-Ohio-184, 967 N.E. 2d 333.....	26
<i>State v. Zink</i> , 9 th Dist. No. 17484 (Sept. 4, 1996).....	27, 28
<i>United States v. Longmire</i> , 761 F.2d 411 (7 th Cir. 1985).....	11, 29
<i>Westerville v. Sagraves</i> , 10 th Dist. 04API126, 2005-Ohio-5078.....	9
<i>Xenia v. Wallace</i> , 37 Ohio St.3d 216, 524 N.E.2d 889 (1998).....	11, 12, 29

OTHER AUTHORITIES

U.S. Constitution, Fourth Amendment.....2, 5, 7, 14, 37

U.S. Constitution, Fifth Amendment.....2, 7, 37

U.S. Constitution, Sixth Amendment.....2, 7, 37

U.S. Constitution, Fourteenth Amendment.....2, 7, 37

Ohio Constitution, Article 1, Section 14.....2, 7, 37

R.C. 4511.19.....2, 18, 20, 23, 24, 25, 26, 28, 29

Crim.R. 47.....12, 23

NHTSA “DWI Detection and Standardized Field Sobriety Testing”,
Student Manual, 2006 Edition32, 33, 34, 35, 36

Weiler and Weiler, *Ohio Driving Under the Influence Law*,
Section 9:13 (2012-2013 Ed.).....8

I. STATEMENT OF THE FACTS

On August 3, 2011, Patrolman Ryan M. Young of the North Ridgeville Police Department allegedly observed Defendant-Appellant Corrine Codeluppi (hereinafter, “Codeluppi”) traveling at a high rate of speed on Lorain Road in North Ridgeville, Ohio. (Police Report “Report,” attached as Exhibit A-2 to the Appellate Brief of City of North Ridgeville, at p. 1; Motion to Suppress at p. 3.) According to the Report, the laser displayed a speed of 53 m.p.h. in a 35 m.p.h. zone. (*Id.*) Patrolman Young then activated his lights and pulled Codeluppi over. (*Id.*) When he approached the vehicle, Patrolman Young allegedly detected an odor of alcohol from the interior of the vehicle. (*Id.*) Codeluppi allegedly stated that she had had two drinks and was on her way home. (*Id.*) No other observations are noted in the Report to support Patrolman Young’s seizure of Codeluppi or to support a traffic stop for an OVI. (See, generally, Report, Motion to Suppress.) No video was made of the stop. (*Id.* See also, Supplemental Motion to Suppress (“Supplement”) at p. 2.)

Based solely upon the admission that she had had two drinks and an alleged odor from the interior of the vehicle, Patrolman Young required Codeluppi to perform three field sobriety tests: (1) the Horizontal Gaze Nystagmus (“HGN”) test; (2) the Walk and Turn test; and (3) the One Leg Stand test. (Report at p. 1, Motion to Suppress at p. 3, Supplement at p. 2-3.) Based upon her performance on these three field sobriety tests, Patrolman Young arrested Codeluppi and booked her at the station. (See, generally, Report, Motion to Suppress at p. 3, Supplement at p. 3.)

As a result of this arrest, Codeluppi was charged in Elyria Municipal Court with one count of Operating a Vehicle while Intoxicated (“OVI”) in violation of Ohio Revised

Code Section 4511.19(A)(1)(a), and one count of Excessive Speed over 5 m.p.h. (Motion to Suppress at p. 3.)

The specific issue before this Honorable Court arose when Codeluppi sought to suppress certain illegally obtained evidence from trial. Specifically, Codeluppi filed a Motion to Suppress on October 4, 2011, seeking an Order excluding the following evidence:

1. Any and all evidence obtained by the State of Ohio subsequent to the unlawful and unconstitutional traffic stop and seizure of Codeluppi;
2. Any and all evidence obtained by the State of Ohio as the fruit of the unconstitutional arrest of Codeluppi;
3. Any and all standardized field sobriety test observations and/or results as said field tests were not performed in substantial compliance with NHTSA guidelines; and/or
4. Any and all oral or written custodial statements obtained from or made by Codeluppi.

(Motion to Suppress at p. 1). In said Motion, Codeluppi stated the facts as noted above, explained the basis for the requested suppression of evidence, and argued that:

1. Based upon the facts in the Report, the officers lacked sufficient reasonable grounds to effectuate a traffic stop/seizure;
2. Based upon the facts in the Report, the officers lacked probable cause to arrest Codeluppi;
3. There was no evidence that the standardized field sobriety tests were conducted in substantial compliance with NHTSA guidelines because the officer failed to instruct, conduct, evaluate, administer and/or record the standardized field sobriety tests in substantial compliance with the NHTSA guidelines; and
4. Statements obtained from Codeluppi were obtained in violation of her Fifth Amendment right against self-incrimination, her Fifth and Sixth Amendment right to counsel, as applicable under the Fourteenth Amendment, including Codeluppi's refusal to submit to various police skill tasks and/or her refusal to submit to a portable breath test device.

(See Motion to Suppress at p. 1-2.) The Motion to Suppress further contained the facts as found in the Report and approximately six (6) pages of law to support the suppression of evidence. The Motion to Suppress, including the facts, law and argument, was approximately ten (10) pages in length.

A hearing was set upon the filing of the Motion for November 15, 2011 at 1:30 p.m., during which time Codeluppi anticipated ascertaining additional facts from the arresting officer which were not contained in his Report or any other discoverable document. (Supplement at p. 2-3; Motion for Reconsideration at p. 6.)

On November 14, 2011 at 9:50 a.m. – the day before the hearing – the prosecutor served Codeluppi with a document entitled “Response to Defendant’s Motion to Suppress.” (Motion for Reconsideration at p. 3.) This “Response” was more akin to a motion to strike, as it did not respond to any issue raised in Defendant’s Motion, but rather was a collateral attack seeking to have the Motion to Suppress struck or denied on the grounds that the motion was allegedly not stated with sufficient particularity. (See, generally, Response to Defendant’s Motion to Suppress.)

Upon receipt of said Response, counsel for Codeluppi immediately contacted the prosecutor by telephone and explained the factual challenges raised in the Motion to Suppress. (Motion for Reconsideration at p. 3.) Counsel explained that because there was no video of the stop, and as there was only a self-serving Report which failed to set forth what instructions and demonstrations, if any, were provided by Patrolman Young with respect to the administration of the field sobriety tests, there was a question as to whether these tests were performed in accordance with the NHTSA guidelines. (Affidavit of Joseph T. Burke “Affidavit,” attached to the Motion for Reconsideration as

Exhibit A, at ¶¶4, 5.) Counsel further offered to file a supplemental brief that same day explaining again the matters raised in the Motion and discussed on the phone. (*Id.* at ¶6.) The prosecutor stated that a supplemental brief could just be served upon her at the hearing the next afternoon. (*Id.*)

The trial court did not permit Codeluppi a chance to respond to the prosecution's collateral attack. (Trial Court Docket "Trial Docket" at 11/14/11.) Rather, within a few hours of having first received the prosecutor's claim of lack of particularity, a facsimile was received at 2:46 p.m. on November 14, 2011 from Judge Lisa Locke Graves containing a Journal Entry stating:

Defendant's Motion to Suppress is denied, at the state's request, due to the fact it fails to state legal and factual bases with sufficient particularity to place the prosecutor and the court on notice of the issues to be decided. *Bowling Green v. O'Neal* (1996), 113 Ohio App.3d 880, 883. Case remains set for pretrial on 11/15/11 at 1:30 p.m.

(See Trial Docket at 11/14/11 and Exhibit A-1 to the Motion for Reconsideration.)

On November 15, 2011, Codeluppi filed (1) Defendant's Motion for Leave to File Supplemental Brief in Support of Defendant's Motion to Suppress; (2) Defendant's Supplemental Brief in Support of Defendant's Motion to Suppress; and (3) Defendant's Motion for Reconsideration of the Journal Entry dated November 14, 2011. (See Trial Docket at 11/15/11 and Affidavit at ¶10.) Attached to the Motion for Reconsideration was an Affidavit of Joseph T. Burke swearing to the prosecutor's actual knowledge of the contested matters as well as the facts and law supporting the Motion filed by Defendant. (See Motion for Reconsideration at Exhibit A.)

In the Supplemental Brief in Support of Defendant's Motion to Suppress, Codeluppi set forth an additional nine (9) pages of law and argument. (See generally,

Supplement.) Specifically, Codeluppi argued that the arresting officer had no reasonable suspicion based upon any specific and articulable facts noted in the Report that Codeluppi was under the influence of alcohol and there was no evidence of any impaired driving that would allow the Officer to have a reasonable suspicion that Codeluppi was under the influence of alcohol. (Supplement at p. 5.) Thus, the Officer violated Codeluppi's Fourth Amendment rights by requesting that she exit the vehicle and perform any field sobriety tests. (*Id.*) As the detention was unlawful, all evidence seized from that detention, including the field sobriety tests, should have been suppressed. (*Id.*) Similarly, Codeluppi, by citing the facts in the Report known to the Officer at the time of the arrest, argued that there was no probable cause to make an OVI arrest. (*Id.* at p. 5-8).

Codeluppi pointed out in the Supplement that because there was no video of the stop and arrest, the only information provided regarding the stop and arrest was in the Report. (*Id.* at p. 2.) The Supplement further noted that the Report did not identify any instructions or the nature and manner in which the HGN test was administered, did not identify any instructions or demonstrations, if any, that were provided to Codeluppi in regards to the Walk and Turn test, and further did not identify any instructions or demonstrations, if any, that were provided with regard to the One Leg Stand test – all of which are necessary in order to determine whether or not the tests were performed in substantial compliance with the NHTSA guidelines. (*Id.* at p. 2-3.)

As the constitutionality of the stop and arrest and whether or not the NHTSA guidelines were substantially complied was raised in the Motion to Suppress and could not be adequately ascertained from the Report, it was imperative that a hearing be held. (*Id.* at p. 2-3, 8.) Codeluppi further argued that additional facts could not be ascertained

without a hearing as the additional facts could only be ascertained by cross-examining the arresting officer. (*Id.* at p. 2-3, Motion for Reconsideration at p. 6.) Codeluppi also argued that a hearing was necessary for the prosecutor to establish that there was a legal basis for the stop and arrest, as the constitutionality of a warrantless arrest is never presumed, and the burden of proof as to the constitutionality of a warrantless stop and arrest is on the prosecution. (Supplement at p. 7; Motion for Reconsideration at p. 6; *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).)

Codeluppi also filed Defendant's Motion for Reconsideration along with the Supplement. (Trial Docket at 11/15/11.) In said Motion for Reconsideration, Codeluppi articulated another six (6) pages of facts and law to support holding a hearing on her Motion to Suppress and also attached an affidavit from the undersigned counsel as to the prosecutor's actual notice of all matters sought to be challenged at the hearing and the factual basis for same. (See, generally, Motion for Reconsideration.)

When Codeluppi appeared for the pretrial, the trial judge was not present at court that day. (Affidavit at p. 7.) At the pretrial, no motions were ruled upon and Judge Gary Bennett accepted a "No Contest" plea in the absence of Lisa Locke Graves, the trial judge. (*Id.*)

Counsel informed the trial court and the prosecutor of the intent to appeal, and a timely appeal was filed on the issue of the Motion to Suppress. (Court of Appeals Docket at 12/19/11.) Codeluppi argued in her Appellate Brief that (1) the trial court abused its discretion in denying the Motion to Suppress without allowing for the Defendant to respond to the collateral attack found in the State's "Response;" (2) the denial of the Motion to Suppress without holding the previously scheduled hearing was a denial of

Codeluppi's right to Due Process as guaranteed by the U.S. and Ohio Constitutions; (3) the Motion should not have been denied based upon a lack of particularity as the factual and legal basis of the motion was stated with sufficient particularity pursuant to *Shindler*; (4) the Motion should not have been denied based upon a lack of particularity as the prosecutor had expressed that she had a clear understanding and actual notice prior to the scheduled hearing; (5) the trial court erred by allowing evidence derived from an illegally extended investigative detention to be used to establish probable cause for arrest and conviction in violation of the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14, of the Ohio Constitution; and (6) that the trial court erred in allowing evidence derived from field sobriety tests administered in contravention of NHTSA guidelines to be used to establish probable cause for arrest and conviction, in violation of the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14, of the Ohio Constitution. (See, generally, Brief of Appellant.) Finally, Codeluppi pointed out that while she had met her burden under *Shindler*, the State had utterly failed to set forth any factual averments showing that the stop and arrest was constitutional, that the NHTSA guidelines were substantially complied with, and/or any other matter expressly raised in the Motion to Suppress. (*Id.* at p. 12, 27. See also, Motion for Reconsideration at p. 5.)

The Court of Appeals affirmed the Judgment 2-1, with Judge Dickinson concurring in judgment only, and with Judge Belfance dissenting. (*State v. Codeluppi*, 9th Dist. No. 11CA010133, 2012-Ohio-4567). The Court of Appeals determined that there was no need for a hearing on the Motion to Suppress because there was not enough

of a factual basis stated in the Motion itself which would justify relief. (*Codeluppi* at *8.)

The Court of Appeals found that the Motion:

[G]enerally sets forth numerous legal issues regarding probable cause, substantial compliance with NHTSA guidelines in field sobriety testing, and possible constitutional violations. However, the motion fails to state *with particularity* any factual allegations as to (1) how Officer Young allegedly lacked probable cause to further detain Ms. Codeluppi after initiating the traffic stop, and (2) the respects in which Officer Young allegedly violated provisions of the NHTSA guidelines in administering the field sobriety tests.

(*Codeluppi* at *8-*9, emphasis in original.)

However, as recognized by Judge Belfance in her dissent, the Court's decision, which required a more detailed Motion to Suppress, "places an improper burden upon defendants who are essentially at the start of the case and may have very little information. Judge Belfance explained:

It is important to remember that "[a] defendant has a short window of time in which to file the motion or face a waiver. Until discovery is complete, counsel will likely not have sufficient information to fully explore potential grounds. Even after it is concluded, the defense may still lack some information necessary to explore and pursue all potential grounds. As [an] example, in the case of field sobriety tests, few defendants will be conversant enough to inform counsel of the exact details in which the tests were administered so as to expose any defects. Unless a video has been made, and preserved, of the test administration, the attorney will likely not be in a position to learn the deficiencies in the administration of the test until there is an opportunity to question the officer on the stand."

