IN THE SUPREME COURT OF OHIO

STATE OF OHIO	)	Case No. 2015-2019
	)	
VS.	)	On Appeal from the
	)	11th District Court of
DENNIS I. BAIRD	)	Appeals (Lake County)
	)	Case No. 2014-L-098
	)	

REPLY BRIEF IN OPPOSITION TO JURISDICTION OF APPELLANT, THE STATE OF OHIO

Judith M. Kowalski (0061386)
333 Babbitt Road Suite 323
Euclid, Ohio 44123
(216)261-1529
FAX: (216)261-4821
judykowalski@att.net

COUNSEL FOR APPELLEE, DENNIS BAIRD

Judson J. Hawkins (0012406)
37811 Lake Shore Blvd.
Eastlake, Ohio 44095
(440)840-6286
FAX: (440)942-8880
hawkinsatlaw@outlook.com

COUNSEL FOR APPELLANT, THE STATE OF OHIO

TABLE OF CONTENTS

EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION.....3

STATEMENT OF THE CASE AND THE FACTS.....5

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....7

Proposition of Law No. I: *Old Chief v. United States* (1997) 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed. 2d 574 is controlling authority for the case at bar, and requires that a trial court accept a proffered stipulation of a prior O.V.I. conviction, even over the objection of the State, when to do otherwise would allow unnecessary and potentially prejudicial evidence before the jury.....7

Old Chief v. United States (1997) 519 U.S. 172, 117 S. Ct. 644, 136 L.Ed. 2d 574....7

State v. Payne (1999) Ohio App. LEXIS 1433.....7

State v. Hatfield 2007-Ohio-7130.....8

Michelson v. United States (1948) 335 U.S. 469.....8

Proposition of Law #2: If this Court finds that the decision in the instant case is in conflict with and contradictory to other cases in this and other districts, then this Court should follow the dissent in *State v. Baker* 126 Ohio St. 3d 1215, 2010-Ohio-3235, 931 N.E. 2d 122, and adopt the holding in *Old Chief* and apply the reasoning to Ohio statutes.....9

State v. Bibler 17 N. E. 3d 1154, 2014-Ohio-3375(Ohio App. 3rd District 2014)...9,10

State v. Robinson 2012-Ohio-6068.....9

State v. Baker 126 Ohio St. 3d 1215, 2010-Ohio-3235, 931 N.E. 2d 122.....9

State v. Woods 8th District Cuyahoga No. 78752, 2001 WL 1002233.....10

CONCLUSION.....10

CERTIFICATE OF SERVICE.....11

APPENDIX
OPINION of the 11th District Court of Appeals..... 1

JUDGMENT ENTRY of the 11th District Court of Appeals.....11

EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case presents no critical issue regarding the matters of judicial discretion, U.S. Supreme Court interpretations of the Federal Rules of Evidence, nor does it have any impact on the state's ability to introduce elements of a crime during jury trials. The Court of Appeals in this matter correctly applied the Supreme Court holding in question to these facts.

The 11th District Court of Appeals properly adopted a controlling U.S. Supreme Court decision, namely *Old Chief v. United States* (1997) 519 U.S. 172, 117 S.Ct.644, 136 L.Ed. 2d 574. In that case, the court held that the government is required to accept a defendant's stipulation concerning a prior conviction, if the defendant is subject to prosecution and conviction for a current crime based solely on a prior conviction. This is in order to ensure that the defendant is not unfairly prejudiced. In the case at hand, the State of Ohio only needed to prove one conviction, but insisted on going forward and presenting evidence of two convictions, ostensibly to inflame the prejudices of the jury so that they would see Mr. Baird as a chronic offender. Even the dissent in the case at bar agrees that the trial court erred by admitting that evidence. The facts in this case are analogous to those in *Old Chief,* so there is no issue of the court of appeals misapplying the rule stated therein.

Further, the State's assertion that the case is of great general and public interest because it elevates federal court decisions on evidence to controlling authority for Ohio courts is an exaggeration. The issue in the instant case is nearly identical to that in *Old*

Chief, and therefore, that decision serves as appropriate authority upon which to overturn Mr. Baird's conviction. *Old Chief* is not simply a federal court decision on federal rules of evidence; it is a ruling by the highest court in the land on a simple but very important question: Can a state refuse to accept a defendant's proffered stipulation to a conviction and insist upon going forward to present evidence that is guaranteed to prejudice the accused? The State does not like the answer, but that is not sufficient reason to claim that the Court of Appeals has ignored precedent and stripped judges of discretion.

