

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
Appellee,	:	On Appeal from the
	:	Hamilton County Court
vs.	:	of Appeals, First
	:	Appellate District
DARRYLE SANDERS,	:	
	:	Court of Appeals
Appellant.	:	Case Nos. C-130193, C-130194

14-0478

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT DARRYLE SANDERS

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**EXPLANATION OF WHY THIS CASE RAISES A SUBSTANTIAL
CONSTITUTIONAL QUESTION AND IS OF GREAT PUBLIC INTEREST**

This case raises a question concerning the right to be free from unreasonable searches and seizures under the Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution. In particular, it raises the question of when probable cause to arrest has been established in an operating a vehicle under the influence investigation. This case is also of great public interest because it asks whether an appellate court errs in reversing a trial court's grant of a motion to suppress evidence gathered after an unreasonable seizure, where, according to its own precedent, probable cause to arrest had not been established at the time of arrest.

STATEMENT OF THE CASE AND PROCEDURAL POSTURE

At 2:44 a.m. on July 12, 2012, Ohio State Highway Patrol Trooper Jacob Salamon, while driving in the opposite direction, observed Darryle Sanders traveling 59 miles per hour on Columbia Parkway in Cincinnati, which has a 45-miles-per-hour speed limit. Trooper Salamon performed a U-turn and followed Mr. Sanders, who had slowed to 51 miles per hour. Trooper Salamon narrated his observations on video, alleging marked-lines violations by Mr. Sanders despite a lack of any indication that Mr. Sanders' tires ever completely crossed over any marked lines on the street. Notably, Mr. Sanders was not charged with any marked-lanes violations.

Trooper Salamon initiated a stop of Mr. Sanders after they both pulled through the intersection of Delta Avenue and Columbia Parkway. Mr. Sanders immediately signaled to the right and pulled over. Trooper Salamon approached Mr. Sanders' car and asked for his license and insurance, which Mr. Sanders provided without issue. Trooper Salamon testified that when he reached Mr. Sanders' car, he noticed that he had a moderate odor of alcohol on his breath and bloodshot, glassy eyes. Mr. Sanders, however, did not have slurred speech. Trooper Salamon then asked Mr. Sanders if he had any alcohol to drink. He testified that Mr. Sanders said "some

drinks,” but at 2:47:21 a.m. in the video of the stop, Mr. Sanders appeared to actually respond, “just a little bit.”

Trooper Salamon asked Mr. Sanders to exit his vehicle to conduct field sobriety tests on him. Mr. Sanders got out of his car without any problem. The first test performed was the horizontal gaze nystagmus (“HGN”) test. Trooper Salamon testified that he had been trained and qualified in the HGN test. On direct examination, Trooper Salamon was asked what the standard procedure for the HGN test was. He made no mention of how far or how high to hold the stimulus from the head of the person being tested, no mention that the person’s head should be still, nor any testimony of how long the test should take. Trooper Salamon did not testify regarding the stimulus distance until cross-examination, and only responded affirmatively when asked if the stimulus must be slightly above eye level (he did not offer the information himself).

Trooper Salamon testified that he does not use the National Highway Traffic Safety Administration (“NHTSA”) chart for taking field notes when observing field sobriety tests. “A lot of departments that don’t have cameras use this. *** Because they use it to turn in as evidence,” he said. “Since we have cameras, we don’t necessarily use it.” Nevertheless, Trooper Salamon performed the HGN test off camera.

While performing the HGN test, Mr. Sanders was facing a row of buildings with glass facades, his right-rear turn signal was blinking, the trooper’s rear overhead lights were on, and one vehicle drove past. Furthermore, Trooper Salamon testified that the NHTSA manual requires a minimum of 80 seconds to perform the HGN test. The video of the stop indicates he started the HGN test at 2:48:37 a.m. and finished at 2:49:54 a.m., for a total of 77 seconds. He testified that during the HGN test he observed all six clues of impairment. He did, however, also test for vertical nystagmus, which he did not observe.

The second field sobriety test performed was the one-leg stand. Trooper Salamon did not testify whether he had any training in the one-leg stand test, but he did testify regarding how the test is performed. In performing the one-leg stand test, which was the only test visible on camera for the whole duration of the test, Mr. Sanders exhibited no clues of impairment.

