

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.)	

REPLY BRIEF OF DEFENDANT-APPELLANT CORRINE CODELUPPI

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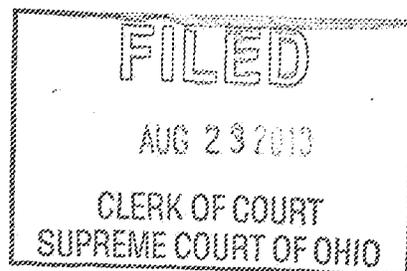


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Proposition of Law No. I.

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.

Appellee's recitation of case law merely serves to support Appellant's position that defendants in Ohio are not subject to the same equal protections of law as, depending in which jurisdiction they are arrested, defendants have varying levels of constitutional protections.

If one is arrested outside of the Ninth District, one merely needs to provide notice of the issues in order to have a right to a suppression hearing. For example, see *State v. Mook*, Eleventh Dist. Nos. 2001T0057 & 2001T0058, 2002-Ohio-7162, ¶4-5 (where the Eleventh District Court of Appeals found a two sentence motion to have been plead with sufficient to place the prosecutor and court on notice of the issue of lack of probable cause); *Bowling Green v. O'Neal*, 113 Ohio App.3d 880, 682 N.E.2d 709 (1996) (where the Sixth District Court of Appeals found that the motion to suppress 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); *State v. Horner*, 4th Dist. No. 01CA6 (Dec. 6, 2001) (where the Fourth District Court of Appeals 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); *State v. Hill*, 8th Dist. Nos. 83762, 83775, 2005-Ohio-3155 (where the Eighth District Court of Appeals found that the phrase "illegal stop and detention" in a two sentence motion was enough to put the prosecutor and court on sufficient notice as to what issues were being contested); *State v. Nicholson*, 12th Dist. No. CA2003-10-106, 2004-Ohio-6666 (where the Twelfth District Court

of Appeals found that where no factual basis is presented but specific provisions of code are cited as having been violated, the motion to suppress was stated with sufficient particularity.)

However, if arrested in the Ninth District, a defendant must not only state the full factual and legal bases of the claim, but must also establish that there is substantial evidence to support the allegations, before the Ninth District will find that a motion to suppress has been stated with enough particularity to entitle the defendant to a hearing. In many cases, much like in this case, 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 Ninth District 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. As such, the constitutional rights of Ohio citizens vary depending on the district in which they are stopped and/or arrested. The standard should be uniform across all Appellate Districts in Ohio.

This Honorable Court should affirm the standards it has previously set forth in *Xenia v. Wallace*, 37 Ohio St.3d 216, 524 N.E.2d 889 (1998) and *State v. Shindler*, 70 Ohio St.3d 54, 636 N.E.2d 319 (1994), as merely setting forth some basis of fact and law to place the court and prosecutor on notice of the issues which most clearly reflects the reality of the lack of information available to a defendant, especially in a case such as this where no video of the stop exists and the police report lacks key details to determine whether or not a defendant's constitutional rights were violated.

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 v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). 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.

As admitted by the Appellee on p. 4 of its brief, the issue before the Court in *Shindler* was “[T]o what extent a motion to suppress evidence must set forth its legal and factual bases in order to require a hearing[?]” *Shindler* at 56. The answer reached by this Court was that “the accused must state the legal and factual bases for the motion with sufficient particularity to place the prosecutor and court on notice of the issues to be decided.” *Shindler* at syllabus.

Codeluppi is not asking this Honorable Court to change the requirement to place the prosecutor and court on notice of the issues to be decided or to eliminate any requirement to state a factual or legal basis, as erroneously alleged by The Ohio Prosecuting Attorneys Association on p. 7 of their Amicus Brief. Rather, Codeluppi asks that the level of particularity required by the courts be consistent throughout the State and that the burden of stating facts not be placed so high that it is impossible for a defendant to meet that burden, especially in cases in which the police officer chooses to refrain from sharing the facts by creating a vague report and not videotaping the stop, as was done in this case.