Finally, this decision does not undermine the public's confidence in how the state executes the laws as adopted by the legislature. It simply prevents courts from allowing the state to introduce unfairly prejudicial evidence, especially when a defendant offers a concession that *helps the state prove an element of its case.* As Counsel for the State admits in his brief, the state must proceed lawfully in deciding to introduce or not introduce evidence; the state cannot insist on bringing in evidence that is potentially inflammatory and unfairly prejudicial to the accused.

The right of the state to vigorously enforce the laws of the land is balanced by the right of an accused to a fair trial unencumbered by evidence likely to "lure the factfinder into declaring guilty on a ground different from proof specific to the offense charged."*Old Chief, supra,* at page 180. There is no substantial constitutional issue here, no great public interest and therefore, for the foregoing reasons, this Honorable Court should not accept jurisdiction in this matter.

STATEMENT OF THE CASE AND THE FACTS

Appellee Dennis Baird was arrested on February 1, 2014, and charged with O.V.I. in violation of O.R.C . 4511.19 (A)(1) and (A) (2)(a) and (b).

Mr. Baird offered to stipulate to one of his prior convictions, which would have satisfied the element of the charge that he had a prior conviction. The state refused to accept the stipulation, and the Court allowed the state to present evidence of both of Mr. Baird's prior convictions to the jury. A police officer testified to the convictions, and to certified copies of the judgment entries of those convictions (Trial Transcript, hereafter T.T.pp. 64-65). Mr. Baird was convicted of all counts.

Mr. Baird appealed to the 11th District Court of Appeals, arguing that the Court erred in allowing the State to introduce evidence of the two prior convictions when there was an offer of stipulation to one conviction.

The Court of Appeals agreed and reversed and remanded to the trial court. The decision states that pursuant to the *Old Chief* case, allowing the evidence in was unfairly prejudicial when the defendant was willing to stipulate to the prior conviction, which was an element of the crime. The Appeals Court also cited previous decisions in which the Court had applied this U.S. Supreme Court decision when interpreting Evidence Rule 403, namely *State v. Hatfield*, 2007-Ohio-7130.

However, the Court of Appeals further questioned the quality of the other evidence introduced, including a booking video which suffered from numerous technical glitches, and in which "frequently the audio and the visual do not match at all". The Court noted that the defendant suffered from medical issues that could have contributed to what officers observed that night: "He has a problem with his balance, due to damage

to his inner ear. He takes several medications, including a muscle relaxer and blood thinner" *Baird,* at Paragraph 4.

The Court also noted that in the booking video, "(h)e answered most questions quickly and without difficulty, and participated intelligently, if somewhat vigorously, in a discussion of the effect of two prior O.V.I. convictions he had sustained." It was further noted that "Mr. Baird's gait is somewhat shambling. His voice is very gruff, and his speech pattern sometimes moves from fast to slow without warning or apparent reason. At the trial in this matter, his mother Judy Baird, with whom he lives, testified. She stated that this was his normal manner of speech." The mother also testified at trial that she was with the defendant from 4:00PM until 7:30PM on the day of arrest, and that he did not drink anything during that time. *Baird*, at Paragraphs 8 and 9.

On appeal, Mr. Baird raised five assignments of error, and the Court decided that, having found merit in his claim that the evidence of prior convictions was improperly introduced, the other issues are moot. However, the Court did review the trial transcript and the evidence presented and noticed the problems presented that went beyond bringing in the two prior convictions.

Even the dissent agreed that the evidence of prior convictions was improperly admitted "on the basis that admission of said evidence violated Evid. R. 403 (A) and *Old Chief,* supra." *State v. Baird* 2014-L-0098, at Paragraph 31.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: *Old Chief v. United States* (1997) 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed. 2d 574 is controlling authority for the case at bar, and requires that a trial court accept a proffered stipulation of a prior O.V.I. conviction, even over the objection of the State, when to do otherwise would allow unnecessary and potentially prejudicial evidence before the jury.