The final field sobriety test performed was the walk-and-turn test. Trooper Salamon also did not testify whether he had any training in the administration of the walk-and-turn test, but he did testify as to how it is performed. He testified that, “[y]ou demonstrate how to turn around, and then they do the nine steps back.” He also testified that he did not read the NHTSA instructions for the walk-and-turn test, but instead gave them from memory.

Trooper Salamon did not testify regarding a “series of small steps” for the turn, but instead demonstrated a maneuver in which he took one step out, turned on his pivot foot, and stepped back to the line with the foot with which he stepped out. On the video, only the instructions, the first six steps out and the last six steps back take place on camera. Trooper Salamon testified he observed four clues out of eight on the walk-and-turn test: Mr. Sanders allegedly moved his feet while listening to the instructions, he did not touch heel-to-toe, he stepped off the line and he turned incorrectly. The only one of those clues apparent on the video was Mr. Sanders moving his feet during the instructions.

Based on the foregoing, Mr. Sanders was charged with Operating a Vehicle Under the Influence of Alcohol, a Drug of Abuse, or a Combination of Them (“OVI”) under both R.C. 4511.19(A)(1)(a) and R.C. 4511.19(A)(1)(d), and Speeding in violation of R.C. 4511.21(A). He subsequently filed a Motion to Suppress his warrantless seizure on March 4, 2013. A hearing on that Motion to Suppress was held before the trial court on March 20, 2013.

The trial court said it was “considering everything including the film” in ruling on the Motion to Suppress. It made several findings of fact. It found that Mr. Sanders hit the white lines with his tires several times, but that he never actually left his lane of travel – leaving speeding as the primary reason for the stop. It also found that “the officer did observe what he described as a moderate odor of alcohol, and that there was no slurred speech, and that the defendant was able to communicate with this officer and answer all questions, retrieve his driver’s license, registration and insurance.” It went on to find that “the defendant was able to sufficiently exit the vehicle with no problems, [and] that the officer did observe the bloodshot, glassy eyes outside of the vehicle.”

The trial court also found that there was a great deal of glass on the buildings in the area where the HGN test was performed, that Mr. Sanders’ car’s signal light was flashing, that traffic was still moving by, and that flashing lights could still be seen emanating around the area and off the glass from the buildings. The trial court said it could not hear in the video whether the instructions given by Trooper Salamon for the HGN test included telling Mr. Sanders to hold his head still. Therefore, it found the HGN test was not performed in substantial compliance with NHTSA standards. Regarding the one-leg stand test, the trial court found that it was performed in substantial compliance with NHTSA standards, and that Mr. Sanders “sufficiently passed that test.” Concerning the walk-and-turn test, the trial court found that the way in which the test was explained and demonstrated by Trooper Salamon did not substantially comply with NHTSA standards. Based on the foregoing, the trial court suppressed the HGN test and the walk-and-turn test.

Finally, in ruling on the Motion to Suppress, the trial court said, “So what we have left is speeding. We have weaving within lanes or marked lanes violation within lanes. We have a

moderate odor of alcohol, bloodshot, glassy eyes and no slurred speech. We have him passing the one leg stand. And this court finds that there was not probable cause to arrest him based on all that I have seen both by way of the testimony and by what this Court saw by way of the video.”

The trial court granted Mr. Sanders’ Motion to Suppress. The state appealed to the Hamilton County Court of Appeals, First Appellate District. The First District reversed the trial court’s decision and remanded the case for further proceedings on February 14, 2014.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: The Hamilton County Court of Appeals, First Appellate District, erred in reversing the trial court’s grant of Mr. Sanders’ Motion to Suppress, where the trial court’s findings of fact were supported by competent and credible evidence, and the State Trooper did not have sufficient evidence, derived from a reasonably trustworthy source of facts and circumstances, sufficient to cause a prudent person to believe Mr. Sanders was driving under the influence.

The Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution guarantee the right to be free from unreasonable searches and seizures. *State v. Orr*, 91 Ohio St.3d 389, 745 N.E.2d 1036 (2001). In this case, Mr. Sanders was subjected to an unreasonable seizure when he was arrested without probable cause that he had been driving under the influence of alcohol. The trial court suppressed the evidence obtained against Mr. Sanders as a result of his warrantless seizure. The Hamilton County Court of Appeals, First Appellate District, erred by reversing the trial court’s grant of Mr. Sanders’ Motion to Suppress. There was no probable cause to arrest Mr. Sanders, and to find otherwise was not only incorrect, but went against the First District’s own precedent.

Appellate review of a trial court’s ruling on a motion to suppress represents a mixed question of law and fact. Appellate courts must accept the trial court’s findings of fact if they are

supported by competent and credible evidence, but they review *de novo* the trial court's application of the relevant law to those facts. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶8.

The legal standard for determining whether an officer had probable cause to arrest a suspect for operating a vehicle under the influence of alcohol is 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." *Cincinnati v. Bryant*, 1st Dist. Hamilton No. C-090546, 2010-Ohio-4474, ¶15, quoting *State v. Homan*, 89 Ohio St.3d 421, 427, 732 N.E.2d 952 (2000). This is an objective, not subjective, standard. *Bryant* at ¶15, citing *State v. Deters*, 128 Ohio App.3d 329, 333, 714 N.E.2d 972 (1st Dist. 1998).

Under R.C. 4511.19(D)(4)(b), the State must prove by clear and convincing evidence that the field sobriety tests were administered in substantial compliance with testing standards in order for the officer involved to testify concerning the results of those tests and for the State to introduce those results into evidence. *State v. Rice*, 1st Dist. Hamilton Nos. C-090071, C-090072 and C-090073, 2009-Ohio-6332, ¶26. In other words, if the State cannot prove by clear and convincing evidence that the field sobriety tests were administered in substantial compliance with testing standards, those tests must be suppressed. R.C. 4511.19(D)(4)(b) is written as follows:

"In any criminal prosecution or juvenile court proceeding for a violation of division (A) or (B) of this section, *** 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.”

When it reversed the trial court’s grant of Mr. Sanders’ Motion to Suppress, the First District Court of Appeals issued an unclear Opinion that is both internally inconsistent and inconsistent with its own precedent. In paragraph three of its Opinion, the First District stated, regarding Ohio State Highway Patrol Trooper Jacob Salamon’s observations of Mr. Sanders’ driving, that “[h]e also saw Sanders commit several marked-lane violations. When Sanders stopped at an intersection, Sanders’s tire crossed over the left lane line.” *State v. Sanders*, 1st Dist. Hamilton Nos. C-130193 and C-130194, 2014-Ohio-511, ¶3. Nevertheless, just eight paragraphs later, it said “[h]e weaved within his lane of travel, touching the lane line with the right side of his car. When he stopped at an intersection, he was not within his lane of travel, but partially touching the lane line with the left side of his car.” *Sanders* at ¶11. Therefore, Trooper Salamon did not actually observe Mr. Sanders commit any marked-lanes violations, and his tire did not cross over the left lane line at the intersection, just as the trial court found. This is also reflected in the fact that Mr. Sanders was not charged with any marked-lanes violations.

The First District’s Opinion was also wholly unclear as to its handling of the trial court’s finding that the horizontal-gaze-nystagmus and walk-and-turn field sobriety tests were not

performed in substantial compliance with NHTSA regulations. On the one hand, in paragraph six of its Opinion, the First District recounted the results of the field sobriety tests. *Sanders* at ¶6. On the other hand, in the next paragraph it found that the trial court did not actually suppress the results of those tests, despite the fact that the trial court granted the Motion to Suppress. That finding in the Opinion is likely based on the State's argument in its brief that no suppression actually happened, based on the trial court's statement that, "those tests will not be considered in determining whether there was probable cause to arrest."

Under R.C. 4511.19(D)(4)(b), if the field-sobriety tests were not administered in substantial compliance with the NHTSA standards, the Trooper cannot testify at trial about the tests, and the tests cannot be introduced into evidence. The definition of "suppression of evidence" is, "[a] trial judge's ruling that evidence offered by a party should be excluded because it was illegally acquired." *Black's Law Dictionary* 1578 (9th Ed.2009). It follows clear logic that the trial court would not consider evidence it has excluded. By definition, therefore, the field-sobriety tests were suppressed.