(*Codeluppi* at *18, citing Weiler and Weiler, *Ohio Driving Under the Influence Law*, Section 9:13 (2012-2013 Ed.))

This is most certainly true in a case such as this where no video was taken of the administration of the field sobriety tests and very little detail is provided as to the instruction, administration, and evaluation of field sobriety tests in the Report. (See, generally, Report.) In fact, such a ruling encourages police not to video the stop or

seizure and further encourages the police not to provide a detailed report. Pursuant to this holding, if the information is not recorded on video or in a report, a Defendant would rarely be able to challenge the constitutionality of an unconstitutional stop or seizure.

II. ARGUMENT

A. Standard of Review

There appears to be a dispute as to the proper standard of review of a trial court's decision on a motion to suppress.

The majority of courts appear to rely upon a standard of review containing mixed questions of law and fact, deferring to the trial court for the factual findings so long as they are supported by some competent, credible evidence, and reviewing legal conclusions de novo to determine whether the trial court applied the appropriate legal standard. *State v. Clark*, 12th Dist. No. CA2009-10-039, 2010-Ohio-4567, ¶9; *State v. Long*, 127 Ohio App.3d 328, 332, 713 N.E.2d 1 (1998); *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶8; *State v. Bryson*, 142 Ohio App.3d 397, 402, 755 N.E.2d 964 (2001); *State v. Slates*, 9th Dist. No. 25019, 2011-Ohio-295, ¶6; *State v. Hill*, 8th Dist. Nos. 83762, 83775, 2005-Ohio-3155, ¶12.

Other courts have found that an abuse of discretion standard should be applied. *Westerville v. Sagraves*, 10th Dist. 04AP1126, 2005-Ohio-5078, ¶10; *State v. Gozdan*, Carroll App. No. 03-CA-792, 2004-Ohio-3209, ¶6; *Solon v. Mallion*, 10 Ohio App.3d 130, 132, 460 N.E.2d 729 (1983). An abuse of discretion implies an unreasonable, unconscionable, or arbitrary attitude on the part of the trial court. *Blakemore v. Blackmore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

In fact, the three judges in the Ninth District Court of Appeals in this case could not agree as to which standard was the proper standard of review. *Codeluppi* at *5, *15.

It is believed that under either standard, the trial court erred in denying Codeluppi's Motion to Dismiss without a hearing, as Codeluppi has stated the issues with sufficient particularity to place the prosecutor and court on notice of the contested matters. As such, the trial court's denial of the Motion to Suppress should be reversed and Codeluppi's conviction overturned.

B. Proposition of Law No. I.

When a defendant files a Motion to Suppress, a highly detailed pleading of facts and law is not required to satisfy the *Shindler* notice requirements and to trigger the right to a hearing, thus the trial court errs in dismissing the Motion without a hearing.

- 1. Codeluppi's Motion to Suppress met the *Shindler* requirements by setting forth the legal and factual bases of the OVI stop and arrest with sufficient particularity to place the prosecutor and Court on notice of the issues to be decided.**

The Ninth District has misapplied this Court's ruling in *State v. Shindler*, 70 Ohio St.3d 54, 636 N.E.2d 319 (1994), by requiring a defendant to do more than provide notice of the issues to be resolved at the hearing. By requiring a defendant to provide substantial detailed facts to support a Motion to Suppress, the Ninth District has improperly shifted the burden of proof to the defendant. In many cases, much like in the case of *Codeluppi*, the Ninth District is requiring defendants to prove a negative and to establish facts contained solely within the mind of the arresting officer prior to any opportunity to question the officer under oath. The reasoning of the Court of Appeals is fundamentally flawed in that it improperly places the burden of proof as to the legality of the way evidence was obtained and the legality of a stop and/or arrest on the defendant.

Not only is placing the burden of proof on the defendant incorrect under this Honorable Court's prior decisions in *Shindler* and *Xenia v. Wallace*, 37 Ohio St.3d 216, 524 N.E.2d 889 (1998), but it is also impractical and unjust. This is especially true in a case such as this one, where there was no video of the stop, arrest or field sobriety tests and as the Report lacks sufficient detail to determine if the legality of the stop/arrest and/or whether or not any of the field sobriety tests were performed in substantial compliance with the NHTSA guidelines. In fact, without the opportunity to question the arresting officer at a suppression hearing, there will be no way to determine whether or not a defendant's constitutional rights were violated.

This Honorable Court stated in *Xenia v. Wallace*, that there are at least three arguments for placing the burden on the prosecution rather than the defense to establish that probable cause existed for a warrantless search: "(1) a party charged from the outset with the burden of persuasion with respect to a particular issue ordinarily has the subsidiary burden of going forward with evidence of such issue; (2) the state has primary access to persons with the relevant information (i.e. the law enforcement officers); and (3) it is less burdensome for a party to produce evidence on the existence of probable cause than the lack of probable cause." *Wallace* at 219-220 (citations omitted). See also *United States v. Longmire*, 761 F.2d 411, 417 (7th Cir. 1985) ("To require the defendant to prove the absence of reasonable suspicion without knowledge of the facts upon which the police based their assessment of the existence of a reasonable suspicion is to place upon him an impossible burden.")

It is undisputed that a warrantless seizure is per se unreasonable, unless it falls within one of the recognized exceptions to the warrant requirement. *Katz* at 357.

Therefore, this Honorable Court previously ruled that in order to suppress evidence obtained through a warrantless search or seizure, a defendant must (1) show that there was not a warrant, and (2) raise the grounds upon which the validity of the search or seizure is challenged in a manner as to give the prosecutor notice of the basis of the challenge. *Wallace* at paragraph 1 of the syllabus.

Once a defendant has demonstrated the warrantless search and/or seizure and has stated the grounds for challenging its legality, the state bears the burden to establish that the search or seizure falls within an exception to the warrant requirement. *Id.* at paragraph 2 of the syllabus.

Several years later, a question arose as to what was required under Criminal Rule 47 for a Motion to Suppress. Crim.R. 47 provides:

An application to the court for an order shall be by motion. A motion, other than one made during trial or hearing, shall be in writing unless the court permits it to be made orally. It shall state with particularity the grounds upon which it is made and shall set forth the relief or order sought. It shall be supported by a memorandum of authority containing citations of authority, and may also be supported by an affidavit.

To expedite business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

This Honorable Court had an opportunity to construe *Xenia v. Wallace* and Criminal Rule 47, and held that in order for a hearing to be required pursuant to a motion to suppress, “the accused must state the legal and factual basis for the motion with sufficient particularity to place the prosecutor and court on notice of the issues to be decided.” *Shindler* at syllabus.

This Court found that Crim.R. 47 “requires that the prosecution be given notice of the specific legal and factual grounds upon which the validity of the search and seizure is

challenged.” *Shindler* at 57. At least one appellate court has interpreted this to mean that “the basis need not be set forth with minute detail, only with sufficient particularity to put the prosecution on notice of the nature of the challenge.” See *State v. Purdy*, 6th Dist. No. H-04-008, 2004-Ohio-7069, ¶15, citing *Shindler* at 57-58. See also, *State v. Horner*, 4th Dist. No. 01CA6 (Dec. 6, 2001), *7 (“although a motion to suppress evidence need not be specifically allege every underlying fact involved in a suppression issue, the motion must sufficiently put the prosecution on notice that a certain issue will be contested.”)

More recently, it has been held that “...even where defendant’s motion lacked the required particularity he may still provide some factual basis, either during cross-examination at the suppression hearing...to support his claim...in an effort to raise the ‘slight burden’ placed on the state.” *Clark* at ¶12. Furthermore, it has been held that the particularity standard can be met upon consideration of the motion to suppress, the testimony at the suppression hearing and upon supplemental briefing. *State v. Brown*, 166 Ohio App.3d 638, 2006-Ohio-1172, 852 N.E.2d 1128, ¶24. Finally, where the state acknowledges notice as to the issues raised in the motion to suppress, the motion to deny the motion to suppress for lack of particularity must fail. *State v. Wetherill*, 5th Dist. No. 05P090062, 2006-Ohio-5687, ¶94-95.

After applying these proper standards to the Motion to Suppress in this case, this Court should reverse the trial court’s denial of the Motion to Suppress and should overturn Codeluppi’s conviction.

In the instant matter, Codeluppi’s motion does indeed state with particularity the factual and legal bases upon which Codeluppi is challenging her warrantless stop and arrest for OVI. It was expressly argued in the Motion to Suppress that the officer did not

have reasonable grounds to effectuate a stop for OVI based upon the facts known to him at the time of the stop, i.e. that Codeluppi was allegedly speeding, that Patrolman Young believed he detected the odor of alcohol and that Codeluppi allegedly admitted to having two drinks that day. (Motion to Suppress at p. 3-4; Supplement at p. 6.)

The United States Supreme Court has held that the scope of a detention must be narrowly tailored to its underlying justification. *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). In *State v. Evans, infra*, the court stated that any further detention must be supported by reasonable suspicion:

Once the officer has stopped the vehicle for some minor traffic offense and begins the process of obtaining the offender's license and registration, the officer may then proceed to investigate the detainee for driving under the influence if he or she has a reasonable suspicion that the detainee may be intoxicated based on specific and articulable facts, such as where there are clear symptoms that the detainee is intoxicated.

State v. Evans, 127 Ohio App.3d 56, 63, 711 N.E.2d 761 (1998). "It is well-established that an officer may not request a motorist to perform field sobriety tests unless that test is independently justified by reasonable suspicion based upon articulable facts that the motorist is intoxicated." *State v. Strope*, 5th Dist. No. 08 CA 50, 2009-Ohio-3849, ¶18.

As explained in the Motion to Suppress at p. 3-4, Patrolman Young unlawfully expanded the detention of Codeluppi and violated her Fourth Amendment rights when he requested that she exit the vehicle and perform field sobriety tests when he had no reasonable suspicion based upon specific and articulable facts that Codeluppi was intoxicated or under the influence of alcohol. The only indicia of alcohol noted by Patrolman Young prior to requesting Codeluppi perform the field sobriety tests allegedly were (1) the alleged odor of alcohol about the interior of the vehicle and (2) Ms. Codeluppi's alleged admission to having consumed two drinks. The stop occurred on a

weeknight evening and there was no evidence that Patrolman Young observed slurred speech, glassy or bloodshot eyes, clumsiness, belligerent attitude, difficulty in exiting the vehicle, or difficulty following commands. There was also no evidence as to the period of time over which Codeluppi had allegedly consumed the two drinks. As such, Patrolman Young did not have a reasonable suspicion based upon articulable facts that Codeluppi was under the influence of alcohol, and therefore, was not lawfully permitted to detain Codeluppi for purposes of an OVI investigation. Accordingly, the detention of Codeluppi for the investigation, and specifically for the purpose of Codeluppi performing the field sobriety tests, was an unlawful seizure and all evidence arising from the unconstitutional seizure must be suppressed.

Codeluppi's mere allegation that there was no reasonable suspicion sufficient to stop her vehicle was all that was necessary to be stated in the Motion to Suppress in order to place the prosecutor and court on notice and entitled her to a hearing:

A simple allegation that there was insufficient probable cause to make an initial stop, without more, [is] sufficient to support a motion to suppress based on that ground. From the defendant's point of view, there is nothing more to be said. From his point of view, he was driving along, minding his own business, when the police unaccountably stopped him.

State v. Palmer, 2nd Dist. No. 3085, *2 (March 8, 1995).

It was further argued that Patrolman Young lacked probable cause to arrest Codeluppi for an OVI based upon the facts and observations he stated in his Report, and as restated in the Motion to Suppress. (Motion to Suppress at p. 3, 4-8; Supplement at p. 6.)

In determining whether there exists probable cause to make an OVI arrest, a court must consider whether, at the moment of the 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. *Beck v. Ohio*, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964); *State v. Timson*, 38 Ohio St.2d 122, 311 N.E.2d 16 (1974). In doing so, the court must look at the totality of the facts and circumstances surrounding the arrest. *State v. Miller*, 117 Ohio App.3d 750, 757, 691 N.E.2d 703 (1997).

This Honorable Court found in *Shindler* that where a motion to suppress states that an arrest was based upon a minor speeding violation and moderate smell of alcohol, and argues a lack of probable cause to stop or arrest the defendant, the defendant has stated facts and law with enough particularity to place the prosecutor and court on notice, and as such, is entitled to a hearing on those issues.. *Shindler* at 57. As Codeluppi's Motion to Suppress made the same legal challenge and based the challenge on substantially similar facts, as well as cited to case law to back up those allegations, Codeluppi was entitled to a hearing on the issues of the stop and arrest.

In *Ohio v. Mook, infra*, the Eleventh District Court of Appeals found a Motion to Suppress to be sufficient to place the prosecutor and court on notice of the issues to be determined. The motion and accompanying brief stated in its entirety:

Now comes the defendant and moves the Court to suppress all evidence in this case subsequent to the traffic stop of the defendant for speeding. In support of this motion, defendant says that the arresting officer did not have probable cause to stop the defendant for speeding.

Ohio v. Mook, Eleventh Dist. Nos. 2001T0057 & 2001T0058, 2002-Ohio-7162, ¶4-5.

Clearly, Codeluppi's Motion far exceed that which was found to be stated with sufficient particularity in *Mook*.