1. Codeluppi’s Motion to Suppress and accompanying Memorandum set forth the factual and legal bases to place the court and prosecutor on notice of the issues to be determined at the suppression hearing.

Codeluppi’s motion was not devoid of facts and law, as alleged by the Appellee, rather, it contained more facts than that which was found to be adequate in *Shindler*. Appellee’s Brief at 9, 38. The motion to suppress in *Shindler* contained virtually no case specific facts, a fact conceded to by Appellee at p. 30 of its Brief. The facts stated in the *Shindler* motion were as

follows: (1) defendant was stopped initially because of a speed violation, (Ohio Revised Code section 4511.21), a minor misdemeanor and, arguably (2) there are no facts present in this case which would give rise to a reasonable and articulable suspicion that the vehicle and/or its driver was in violation of the law. See Motion to Suppress in *Shindler*, attached to the Brief of Appellee at Appendix 1-5. According to the Ohio Prosecuting Attorneys Association, *Shindler* set forth adequate factual bases by merely claiming that “the arrest was based upon a ‘minor speeding violation and her moderate order of alcohol’ and that ‘she was unduly threatened by the loss of her license.’” Brief of the Ohio Prosecuting Attorneys Association (“Amicus Brief”) at 6, citing *Shindler* at 57-58.

Codeluppi’s Motion was in no way boilerplate as alleged by the State. Codeluppi stated four (4) paragraphs of facts supporting her original motion plus facts throughout the Law & Argument section of her Brief in Support. In fact, Codeluppi set forth the same facts which were stated in *Shindler*, plus additional facts, to support her Motion to Suppress as to her allegation that the State lacked probable cause to stop and arrest her without a warrant for an OVI. Much like in *Shindler*, Codeluppi was also pulled over for a minor traffic violation (speeding) and an odor of alcohol was allegedly detected by the officer, leading to her arrest for an OVI. Motion at p. 3-4, 8. As this Court has already ruled that these facts are sufficient to warrant a hearing (and as the Ohio Prosecuting Attorneys Association admits these facts are sufficient), the trial court erred by denying Defendant’s Motion without a hearing. Amicus Brief at p. 6.

Contrary to Appellee’s claims, a legal basis was explicitly stated in the Motion as Codeluppi cited to *Whren v. United States*, 517 U.S. 806; 116 S. Ct. 1796, 135 L.Ed.2d 89 (1996); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d. 889 (1968) and *State v. Andrews*, 57 Ohio St.3d 86, 565 N.E.2d 1271 (1991) for the proposition that the officer who effectuated

the traffic stop and seizure of Codeluppi is required by law to have had either probable cause to believe that the traffic violation was committed by the defendant or must be able to articulate specific facts which would warrant a person of reasonable caution to believe that the defendant had or was committing a crime. Motion at p. 4. No probable cause or specific facts have been set forth in this case and thus, Codeluppi was entitled to, at minimum, a hearing on her Motion.

Thus, Codeluppi set forth an argument that the facts noted in the police report were not sufficient to establish probable cause and that probable cause was required by law for a warrantless arrest. See, generally, Motion. As such, Codeluppi more than adequately set forth with sufficient particularity both law and fact to support her Motion in regards to her claim of lack of probable cause, and thus, it was error to deny a hearing on this issue.

Incidentally, even if Appellee's allegation that "Codeluppi's Motion to Suppress indicated in a headline, without elaboration, that 'the law enforcement officer lacked sufficient reasonable grounds to effectuate the traffic stop'" was actually true, which it is not, Codeluppi would have still set forth a sufficient legal and factual basis under the law to be entitled to a hearing on her Motion. See *State v. Palmer*, 2nd Dist. No. 3085, *2 (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.") However, a mere perusal of the Motion shows that Appellee's allegation is simply not true.