The First District's handling of the field-sobriety tests is of central importance to its inconsistency with its own precedent. The content of its Opinion leads the reader to the conclusion that it too, like the trial court, did not consider the field-sobriety tests in reaching its holding. First, it makes the following statement regarding the standard of review for the determination of probable cause: "Probable cause to arrest need not be based on a suspect's poor performance on field-sobriety tests. The totality of the facts and circumstances can support a finding of probable cause to arrest even without evidence of field-sobriety tests. *State v. Homan*, 89 Ohio St.3d 421, 427, 732 N.E.2d 952 (2000), *superseded by statute on other grounds as stated in State v. Boczar*, 113 Ohio St.3d 148, 2007-Ohio-1251, 863 N.E.2d 155; *State v. Kiefer*,

1st Dist. Hamilton No. C-030205, 2004-Ohio-5054, ¶18.” Second, after making that statement, it makes no mention of the field-sobriety tests in reaching its determination that probable cause existed at the time of arrest. Therefore, regardless of whether it believed the field-sobriety tests were suppressed, or whether it believed the field-sobriety tests were not performed in substantial compliance with NHTSA regulations, it held that probable cause existed without them.

The First District, without the field-sobriety tests, was left with the following findings in making its determination there was probable cause:

Trooper Salamon stopped Sanders’s car for speeding and marked-lane violations. Sanders was not nominally speeding; he was traveling 59 m.p.h. in a 45 m.p.h. zone, 14 m.p.h. over the posted speed limit. He weaved within his lane of travel, touching the lane line with the right side of his car. When he stopped at an intersection, he was not within his lane of travel, but partially touching the lane line with the left side of his car. When Trooper Salamon approached Sanders, he noticed that Sanders had bloodshot, glassy eyes. Trooper Salamon also noticed an odor of alcohol in the car and a moderate odor of alcohol on Sanders’s breath that continued to be apparent when Sanders got out of the car. When Trooper Salamon asked Sanders if he had consumed alcohol, Sanders admitted that he had had “some drinks.” *Sanders* at ¶11.

Based on those facts, to find that “Trooper Salamon had sufficient facts within his knowledge to warrant a prudent police officer in believing that Sanders had been operating a motor vehicle while under the influence of alcohol in violation of former R.C. 4511.19” is a departure from the First District’s precedent – specifically, *State v. Phoenix*, 192 OhioApp.3d 127, 2010-Ohio-6009, 948 N.E.2d 468 (1st Dist.) and *State v. Ruberg*, 1st Dist. Hamilton Nos. C-120619 and C-120620, 2013-Ohio-4144. The facts used in those cases to determine there was not probable cause to arrest, compared to the facts in this case, are summarized in the following chart:

	<i>State v. Phoenix</i>	<i>State v. Ruberg</i>	<i>State v. Sanders</i>
Driving	Driving without headlights on at night	Speeding, 72 m.p.h. in a 45 m.p.h. zone	- Speeding, 59 m.p.h. in a 45 m.p.h. zone - Weaving within lane - Tire on line at intersection
Eyes	Glassy and bloodshot	"A little red"	Glassy and bloodshot
Odor of Alcohol	Slight	Unspecified, but there was an odor	Moderate
Speech	No slurred speech	No slurred speech	No slurred speech
Admission of Drinking	"A couple of beers"	One drink, 9.5 hours earlier	"Some drinks" or "just a little bit"*
Getting License	No difficulty	No difficulty	No difficulty
Getting Insurance			No difficulty
Exiting Vehicle	No difficulty	No difficulty	No difficulty
Other Behavior	- Difficulty turning on headlights - Open beer bottle in back seat		
Horizontal-Gaze-Nystagmus	Invalid – Stimulus only six inches away	Six of six clues, but invalid – not turned away from traffic/cruiser lights	Six of six clues – not considered by either Court**
Vertical-Gaze-Nystagmus			No clues
Walk-and-Turn	One clue	One clue (possibly two)	Four of eight clues – not considered by either Court**
One-Leg-Stand	One clue	No clues	No clues
Probable Cause?	No	No	Yes

* Sanders disputes the finding he admitted to "some drinks" where in the video of the traffic stop it appears he said, "just a little bit."