As noted in greater detail below, Codeluppi argued in her Motion to Suppress that the field sobriety tests could not be considered due to the lack of any indication of substantial compliance with the NHTSA guidelines in the Report. Furthermore, Codeluppi argued that Patrolman Young did not observe the defendant driving erratically or unsafely and did not witness any impaired motor conditions, and therefore, Patrolman Young did not have any probable cause to arrest her for an OVI. Motion to Suppress at p. 5-6. In support of her argument, Codeluppi cited to *State v. Cooper*, 120 Ohio App.3d 416, 698 N.E.2d 64 (1997) (finding that where the only facts relied upon by an officer are the odor of alcohol and the fact that the defendant was sleeping in his vehicle in a private parking lot at approximately 3:00 a.m. was not enough to support a finding of probable cause, noting that there was “no evidence of slurred speech, bloodshot eyes or a lack of coordination.”); *Aurora v. Hennessey*, Portage App. No. 89-P-2089 (Aug. 3, 1990) (holding that where an officer did not observe the defendant driving erratically or unsafely, did witness impaired motor coordination, and did not conduct field sobriety tests, the officer had no probable cause to arrest the defendant.) *Id.*

The odor of alcohol about the vehicle and an admission of consumption of alcohol without reference to the time in which it was consumed, does not constitute probable cause to arrest an operator for operation of a vehicle under the influence. *State v. Finch*, 24 Ohio App.3d 38, 40, 492 N.E.2d 1254 (1985), citing (stating that “there is no evidence that the officer witnessed any impaired coordination on the part of the [defendant], and it is not a violation of the law to drive smelling of alcohol, or with bloodshot eyes, a flushed face, or slurred speech. In other words, merely appearing to be too drunk to drive is not, in our opinion, enough to constitute probable cause to arrest.”); Supplement at p. 6.

Codeluppi also argued that the officer did not substantially comply with the NHTSA guidelines in administering the HGN, One Leg Stand, and Walk and Turn tests. (Motion to Suppress at p. 1, 5-8; Supplement at p. 8; Motion for Reconsideration at p. 6.) Defendant was unable to expressly state the factual basis of how these tests did not substantially comply with the NHTSA guidelines as Defendant did not have any such information available to her as to how the instructions were provided, how the demonstrations occurred, and how these tests were administered without having an opportunity to question Patrolman Young at a suppression hearing due to the lack of information provided by the Patrolman Young in the Report and as no video of the instruction or administration of these tests exists. (Supplement at p. 2, 3, 8; Motion for Reconsideration at p. 2-3, 5-6.)

R.C. 4511.19(D)(4)(b) states in relevant part:

(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 whole blood, blood serum or plasma, 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.

The burden of proof is on the prosecution to show that the field sobriety tests were administered in substantial compliance with applicable standards. *Brown*, ¶18, fn. 8. See also, *State v. Boczar*, 113 Ohio St.3d 148, 2007-Ohio-1251, 863 N.E.2d 155, ¶24.

In the present case, there simply is no evidence as to whether any of the field sobriety tests were administered in substantial compliance with the NHTSA standards. The Report contains four typed paragraphs describing the stop, detention and Codeluppi's performance on the field sobriety tests, but contains only one short generalized phrase regarding the instructions and demonstration requirement ("I explained and demonstrated the following tests..."). (See generally, Report.) There is no detail as to what instructions were given, whether Codeluppi asked any questions or whether the Officer properly demonstrated the field sobriety tests. (Report at p. 1-2.) There was no video of this detention and no witnesses. *Id.* Specifically regarding the HGN test, it cannot be determined from the Report what instructions were given to Codeluppi regarding that test and whether those instructions substantially complied with NHTSA guidelines. Additionally, it cannot be determined how Patrolman Young administered the HGN test and whether he substantially complied with the specific methods required to obtain an accurate evaluation, such as how many passes were made of the stimulus, the time it took to complete the test and the distance the stimulus was held from Codeluppi's face. *Id.*

Similarly on the Walk and Turn Test and One Leg Stand test, it cannot be determined from the police report what instructions were given to Codeluppi, whether

Patrolman Young demonstrated the test for Codeluppi, and whether those instructions and demonstrations substantially complied with NHTSA guidelines. Report at p. 1-2; Supplement at p. 2-3; Motion at p. 5-8.

Since no video exists of this stop and arrest, it is virtually impossible for Codeluppi to state facts with any degree of certainty without having an opportunity to question Patrolman Young on the stand. Regardless, it is the prosecutor who bears the burden of establishing substantial compliance – it is not a defendant’s burden to show a lack of substantial compliance in a Motion to Suppress before a hearing is held on that issue.

However, the mere recitation of R.C. 4511.19(D)(4)(b) along with the statement that “the arresting officer failed to administer the field sobriety testing to Defendant in substantial compliance with the testing standards then in effect set by the national highway traffic safety administration” and that the “testing law enforcement officer failed to instruct, conduct, evaluate, administer, and/or record the standardized field sobriety tests used in the within matter in substantial compliance with the National Highway Traffic Safety Administration (“NHTSA”) guidelines” was more than adequate to place the prosecution and court as to what was being challenged. Motion to Suppress at p. 5, 7 “In many cases, and as implicitly recognized in *Shindler*, the simple identification of a code section is clearly sufficient to place the state on notice of what is being challenged.” *Slates* at ¶77, fn. 3 (Belfance, J., dissenting.) However, Codeluppi went much further and pointed out that the tests were administered under duress, administered in difficult environmental conditions, that the results may be biased. Motion to Suppress at p. 5.

Finally, Codeluppi argued in the Motion to Suppress that her statement that she had consumed alcohol that day should be excluded as there was no *Miranda* warning or a valid waiver, as required for a custodial stop. (Motion to Suppress at p. 3, 8-9.) Once again, Codeluppi not only cited to the facts as expressed by Patrolman Young in the Report, but further cited to *Miranda v. Arizona*, 384 U.S. 463, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) and to *Stansbury v. California*, 114 S.Ct. 1526, 114 S. Ct. 1526, 128 L.Ed.2d 293 (1994). (Motion to Suppress at p. 8-9.) Defendant argued that the stop was custodial and that Patrolman Young specifically asked questions designed to elicit self-incriminating responses relating to an OVI without providing any Miranda warnings or properly obtaining a valid, knowing and intelligent waiver of her rights from Codeluppi. (*Id.* at p. 9.)

In *State v. Lyons, infra*, the Sixth District found that where a motion to suppress raises a challenge as to the admission of statements made without Miranda warnings having been given to the defendant, the defendant has plead the motion with sufficient particularity to place the prosecutor and court on notice of the issue. *State v. Lyons*, 138 Ohio App.3d 614, 616, 741 N.E.2d 974 (2000).

Thus, the prosecutor and trial court had more than adequate notice that the issues that were being contested were: (1) whether or not there were reasonable grounds to effectuate a traffic stop and seizure of the Defendant for an OVI; (2) whether or not probable cause existed to make a warrantless arrest of the Defendant; (3) whether or not the officer substantially complied with the NHTSA guidelines in the instruction, conduction, evaluation, administration and/or recording of the HGN test, the Walk and

Turn test and/or the One Leg Stand test; and (4) whether or not Codeluppi's right against self-incrimination was violated by the State having taken statements from Codeluppi in a custodial interrogation without first providing the Miranda warnings or having obtained a valid, knowing, and intelligent waiver of same from Codeluppi. (See generally, Motion to Suppress).

Codeluppi has stated the legal and factual basis of her Motion to Suppress "with sufficient particularity to place the prosecutor and court on notice of the issues to be decided." *Shindler* at syllabus. As such, the trial court erred in failing to hold a hearing and/or rule on the merits of the Motion to Suppress.

Rather than ruling on its merits, the trial court denied the Motion on the basis of *Bowling Green v. O'Neal*, 113 Ohio App.3d 880, 883, 682 N.E.2d 709 (1996) stating that Ms. Codeluppi "fail[ed] to state the legal and factual bases with sufficient particularity to place the prosecutor and the court on notice of the issues to be decided" and converted the hearing that had previously been set on the Motion to Suppress into a pretrial.

The trial court's holding is perplexing as the Sixth District Court of Appeals found that the motion to suppress filed in *Bowling Green v. O'Neal*, *supra*, was stated with sufficient particularity to require the court to hold a hearing even though it merely contained a statement that the BAC test results were "improperly obtained" along with allegations that the machine was improperly calibrated and improper solution was used. *O'Neal* at 883.

Clearly, Codeluppi's Motion and supporting briefs exceeded that which was found to be acceptable in *O'Neal* and further exceeded the standards set forth in *Shindler*. Codeluppi specifically stated the facts contained in the Report concerning what was

known to Patrolman Young at the time of the stop and argued that there were no reasonable grounds to effectuate the stop and no probable cause to arrest her. Codeluppi further noted that the field sobriety tests were not performed in substantial compliance with the NHTSA guidelines and set forth R.C. 4511.19(D)(4) which requires the prosecution to establish that the tests were provided in substantial compliance with the guidelines before it can be entered into evidence. Codeluppi further clarified this position in speaking with the prosecutor and in the Supplemental Brief to the trial court, noting that because the Report did not provide any indication of the instructions provided, demonstration of the tests, or how they were conducted, evaluated or recorded, and as no video of the stop was made, there was no evidence that the tests were performed in substantial compliance with the NHTSA guidelines. (Motion to Suppress at p. 1-3, 4-8; Supplement at p. 2-3, 6-8; Motion for Reconsideration at p. 2-3, 6.)

In *State of Ohio v. Horner, supra*, the defendant moved to suppress the BAC tests, field sobriety test, statements, officer's observations and opinions concerning sobriety and all physical evidence obtained from the defendants vehicle. *Horner* at *2. In support, the defendant merely listed a laundry list of Ohio Revised Code provisions, Ohio Administrative Code provisions and Constitutional rights that were allegedly violated. *Id.* at *2-*3. The court held a hearing held that the defendant failed to state the basis of his motion as to the BAC results with sufficient particularity as required by Crim.R. 47. *Id.* at *3. On appeal, the Fourth District found that the defendant stated the grounds for suppression with sufficient particularity to place the prosecution and court on notice of the challenges by merely stating specific regulations and constitutional amendments that she believed were violated. *Id.* at *5. The court further noted that the defendant did not

have facts available to her prior to the hearing to support her motion but that she cross-examined the officer at the hearing on these issues to try to obtain those facts. *Id.* at *7.

In the instant matter, Codeluppi challenged the admissibility of the field sobriety tests on the basis of specific constitutional amendments and R.C. 4511.19(D)(4) and further noted that there was no evidence of substantial compliance in the Report. Thus, she was entitled to a hearing on her Motion to Suppress. Similarly to the defendant in *Hill*, Codeluppi simply did not possess the information necessary to state a more specific factual basis as to the lack of substantial compliance with NHTSA guidelines as no further information was available to the defendant without cross-examining Patrolman Young at the hearing.

The Eighth District Court of Appeals found that a motion to suppress was stated with sufficient particularity so as to require a hearing on the issue, when said motion stated in its entirety “Now comes Defendant, MICHAEL PATRICK HILL, by and through his undersigned counsel of record, and hereby moves this Honorable Court to Suppress any and all evidence as fruit of the poisonous tree from the illegal stop and detention of Defendant Michael Patrick Hill. Defendant requests that hearing on this motion be set forthwith accordingly.” *Hill* at ¶14. The State moved to strike the motion on the basis of lack of particularity. *Id.* at ¶5. The Eighth District found that the phrase “illegal stop and detention” was enough to put the prosecutor and court on sufficient notice as to what issues were being contested. *Id.* at ¶19, 22.

In *State v. Embry*, Twelfth Dist. No. CA200311110, 2004-Ohio-6324, The Twelfth District found a very general motion to suppress met the initial burden of putting the prosecutor and court on notice and entitled the defendant to a hearing. In *Embry*, the

defendant's motion contended with respect to the Breathalyzer that: (1) the individual administering the test on appellee was not authorized; (2) the individual did not conduct the test in accordance with the appropriate time limitations; (3) the individual did not obtain a proper breath sample from appellee; and (4) the senior operator did not conduct a proper instrument check with an authorized testing solution and with the proper radio equipment, at least once every seven days. *Id.* at ¶13. The Twelfth District found that these allegations put the court and prosecution on notice that the defendant was challenging the maintenance, calibration and testing procedures relating to the Breathalyzer and therefore was stated with sufficient particularity pursuant to *Shindler*. *Id.* at ¶14.

Codeluppi not only identified R.C. 4511.19(D)(4), but also stated that there was no information in the police report concerning the instruction, condition, evaluation, administration, and/or recording of the HGN test, Walk and Turn test and/or the One Leg Stand test (which is the only evidence of the tests other than though testimony of the arresting officer himself, as there was no video or witness of the tests). Therefore, a hearing was necessary to determine if these field sobriety tests were conducted in substantial compliance with the field sobriety tests. Codeluppi has raised these issues with sufficient particularity to put the court and prosecution on notice that she is contesting whether or not the HGN test, Walk and Turn test and/or the One Leg Stand test were conducted in substantial compliance with the NHTSA guidelines. Therefore, the State, **at a minimum**, was required to demonstrate, in general terms, that it substantially complied with NHTSA guidelines. *Id.* at ¶12. See also *State v. Nicholson*, 12th Dist. No. CA2003-10-106, 2004-Ohio-6666, ¶11-12 (finding that where no factual

basis is presented but specific provisions of code are cited as having been violated, there exists a general challenge requiring the state to address the claims); *Ohio v. Dugan*, Twelfth Dist. No. CA2012-04-081, 2013-Ohio-447, ¶33 (“when the language in the motion to suppress raises only general claims, even though accompanied by specific administrative code subsections, then there is only a slight burden on the state to show, in general terms, compliance with the health regulations”); *State v. Yeaples*, 180 Ohio App.3d 720, 2009-Ohio-184, ¶23 (“[W]hen a motion fails to allege a fact-specific way on which a violation has occurred, the state need only offer basic testimony evidencing compliance with the code section.”)

Despite this requirement, the State failed to address any substantial compliance in its Response or otherwise before Codeluppi was convicted. Where the State fails to demonstrate substantial compliance with the NHTSA guidelines, the field sobriety tests should be suppressed. *Purdy* at ¶27. See also, 4511.19(D)(4).

The Twelfth District further held that once the state has produced enough evidence to show substantial compliance in general at a hearing, then the defendant must elicit facts to show that the regulation was not followed rather than relying upon a hypothetical general violation stated in a motion to suppress. *Embry* at ¶26. The Twelfth District further noted that it is permissible for the defendant to obtain these additional facts through cross-examination at the suppression hearing. *State v. Dugan*, 12th Dist. No. CA2012-04-081, 2013-Ohio-447, ¶34.