Similarly, Codeluppi set forth sufficient facts to warrant a hearing on her claim in her Motion that her *Miranda* rights were violated. Specifically, Codeluppi stated that the officer conducted a custodial interrogation without providing a *Miranda* warning and/or obtaining a valid, knowing, and intelligent waiver of her right against self-incrimination, leading Codeluppi to allegedly provide an incriminating statement that she had been to two bars and had consumed

two drinks that day. Motion at p. 3, 8-9. In addition to setting forth the lack of probable cause for the stop, the custodial interrogation without a *Miranda* warning and a valid, knowing, and intelligent waiver of same, and the self-incriminating statement that was elicited during this improper interrogation, Codeluppi further cited to, amongst other authority, the Fifth, Sixth and Fourteenth Amendments, and *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) (for the proposition that warnings and a valid waiver are required as a prerequisite to the admissibility of any statement obtained in a custodial interrogation.) Motion at 3-4, 8-9. Thus, once again, Codeluppi set forth the factual and legal bases for her claim with sufficient particularity to place the prosecution and court on notice of the issue and to warrant a hearing. As such, the trial court erred in refusing a hearing on the Motion to Suppress in this regard.

Interestingly, the State never contested the particularity of the allegations concerning probable cause or the *Miranda* violations before the trial court.¹ The State only challenged the particularity of the argument concerning the field sobriety tests in its Response to Defendant's Motion to Suppress. Appellee's Response to Defendant's Motion to Suppress ("Response") expressly stated that:

The city of North Ridgeville hereby submits this Response to Defendant's Motion to Suppress seeking, pursuant to Criminal Rule 47, sufficient particularity on the issue of alleged improper administration of field sobriety tests, as outlined in the attached Memorandum and incorporated by reference.

Response at p. 1 (emphasis added). Thus, the State's claims of lack of particularity concerning the lack of probable cause and the *Miranda* violation were never raised in the trial court and cannot be raised on appeal.

¹Appellee now also claims that the Motion to Suppress was allegedly untimely. Brief of Appellee at p. 8. As this allegation was first raised on appeal and not in the trial court, the allegation has been waived as a matter of law. *Schade v. Carnegie Body Co.*, 70 Ohio St.2d 207, 436 N.E.2d 1001 (1982).

Codeluppi further stated the factual and legal basis of her claim that Officer Young failed to substantially comply with the NHTSA guidelines with as much particularity as possible in light of the fact that little to no information was available without the opportunity to cross-examine Officer Young. Interestingly, the Ohio Prosecuting Attorneys Association appears to concede that Codeluppi set forth a sufficient basis when it states that her Supplemental Motion “laid out the missing factual details.” Amicus Brief at p. 10. However, the Supplemental Motion does not include any additional “facts” as no additional “facts” could be ascertained without a hearing and an opportunity to question the officer. Rather, the Supplemental Motion states that the additional facts requested by the State could not be ascertained due to the vague nature of the police report and lack of videotape in this case. The Supplemental Motion merely included additional statements showing how numerous relevant and necessary details concerning the three field sobriety tests were suspiciously absent in the police report. These statements of the lack of information provided to the defendant merely reiterated and attempted to clarify the same claims made in the original motion. See, generally, Motion, Supplemental Motion.

Regardless, even if the lack of information as to how the field sobriety tests were administered, evaluated or instructed, could be found to be a “fact” that was missing in the original Motion, it cannot explain why the trial court refused to hear the Motion as to the lack of probable cause for the stop and/or arrest or the violation of Codeluppi’s *Miranda* rights. Interestingly, neither the State nor The Ohio Prosecuting Attorneys Association chose to address this glaring issue in either of their briefs.²

² Appellee sole argument as to the *Miranda* and lack of probable cause issues is to assert that the Appellant should have been required to request a separate hearing on each issue in the Motion to Suppress. Brief of Appellee at p. 27. Not only does this fly in the face of judicial economy, but Appellant believe she was entitled to a hearing as to all of the issues in her Motion. As this Honorable Court will further recall, there was no need (or requirement) to ask for a separate