** The trial court found this test was not administered properly. The First District Court of Appeals did not discuss whether the test was administered properly, but also did not consider the test as part of its finding that probable cause existed. *Sanders* at ¶10-12.

The above chart demonstrates that the distinctions between this case and *Phoenix* and *Ruberg* are not sufficient to find that probable cause to arrest existed here. While Mr. Sanders was speeding, weaving within his lane, and stopped with his tire on the white line at the intersection, he was travelling slower than *Ruberg* and had his headlights on, unlike *Phoenix*. It

is possible he had the greatest odor of alcohol of the three cases, because it was never made clear how strong the odor of alcohol was in *Ruberg*, other than it was not strong. However, unlike *Phoenix*, he didn't have any alcohol containers in his car, and didn't fumble around with anything such as his headlights. Finally, because the First District, like the trial court, did not consider the field-sobriety test results, Mr. Sanders demonstrated no clues on the one properly administered field-sobriety test, while *Ruberg* showed at least one clue and *Phoenix* showed two. These differences, mitigated by incriminating factors in *Phoenix* and *Ruberg* not present in this case, cannot possibly have justified the finding of probable cause and reversal of the trial court's decision.

The First District referenced three of its own precedential cases in finding that probable cause existed in this case: *State v. Whitty*, 1st Dist. Hamilton Nos. C-100101 and C-100102, 2010-Ohio-5847, ¶18-19, *State v. Fisher*, 1st Dist. Hamilton No. C-080497, 2009-Ohio-2258, ¶12, and *State v. Kiefer*, 1st Dist. Hamilton No. C-030205, 2004-Ohio-5054, ¶19. The relevant facts in those cases are summarized in the following chart:

	<i>State v. Whitty</i>	<i>State v. Fisher</i>	<i>State v. Kiefer</i>
Driving	Equipment violation	Speeding, 76 m.p.h. in a 55 m.p.h. zone	Stopped on interstate exit ramp, eyes closed, head down
Eyes	Bloodshot and watery	Slightly bloodshot	Watery, glassy, bloodshot
Odor of Alcohol	Unspecified, but there was an odor	Strong	Unspecified, but there was an odor
Speech	Mumbled and slurred		Slurred
Admission of Drinking	Consumed alcohol before driving	Initially denied, then admitted to drinking the night before	Six beers
Getting License	No difficulty	Took 15 to 20 seconds longer than average	
Getting Insurance			
Exiting Vehicle			Staggered on way to sidewalk
Other Behavior			Poor attention span
Horizontal-Gaze-Nystagmus	Performed poorly, but inadmissible	"Performed poorly"	"Failed to adequately perform", 2 of 3 suppressed
Vertical-Gaze-Nystagmus			
Walk-and-Turn	Performed poorly, but inadmissible	"Performed poorly"	"Failed to adequately perform", 2 of 3 suppressed
One-Leg-Stand	No clues	"Performed poorly"	"Failed to adequately perform", 2 of 3 suppressed
Probable Cause?	Yes	Yes	Yes

All three cases relied on by the First District in making its decision have more incriminating facts than does this case. Unlike *Whitty*, Mr. Sanders did not mumble or have slurred speech. Unlike *Fisher*, Mr. Sanders did not have a strong odor of alcohol on him, he did not struggle with his license, and he did not perform poorly on any properly administered field-sobriety tests. Unlike *Kiefer*, Mr. Sanders was not essentially passed out on an interstate exit ramp, did not slur his speech, admitted to drinking fewer than six beers, did not stagger, did not

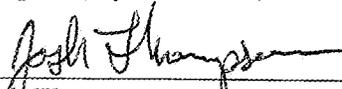
have attention-span issues and did not fail to adequately perform any properly administered field-sobriety tests.

If there is a line in the First District at which probable cause to arrest develops in OVI investigations, it is not clear where that line is. The previous line established by *Phoenix* and *Ruberg* appears to have been erased and replaced by this case. The trial court acted correctly when it granted Mr. Sanders' Motion to Suppress based on the precedent that existed at the time of the decision. The First District erred in changing that line to a point short of what should be considered probable cause to arrest. Based on the foregoing, the trial court did not err in granting Mr. Sanders' Motion to Suppress. This Court should take jurisdiction of this matter.