The City of Eastlake in its memorandum correctly outlines the holding in *Old Chief,* but incorrectly asserts that the premise is different from the one in the instant case. The City claims that because *Old Chief* relied on any felony conviction, whereas the statute in this case requires that a prior OVI conviction be named in the complaint and proved to the jury. It is a distinction without a difference under these circumstances. In this case, the defendant offered to stipulate to an element of the crime, which was one prior OVI conviction. The City of Eastlake refused to agree because the prosecutor wanted to bring in *two* prior convictions---which he did not need. The only possible reason would be to not only prove the conviction but prejudice the jury. In the syllabus, the U. S. Supreme Court explicitly prohibits such a move:

> "(b) As to a criminal defendant, Rule 403's term "unfair prejudice" speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on an improper basis rather than on proof specific to the offense charged. *Such improper grounds certainly include generalizing from a past bad act that a defendant is by propensity the probable perpetrator of the current crime.* (Emphasis added)Thus, Rule 403 requires that the relative probative value of prior-conviction evidence be balanced against its prejudicial risk of misuse. A judge should balance these factors not only for the item in question but also for any actually available substitutes. If an alternative were found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk. Pp. 180-185.

In the case at bar, allowing the defendant to stipulate to an element of the offense would be as probative of the fact of his conviction, as the testimony of the police officer to the certified judgment entry. However, it would not be as prejudicial to Mr. Baird because it would not be testified to by a witness who is in a position of authority, and there arguably would be no testimony about it at all. In this matter, the City of Eastlake appears to be trying to paint this defendant as a chronic, habitual offender by insisting on presenting both convictions to the jury.

The Appellant cites in support of his theory case law significantly older than the cases cited by the Court of Appeals in its decision. In *State v. Payne* (1999 11th District Court of Appeals) 97-L-284, 1999 Ohio App LEXIS 1433, the appeals court ruled that the prosecution had to prove the defendant's three prior convictions, including the name and nature of those convictions. A stipulation by the defendant would have included that information.

The 11th District much more recently applied *Old Chief* in interpreting Ohio Evidence Rule 403, which is substantially the same as the federal rule, in the case of *State v. Hatfield* 2007-Ohio-7130.

It is true that either evidence or stipulation must be presented to the jury. But a stipulation does not run the risk of being embellished or given undue weight, based on the manner in which the witness testifies or who that witness is. And in this case, the State was not only determined to present evidence of one conviction, which was all that was necessary, but two convictions, which were not necessary. Evidence Rule 404B specifically prohibits "evidence of other crimes, wrongs or acts…to prove the character of a person in order to show that he acted in conformity therewith."

As the 11th District pointed out in the *Hatfield* case at **¶147,** quoting *Old Chief:*

> "'The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime.'" Id., quoting, *Michelson v.. United States* (1948), 335 U.s. 469, 475-476. Such a maneuver is procedurally illegitimate because such evidence tends to "weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." Id. Under the circumstances, the admission of appellant's entire record of suspensions created an environment in which the jury's verdict could very likely have been premised upon improper considerations."

Therefore, as the Eleventh District correctly pointed out in its opinion in this matter, *Old Chief* is controlling authority for this specific situation, and the Court and others have so held in recent cases.

Proposition of Law #2: If this Court finds that the decision in the instant case is in conflict with and contradictory to other cases in this and other districts, then this Court should follow the dissent in *State v. Baker* 126 Ohio St. 3d 1215, 2010-Ohio-3235, 931 N.E. 2d 122, and adopt the holding in *Old Chief* and apply the reasoning to Ohio statutes.

In a recent Third District Court of Appeals case, *State v. Bibler*, 17 N.E.3d 1154, 2014-Ohio-3375 (Ohio App. 3 Dist. 2014), the Court noted that a number of courts believe the *Old Chief* holding should be adopted by this Court:

> **"[¶33]** Bibler is requesting that this court liberally construe *Old Chief* to exclude all mention of a prior conviction if a defendant assents to the prior conviction, whether through stipulation or pleading guilty to it. In making that request, Bibler raises the same argument raised by the Sixth District that " at least three justices of the Ohio Supreme Court have recently indicated that Ohio should adopt the holding in *Old Chief." State v. Robinson*, 6th Dist. Lucas No. L-10-1369, 2012-Ohio-6068, ¶ 41, citing *State v. Baker*, 126 Ohio St. 3d 1215, 2010-Ohio-3235, 931 N.E. 2d 122 (Lundberg Stratton, J., Brown, C.J., and Pfeifer, J. dissenting).

The Court further noted:

> **[¶37]** ...Bibler notes that the Eighth District acknowledged the need to adopt *Old Chief* in Ohio to prevent the State from admitting the name and nature of a prior conviction if a defendant offers to concede as much. *State v. Woods*, 8th Dist. Cuyahoga No. 78752, 2001 WL 1002233, *2 (Aug. 30, 2001).