The narrative in the police report, which is the only evidence available to the Appellant as to Officer Young's instructions, administration, evaluation, and or recording of the results relating to the field sobriety tests, was vague and devoid of most of the necessary information needed to evaluate whether or not said tests were performed in compliance with the NHTSA standards. For example, with regards to the HGN Test, Officer Young noted in his report that he observed the lack of smooth pursuit, distinct nystagmus at maximum duration and onset nystagmus prior to 45 degrees in both eyes. However, the narrative in the police report did not identify any instructions that were given to the Appellant and did not describe the nature or manner in which the test was given so that it could be determined whether or not the HGN test was administered in accordance with NHTSA guidelines. Similarly, with respect to both the One Leg Test and the Walk and Turn Test, the report did not contain any description of any instructions or demonstrations Officer Young provided to the Appellant and whether or not these purported instructions or demonstrations were conducted in substantial compliance with the NHTSA guidelines.

The only issue is whether or not the facts and law were stated with enough particularity to place the prosecutor on notice of the issues to be presented. As Codeluppi affirmatively stated the specific aspects of the HGN, Walk and Turn, and One Leg Stand tests that were at issue in the Supplemental Motion, described the lack of a Miranda warning having been provided, and described the lack of probable cause based upon the facts of the case, any claim that the Motion was not stated with enough particularity to place the prosecutor on notice of the issues is

hearing on each issue as the trial court set a hearing as to all of the issues raised in the Motion. The trial court later cancelled this hearing without notice, mere hours after receiving the Appellee's request to deny the Motion based upon claims of a lack of particularity, and without allowing any opportunity for the Appellant to respond. Codeluppi filed a Supplemental Motion the very next day showing that she had stated legal and factual bases to all issues in the Motion and was entitled to a hearing as to each and every issue contained in her Motion.

spurious at best. In fact, notice has never been an issue in this case as the undersigned personally spoke with the prosecutor a day before the hearing about the issues to be decided at the hearing and the prosecutor admitted that she had actual notice of the issues prior to the hearing. See Affidavit (“Aff.”), attached to the Motion for Reconsideration at ¶¶4-5. See also, *State v. Wetherill*, 5th Dist. No. 05P090062, 2006-Ohio-5687, ¶¶94-95 (holding that where the State acknowledges notice of the issues raised in a motion to suppress, the motion to deny the motion to suppress for lack of particularity must fail.) Thus, it was error to deny Codeluppi’s Motion without a hearing.

- 2. When there is no video of the stop and substantial compliance cannot be ascertained through a vague police report, it is generally impossible for a defendant to state the factual basis of his claim in any more detail without having an opportunity to cross-examine the officer at a suppression hearing.**

As with many OVI cases, when the report of the arresting officer is vague and fails to provide the necessary descriptions of the instructions, administration, evaluation and recording of the sobriety field tests and there is no videotape of the stop, a defendant cannot state facts with any more particularity than that which was stated in Codeluppi’s Motion.

It should be noted that the only place any facts concerning the instructions, administration, evaluation and recording of the sobriety field tests could come from was the police report itself, which was in both the State and Codeluppi’s possession and/or from Codeluppi herself, who is not trained in the law, the administration of field sobriety tests, or the NHTSA guidelines. Appellee repeatedly claims that had Codeluppi merely engaged in additional discovery, the facts at issue (most of which are contained solely within the officer’s own mind) could have somehow been discovered. However, no discovery provision exists to force the officer to provide sworn testimony prior to a suppression hearing. Recognizing this fact, the Ohio Prosecuting Attorneys Association attempt to claim in their Amicus Brief that

Codeluppi allegedly had access to go up to the police officer to question him in order to obtain additional facts. See Amicus Brief at p. 10. However, the Criminal Rules of Procedure do not contain any requirement for an officer to be compelled to answer any such questions. The reality of the situation is that an officer will not voluntarily admit that he violated a defendant's constitutional rights when making a stop or arrest and therefore, this suggestion to obtain voluntary testimony is dubious. In support of this purported argument that Appellant allegedly should have engaged in additional Discovery, the Appellee notes that:

The current license of the operator and senior operator are easily obtained either through discovery or through a visit to the police station. Pre- and post- calibration records may be viewed by the defense with very little effort. The batch solution certificate is equally easy to secure. The operator's checklist is often a routine part of discovery.

