

IN THE SUPREME COURT OF OHIO

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

MERIT BRIEF OF AMICUS CURIAE, CUYAHOGA CRIMINAL LAWYERS ASSOCIATION, IN SUPPORT OF APPELLANT CORRINE CODELUPPI

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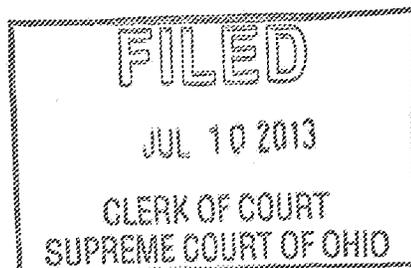
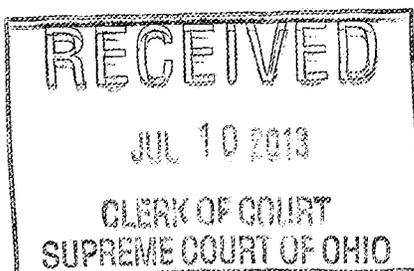


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INTEREST OF THE AMICI CURIAE

The Cuyahoga Criminal Defense Lawyers Association ("CCDLA") is one of the largest professional organizations of criminal law practitioners in the State. The CCDLA meets regularly to provide a forum for material exchange of information concerning the improvement of criminal law, its practices and procedures. Through these meetings, and its active online community, the CCDLA promotes the study, research and advancement of knowledge of criminal defense law and promotes the proper administration of criminal justice.

CCDLA members practice in courts throughout Ohio, and regularly file motions to suppress, not only in OVI cases, but in other criminal cases. As such, the members of the CCDLA have a vested interest that their motions to suppress are reviewed properly under the law. If the ruling of the Lorain County Court of Appeals, Ninth Appellate District is not reviewed by this Court and overturned, it will be nearly impossible for defendants to be granted a suppression hearing to challenge illegally obtained evidence and an unconstitutional arrest. This Court cannot allow that to happen.

STATEMENT OF THE CASE AND FACTS

Amici respectfully directs this Court to the Appellant's Statement of the Facts found in her Merit Brief.

ARGUMENT

The trial court denied Ms. Codeluppi's motion to suppress, without a hearing, because it found that the motion failed to state legal and actual bases with sufficient particularity to place the prosecutor and the court on notice of the issues to be decided. The appellate court, in a two to one decision, with one Judge concurring in judgment only, agreed that the prosecutor and court were not sufficiently noticed of the issues to be decided. The dissenting judge, however, opined that Ms. Codeluppi's motion to suppress was sufficient to put the prosecution on notice of the issues.¹

As the dissent makes clear, the trial court and the majority opinion in the appellate court erred by denying Ms. Codeluppi's motion to suppress without a hearing. The two lower courts have not correctly applied the notice requirement in *State v. Shindler*, 70 Ohio St.3d 54, 636 N.E.2d 319 and the Ohio Rules of Criminal Criminal Procedure, Rule 47 ("Crim.R. 47").

The police report is the only evidence in this case. There are no other witnesses, no audio evidence, nor any videotape evidence. With its ruling, the appellate court is requiring a defendant to plead facts with such specificity that is not possible in this case. These specific facts are simply unknown without questioning the arresting officer. But if the court requires the defendant to include these unknown facts in a motion to suppress in order to warrant a suppression hearing, then the court is asking the defendant to prove why the prosecutor would not be able to meet its burden of proof.

¹ As a former municipal court judge, one of the founding members of Akron's DUI Court, and as former presiding Judge on the same DUI Court, the dissenting Judge below has unique and valuable insight into the real world workings of an OVI case in general, and the requirements for a motion to suppress in an OVI case in particular. Her insights and analysis should not be dismissed lightly.

The appellate court is essentially switching the burden of proof. Incredibly, the appellate court is switching the burden of proof to the party with less access to the information necessary to meet that burden. After all, the police and prosecution have greater access to the evidence that proves they met their burden. In a case such as this, with only a cursory police report and no video or audio evidence, the defendant is practically walking in the dark. This standard is hopelessly wrong and almost impossible to meet.