In the *Baker* case, the cause was dismissed "for want of conflict" but the dissent noted that the certified question before the Court involved whether *Old Chief* should be controlling law for the courts of Ohio:

> "... (T)he issue is squarely before us and has remained unresolved in Ohio for 13 years. The bench and bar of this state need clarification on this issue. The Ninth District needs a definitive answer from us on our interpretation. Therefore, I dissent from the dismissal of this case as having been improvidently certified, and I would adopt the holdings of *Old Chief* and apply the reasoning of *Old Chief* to the Ohio statute."

CONCLUSION

For the foregoing reasons, this matter is not a case of great general or public interest, and does not involve a substantial constitutional question as the Court of Appeals correctly applied the holding in *Old Chief* to these facts. Further, if this Court accepts jurisdiction, it should follow the decision in *Old Chief*, and bar the State from admitting prior convictions through testimony and evidence if a defendant offers to concede those facts.

Respectfully submitted,

JUDITH M. KOWALSKI 0061386
Attorney for Dennis Baird
333 Babbitt Road Suite 323
Euclid, Ohio 44123
(216)261-1529
FAX: (216)261-4821
judykowalski@att.net

CERTIFICATE OF SERVICE

A TRUE AND ACCURATE COPY of Appellee's response was sent by ordinary mail,postage prepaid, to Judson Hawkins, Esq. at 37811 Lake Shore Blvd., Eastlake, Ohio 44095, this 12th day of JANUARY 2016.

Judith M Kowalski

JUDITH M. KOWALSKI

STATE OF OHIO	)	**IN THE COURT OF APPEALS**
	)SS.	
COUNTY OF LAKE	)	**ELEVENTH DISTRICT**

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

DENNIS I. BAIRD,

Defendant-Appellant.

JUDGMENT ENTRY

CASE NO. 2014-L-098

FILED
COURT OF APPEALS
NOV 02 2015
MAUREEN G. KELLY
CLERK OF COURT
LAKE COUNTY, OHIO

For the reasons stated in the Opinion of this court, the third assignment of error has merit. We decline to reach the remaining assignments of error, finding them moot. The order of this court is that the judgment of the Willoughby Municipal Court is reversed, the sentence is vacated, and this matter is remanded for further proceedings consistent with this opinion. Costs to be taxed against appellee.

Colleen Mary O'Toole
JUDGE COLLEEN MARY O'TOOLE

THOMAS R. WRIGHT, J., concurs,

CYNTHIA WESTCOTT RICE, J., dissents with a Dissenting Opinion.

standing alone, constitutes overwhelming proof of the defendant's guilt." *State v. Williams* 6 Ohio St.3d 281 (1983), paragraph six of the syllabus.

{¶36} Here, there was only one error committed by the court -- the admission of appellant's prior OVI convictions. In addition, the state presented ample evidence that appellant was under the influence before he was booked. Officer Isabella testified that appellant: (1) crossed the center line twice; (2) had slurred speech, glassy eyes, and smelled of alcohol; (3) admitted he had had two drinks that evening; (4) said it was 1:30 p.m. when in fact it was 8:40 p.m., in responding to the officer's question asking him the time; (5) failed the one field sobriety test he agreed to take, the horizontal gaze nystagmus test; and (6) was unable to correctly recite the alphabet twice. A review of the record reveals that, after leaving out the disputed evidence, the remaining evidence presented by the state satisfied both standards for harmless error. I would therefore affirm the trial court's judgment.

{¶37} For the foregoing reasons, I respectfully dissent.

this court has been reversed * * *, and this case is remanded to the district court for further proceedings in light of the Supreme Court's opinion in *Old Chief*[, *supra.*] The district court may consider whether any error found by the Supreme Court was harmless." 121 F.3d 448.

{¶32} Error is harmless unless the defendant's substantial rights are affected. Crim.R. 52(A); *State v. Hicks*, 6th Dist. Ottawa No. L-83-074, 1991 Ohio App. LEXIS 3856, *13 (Aug. 16, 1991).

{¶33} Ohio courts have discussed two standards for harmless error in criminal cases, depending on whether the rights affected by the error are constitutional or non-constitutional rights. For non-constitutional errors in the admission of evidence, the test is whether "there is substantial other evidence to support the guilty verdict." *State v. Webb*, 70 Ohio St.3d 325, 335 (1994).

> {¶34} The Ohio test * * * for determining whether the admission of inflammatory and otherwise erroneous evidence is harmless non-constitutional error requires the reviewing court to look at the whole record, leaving out the disputed evidence, and then to decide whether there is other substantial evidence to support the guilty verdict. If there is substantial evidence, the conviction should be affirmed, but if there is not other substantial evidence, then the error is not harmless and a reversal is mandated. *State v. Davis*, 44 Ohio App.2d 335, 347 (8th Dist.1975).