Brief of Appellee at p. 30. However, none of these discoverable matters pertained to the issues contained in Codeluppi's Motion to Suppress, and thus the fact that these matters could have been discoverable is absolutely irrelevant. Interestingly, there was no breathalyzer test even given in this case. The Appellee has not and cannot show that any additional relevant facts could have been discovered absent an opportunity to question the officer at a suppression hearing.

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.

Appellee also claims that Codeluppi herself should testify as to in which ways the officer failed to substantially comply with the NHTSA guidelines as to each of the three tests at issue. However, as has been stated by the Honorable Eve Belfance, in her dissent in the Court of Appeals in this matter:

[I]n 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.”

(*State v. Codeluppi*, 9th Dist. No. 11CA010133, 2012-Ohio-5812 at *18, citing Weiler and Weiler, *Ohio Driving Under the Influence Law*, Section 9:13 (2012-2013 Ed.) Thus, as explained by Judge Belfance, who is a founding member of Akron’s DUI Court and was a former presiding judge on that DUI Court, it is not a matter of merely asking a defendant to identify the deficiencies as very few defendants could ever do so even after reading the requirements. Furthermore, defendants are not trained in the administration of field sobriety tests in order to make such a determination. For example, as to the HGN test, a defendant would be unlikely to be able to recall the degree of the angle used by the officer during the test, and cannot see what his or her own eyes are doing to determine whether or not jerking was present or if some of the whites of his or her own eyes were showing, all of which are necessary to determine if the officer properly administered and/or evaluated the test. There were no means available to obtain any additional factual basis except by cross-examining Officer Young at a suppression hearing.

3. Appellee’s claim that it was unaware of the issues to be determined at the hearing is spurious at best.

Appellee next claims that it could not possibly know what was at issue as no specific Revised Code or Administrative Code provision was allegedly cited and there are allegedly numerous possible issues relating to whether or not Officer Young substantially complied with the NHTSA guidelines as to these three field sobriety tests. Brief of Appellee at p. 6. The Ohio Prosecuting Attorneys Association also claims that boilerplate motions, such as the one Codeluppi allegedly filed, make “it impossible to anticipate whether testimony will concern a traffic stop with breathalyzer testing, a warrantless search of a residence, a pat-down of a defendant, or one of the other areas of law that may be implicated in a broadly-written motion to suppress.” Amicus Brief at p. 7.

However, the State and Amicus’s claims are questionable as Appellant expressly stated that “the testing law enforcement office 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 (NHTSA) Guidelines.” Appellant further identified the three tests at issue – the HGN test, the Walk and Turn Test, and the One Leg Stand test. The NHTSA guidelines on these three tests total approximately one (1) page per test, which includes not only the proper instructions, demonstrations and procedures, but also includes general guidelines as to all field sobriety tests and detailed descriptions of what to look for while conducting the test. These requirements are listed in Appellant’s Merit Brief between pages 33-36. Additionally, whether or not these requirements were met requires only one witness to be called by the State – the officer who administered the tests – and the questioning is limited to what he saw, did, and how he evaluated the results. The State’s burden is not as onerous as it attempts to mislead the Court to believe. In fact, the Appellee states numerous times in its brief

that all of the NHTSA manual requirements “are well-known and present no burden ...to obtain.” Brief of Appellee at p. 10.

Despite admitting to the ease in which it can obtain the NHTSA guidelines, Appellee curiously claims that because the relevant portions of the NHTSA guidelines were not expressly retyped into the brief itself, that the Motion is somehow deficient.³ There is absolutely no requirement to retype the NHTSA guidelines verbatim. Furthermore, as these NHTSA guidelines are “easily obtainable” and as the specific matters at issue were expressly cited to, there should be no need to retype these guidelines in a motion.