CONCLUSION

The trial court in this case did not err in granting Mr. Sanders' Motion to Suppress the evidence discovered as a result of his unreasonable seizure. Rather, the Hamilton County Court of Appeals, First Appellate District, erred in reversing that decision – in contradiction of its own precedent – because probable cause to arrest had not been established when Mr. Sanders was arrested. This Court should take jurisdiction of this matter.

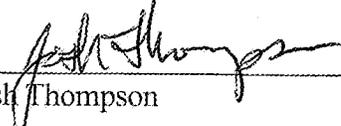
Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the Memorandum of Appellant in Support of Jurisdiction has been served on Christopher Liu, Attorney for Appellee, the State of Ohio, at 513-352-5217 via facsimile transmission on this 27th day of March, 2014.



Josh Thompson

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

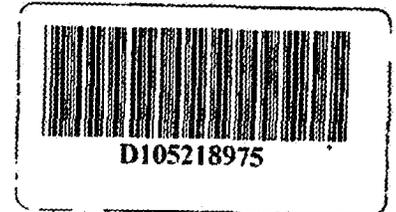
STATE OF OHIO, : APPEAL NOS. C-130193
 : C-130194
 Plaintiff-Appellant, : TRIAL NOS. 12TRC-34067A & B
 :
 vs. : *OPINION.*
 :
 DARRYLE SANDERS, : PRESENTED TO THE CLERK
 : OF COURTS FOR FILING
 Defendant-Appellee. :
 :
 FEB 14 2014

COURT OF APPEALS

Criminal Appeals From: Hamilton County Municipal Court

Judgments Appealed From Are: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: February 14, 2014



John P. Curp, City Solicitor, Charles Rubenstein, City Prosecutor, and Christopher Liu, Assistant City Prosecutor, for Plaintiff-Appellant,

Office of the Hamilton County Public Defender and Josh Thompson, for Defendant-Appellee.

Please note: this case has been removed from the accelerated calendar.

OHIO FIRST DISTRICT COURT OF APPEALS

DINKELACKER, Judge.

{¶1} Plaintiff-appellant the city of Cincinnati appeals the decision of the Hamilton County Municipal Court granting defendant-appellee Darryle Sanders's motion to suppress evidence stemming from his arrest for driving under the influence of alcohol on the basis that the arresting officer did not have probable cause to arrest him. We find merit in the city's sole assignment of error, and we reverse the trial court's judgment.

{¶2} On July 12, 2012, Sanders was charged with operating a motor vehicle under the influence of alcohol under former R.C. 4511.19(A)(1)(a), operating a motor vehicle with a prohibited breath-alcohol content under former R.C. 4511.19(A)(1)(d) and speeding under former R.C. 4511.21(A). Subsequently, the trial court held a hearing on Sanders's motion to suppress.

{¶3} The evidence at the hearing showed that Ohio State Highway Patrol Trooper Jacob Salamon observed Sanders traveling 59 m.p.h. in a 45 m.p.h. zone on Columbia Parkway. He also saw Sanders commit several marked-lane violations. When Sanders stopped at an intersection, Sanders's tire crossed over the left lane line.

{¶4} Trooper Salamon stopped Sanders's car. When he approached Sanders, he noticed that Sanders's eyes were glassy and bloodshot. He also noticed an odor of alcohol in the car and a moderate odor of alcohol on Sanders's breath, which continued to be apparent after he got out of the car. When Trooper Salamon asked if he had consumed any alcohol, Sanders replied that he had had "some drinks."

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{¶5} Trooper Salamon had Sanders perform field-sobriety tests. First, he administered the horizontal-gaze-nystagmus test. After checking each eye twice, Trooper Salamon observed a lack of smooth pursuit in each eye, an onset of nystagmus prior to 45 degrees in each eye, and nystagmus at maximum deviation in each eye. In total, he observed six out of six potential clues of impairment.