Despite the vast authority to the contrary, the Ninth District Court of Appeals (in a 2-1 decision with Judge Dickenson concurring in judgment only and Judge Belfance dissenting) upheld the decision of the trial court stating that:

Upon review of the motion, we agree it *generally* sets forth numerous legal issues regarding probable cause, substantial compliance with NHTSA guidelines in field sobriety testing and possible constitutional violations. However, the motion fails to state *with particularity* and factual allegations as to (1) how Officer Young allegedly lacked probable cause to further retain Ms. Codeluppi after initiating the traffic stop, and (2) the respects in which Officer Young allegedly violated provisions of the NHTSA Guidelines in administering the field sobriety tests.

* * *

Ms. Codeluppi sets forth many legal issues and supporting authorities, however, when discussing the actual traffic stop, she merely states that “the testing law enforcement officer failed to instruct, conduct, evaluate, administer, and/or record the standardized field sobriety tests used in the within matter in substantial compliance with the NHTSA Guidelines.” This statement is very broad and does not adequately put the State or trial court on notice of the issues to be decided.”

Codeluppi at *8-9, *10. Based upon this reasoning, the Ninth District believed that the trial court did not abuse its discretion by denying the Motion to Suppress regarding any of the issues raised in said Motion. *Codeluppi* at *11.

In reaching its conclusion, the Ninth District stated that they believed that Codeluppi’s Motion was akin to that which was filed in State of *State v. Zink*, 9th Dist. No. 17484, (Sept. 4, 1996). *Zink* filed a motion arguing that the officer did not have a reasonable basis to stop the defendant, that there was not any probable cause for the arrest, and argued that the State failed to comply with the Department of Health regulations regarding the breath test. The court conducted a hearing on the reasonable suspicion and probable cause arguments but held that the motion was not stated with particularity as to the claim that the State failed to comply with the Department of Health regulations. In regards to this allegation, the Motion in *Zink* merely consisted of a two sentence paragraph which merely listed every possible rule and regulation that might conceivably be applicable. *Id.* at *3. The Ninth District noted that “[t]here must be some

factual basis in the motion to indicate that there is some substance to the motion and not just a shotgun approach achieved by merely ‘wrapping the administrative code in a folder and filing it.’” *Zink* at *2, citing *State v. Hensley*, 75 Ohio App.3d 822, 829, 600 N.E.2d 849 (1992).

Codeluppi did not state a laundry list of every conceivable violation relating to OVI arrests, but rather specifically alleged that the NHTSA guidelines were not substantially complied with on the basis that the Report provided no evidence whatsoever as to the how these tests were explained or administered. The Ninth District’s decision in *Codeluppi* applies much more stringent standards than that which has been applied in other Districts within this State and requires a much higher burden than that which was required by this Honorable Court in *Shindler*. The *Codeluppi* decision holds that a motion to suppress must do more than provide notice of the issues to be resolved. By so holding, the Ninth District has improperly shifted the burden of proof to the defendant to show why the State can’t meet its burden of proof. This burden is unconstitutional as the burden is on the State to prove an exception to the warrant requirement. *Katz, supra*; R.C. 4511.19(D)(4). Furthermore, this increased burden on the defendant is impractical because none of the information needed to support the motion is in the possession of the defendant when there is no video of the stop and the police report does not describe the tests in sufficient detail to determine whether or not they were administered in compliance with NHTSA guidelines. Furthermore, a defendant has no process or means available to him to obtain this information unless a hearing is held and he is given an opportunity to cross-examine the testing officer.

Codeluppi set forth with particularity each and every matter which was being contested in her Motion to Suppress. Her Motion to Suppress was not a boilerplate list of every possible conceivable violation that may occur during an OVI stop and arrest. Codeluppi set forth the facts within her knowledge and further set forth what facts could not be ascertained without a hearing and opportunity to question Patrolman Young. By requiring the Defendant to set forth facts that the officer chose not to provide in his Report and for which the officer retains sole knowledge, the denial of a hearing amounts to a denial of due process. The Ninth District has set an unreasonable and impossible standard, and because of this standard, the citizens of the state of Ohio now have reduced constitutional protections in the Ninth District.

This Court decided in *Shindler* that a defendant's motion to suppress must simply cite "the statutes, regulations and constitutional amendments she alleged were violated, [and] set forth some underlying factual basis to warrant the hearing and [give] the prosecutor and court sufficient notice of the basis of her challenge." *Shindler* at 58. The burden imposed by *Shindler* is **notice** of the issues, nothing more. Once sufficient notice is given, the prosecutor bears the burden of proof, including the burden of going forward with the evidence at the hearing on the motion to suppress. *Id.* at 56, citing *Wallace* at paragraph one and two of the syllabus. Where a defendant submits to field sobriety tests, the Ohio Revised Code places the burden of proof on the State to establish that the officer complied with its foundational requirements. RC 4511.19(D)(1) and (4). See also, *Longmire* at 417 ("because the evidence allegedly constituting probable cause is solely within the knowledge and control of the arresting officers, they should bear the additional burden of establishing that probable cause in fact existed.").

Since no video exists of this stop and arrest, it is virtually impossible to state with any degree of certainty whether Patrolman Young properly instructed and demonstrated the field sobriety tests in accordance with NHTSA guidelines without an opportunity to question him at the hearing. Practicing OVI attorneys are continually confronted with this scenario, attempting to set forth, with factual particularity, whether an officer properly instructed and demonstrated field sobriety tests in accordance with NHTSA guidelines when the only evidence is a police report which states what the officer did, but does not address the manner in which he did so, or more importantly, what he failed to do. If a defendant is required to provide detailed facts prior to the hearing to show that the instructions and/or demonstrations did not substantially comply with the NHTSA guidelines, it will be virtually impossible for a defendant to do so when the officers involved do not video the stop or the field sobriety tests. Such a requirement will encourage police departments across the state to eliminate any video of the stop or field sobriety tests and to produce brief, self-serving police reports so that defendants are prevented from bring any challenge to protect their constitutional rights.

2. For purposes of a Motion to Suppress in an OVI case, a more rigorous or onerous standard other than *Shindler* is neither feasible nor practical.

By accepting Codeluppi's Proposition of Law for review, this Court may be inclined to modify *Shindler* by requiring a more rigorous or onerous standard other than stating the legal and factual bases to be challenged with sufficient particularity. Such a standard in the context of an OVI case would not be feasible or practical for several reasons.

First, an OVI case only presents a finite number of issues subject to challenge including: (1) the basis for the traffic stop; (2) the continued detention after the initial stop; (3) the probable cause to arrest for purposes of an OVI arrest which include the Officer's observation and a defendant's performance on the field sobriety tests; (4) Miranda issues after a defendant is placed in custody; and (5) the calibration, testing and administration of the blood alcohol tests. Generally, a Motion to Suppress in an OVI case will concentrate on one or more of these issues.

Second, where no video exists of a stop and arrest of an OVI suspect, the only evidence to review is the police report and a suspect's own observations. Neither is sufficient to justify a more rigorous and onerous standard than that which is set forth in *Shindler*.

As set forth herein, a police report in an OVI case sets forth what the Officer did in effectuating a stop and arrest, but fails to address what the Officer did not, or failed to do regarding the same. In the present case, in addressing the field sobriety tests, Patrolman Young's Report stated the following:

I requested that she exit the vehicle to perform a series of Field Sobriety Tests. I directed Codeluppi to the sidewalk where I explained and demonstrated the following tests:

Horizontal Gaze Nystagmus - Codeluppi swayed towards and away from me during the instruction phase. I observed her eyes to be red and glassy. I observed lack of smooth pursuit, distinct nystagmus at maximum deviation and onset of nystagmus prior to 45 degrees in both eyes.

Walk and Turn - Codeluppi was wearing high heels and I gave her the option to perform the test in her bare feet, but she declined. She could not stand in the start position and repositioned her feet throughout the instruction portion. She used her arms to maintain her balance during the instruction phase. She constantly interrupted me while explaining the test, and started the test three times before she was instructed to do so. When she was instructed to begin, Codeluppi started on the wrong foot (after

repositioning her feet numerous times) and did not touch heel to toe on steps 3, 6, 8 and 9. She walked with her arms away from her body to maintain balance. When she finished her nine steps, she stopped and looked at me. After I re-explained the test, Codeluppi reset her feet, and began to walk casually for her second set of nine steps. She did not touch heel to toe for any of the steps and again, pulled her arms away from her body for balance.

One Leg Stand - Again, Codeluppi declined the option of taking her high heel shoes off for the test. She started the test on two separate occasions while I was explaining it to her. Once instructed to begin, she lifted her left foot and immediately placed it back on the pavement, using her arms to maintain balance. On her second attempt, Codeluppi raised her left foot approximately three inches of the ground and looked directly at me without counting. Her foot was raised for approximately four seconds, before she asked me if I was counting. Codeluppi put her foot down, and I re-explained the test. Codeluppi's third attempt was similar to her first. She raised her left foot but immediately lost her balance. The test was terminated for her safety.

(See Report at p. 2).

Patrolman Young's Report does not address, reference or acknowledge how these field sobriety tests were instructed, what accompanying demonstrations were given and whether they were administered in accordance with the NHTSA Manual "Concepts and Principles of the Standardized Field Sobriety Tests."

The NHTSA Manual makes clear that validation of the field sobriety tests applies only when:

- (1) The tests are administered in the prescribed standardized manner;
- (2) The standardized clues are used to assess the suspect's performance;
- (3) The standardized criteria are employed to interpret that performance.

The NHTSA Manual concludes "[i]f any one of the standardized field sobriety test elements is changed, the validity is compromised." See NHTSA "DWI Detection and Standardized Field Sobriety Testing", Student Manual, 2006 Edition ("NHTSA Manual,"

Session VIII, Concepts and Principles of the Standardized Field Sobriety Tests, p. VIII-19).

Applying the foregoing to Patrolman Young's Report, in administering the Horizontal Gaze Nystagmus (HGN) test, there is no indication whether Patrolman Young provided Codeluppi with the following verbal instructions required by the NHTSA Manual, to-wit:

- "I am going to check your eyes."
- "Keep your head still and following this stimulus with your eyes only."
- "Keep following the stimulus with your eyes until I tell you to stop."

(See NHTSA Manual, p. VIII-6.)

Similarly, it cannot be determined from Patrolman Young's Report whether he checked Codeluppi for eyeglasses, whether he positioned the stimulus 12-15 inches from her face, whether he checked for equal pupil size and resting nystagmus in Codeluppi, whether he made the requisite number of passes in checking for lack of smooth pursuit, distinct and sustained nystagmus at maximum deviation, onset of nystagmus prior to 45 degrees, and whether he moved the stimulus at the proper speed in administering these tests. (*Id.*, p. VIII-7).

In administering the Walk and Turn test, there is no indication in Patrolman Young's Report whether he provided Codeluppi with the following verbal instructions, with accompanying demonstrations required by the NHTSA Manual, to-wit:

Procedures for Walk-and-Turn Testing

1. Instructions Stage: Initial Positioning and Verbal Instructions

For standardization in the performance of this test, have the suspect assume the heel-to-toe stance by giving the following verbal instructions, accompanied by demonstrations:

- “Place your left foot on the line” (real or imaginary). Demonstrate
- “Place your right foot on the line ahead of the left foot, with heel of right foot against toe of left foot.” Demonstrate.
- “Place your arms down at your sides.” Demonstrate.
- “Maintain this position until I have completed the instructions. Do not start to walk until told to do so.”
- “Do you understand the instructions so far?” (Make sure suspect indicates understanding.)

2. Demonstrations and Instructions for the Walking Stage

Explain the test requirements, using the following verbal instructions, accompanied by demonstrations:

- “When I tell you to start, take nine heel-to-toe steps, turn, and take nine heel-to-toe steps back.” (Demonstrate 3 heel-to-toe steps.)
- “When you turn, keep the front foot on the line, and turn by taking a series of small steps with the other foot, like this.” (Demonstrate).
- “While you are walking, keep your arms at your sides, watch your feet at all times, and count your steps out loud.”
- “Once you start walking, don’t stop until you have completed the test.”
- “Do you understand the instructions?” (Make sure suspect understands.)
- “Begin, and count your first step from the heel-to-toe position as “One.”

(See NHTSA Manual, p. VIII-9).

Finally, in administering the One-Leg Stand test, there is no indication in Patrolman Young's Report whether he provided Codeluppi with the following verbal instructions with accompanying demonstrations required by the NHTSA Manual, to-wit:

Procedures for One-Leg Stand Testing

1. Instructions Stage: Initial Positioning and Verbal Instructions

Initiate the test by giving the following verbal instructions, accompanied by demonstrations.

- "Please stand with your feet together and your arms down at the sides, like this." (Demonstrate)
- "Do not start to perform the test until I tell you to do so."
- "Do you understand the instructions so far?" (Make sure suspect indicates understanding.)

2. Demonstrations and Instructions for the Balance and Counting Stage

Explain the test requirements, using the following verbal instructions, accompanied by demonstrations:

- "When I tell you to start, raise one leg, either leg, with the foot approximately six inches off the ground, keeping your raised foot parallel to the ground." (Demonstrate one leg stance.)
- "You must keep both legs straight, arms at your side."
- "While holding that position, count out loud in the following manner: "one thousand and one, one thousand and two, one thousand and three, until told to stop." (Demonstrate a count, as follows: "one thousand and one, one thousand and two, one thousand and three, etc." Officer should not look at his foot when conducting the demonstration - OFFICER SAFETY.)
- "Keep your arms at your sides at all times and keep watching the raised foot."
- "Do you understand?" (Make sure suspect indicates understanding.)

- “Go ahead and perform the test.” (Officer should always time the 30 seconds. Test should be discontinued after 30 seconds.)

(See NHTSA Manual, p. VIII-12)

In the absence of a video of the stop and arrest, the only way to ascertain whether or not a police officer properly instructed and administered the FST's set forth above in substantial compliance with the NHTSA Manual is to cross-examine him at a suppression hearing. Therefore, to require a highly detailed pleading of facts and law beyond the *Shindler* requirement is just not possible, feasible or fathomable.

Some judges have suggested that an OVI defendant may be a source of information as to whether the field sobriety tests were properly instructed and administered. Most, if not all defendants, have not been trained in the administration of field sobriety tests as promulgated by NHTSA. Therefore, they generally have nothing meaningful to add. More importantly, most OVI defendants believed they passed the field sobriety tests with flying colors, only to find themselves handcuffed and in the back of the cruiser. Practically speaking, OVI defendants are not qualified to opine on the manner in which the field sobriety tests were administered and what clues the Officer observed in the performance of them.