Appellee further erroneously claims that the Motion is further deficient because, despite identifying the tests at issue, the particular code provision referencing the guidelines was allegedly not expressly stated. First off, not only did Codeluppi expressly state that the Officer did not substantially comply in the instruction, conduction, evaluation, administration and/or recording of the HGN test, the Walk and Turn Test and the One leg Stand Test, but Codeluppi also specifically identified the “easily obtainable” NHTSA guidelines and further cited to R.C. 4511.19. See, generally, Motion. Additionally, Codeluppi expressed the impossibility of providing any further facts due to the vagueness of the police report and the nonexistence of any video of the stop itself. Supplemental Motion at 2-3, 8. Thus, Codeluppi set forth with sufficient particularity, the factual and legal bases of her challenge. Similarly, the Ohio Prosecuting Attorneys Association’s allegation that the court or the prosecution could become confused as to what was at issue in this case after reviewing this Motion and somehow erroneously believe the issue before the Court was a breathalyzer test question (despite the Motion expressly stating that

³ Interestingly, Appellee claims on p. 10 of its Brief that Appellant could allegedly have met her burden to state the factual bases of her claim by merely retyping the requirements of the NHTSA guidelines, but then claims on P. 19 of its Brief that factual allegations cannot come from citing the requirements in the NHTSA guidelines.

the breathalyzer was refused), a warrantless search of a residence (despite all the facts and argument concerning a stop and arrest for a OVI) a pat down of a defendant or any other area of law other than that which was expressly stated in the Motion, simply belies belief.

4. The Appellee has failed to meet its slight burden of establishing substantial compliance in this case.

The legislature has issued a prohibition on the State from presenting testimony or introducing evidence as to the field sobriety tests unless and until the State has 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...” R.C. 4511.19(D)(4)(b). Thus, the burden is already on the prosecution to establish their compliance with these standards prior to any use of any testimony or evidence of same being used at trial. Claiming that that burden is too onerous does not relieve the State from the statutory requirement to meet this burden. The Appellate courts have found that the extent of this burden depends on the level of specificity with which the defendant challenges the legality of the tests. *State v. Plunkett*, 12th Dist. No. CA2007-01-012, 2008-Ohio-1014. For example, when the language in the motion raises only general claims, there is only a slight burden on the State to show, in general terms, substantial compliance. *State v. Jimenez*, 11th Dist. No. CA2006-01-005, 2007-Ohio-1658, ¶25.

In *State v. Plunkett, supra*, the defendant filed a very broad motion generally listing the evidence he was seeking to have suppressed, followed by several general legal bases for the requested suppression, which included a claim that there was a lack of substantial compliance

with NHTSA standards in conducting the field sobriety tests. The motion itself contained only one paragraph of facts which stated:

Mr. Plunkett was stopped for an alleged violation of Speeding while operating his vehicle on Township Road in the Township of Clearcreek, Warren County, Ohio. Mr. Plunkett was also cited for DUI and his license was seized.

Id. at ¶17. The Court found that this statement of fact, along with the grounds cited in the brief, was stated with enough particularity pursuant to *Shindler* to place the prosecutor and court on notice as to what the appellant wished to generally challenge. Therefore the State had a slight burden to show that there was substantial compliance with the field sobriety test requirements.

The Twelfth District also noted that a defendant can raise this slight burden upon the State by stating a factual basis specific to the defendant's case. *State v. Deutsch*, 12th Dist. No. CA2008-03-035, 2008-Ohio-5658, ¶12. One way that a defendant can obtain factual basis to support a motion to suppress is through cross-examination at a hearing on the motion:

A defendant who files a boilerplate motion with a bare minimum factual basis will need to engage in cross-examination if he wishes to require the state to respond more than generally to the issues raised in the motion.