{¶6} Sanders performed the one-leg-stand test satisfactorily, and Trooper Salamon observed zero out of four clues. Finally, Trooper Salamon had Sanders perform the walk-and-turn test. He saw Sanders "break his feet" before completion of the instructions. Sanders also failed to touch heel to toe, stepped off the line, and lost his balance during the turn. In total, Trooper Salamon observed four out of eight clues of impairment. Based on the totality of the circumstances, Trooper Salamon believed that Sanders was impaired and arrested him.

{¶7} In ruling on the motion to suppress, the trial court found that the horizontal-gaze-nystagmus test and the walk-and-turn test were not given in substantial compliance with the regulations established by the National Highway Transportation Safety Administration. Therefore, although it did not actually suppress the results of the tests, the court did not consider those tests in ruling on the motion to suppress. The court ultimately determined that Trooper Salmon lacked probable cause to arrest and granted Sanders's motion to suppress. The city has filed a timely appeal under R.C. 2945.67(A) and Crim.R. 12(K).

{¶8} In its sole assignment of error, the city contends that the trial court erred in granting Sanders's motion to suppress based on a lack of probable cause to arrest. It argues that Trooper Salamon's observations, together with Sanders's admission that he had been drinking, were sufficient to warrant a prudent person in

OHIO FIRST DISTRICT COURT OF APPEALS

believing that Sanders was driving under the influence of alcohol. This assignment of error is well taken.

{¶9} Appellate review of a motion to suppress presents a mixed question of law and fact. We must accept the trial court's findings of fact as true if competent, credible evidence supports them. But we must independently determine whether the facts satisfy the applicable legal standard. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8; *State v. Fisher*, 1st Dist. Hamilton No. C-080497, 2009-Ohio-2258, ¶ 7.

{¶10} In determining whether probable cause to arrest existed, a court must ascertain whether, at the time of the arrest, the police officer had sufficient facts and circumstances within his knowledge to warrant a prudent person in believing that the defendant was committing or had committed an offense. *State v. Heston*, 29 Ohio St.2d 152, 155-156, 280 N.E.2d 376 (1972); *Fisher* at ¶ 10. Probable cause to arrest need not be based on a suspect's poor performance on field-sobriety tests. The totality of the facts and circumstances can support a finding of probable cause to arrest even without evidence of field-sobriety tests. *State v. Homan*, 89 Ohio St.3d 421, 427, 732 N.E.2d 952 (2000), *superseded by statute on other grounds as stated in State v. Boczar*, 113 Ohio St.3d 148, 2007-Ohio-1251, 863 N.E.2d 155; *State v. Kiefer*, 1st Dist. Hamilton No. C-030205, 2004-Ohio-5054, ¶ 18.

{¶11} Trooper Salamon stopped Sanders's car for speeding and marked-lane violations. Sanders was not nominally speeding; he was traveling 59 m.p.h. in a 45 m.p.h. zone, 14 m.p.h. over the posted speed limit. He weaved within his lane of travel, touching the lane line with the right side of his car. When he stopped at an intersection, he was not within his lane of travel, but partially touching the lane line with the left side of his car. When Trooper Salamon approached Sanders, he noticed

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that Sanders had bloodshot, glassy eyes. Trooper Salamon also noticed an odor of alcohol in the car and a moderate odor of alcohol on Sanders's breath that continued to be apparent when Sanders got out of his car. When Trooper Salamon asked Sanders if he had consumed alcohol, Sanders admitted that he had had "some drinks."

{¶12} Thus, Trooper Salamon had sufficient facts within his knowledge to warrant a prudent police officer in believing that Sanders had been operating a motor vehicle while under the influence of alcohol in violation of former R.C. 4511.19. Therefore, he had probable cause to arrest Sanders. *See State v. Whitty*, 1st Dist. Hamilton Nos. C-100101 and C-100102, 2010-Ohio-5847, ¶ 18-19; *Fisher*, 1st Dist. Hamilton No. C-080497, 2009-Ohio-2258, at ¶ 12; *Kiefer* at ¶ 19. We sustain the city's assignment of error, reverse the trial court's judgments and remand the cause to the trial court for further proceedings consistent with the law and this opinion.

Judgments reversed and cause remanded.

HENDON, P.J., and FISCHER, J., concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.