This case best illustrates why a more rigorous or onerous standard requiring a highly detailed pleading of facts and law in an OVI Motion to Suppress is just not possible. To require a more rigorous standard than notice to the prosecutor and the Court of the issues to be decided, would be futile and impossible.

II. CONCLUSION

Given the lack of any other evidence of the encounter, a suppression hearing was the only reasonable method available to Codeluppi to protect her constitutional rights. The denial of the hearing and the denial of Codeluppi's ability to fully present her written arguments in support of her Motion to Suppress resulted in the use of tainted field sobriety test evidence being used to support probable cause for her arrest in violation of her right to be free from unreasonable search and seizure, the right against self-incrimination, the right to be represented by an attorney, and the right to due process of law pursuant to the Fourth, Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 14 of the Ohio Constitution.

To require more than notice of the facts that are known and the legal basis of the challenge would place an undue burden on the defendants in Ohio. The practical matter is that where there is no video of the stop, arrest, or field sobriety tests, the defendant generally does not have access to any timely discovery mechanism in which the defendant can determine the constitutionality of the stop prior to the deadline to file a Motion to Suppress. Rather, the facts needed to establish the constitutionality (or lack thereof) reside solely with the prosecution and its witnesses. It is unlikely that the witnesses for the prosecution will voluntarily contact the defense counsel to inform counsel of a violation. Therefore, the only means of determining same would be through a hearing on the motion itself.

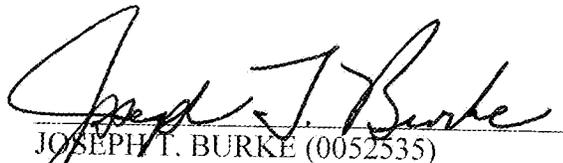
The decision below is fundamentally flawed as it incorrectly places the burden of proof on the defense and additionally and improperly requires the defendant to establish

that she is entitled to relief prior to having access to the information needed to establish same.

The great disparity among the Ohio appellate courts creates a scenario allowing the unequal protection of significant constitutional rights. In clarifying the requirement, this Honorable Court should adopt the view that a defendant merely needs to state the legal basis of the challenge with enough particularity to place the prosecutor and court **on notice** of the issues to be determined at a hearing, in order to have a right to a hearing on those issues.

The decision of the Court of Appeals should be reversed. A reversal will promote the interests of justice and establish a uniform standard for the constitutional rights of all citizens of the State of Ohio. No longer will citizens of certain Districts be provided less constitutional protections than their counterparts in the neighboring Districts in Ohio. Similarly, Codeluppi's conviction should be overturned in the interests of justice.

Respectfully Submitted,

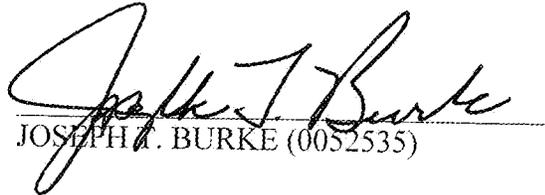


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing “Merit Brief of Defendant-Appellant Corrine Codeluppi” was forwarded via regular U.S. Mail to Appellee through its counsel of record, Toni L. Morgan, Prosecutor for the City of North Ridgeville, 7307 Avon Belden Rd., North Ridgeville, Ohio 44039; counsel for Amicus Curiae Ohio Association Criminal Defense Lawyers, Paul Griffin, Paul A. Griffin Co., L.P.A., 600 Broadway, 2nd Floor, Lorain, Ohio 44052; and counsel for Amicus Curiae Cuyahoga Criminal Defense Lawyers Association, John T. Forristal, P.O. Box 16832, Rocky River, Ohio 44116, on this 9th day of July, 2013.


JOSEPH T. BURKE (0052535)

*Counsel for Defendant/Appellant
Corrine Codeluppi*

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	)	CASE NO.	13-0186
)		
Plaintiff-Appellee,)		
	)	On Appeal from the Lorain	
vs.	)	County Court of Appeals,	
	)	Ninth Appellate District	
)		
CORRINE CODELUPPI,	)	Court of Appeals Case No.	
)	11CA010133	
Defendant-Appellant)		

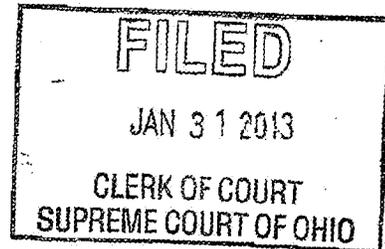
NOTICE OF APPEAL OF APPELLANT, CORRINE CODELUPPI

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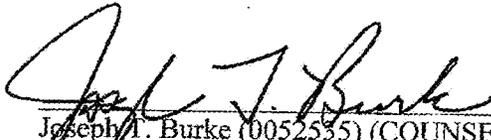
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NOTICE OF APPEAL OF APPELLANT, CORRINE CODELUPPI

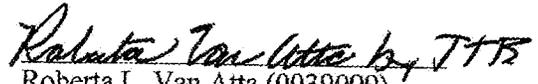
Appellant Corrine Codeluppi hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Lorain County Court of Appeals, Ninth Appellate District, entered in Court of Appeals Case No. 11CA010133 on December 17, 2012.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,



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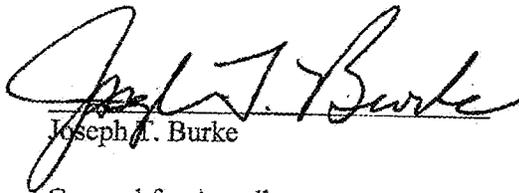


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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing "Notice of Appeal of Appellant Corrine Codeluppi" has been served upon Toni L. Morgan, North Ridgeville City Prosecutor, 7307 Avon Belden Road, North Ridgeville, Ohio 44039, Counsel for Appellee by ordinary U.S. mail this 31st day of January, 2013.



Joseph A. Burke

Counsel for Appellant
Corrine Codeluppi

[Cite as *State v. Codeluppi*, 2012-Ohio-5812.]

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 11CA010133

Appellee

v.

CORRINE CODELUPPI

APPEAL FROM JUDGMENT
ENTERED IN THE
ELYRIA MUNICIPAL COURT
COUNTY OF LORAIN, OHIO
CASE No. 2011TRD05695

Appellant

DECISION AND JOURNAL ENTRY

Dated: December 10, 2012

MOORE, Judge.

{¶1} Defendant-Appellant, Corrine Codeluppi, appeals from the November 14, 2011 order of the Elyria Municipal Court denying her motion to suppress. For the following reasons, we affirm.

I.

{¶2} In August of 2011, Officer Ryan M. Young of the North Ridgeville Police Department stopped Ms. Codeluppi on Lorain Road for driving 53 m.p.h. in a 35 m.p.h. zone. When Officer Young walked to the driver's window of Ms. Codeluppi's car, he smelled a strong odor of alcohol coming from the interior of the car. He confronted Ms. Codeluppi about the odor, and she admitted to being at two bars and having two drinks. At that time, Officer Young requested that Ms. Codeluppi exit the car to perform Field Sobriety Tests.

{¶3} Officer Young attempted to administer three Field Sobriety Tests on Ms. Codeluppi: (1) the Horizontal Gaze Nystagmus ("HGN"), (2) the Walk and Turn, and (3) the One Leg Stand.

{¶4} During the instruction phase of the HGN test, Officer Young reported that Ms. Codeluppi swayed toward and away from him. He observed that her eyes were red and glassy. He also observed lack of smooth pursuit, distinct nystagmus at maximum deviation, and the onset of nystagmus prior to 45 degrees in both eyes.

{¶5} Prior to the Walk and Turn test, Officer Young gave Ms. Codeluppi the option of taking off her high heeled shoes and performing the test in her bare feet. Ms. Codeluppi refused and testing commenced. During the instruction phase of the Walk and Turn test, Ms. Codeluppi could not stand in the start position, thus causing her to reposition her feet throughout the test. She also used her arms to maintain balance and repeatedly interrupted the officer while he explained the test. Further, Officer Young reported that she started the test three times prior to being instructed to do so. Finally, when Ms. Codeluppi was instructed to begin, she began the test on the wrong foot and did not touch "heel to toe on steps 3, 6, 8, and 9." Officer Young re-explained the test and during her second attempt, Ms. Codeluppi used her arms for balance, walked casually, completely failing to touch heel to toe.

{¶6} Again, prior to the One Leg Stand test, Ms. Codeluppi declined the offer to remove her high heeled shoes. During the instruction phase of the One Leg Stand test, she prematurely started the test twice. Then, after three attempts where she either lost her balance or failed to count, Officer Young terminated the test for Ms. Codeluppi's own safety.

{¶7} At that time, Officer Young arrested Ms. Codeluppi for operating a vehicle while intoxicated ("OVI"). Ms. Codeluppi was charged with OVI, in violation of R.C.

4511.19(A)(1)(a), and speeding, in violation of R.C. 4511.21. Ms. Codeluppi pleaded not guilty to all charges and filed a motion to suppress wherein she challenged the constitutionality of her arrest.

{¶8} In her motion to suppress, Ms. Codeluppi asserted that: (1) the officer lacked sufficient reasonable grounds to effectuate a traffic stop and/or probable cause to arrest her, (2) the Field Sobriety Tests were not conducted in substantial compliance with National Highway Traffic Safety Administration ("NHTSA") Guidelines, and (3) statements she made during the traffic stop were obtained in violation of her Fifth, Sixth, and Fourteenth Amendment rights. Ms. Codeluppi also requested a hearing.

{¶9} One day prior to the hearing scheduled on November 15, 2011, the State filed its response to Ms. Codeluppi's motion to suppress. In its response, the State argued that Ms. Codeluppi's motion should be denied because, pursuant to Crim.R. 47, it failed to state with particularity the respects in which Officer Young failed to conduct the Field Sobriety Tests in substantial compliance with NHTSA guidelines. As such, the State contended that Ms. Codeluppi did not put it on notice by setting forth any factual basis for her challenge to the constitutionality of the traffic stop and arrest.

{¶10} On November 14, 2011, after reviewing both parties' arguments, the trial court denied Ms. Codeluppi's motion to suppress without conducting the scheduled hearing, and, instead, set the matter for a pre-trial. In its order, the trial court stated:

[Ms. Codeluppi's] Motion to Suppress is denied, at the [S]tate's request, due to the fact it fails to state legal and factual bases with sufficient particularity to * * * place the prosecutor and the court on notice of the issues to be decided. * * * Case remains set for pretrial on 11/15/11 at 1:30 P.M.

{¶11} On November 15, 2011, Ms. Codeluppi filed a motion for leave to file a supplemental brief in support of her motion to suppress, along with an affidavit from her

attorney, Joseph T. Burke. In addition, she simultaneously filed a supplemental brief and a motion for reconsideration. That same day, Ms. Codeluppi pleaded no contest to OVI and speeding. Based upon her plea, the trial court found Ms. Codeluppi guilty of OVI, and the State dismissed the speeding violation.

{¶12} Ms. Codeluppi timely appealed, and raised five assignments of error for our consideration. For purposes of facilitating our discussion, we will address Ms. Codeluppi's related assignments of error together.

{¶13} Prior to addressing Ms. Codeluppi's assignments of error, we will briefly address the State's contention that there is no final appealable order in this case because the trial court never ruled upon Ms. Codeluppi's motions for leave to file a supplemental brief in support of her motion to suppress and for reconsideration. "Typically, if a trial court fails to rule on a pending motion prior to entering judgment, it will be presumed on appeal that the motion in question was implicitly denied." *George Ford Constr., Inc. v. Hissong*, 9th Dist. No. 22756, 2006-Ohio-919, ¶ 12, citing *Lorence v. Goeller*, 9th Dist. No. 04CA008556, 2005-Ohio-2678, ¶ 47. In the present matter, Ms. Codeluppi filed the above-stated motions on November 15, 2011, and then, subsequent to filing the motions, entered a plea of no contest as to OVI and speeding. The record indicates that the trial court accepted Ms. Codeluppi's plea and journalized a sentencing order wherein she was found guilty of OVI and the charge for speeding was dismissed. The record is devoid of any evidence indicating that the trial court was unaware of the motions filed prior to Ms. Codeluppi's plea, or that the trial court intentionally left certain motions pending. Therefore, this Court cannot conclude that the trial court failed to consider Ms. Codeluppi's motions. Rather, we conclude that the trial court implicitly overruled the motions and a final appealable order exists. *See Lorence* at ¶ 48.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT ISSUED AN ORDER DENYING [MS.] CODELUPPI'S MOTION TO SUPPRESS EVIDENCE WITHOUT ALLOWING [MS.] CODELUPPI AN OPPORTUNITY TO REPLY IN VIOLATION OF RULE[S] 47 AND 12(F) OF THE OHIO RULES OF CRIMINAL PROCEDURE.

{¶14} In her first assignment of error, Ms. Codeluppi argues that the trial court abused its discretion by denying her motion to suppress without allowing her time to file a reply to the State's response in violation of Crim.R. 47 and 12(F). An abuse of discretion "implies that the [trial] court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). We disagree with Ms. Codeluppi's contention.

{¶15} Motions in criminal proceedings are governed by Crim.R. 47, which states:

An application to the court for an order shall be by motion. A motion, other than one made during trial or hearing, shall be in writing unless the court permits it to be made orally. It shall state with particularity the grounds upon which it is made and shall set forth the relief or order sought. It shall be supported by a memorandum containing citations of authority, and may also be supported by an affidavit.

To expedite its business, the court may make provision by rule or order for the submission and determination of motions *without oral hearing* upon brief written statements of reasons in support and opposition.

(Emphasis added.) However, this is a traffic case, and Traf.R. 11(E) sets forth the procedure for ruling on motions. Therefore, Ms. Codeluppi's reliance upon Crim.R. 12(F) is misplaced. Traf.R. 11(E) does not provide for the filing of a reply to the response to a motion, but states, in relevant part, that "[a] motion made before trial, other than a motion for change of venue, shall be timely determined before trial."