Id. at ¶26. See also: *State v. Wyatt*, 12th Dist. No. CA2008-01-013, 2008-Ohio-5667, ¶15 (“[T]he necessary factual basis can be obtained during cross-examination...”); *State v. Eyer*, 12th Dist. CA-2007-06-071, 2008-Ohio-1193, ¶12 (“One way this factual basis can be obtained is during cross-examination at the hearing on the motion.”); *State v. Henry*, 12th Dist. No. CA2008-05-008, 2009-Ohio-10, ¶12 (“However, if the defendant's motion to suppress lacks the required particularity, the defendant may still provide some factual basis, either during cross-examination or by conducting formal discovery, to support a claim that the standards were not followed in an effort to ‘raise the slight burden’ placed on the state.”)

Once the factual basis has been established with particularity during cross-examination, then the State is required to provide a specific response showing substantial compliance in regards to the facts elicited by the defendant which are specific to his or her case. *Jimenez* at ¶38.

In *State v. Fink*, 12th Dist. Nos. CA-2008-10-118, CA2008-10-119, 209-Ohio-3538, the defendant merely alleged that “the tests were not administered in substantial compliance with the testing standards in effect at the time the tests were administered.” *Id.* at ¶28. The Court found that this statement was stated with sufficient particularity to place the State on notice of the issue being challenged, and therefore, the defendant had the opportunity to cross-examine the officer at the suppression hearing to develop a case specific factual basis to raise the State’s slight burden. *Id.* at ¶32. These cases establish, at a minimum, that a defendant has a *right* to a hearing and the opportunity to cross-examine the arresting officer in order to ascertain a more detailed factual basis to support the violations noted in a defendant’s motion to suppress.

Codeluppi has similarly set forth adequate notice of the issues to have been entitled to a hearing on the matter. As the State has never shown that it substantially complied with the NHTSA guidelines in general, the State has not met its minimal burden in this case. As such, it was error to deny Codeluppi’s Motion without a hearing.

5. Codeluppi set forth factual and legal bases with enough particularity pursuant to *Shindler* to be entitled to a hearing on her Motion to Suppress.

It appears that the Ohio Prosecuting Attorneys Association is requesting the Court to set forth the same standard as that requested by the Appellant herein. The Ohio Prosecuting Attorneys Association notes that “The *Shindler* standard does not impose a heavy burden, as it does not require defendants to present a highly detailed factual explanation or prove the facts they allege.” Amicus Brief at p. 6. The Ohio Prosecuting Attorneys Association further admits

that an acceptable factual basis may merely be a short recitation that the defendant “did not violate any law within the trooper’s presence and that he intended to rely upon the facts documented in the audio and video recording of the traffic stop” or that “the arresting officer did not have probable cause to stop the defendant for speeding.” Amicus Brief at p. 6 citing *State v. Rife*, 4th Dist. No. 11CA3276, 2012-Ohio-3264 and *State v. Mook*, *supra*. Ironically, pursuant to this standard, Codeluppi’s Motion was stated with adequate particularity to place the court and prosecution on notice of the issues, and thus, Codeluppi was entitled to a hearing.

Codeluppi made clear that she was expressly relying on the lack and facts documented in the police report and the fact that no video was made of the stop. Additionally Codeluppi expressly stated in her Motion, amongst other matters, that “the officer lacked sufficient reasonable grounds to effectuate a traffic stop/seizure and/or probable cause to arrest the Defendant...” and “the arresting law enforcement officer lacked probable cause to make a warrantless arrest of the Defendant.” Motion at p. 1, 3. Thus, it is undisputed that the trial court erred in this case by refusing to conduct a hearing as to any aspect of Codeluppi’s Motion to Suppress.