Taking the lower court's reasoning to its logical conclusion, anytime anyone is arrested for an OVI and there is no videotape of the stop, field sobriety tests, and/or arrest, and the only evidence is a scant and conclusory police report that claims everything was done above bar, it will be virtually impossible under this standard for a defendant to present particular facts to justify a suppression hearing. Under this standard, no defendant will be able to challenge the constitutionality of the stop, detention, seizure, arrest, field sobriety testing procedures and statements made to the police absent a video showing the same. Furthermore, the appellate court's rationale will encourage the police to not videotape OVI arrests and field sobriety tests, thus endangering the officers and the public. Likewise, it will encourage prosecutors to wait until the last minute to file a response to a motion to suppress, claim the motion was not factually specific enough to put it on notice of the issues to be raised at the hearing, and thus avoid a hearing.

The lower court has basically instructed the police to keep the details to a minimum in their reports, don't take a video, and then you will not have to justify your action in a suppression hearing. Not only is the appellate court's decision against the

holdings of this Court concerning the requirements for motion to suppress in OVI cases, it is a blatant violation of due process.

PROPOSITION OF LAW I:

When a defendant files a Motion to Suppress which is sufficient to place the State on notice of the facts and law, the trial court errs in dismissing the Motion without a hearing.

Crim.R. 47 requires a motion to suppress to "state with particularity the grounds upon which it is made and [to] set forth the relief or order sought." This Court has held that when filing a motion to suppress, "the defendant must (1) demonstrate the lack of a warrant, and (2) raise the grounds upon which the validity of the search or seizure is challenged in such a manner as to give the prosecutor notice of the basis for the challenge." *Xenia v. Wallace*, 37 Ohio St.3d 216, 524 N.E.2d 889 (1988), paragraph one of the syllabus; accord *Shindler*, 70 Ohio St.3d 54 at syllabus. Once the defendant demonstrates that a warrantless search or seizure occurred and provides the state with sufficient notice of the basis for his challenge to the search or seizure, the state bears the burden to establish that the search or seizure fell within an exception to the warrant requirement. *Wallace*, 37 Ohio St.3d at para. 2 of the syllabus.

But, the defendant need not particularize the legal and factual bases for his challenge in excruciating detail. See *State v. Horner*, 4th Dist. Jackson No. 01CA6, 2001 WL 1627648 (Dec. 6, 2001) ("although motions to suppress evidence need not 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"). The burden on a defendant to put the prosecution on notice should not be impossibly high because "[t]he motion to suppress is merely a procedural vehicle to 'put the ball into play' and serve notice that the defendant intends to have the state meet its * * * burden

of demonstrating compliance with any and all challenged regulations and requirements." Weiler & Weiler, *Baldwins Ohio Driving Under the Influence Law* (2011-2012 ed.), Section 9:13, at 247.

In *Shindler*, this Court determined that *Shindler's* motion to suppress provided the state with sufficient notice of the legal and factual grounds upon which she challenged the warrantless search and seizure when her motion stated, in part, that "[t]here was no lawful cause to stop the defendant, detain the defendant, and/or probable cause to arrest the defendant without a warrant." *Shindler*, 70 Ohio St.3d 54, at 57. Furthermore, *Shindler's* motion "cited legal authority and set forth a factual basis for challenging the investigative stop and the arrest. Specifically, [Shindler] claimed that the trooper based his arrest on *Shindler's* minor speeding violation and her moderate odor of alcohol." *Id.* at 57.

The similarities between *Shindler* and the case *sub judice* are striking. In both, the trial court denied defendant's motion to suppress without holding a hearing. The underlying facts of the arrests are also similar. In both cases, the defendant was pulled over for speeding and was ultimately charged with OVI after the officer detected an odor of alcohol. In neither case did the officer notice any other signs of impairment before pulling the defendant out of the vehicle to perform field sobriety tests.

The similarities continue in the issues raised in the motions to suppress. Because of these similarities, this Court should overturn the appellate court's erroneous decision in this case.

Similar to *Shindler*, Ms. Codeluppi's motion to suppress herein claimed that her stop and detention was unlawful and that the police lacked probable cause to arrest her.

Likewise, Ms. Codeluppi claimed that the police officer based his decision to arrest her on the minor speeding violation and the odor of alcohol (and on no other factors indicating she was driving impaired), just like the motion to suppress in *Shindler*.

Specifically, Codeluppi's motion to suppress provided 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 pp. 1-2)

Codeluppi's allegation that there was no reasonable suspicion sufficient to stop her vehicle was enough to place the prosecutor and court on notice and entitled her to a hearing. *See State v. Palmer*, 2nd Dist. No. 3085, para. 2, 1995 WL 96859 (March 8, 1995) (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.).