{¶16} In the present matter, Ms. Codeluppi filed her motion to suppress and the State filed its response. Upon reviewing the arguments made by both parties, the trial court

adjudicated the matter in favor of the State. Based upon the record before us, we cannot say that the trial court abused its discretion in ruling on Ms. Codeluppi's motion to suppress without allowing Ms. Codeluppi time to file a reply to the State's responsive memorandum. First, Ms. Codeluppi had the opportunity to make all arguments in her original motion to suppress. Second, Ms. Codeluppi does not cite any authority where a trial court abused its discretion by ruling on a motion to suppress, prior to allowing time for the filing of a reply, where both parties submitted their arguments to the trial court via written memoranda. Finally, the record does not demonstrate that Ms. Codeluppi requested to file a reply brief when she pleaded to the OVI charge.

{¶17} Ms. Codeluppi relies upon our decision in *State v. Dalchuk*, 9th Dist. No. 21422, 2003-Ohio-4268, to support her argument. However, *Dalchuk* is clearly distinguishable from the present matter. In *Dalchuk* at ¶ 5, we held that the trial court abused its discretion by granting the appellee's petition to vacate his administrative license suspension ("ALS"), the same date it was filed, without giving the State notice or time to respond. We stated that "[u]ntil the other party has a reasonable opportunity to file a written response, there is no reasonable consideration by the court of the issues involved." *Id.*, quoting *State v. Diehl*, 3d Dist. No. 14-89-30, 1991 WL 44166, *3 (Mar. 25, 1991).

{¶18} Here, unlike *Dalchuk*, both parties filed written memoranda setting forth their positions regarding the issue of whether evidence derived from the traffic stop should be suppressed. The trial court agreed with the State's position and denied Ms. Codeluppi's motion. Because both parties had an opportunity to make their respective arguments, we cannot say that the trial court's denial of Ms. Codeluppi's motion to suppress, without allowing time for her to file a reply, was arbitrary, unreasonable, or unconscionable.

{¶19} Accordingly, Ms. Codeluppi's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT DENIED [MS.] CODELUPPI'S MOTION TO SUPPRESS WITHOUT CONDUCTING THE PREVIOUSLY SCHEDULED ORAL HEARING IN VIOLATION OF RULE [11(B)(3)(b)] OF THE LOCAL RULES OF ELYRIA MUNICIPAL COURT; [AND] RULE[S] 47 AND 12(F) OF THE OHIO RULES OF CRIMINAL PROCEDURE.

ASSIGNMENT OF ERROR III

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT DENIED [MS.] CODELUPPI'S MOTION TO SUPPRESS FOR FAILURE TO STATE WITH SUFFICIENT PARTICULARITY THE GROUNDS UPON WHICH THE MOTION WAS MADE IN VIOLATION OF RULE[S] 47 AND 12(F) OF THE OHIO RULES OF CRIMINAL PROCEDURE.

{¶20} In her second and third assignments of error, Ms. Codeluppi argues that the trial court abused its discretion by denying her motion to suppress (1) without conducting a hearing, in violation of Loc.R. 11(B)(3)(b)¹ of the Elyria Municipal Court and Crim.R. 47 and 12(F), and, (2) for failure to state with sufficient particularity the grounds upon which the motion was made in violation of Crim.R. 47 and 12(F).

{¶21} Loc.R. 11(B)(3)(b) of the Elyria Municipal Court states, in relevant part that, aside from continuances, "[a]ll other motions shall be in conformance with applicable Rules of Criminal Procedure. Motions shall be set for oral hearing, unless otherwise ordered by the Court."

{¶22} In the present matter, the trial court set the suppression hearing on November 15, 2011. However, after reviewing the parties' submitted motions and memoranda, the trial court

¹ We note that Ms. Codeluppi misstates the local rule in her brief as "11(A)(3)" and "11(B)(3)."

denied Ms. Codeluppi's motion and converted the suppression hearing into a pretrial. Pursuant to Loc.R. 11(B)(3)(b), "[m]otions shall be set for oral hearing, unless *otherwise ordered* by the Court." (Emphasis added.) Although the trial court originally set a suppression hearing, in compliance with the local rule, it later denied Ms. Codeluppi's motion prior to the hearing because it determined that the motion failed "to state legal and factual bases with sufficient particularity to place the prosecutor and the court on notice of the issues to be decided." As such, the trial court did not violate Loc.R. 11(B)(3)(b) by setting a suppression hearing and later converting it to a pretrial through an order of the court.

{¶23} Traf.R. 11(E) does not mandate a hearing on every suppression motion. Thus, the trial court is required to hold a hearing only when the claims are supported by factual allegations which would justify relief. (See *State v. Jefferson*, 9th Dist. No. 20156, 2001 WL 276343, *3 (Mar. 21, 2001), quoting *State v. Hartley*, 51 Ohio App.3d 47, 48 (9th Dist.1988), for a similar proposition of law set forth in Crim.R. 12(F)). As such, "we review a trial court's decision not to hold an evidentiary hearing under an abuse of discretion standard." *Westerville v. Sagraves*, 10th Dist. No. 04AP-1126, 2005-Ohio-5078, ¶ 10. Further, as stated above, Crim.R. 47 provides that a motion "shall state *with particularity* the grounds upon which it is made and shall set forth the relief or order sought." (Emphasis added.)

{¶24} Here, the trial court's order stated that Ms. Codeluppi's motion failed to state any legal and factual bases to place the prosecutor and trial court on notice regarding the issues to be decided. Upon review of the motion, we agree that it *generally* sets forth numerous legal issues regarding probable cause, substantial compliance with NHTSA guidelines in field sobriety testing, and possible constitutional violations. However, the motion fails to state *with particularity* any factual allegations as to (1) how Officer Young allegedly lacked probable cause

to further detain Ms. Codeluppi after initiating the traffic stop, and (2) the respects in which Officer Young allegedly violated provisions of the NHTSA guidelines in administering the Field Sobriety Tests.

{¶25} In *State v. Zink*, 9th Dist. No. 17484, 1996 WL 502317, *1 (Sept. 4, 1996), we examined the issue of whether Ms. Zink's motion to suppress complied with the particularity requirement set forth in Crim.R. 47, thus mandating an evidentiary hearing on suppressing the results of her breath alcohol test. Ms. Zink argued that, pursuant to the Supreme Court of Ohio's decision *State v. Shindler*, 70 Ohio St.3d 54 (1994), her motion to suppress complied with Crim.R. 47 by providing "adequate information to identify the issues to be decided through a combination of general factual allegations and citations to relevant legal authority." *Id.* In affirming the trial court's decision not to hold an evidentiary hearing, we stated:

The State cannot be expected to anticipate and prepare to address every possible violation of Ohio Revised Code 4511.19(D), 4511.19(A) through (D) and Ohio Department of Health Regulations under O.A.C. 3701-53-01 et seq., without any clue as to *which* violation was alleged to have occurred. In addition, there must be some factual basis in the motion to indicate that there is some substance to the motion and not just a shotgun approach achieved by merely "wrapping the administrative code in a folder and filing it." *State v. Hensley*, 75 Ohio App.3d 822, 829 (3d Dist.1992).

(Emphasis sic.) *Shindler* at *2. Further, we distinguished *Zink* from *Shindler* by noting that, although Ms. Shindler's motion was "quite broad," it "set forth seven separate paragraphs, each specifically stating exactly *which* particular statute, regulation, subsection and constitutional right she alleged was violated." *Id.* Additionally, we mentioned that Ms. Shindler's motion "also included many specific factual allegations pertaining to each purported infraction * * * ." *Id.*

{¶26} Here, based upon the record before us, we conclude Ms. Codeluppi's motion to suppress is more akin to Ms. Zink's, rather than Ms. Shindler's, motion. We acknowledge that

Ms. Codeluppi sets forth many legal issues and supporting authorities, however, when discussing the actual traffic stop, she merely states that "the testing law enforcement officer failed to instruct, conduct, evaluate, administer, and/or record the standardized field sobriety tests used in the within matter in substantial compliance with the NHTSA Guidelines." This statement is very broad and it does not adequately put the State or trial court on notice of the issues to be decided. Therefore, pursuant to Crim.R. 47, the trial court did not abuse its discretion in denying Ms. Codeluppi's motion to suppress without a hearing for lack of particularity.

{¶27} Accordingly, Ms. Codeluppi's second and third assignments of error are overruled.

ASSIGNMENT OF ERROR IV

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT DENIED [MS.] CODELUPPI'S MOTION TO SUPPRESS THEREBY ALLOWING EVIDENCE DERIVED FROM AN ILLEGALLY EXTENDED INVESTIGATIVE DETENTION TO BE USED TO ESTABLISH PROBABLE CAUSE FOR THE ARREST AND CONVICTION OF [MS.] CODELUPPI, ALL IN VIOLATION OF [MS.] CODELUPPI'S RIGHT TO BE FREE FROM AN UNREASONABLE SEARCH AND SEIZURE, RIGHT AGAINST SELF-INCRIMINATION, RIGHT TO BE REPRESENTED BY AN ATTORNEY, AND RIGHT TO DUE PROCESS OF LAW PURSUANT TO THE FOURTH, FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 14 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR V

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT DENIED [MS.] CODELUPPI'S MOTION TO SUPPRESS THEREBY ALLOWING EVIDENCE DERIVED FROM FIELD SOBRIETY TESTS ADMINISTERED IN CONTRAVENTION OF THE NHTSA GUIDELINES TO BE USED TO ESTABLISH PROBABLE CAUSE FOR THE ARREST AND CONVICTION OF [MS.] CODELUPPI, ALL IN VIOLATION OF [MS.] CODELUPPI'S RIGHT TO BE FREE FROM AN UNREASONABLE SEARCH AND SEIZURE, RIGHT AGAINST SELF-INCRIMINATION, RIGHT TO BE REPRESENTED BY AN ATTORNEY, AND RIGHT TO DUE PROCESS OF LAW PURUSANT TO THE FOURTH, FIFTH, SIXTH, AND FOURTEENTH

AMENDMENTS OF THE UNITED STATES CONSTITUTION AND
ARTICLE I, SECTION 14 OF THE OHIO CONSTITUTION.

{¶28} In her fourth and fifth assignments of error, Ms. Codeluppi argues that the trial court abused its discretion in denying her motion to suppress because (1) Officer Young illegally extended her detention after the initial traffic stop, and (2) the Field Sobriety Tests were administered in contravention to NHTSA guidelines. Thus, she argues that Officer Young lacked probable cause to arrest her for OVI.

{¶29} In its resolution of Ms. Codeluppi's third assignment of error, this Court concluded that the trial court did not err in denying her motion to suppress. Therefore, Ms. Codeluppi's fourth and fifth assignments of error are moot, and we decline to address the issue of probable cause.

III.

{¶30} In overruling Ms. Codeluppi's first, second, and third assignments of error, and deeming her fourth and fifth assignments of error moot, we affirm the judgment of the Elyria Municipal Court.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Elyria Municipal Court, County of Lorain, 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

Subpoena 16

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.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

DICKINSON, J.
CONCURS IN JUDGMENT ONLY.

BELFANCE, J.
DISSENTING.

{¶35} I respectfully dissent because I believe that the trial court was required to give Ms. Codeluppi the opportunity to actually respond to the State's responsive filing rather than rule merely six hours after its filing. Furthermore, I believe that Ms. Codeluppi's motion to suppress was sufficient to put the prosecution on notice of the grounds upon which it was made, and, therefore, the trial court erred when it denied her motion without a hearing.

Opportunity to Respond

{¶36} The record indicates that Ms. Codeluppi filed her suppression motion on October 4, 2011. That same day, the trial court issued a notice setting the suppression hearing for November 15, 2011, as well as a third pretrial. Notwithstanding the trial court's issuance of the notice of hearing, the State did not protest that it did not have sufficient notice of the grounds for the suppression motion or the nature of the alleged constitutional violations to enable it to proceed with the hearing. In anticipation of the hearing, a subpoena was issued for an officer's

attendance. For over one month, the State did not oppose the suppression motion. Then, one day prior to the scheduled suppression hearing, the State filed a "Response to Defendant's Motion to Suppress" in which it "move[d] the Court to deny the Defendant's Motion to Suppress[.]" and also was "seeking * * * sufficient particularity on the issue of alleged improper administration of field sobriety tests[.]" Notably, the infirmity identified by the State related to only one of the grounds set forth in the suppression motion, and the State did not address the remaining alternative grounds. In substance, the State's "Response" was actually a motion to dismiss Ms. Codeluppi's motion to suppress, acting for all practical purposes as a collateral attack on the motion. Thus, Ms. Codeluppi was entitled to an opportunity to respond to the State's procedural argument just as the State had been entitled to respond to her substantive arguments. *See State v. Dalchuck*, 9th Dist. No. 21422, 2003-Ohio-4268, ¶ 5 ("Until the other party has a reasonable opportunity to file a written response, there is no reasonable consideration by the court of the issues involved.") (Internal quotations and citation omitted.). However, the trial court acted upon the State's filing just hours after it was filed. Given the circumstances, I disagree with the majority's assertion that this was a situation where "both parties had an opportunity to make their respective arguments[.]"

{¶37} Ironically, although the State claimed that Ms. Codeluppi's motion was not specific enough, the State's responsive filing could be said to suffer from the same deficiency given its broad and nonspecific assertion that the suppression motion was deficient. In its response, the State did not truly explain why it could not discern Ms. Codeluppi's grounds for the motion. The State merely asserted that her "Motion to Suppress states only that the field sobriety tests were not administered in strict compliance NHTSA guidelines[]" and that "specific alleged violations were not noted giving no factual basis for the overly broad allegation." The

remainder of the State's response contains a lengthy discussion of legal precedent regarding "shotgun" motion[s.]² The vague nature of the State's filing makes the trial court's immediate ruling even more problematic given that Ms. Codeluppi should have, at the very least, been afforded the opportunity to point out the need for clarification of the State's reasoning, not to mention challenge the fact that the State never addressed or recognized the multiple grounds in her motion.

{¶38} Our system of justice is founded upon the principle of due process, which includes notice, an opportunity to be heard, and fair play among litigants. *See, e.g., Cleveland Bd. of Edn. v. Loudermill*, 470 U.S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case.") (Internal quotations and citations omitted.). Ms. Codeluppi's motion sat unopposed for over thirty days and was not met with opposition until the day before the scheduled suppression hearing. When the State responded, the trial court acted upon the State's filing within hours, thus depriving Ms. Codeluppi of any reasonable opportunity to provide a response to the issues raised by the State. Under the circumstances of this case, Ms. Codeluppi should have been afforded the opportunity to respond to the State's filing, and, therefore, I would sustain her first assignment of error.