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 three field sobriety tests 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. As such, Appellant respectfully requests that this Honorable Court affirm *Shindler*, and require that the facts and law need only to be stated with enough particularity to place the prosecution and court on notice of the issues to be decided. To require anything more onerous would allow the State to trample the constitutional

rights of Ohio citizens by merely requiring its officers to submit vague police reports and refuse to video the stop so that it would be impossible for a defendant to set forth sufficient details of the officer's lack of substantial compliance with the NHTSA guidelines, and therefore, impossible to suppress illegally and improperly obtained evidence. *Shindler* strikes the correct balance between the information available to the defendant prior to the hearing and the State's need to have an idea of who to call and what to ask at the hearing. Thus, the proper requirement should be that the facts and law should be stated with enough particularity to place the court and prosecutor on notice of the issues to be decided.

II. CONCLUSION

As shown herein as well as in the Merit Brief of Appellant and in the Motion and Supplemental Motion before the trial court, 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, Supplemental Motion).

Codeluppi has stated the legal and factual bases of her Motion "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. Codeluppi was denied the right to due process of law in this case.

Appellant has met her burden to set forth her claims with particularity in light of the lack of information provided to her by the arresting officer. Appellee facetiously states that after reading the Motion it was not aware what was being contested. However, Codeluppi expressly stated the legal issues and noted the lack of factual information available without cross-examining Officer Young. Furthermore, the prosecutor had actual notice of the issues pursuant to her conversation with the undersigned. Aff. at ¶4-5.

Appellee claims that not having more information prior to the hearing somehow places a huge burden on the State which it does not wish to have. However, this “burden” is one that the legislature has already placed on the State as a matter of law. R.C. 4511.19(D)(4). As discussed above, where the facts cannot be ascertained until the hearing, the burden on the State is slight, in that it merely has to show substantial compliance in general terms. If case specific facts are elicited on cross examination at the hearing that support the claim of noncompliance, then the State has an additional burden of showing substantial compliance based upon the specific facts of that case.

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 cross-examine Officer Young. All the State needs to do to avoid this situation in the future is to have its officers provide a more detailed report showing substantial compliance and/or video the field sobriety tests – neither of which is a substantial burden. In fact, this Honorable Court noted in *Xenia v. Wallace, supra*, 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:

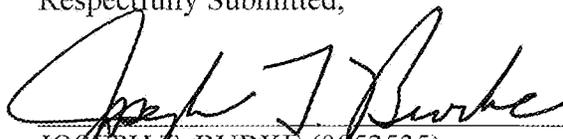
[A] party charged from the outset with the burden of persuasion with respect to a particular issue ordinarily has the subsidiary burden of going forward with evidence of such issue; (2) the state has primary access to persons with the relevant information (i.e. the law enforcement officers); and (3) 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.”)

The State’s request to reduce its workload must be balanced against the constitutional rights of Ohio citizens. When these two competing interests are reviewed, a person’s constitutional rights clearly outweigh any limited burden placed upon the State to document their substantial compliance with the law. If the State were not to be required to document their substantial compliance or to establish the same at a suppression hearing when there is no documentation of same, then defendants’ constitutional rights will be trampled time and time again as the defendants will never be in a position to establish an impossible burden of showing the existence of a constitutional violation without access to facts to establish the same.

The decision below 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.

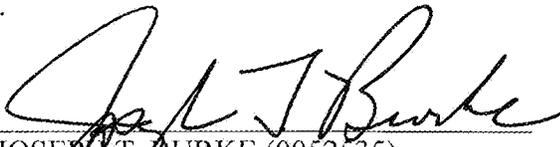
Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Reply Brief of Appellant Corrine Codeluppi" was forwarded via regular U.S. Mail to Appellee through its counsel of record, Toni 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; counsel for Amicus Curiae Cuyahoga Criminal Defense Lawyers Association, John T. Forristal, P.O. Box 16832, Rocky River, Ohio 44116, and counsel for Amicus Curiae Ohio Prosecuting Attorneys Association at Gregg Marx and Jocelyn S. Kelly, 239 West Main Street, Suite 101, Lancaster, Ohio 43130 on this 22nd day of August, 2013.



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