It was further argued that the arresting officer lacked probable cause to arrest Codeluppi for an OVI based upon the facts and observations he provided in police

report. (Motion to Suppress at pp. 3, 4-8) The appellate court did not even address this issue.

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.

Codeluppi's motion to suppress went even further, however, and clearly put the prosecution on notice that per ORC 4511.19(D)(b)(4), the defense was arguing that the officer lacked probable cause to arrest because the officer failed to perform the field sobriety tests in substantial compliance with NHTSA guidelines, and that the tests were performed under improper environmental conditions and under duress. The motion to

suppress also claimed that the defendant was arrested based on the arresting officer's biased analysis of the defendant's performance on the tests.

Moreover, Codeluppi's motion to suppress alleged that her statements to the police were obtained in violation of her Fifth Amendment right against self-incrimination and her Fifth and Sixth Amendment right to counsel, as applicable under the Fourteenth Amendment. Once again, the appellate court did not even consider this allegation. The prosecution cannot introduce any incriminating statements unless it shows by a preponderance of the evidence that Ms. Codeluppi voluntarily, knowingly and intelligently waived her constitutional rights. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct 1602 (1996).

As the dissent pointed out in the court of appeals decision herein, "Ms. Codeluppi's motion contained both factual assertions and legal authority in support of her motion" and therefore the trial court erred by not holding a suppression hearing. *State v. Codeluppi*, 9th Dist. Lorain No. 11CA010133, 2012-Ohio-5812, para. 43 (Belfance, J., dissenting).

This Court should consider the real world and practical considerations that come into play in these type of cases. As the former DUI Court Judge pointed out in her dissent in the court of appeals below, when considering whether or not the motion to suppress was sufficient to put the prosecution on notice, it is important to note 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 effects. 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 & Weiler, Baldwins Ohio Driving Under the Influence Law (2011-2012 ed.), Section 9:13.

State v. Codeluppi, 9th Dist. Lorain No. 11CA010133, 2012-Ohio-5812, para. 45

(Belfance, J., dissenting).

In this case, the police report is the only evidence. In the report, the officer merely states that instructions were given about how to perform the field sobriety tests without providing details of those instructions. For instance, the officer does not state if the instructions complied with the NHTSA guidelines or the Ohio Revised Code. Most importantly, no video or audio of the field sobriety tests exist. Despite this, the lower courts expected Codeluppi's attorney to somehow provide specific facts about what the officer said and did (or did not say or do) when instructing the defendant. Such a standard is impossible to meet and improperly shifts the burden to the defendant. It is the prosecution's burden to show that the tests were conducted in substantial compliance with the ORC and NHTSA guidelines, not the defendant's burden to show that they were not. Requiring the defendant to prove a negative makes it nearly impossible and is clearly against the *Shindler* and Criminal Rule 47 standards.

The appellate court's ruling was error. It did not follow this Court's guidance in *Shindler*; and therefore, this Court should reverse.

If the lower court's ruling is allowed to stand, it will not only have violated Ms. Codeluppi's due process rights, it will threaten the due process rights of all future OVI defendants in the Ninth Appellate District. Under the appellate court's standard, any

future OVI defendant who does not have a video of the stop and/or field sobriety tests (a not uncommon occurrence in OVI defense) will find it nearly impossible to get a hearing on a motion to suppress.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Ohio Constitution, Article I, Section 16 require that a criminal defendant receive a fair trial. By denying the defendant a suppression hearing, the trial court violated Codeluppi's due process rights. Due process is central to our justice system and it includes the opportunity to be heard and fair play among all litigants. *See, e.g. Cleveland Bd. of Edn, v. Loudermill*, 470 U.S. 532, 542 (1985). By denying Codeluppi a suppression hearing, after she proved a warrantless arrest and put the prosecutor on notice of the issues to be challenged at the hearing, the trial court violated the Defendant's due process rights.

CONCLUSION

For the reasons discussed above, the amicus curiae requests this Honorable Court to reverse the appellate court's ruling.

Respectfully submitted,



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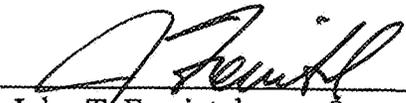
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CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing was served upon the following via regular US mail been filed on this 9th day of July 2013:

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