Sufficiency of Motion to Suppress

{¶39} However, even assuming the trial court did not commit reversible error by depriving Ms. Codeluppi of the opportunity to respond to the State's filing, I believe its determination that her motion was not stated with sufficient particularity is also erroneous.

² In fact, it could be said that the State's motion closely resembles a boilerplate response as it contains no facts concerning the case and does not even address three of the four grounds upon which Ms. Codeluppi's motion to suppress was based.

Standard of Review

{¶40} Before addressing whether Ms. Codeluppi provided the prosecution with sufficient notice of the grounds upon which she sought to suppress in accordance with Crim.R. 47 and the principles enunciated in *State v. Shindler*, 70 Ohio St.3d 54 (1994), I question the majority's employment of an abuse of discretion standard of review with respect to the initial determination of the sufficiency of the motion under Crim.R. 47. Notably, the *Shindler* Court did not review the sufficiency of the motion under an abuse of discretion standard, rather, the court appeared to review the sufficiency of the motion de novo.³

{¶41} The majority relies in part upon *Westerville v. Segraves*, 10th Dist. No. 04AP-1126, 2005-Ohio-5078, which reasoned that, because Crim. R. 12 does not require a hearing on every motion to suppress, the court's decision not to hold a hearing is reviewed under an abuse of discretion standard. However, many of the cases relied upon in *Segraves* only apply the abuse of discretion standard where the motion does not contain *any* factual allegations at all. See *Segraves* at ¶ 10. See, e.g., *State v. Hensley*, 75 Ohio App.3d 822, 830 (3d Dist.1992) ("Where the motion *does not contain factual allegations justifying relief*, the trial court has discretion to deny the motion without hearing.") (Empahsis added.); *Solon v. Mallion*, 10 Ohio App.3d 130, 132 (8th Dist.1983) ("The defense motion here did not contain any such factual allegation, so the court had discretion to deny the motion without any further hearing.")⁴ In

³ *Shindler* expressly recognizes that, if a motion to suppress is sufficient under Crim.R. 47, the trial court is required to hold a hearing. See *id.* at syllabus. Thus, any discretion regarding the decision to hold a hearing arises only after a court makes the threshold legal determination that the motion is not sufficiently particular under Crim.R. 47.

⁴ *Segraves* also relies upon *State v. Gozdan*, 7th Dist. No. 03 CA 792, 2004-Ohio-3209, and *State v. Miller*, 1st Dist. Nos. C-930290, C-930291, 1994 WL 79590 (Mar. 16, 1994). However, *Gozdan*, like *Segraves*, misstates *Mallion*. *Gozdan* at ¶ 6. *Miller* similarly misapplies *State v. Kuzma*, 11th Dist. No. 93-P-0019, 1993 WL 545129 (Dec. 3, 1993 because *Kuzma*

contrast to those cases, in this case, the motion did contain factual allegations. However, irrespective of which standard of review is applied, I would find that the trial court committed reversible error because Ms. Codeluppi's motion was sufficient under Crim.R. 47.

Sufficiency of Motion

{¶42} In *Shindler*, the motion to suppress "challenged the admission of [the defendant's] breathalyzer test results on the basis of specific regulations and constitutional amendments she believed were violated." *Shindler*, 70 Ohio St.3d at 57. Nothing in *Shindler* indicates that the defendant provided any additional factual support for her allegations regarding violations of the administrative code.⁵ Nevertheless, the Supreme Court affirmed the decision of the court of appeals that the defendant's motion to suppress satisfied the particularity requirement of Crim.R. 47. *Id.* at 58.

{¶43} In this case, Ms. Codeluppi filed a 10-page motion and memorandum in support of her motion setting forth the specific grounds she sought to suppress evidence. In her motion to suppress, she alleged, in pertinent part for purposes of this appeal, as follows:

The law enforcement officer lacked probable cause to arrest the Defendant and thus any evidence obtained as a result thereof is the fruit of an unconstitutional search and seizure in violation of the rights guaranteed the Defendant by the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 14 of the Ohio Constitution.

[]The standardized Field Sobriety Tests were not conducted in substantial compliance with NHTSA guidelines.

provides that "[a] trial court has discretion to deny a suppression motion without hearing *where the motion fails to comply with the dictates of Crim.R. 47.*" (Emphasis added.) *Kuzma* at *3.

⁵ The discussion of factual support in *Shindler* is limited to the memorandum giving support to the defendant's allegation that the officer lacked reasonable suspicion to initiate the traffic stop. *Id.* at 57. Of course, an allegation that an officer "was not licensed to operate the instrument analyzing the Defendant's alcohol level nor was he supervised by a senior operator in accordance with O.A.C. 3701-53-07" is itself both a factual and legal assertion. *Id.* at 55, 57.

In her memorandum in support of her motion to suppress, Ms. Codeluppi asserted that Officer Ryan Young requested that she perform the horizontal-gaze-nystagmus test, the walk-and-turn test, and the one-legged-stand test. Ms. Codeluppi argued that the officer lacked probable cause to arrest her because he failed to perform the field sobriety test in compliance with NHTSA as required by R.C. 4511.19(D)(b)(4) and asserted that her arrest was “[b]ased on her performance[]” in the field sobriety tests. Thus, Ms. Codeluppi’s motion contained both factual assertions and legal authority in support of her motion.

{¶44} This case is clearly distinguishable from *State v. Zink*, 9th Dist. No. 17484, 1996 WL 502317 (Sept. 4, 1996), upon which the majority relies.⁶ In that case, this Court stated, “The State cannot be expected to anticipate and prepare to address every possible violation of Ohio Revised Code 4511.19(D), 4511.191(A) through (D) and Ohio Department of Health Regulations under O.A.C. 3701-53-01 *et seq.*, without any clue as to *which* violation was alleged to have occurred.” (Footnotes omitted.) (Emphasis sic.) *Id.* at *2. Far from the motion to suppress in *Zink*, which broadly alleged violations of R.C. 4511.19(D), R.C. 4511.191(A)-(D), and OAC 3701-53-01 *et seq.*, Ms. Codeluppi narrowly alleged that the officer had not conducted the horizontal-gaze-nystagmus test, the walk-and-turn test, or the one-legged-stand test in substantial compliance with NHTSA as required by R.C. 4511.19(D)(b)(4). In other words, as in *Shindler*, she specifically asserted the code section (R.C. 4511.19(D)(b)(4)), the standards that had not been met (NHTSA), and even the specific tests she was challenging. The State could

⁶ Notably, the trial court in *Zink* conducted a hearing on the portion of the defendant’s suppression motion challenging the grounds for the traffic stop and probable cause. *Id.* at *1. It denied a hearing only on the portion of the motion concerning lack of compliance with the entirety of various provisions of the Ohio Revised Code and the administrative code. *Id.*

have had no doubt what the basis for Ms. Codeluppi's motion to suppress was.⁷ However, even assuming that the portions of Ms. Codeluppi's motion to suppress referenced above did not satisfy the particularity requirement of Crim.R. 47, she also specifically argued that the tests were invalid because

- 1) The tests were administered under duress resulting in the Defendant's emotional and/or physical condition (independent of alcohol) affecting the Defendant's ability to perform the field sobriety tests;
- 2) The tests were administered under difficult environmental conditions;
- 3) The officer's analysis of the Defendant's performance on these tests was biased[,] resulting in inaccurate recording at the police station.

In other words, Ms. Codeluppi's motion to suppress *at the very least* specifically alleged that Officer Young failed to properly conduct the field sobriety tests because they were administered under improper conditions, both environmental and due to her own mental and physical condition.

{¶45} It is important to remember that

[a] defendant has a short window of time in which to file the motion or face a waiver. Until discovery is complete, counsel will likely not have sufficient information to fully explore potential grounds. Even after it is concluded, the defense may still lack some information necessary to explore and pursue all potential grounds. As [an] example, in the case of field sobriety tests, few defendants will be conversant enough to inform counsel of the exact details in which the tests were administered so as to expose any defects. Unless a video has been made, and preserved, of the test administration, the attorney will likely not be in a position to learn the deficiencies in the administration of the test until there is an opportunity to question the officer on the stand.

Weiler and Weiler, *Ohio Driving Under the Influence Law*, Section 9:13 (2012-2013 Ed.). In light of the constraints for the filing of a motion to suppress, to require a defendant to file an

⁷ Upon stating the grounds upon which suppression is sought, the State is then in a position to investigate the matter prior to hearing. Unlike defense counsel, it has easy access to law enforcement and can quickly obtain information concerning the circumstances of the traffic stop as well as the administration of field sobriety tests.

even more detailed motion to suppress than Ms. Codeluppi's places an improper burden upon defendants who are essentially at the start of the case and may have very little information. *See Shindler*, 70 Ohio St.3d at 58 (recognizing time constraints attendant to suppression motions as well as potential waiver of constitutional issues). Crim.R. 47 sets forth a basic requirement that all motions, including suppression motions, generally contain the basis for which they are being pursued—a concept that is consistent with the notice pleading requirements inherent in our justice system. *See State v. Slates*, 9th Dist. No. 25019, 2011-Ohio-295, ¶ 74 (Belfance, P.J., dissenting) (“The holding in *Shindler* is consistent with the generalized pleading requirements that are basic to our jurisprudence.”). In my view, it is evident that *Shindler* stands for the proposition that the Crim.R. 47 sufficiency requirement is met where the basic factual and legal contours of the challenge are set out. Accordingly, I would find that Ms. Codeluppi's motion satisfied the requirements of Crim.R. 47 and sustain her third assignment of error.

APPEARANCES:

JOSEPH T. BURKE, Attorney at Law, for Appellant.

TONI L. MORGAN, Prosecuting Attorney, for Appellee.

Elyria Municipal Court

601 Broad Street ~ Elyria, OH 44035

Judge Lisa A. Locke Graves ~ Judge Gary C. Bennett

Eric J. Rothgery, Clerk

Court Order

FILED

11/14/2011

Case Number: 2011TRD05695 2011 NOV 14 P 3:04

State of Ohio

City of North Ridgeville

Plaintiff

Judge Lisa A. Locke Graves

CLERK OF
ELYRIA MUNICIPAL COURT

vs

CORRINE CODELUPPI

Defendant

BY: _____

Defendant's Motion to Suppress is denied, at the state's request, due to the fact it fails to state legal and factual bases with sufficient particularity to place the prosecutor and the court on notice of the issues to be decided. *Bowling Green v. O'Neal* (1996), 113 Ohio App.3d 880, 883. Case remains set for pretrial on 11/15/11 at 1:30 P.M.

Defendant

Attorney

Prosecutor

[Signature]
Judge Lisa A. Locke Graves

Clerk's Office Instructions
Docket Journal Entry

THE STATE OF OHIO }
County of Lorain }

Eric J. Rothgery
Clerk of Elyria Municipal Court

HEREBY CERTIFIES THAT THE ABOVE AND FOREGOING IS
TRULY TAKEN FROM ORIGINAL OR COMPUTERIZED RECORDS
NOW ON FILE IN MY OFFICE.

WITNESS MY HAND AND SEAL OF SAID COURT

THIS

DAY OF

2011

BY: *[Signature]*

Deputy

EXHIBIT

A-2

Appendix 23

Amendment IV to the U.S. Constitution

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.

Amendment V to the U.S. Constitution

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 offense 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.

Amendment VI to the U.S. Constitution

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 defense.

Amendment XIV to the U.S. Constitution

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.

Ohio Constitution, Article 1, Section 14

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

RULE 47. Motions

An application to the court for an order shall be by motion. A motion, other than one made during trial or hearing, shall be in writing unless the court permits it to be made orally. It shall state with particularity the grounds upon which it is made and shall set forth the relief or order sought. It shall be supported by a memorandum containing citations of authority, and may also be supported by an affidavit.

To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

[Effective: July 1, 1973.]

4511.19 Operating vehicle under the influence of alcohol or drugs - OVI.

(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 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.

(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.

(xi) The state board of pharmacy has adopted a rule pursuant to section 4729.041 of the Revised

Code that specifies the amount of salvia divinorum and the amount of salvinorin A that constitute concentrations of salvia divinorum and salvinorin A in a person's urine, in a person's whole blood, or in a person's blood serum or plasma at or above which the person is impaired for purposes of operating any vehicle, streetcar, or trackless trolley within this state, the rule is in effect, and the person has a concentration of salvia divinorum or salvinorin A of at least that amount so specified by rule in the person's urine, in the person's whole blood, or in the person's 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, a violation of division (A)(1) or (B) of this section, or any other equivalent 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 that is vehicle-related, 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 that is vehicle-related, 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, an emergency medical technician-Intermediate, an emergency medical technician-paramedic, 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.

(c) As used in division (D)(1)(b) of this section, "emergency medical technician-intermediate" and "emergency medical technician-paramedic" have the same meanings as in section 4765.01 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 that is vehicle-related, 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. If the person was under arrest as described in division (A)(5) of section 4511.191 of the Revised Code, the arresting officer shall advise the person at the time of the arrest that the person may have an independent chemical test taken at the person's own expense. If the person was under arrest other than described in division (A)(5) of section 4511.191 of the Revised Code, 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 whole blood, blood serum or plasma, 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 described 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, emergency medical technician-intermediate, emergency medical technician-paramedic, or qualified technician, chemist, or phlebotomist who withdraws blood from a person pursuant to this section or section 4511.191 or 4511.192 of the Revised Code, and any hospital, first-aid station, or clinic at which blood is withdrawn from a person pursuant to this section or section 4511.191 or 4511.192 of the Revised Code, 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 also extends to an emergency medical service organization that employs an emergency medical technician-intermediate or emergency medical technician-paramedic who withdraws blood under this section. The immunity provided in this division is not available to a person who withdraws blood if the person engages in willful or wanton misconduct.

As used in this division, "emergency medical technician-intermediate" and "emergency medical technician-paramedic" have the same meanings as in section 4765.01 of the Revised Code.

(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 seventy-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 shall require the offender to be assessed by an alcohol and drug treatment program that is authorized by section 3793.02 of the Revised Code, subject to division (I) of this section, and shall order the offender to follow the treatment recommendations of the program. The purpose of the assessment is to determine the degree of the offender's alcohol usage and to determine whether or not treatment is warranted. Upon the request of the court, the program shall submit the results of the assessment to the court, including all treatment recommendations and clinical diagnoses related to alcohol use.

(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 shall require the offender to be assessed by an alcohol and drug treatment program that is authorized by section 3793.02 of the Revised Code, subject to division (I) of this section, and shall order the offender to follow the treatment recommendations of the program. The purpose of the assessment is to determine the degree of the offender's alcohol usage and to determine whether or not treatment is warranted. Upon the request of the court, the program shall submit the results of the assessment to the court, including all treatment recommendations and clinical diagnoses related to alcohol use.

(iii) In all cases, notwithstanding the fines set forth in Chapter 2929. of the Revised Code, a fine of not less than five hundred twenty-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 fifty 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, the court shall order the offender to participate in an alcohol and drug addiction program authorized by section 3793.02 of the Revised Code, subject to division (I) of this section, and shall order the offender to follow the treatment recommendations of the program. The operator of the program shall determine and assess the degree of the offender's alcohol dependency and shall make recommendations for treatment. Upon the request of the court, the program shall submit the

results of the assessment to the court, including all treatment recommendations and clinical diagnoses related to alcohol use.

(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 division (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 fifty 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, the court shall order the offender to participate in an alcohol and drug addiction program authorized by section 3793.02 of the Revised Code, subject to division (I) of this section, and shall order the offender to follow the treatment recommendations of the program. The operator of the program shall determine and assess the degree of the offender's alcohol dependency and shall make recommendations for treatment. Upon the request of the court, the program shall submit the results of the assessment to the court, including all treatment recommendations and clinical diagnoses related to alcohol use.

(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 fifty 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, the court shall order the offender to participate in an alcohol and drug addiction program authorized by section 3793.02 of the Revised Code, subject to division (I) of this section, and shall order the offender to follow the treatment recommendations of the program. The operator of the program shall determine and assess the degree of the offender's alcohol dependency and shall make recommendations for treatment. Upon the request of the court, the program shall submit the results of the assessment to the court, including all treatment recommendations and clinical diagnoses related to alcohol use.

(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 (F) 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) Fifty dollars of the fine imposed under divisions (G)(1)(a)(iii), (G)(1)(b)(iii), (G)(1)(c)(iii), (G)(1)(d)(iii), and (G)(1)(e)(iii) of this section shall be deposited into the special projects fund of the court in which the offender was convicted and that is established under division (E)(1) of section 2303.201, division (B)(1) of section 1901.26, or division (B)(1) of section 1907.24 of the Revised Code, to be used exclusively to cover the cost of immobilizing or disabling devices, including certified ignition interlock devices, and remote alcohol monitoring devices for indigent offenders who are required by a judge to use either of these devices. If the court in which the offender was convicted does not have a special projects fund that is established under division (E)(1) of section 2303.201, division (B)(1) of section 1901.26, or division (B)(1) of section 1907.24 of the Revised Code, the fifty dollars shall be deposited into the indigent drivers interlock and alcohol monitoring fund under division (I) of section 4511.191 of the Revised Code.

(f) 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.

(g) 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 automobile dealers association. The proceeds of any fine so imposed shall be distributed in accordance with division (C)(2) of that section.

(7) In all cases in which an offender is sentenced under division (G) of this section, the offender shall provide the court with proof of financial responsibility as defined in section 4509.01 of the Revised Code. If the offender fails to provide that proof of financial responsibility, the court, in addition to any other penalties provided by law, may order restitution pursuant to section 2929.18 or 2929.28 of the Revised Code in an amount not exceeding five thousand dollars for any economic loss arising from an accident or collision that was the direct and proximate result of the offender's operation of the vehicle before, during, or after committing the offense for which the offender is sentenced under division (G) of this section.

(8) 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.

(4) The offender shall provide the court with proof of financial responsibility as defined in section 4509.01 of the Revised Code. If the offender fails to provide that proof of financial responsibility, then, in addition to any other penalties provided by law, the court may order restitution pursuant to section 2929.28 of the Revised Code in an amount not exceeding five thousand dollars for any economic loss arising from an accident or collision that was the direct and proximate result of the offender's operation of the vehicle before, during, or after committing the violation of division (B) of this section.

(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.

Amended by 129th General Assembly File No. 25, HB 5, §1, eff. 9/23/2011.

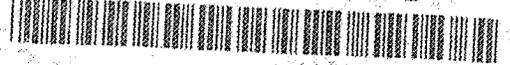
Amended by 128th General Assembly File No. 50, SB 58, §1, eff. 9/17/2010.

Effective Date: 01-01-2004; 09-23-2004; 08-17-2006; 04-04-2007; 2008 SB209 03-26-2008; 2008 SB17 09-30-2008; 2008 HB215 04-07-2009



U.S. DEPARTMENT
OF TRANSPORTATION

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DWI **(Driving While Intoxicated)** **Detection & Standardized** **Field Sobriety Testing**

February, 2006 Edition

Student Manual



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**U.S. DEPARTMENT OF TRANSPORTATION
Transportation Safety Institute
National Highway Traffic Safety Administration**

HS 178 R2/06

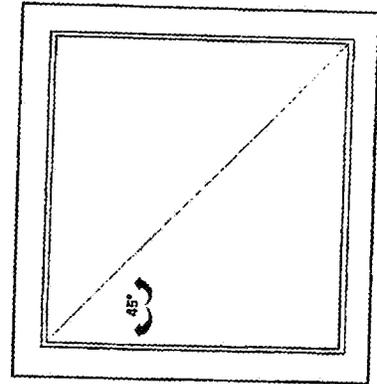
SESSION VIII
CONCEPTS AND PRINCIPLES OF THE
STANDARDIZED FIELD SOBRIETY TESTS

Estimating a 45-Degree Angle

It is important to know how to estimate a 45-degree angle. How far you position the stimulus from the suspect's nose is a critical factor in estimating a 45-degree angle. (i.e., If the stimulus is held 12" in front of the suspect's nose, it should be moved 12" to the side to reach 45 degrees. Likewise, if the stimulus is held 15" in front of the suspect's nose, it should be moved 15" to the side to reach 45 degrees.)

For practice, a 45-degree template can be prepared by making a 15"-square cardboard and connecting its opposite corners with a diagonal line.

To use this device, hold it up so that the person's nose is above the diagonal line. Be certain that one edge of the template is centered on the nose and perpendicular to (or, at right angles to) the face. Have the person you are examining follow a penlight or some other object until suspect is looking down the 45-degree diagonal. Note the position of the eye. With practice, you should be able to recognize this angle without using the template.



Specific Procedures

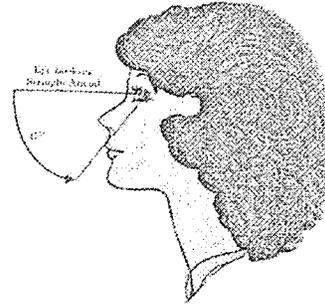
If the suspect is wearing eyeglasses, have them removed.

Give the suspect the following instructions from a safe position. **(FOR OFFICER SAFETY KEEP YOUR WEAPON AWAY FROM THE SUSPECT):**

- o "I am going to check your eyes."
- o "Keep your head still and follow this stimulus with your eyes only."
- o "Keep following the stimulus with your eyes until I tell you to stop."

Position the stimulus approximately 12-15 inches from the suspect's nose and slightly above eye level. Check to see that both pupils are equal in size. If they are not, this may indicate a head injury. You may observe Resting Nystagmus at this time, then check the suspect's eyes for the ability to track together. Move the stimulus smoothly across the suspect's entire field of vision. Check to see if the eyes track the stimulus together or one lags behind the other. If the eyes don't track together it could indicate a possible medical disorder, injury, or blindness.

Check the suspect's left eye by moving the stimulus to your right. Move the stimulus smoothly, at a speed that requires approximately two seconds to bring the suspect's eye as far to the side as it can go. While moving the stimulus, look at the suspect's eye and determine whether it is able to pursue smoothly. Now, move the stimulus all the way to the left, back across suspect's face checking if the right eye pursues smoothly. Movement of the stimulus should take approximately two seconds out and two seconds back for each eye. Repeat the procedure.



After you have checked both eyes for lack of smooth pursuit, check the eyes for distinct and sustained nystagmus at maximum deviation beginning with the suspect's left eye. Simply move the object to the suspect's left side until the eye has gone as far to the side as possible. Usually, no white will be showing in the corner of the eye at maximum deviation. Hold the eye at that position for a minimum of four seconds, and observe the eye for distinct and sustained nystagmus. Move the stimulus all the way across the suspect's face to check the right eye holding that position for a minimum of four seconds. Repeat the procedure.

Note: Fatigue Nystagmus. This type of nystagmus may begin if a subject's eyes are held at maximum deviation for more than 30 seconds.

Next, check for onset of nystagmus prior to 45 degrees. Start moving the stimulus towards the right (suspect's left eye) at a speed that would take approximately four seconds for the stimulus to reach the edge of the suspect's shoulder. Watch the eye carefully for any sign of jerking. When you see it, stop and verify that the jerking continues. Now, move the stimulus to the left (suspect's right eye) at a speed that would take approximately four seconds for the stimulus to reach the edge of the suspect's shoulder. Watch the eye carefully for any sign of jerking. When you see it, stop and verify that the jerking continues. Repeat the procedure. NOTE: It is important to use the full four seconds when checking for onset of nystagmus. If you move the stimulus too fast, you may go past the point of onset or miss it altogether.

If the suspect's eyes start jerking before they reach 45 degrees, check to see that some white of the eye is still showing on the side closest to the ear. If no white of the eye is showing, you either have taken the eye too far to the side (that is more than 45 degrees) or the person has unusual eyes that will not deviate very far to the side.

- | ADMINISTRATIVE PROCEDURES | |
|---------------------------|---|
| 1. | CHECK FOR EYEGLASSES |
| 2. | VERBAL INSTRUCTIONS |
| 3. | POSITION STIMULUS (12-15 INCHES) |
| 4. | EQUAL PUPIL SIZE AND RESTING NYSTAGMUS |
| 5. | TRACKING |
| 6. | LACK OF SMOOTH PURSUIT |
| 7. | DIST. & SUSTAINED NYSTAGMUS @ MAX. DEV. |
| 8. | ONSET OF NYSTAGMUS PRIOR TO 45° |
| 9. | TOTAL THE CLUES |
| 10. | CHECK FOR VERTICAL GAZE NYSTAGMUS |

OFFICER SAFETY IS THE NUMBER ONE PRIORITY ON ANY TRAFFIC STOP.

Procedures for Walk-and-Turn Testing

1. Instructions Stage: Initial Positioning and Verbal Instructions

For standardization in the performance of this test, have the suspect assume the heel-to-toe stance by giving the following verbal instructions, accompanied by demonstrations:

- o "Place your left foot on the line" (real or imaginary). Demonstrate.
- o "Place your right foot on the line ahead of the left foot, with heel of right foot against toe of left foot." Demonstrate.
- o "Place your arms down at your sides." Demonstrate.
- o "Maintain this position until I have completed the instructions. Do not start to walk until told to do so."
- o "Do you understand the instructions so far?" (Make sure suspect indicates understanding.)

2. Demonstrations and Instructions for the Walking Stage

Explain the test requirements, using the following verbal instructions, accompanied by demonstrations:

- o "When I tell you to start, take nine heel-to-toe steps, turn, and take nine heel-to-toe steps back." (Demonstrate 3 heel-to-toe steps.)
- o "When you turn, keep the front foot on the line, and turn by taking a series of small steps with the other foot, like this." (Demonstrate).
- o "While you are walking, keep your arms at your sides, watch your feet at all times, and count your steps out loud."
- o "Once you start walking, don't stop until you have completed the test."
- o "Do you understand the instructions?" (Make sure suspect understands.)
- o "Begin, and count your first step from the heel-to-toe position as 'One.'"

Procedures for One-Leg Stand Testing

1. Instructions Stage: Initial Positioning and Verbal Instructions

Initiate the test by giving the following verbal instructions, accompanied by demonstrations.

- o "Please stand with your feet together and your arms down at the sides, like this." (Demonstrate)
- o "Do not start to perform the test until I tell you to do so."
- o "Do you understand the instructions so far?" (Make sure suspect indicates understanding.)

2. Demonstrations and Instructions for the Balance and Counting Stage

Explain the test requirements, using the following verbal instructions, accompanied by demonstrations:

- o "When I tell you to start, raise one leg, either leg, with the foot approximately six inches off the ground, keeping your raised foot parallel to the ground." (Demonstrate one leg stance.)
- o "You must keep both legs straight, arms at your side."
- o "While holding that position, count out loud in the following manner: "one thousand and one, one thousand and two, one thousand and three, until told to stop." (Demonstrate a count, as follows: "one thousand and one, one thousand and two, one thousand and three, etc." Officer should not look at his foot when conducting the demonstration - OFFICER SAFETY.)
- o "Keep your arms at your sides at all times and keep watching the raised foot."
- o "Do you understand?" (Make sure suspect indicates understanding.)
- o "Go ahead and perform the test." (Officer should always time the 30 seconds. Test should be discontinued after 30 seconds.)

Observe the suspect from a safe distance. If the suspect puts the foot down, give instructions to pick the foot up again and continue counting from the point at which the foot touched the ground. If the suspect counts very slowly, terminate the test after 30 seconds.

IT IS NECESSARY TO EMPHASIZE THIS VALIDATION APPLIES ONLY WHEN:

- o THE TESTS ARE ADMINISTERED IN THE PRESCRIBED, STANDARDIZED MANNER
- o THE STANDARDIZED CLUES ARE USED TO ASSESS THE SUSPECT'S PERFORMANCE
- o THE STANDARDIZED CRITERIA ARE EMPLOYED TO INTERPRET THAT PERFORMANCE.

IF ANY ONE OF THE STANDARDIZED FIELD SOBRIETY TEST ELEMENTS IS CHANGED, THE VALIDITY IS COMPROMISED.

At end of the test, examine each factor and determine how many clues have been recorded. Remember, each clue may appear several times, but still only constitutes one clue.