{¶35} In contrast, "[w]here constitutional error in the admission of evidence is extant, such error is harmless beyond a reasonable doubt if the remaining evidence,

{¶29} The judgment of the Willoughby Municipal Court is reversed, Mr. Baird's sentence is vacated, and this matter is remanded for further proceedings consistent with this opinion.

THOMAS R. WRIGHT, J., concurs,

CYNTHIA WESTCOTT RICE, J., dissents with a Dissenting Opinion.

CYNTHIA WESTCOTT RICE, J., dissents with a Dissenting Opinion.

{¶30} Because I disagree with the majority's analysis and disposition with respect to the third assignment of error, which is the only assigned error the majority addresses in its opinion, I respectfully dissent.

{¶31} I agree with the majority that the trial court erred by admitting evidence of appellant's prior OVI convictions, on the basis that admission of said evidence violated Evid.R. 403(A) and *Old Chief, supra*. However, even an *Old Chief* violation does not automatically warrant reversal of an otherwise valid conviction where the error committed by the trial court is otherwise harmless beyond a reasonable doubt. *See State v. Riffle*, 5th Dist. Muskingum No. 2007-0013, 2007-Ohio-5299, ¶32-35, citing *Old Chief*. In *Old Chief*, the United States Supreme Court did not remand the case to the trial court for a new trial; rather the Court remanded the case to the Ninth Circuit Court of Appeals. *Id.* at 192. In a footnote, the United States Supreme Court stated, "[i]n remanding, we imply no opinion on the possibility of harmless error, an issue not passed upon below." *Id.* at n. 11. On remand, the Ninth Circuit held: "[t]he judgment of

{¶26} We find this assignment of error is controlled by *Old Chief v. United States*, 519 U.S. 172 (1997). In that case, Old Chief was willing to stipulate he had previously been convicted of a crime requiring imprisonment for more than one year, which was an element of one of the crimes with which he was newly charged. *Id.* at 174. The United States refused the stipulation, and the district court agreed, allowing in the judgment entry regarding the prior conviction. *Id.* at 177. The Ninth Circuit Court of Appeals affirmed. *Id.* The U.S. Supreme Court granted Old Chief's petition for a writ of certiorari, and reversed. *Id.* at 178. Analyzing the case under Fed.R.Evid. 403, the court concluded that when the sole issue pertaining to a prior conviction is a defendant's legal status – i.e., whether a defendant is subject to prosecution and conviction for the presently charged crime due to a prior conviction – then, the government is required to accept a defendant's stipulation regarding the prior conviction, to avoid unfair prejudice. *Old Chief* at 190-192. We have previously applied *Old Chief* in interpreting Ohio Evid.R. 403. *See, e.g., State v. Hatfield*, 11th Dist. Ashtabula No. 2006-A-0033, 2007-Ohio-7130, ¶142-148.

{¶27} Pursuant to *Old Chief*, the admission into evidence of Mr. Baird's prior OVI conviction, when he was willing to stipulate he had a prior conviction, was unfairly prejudicial, as it gave the jury an improper basis for the instant verdict.

{¶28} The third assignment of error has merit. We decline to reach the remaining assignments of error, finding them moot. App.R. 12(A)(1)(c).

of the consequences of the person's refusal or submission to the test or tests, refuse to submit to the test or tests."

{¶23} Defense counsel offered to stipulate that Mr. Baird had a prior OVI conviction. The state refused the offer, and both judgment entries of his prior convictions came into evidence. Mr. Baird argued then, as now, that this violated Evid.R. 403(A) which provides, in pertinent part: "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice * * *." Mr. Baird asserts the evidence he had two prior OVI convictions was not necessary for the state to prove its case, since he was willing to stipulate to one. He argues it was prejudicial, as it tended to show not merely that he is a repeat offender, but an habitual, chronic offender. We agree.

{¶24} We review a trial court's evidentiary rulings for abuse of discretion. *Musson v. Musson*, 11th Dist. Trumbull No. 2013-T-0113, 2014-Ohio-5381, ¶34. Regarding this standard, we recall the term "abuse of discretion" is one of art, connoting judgment exercised by a court which neither comports with reason, nor the record. *State v. Ferrante*, 112 Ohio St. 667, 676-679 (1925). An abuse of discretion may be found when the trial court "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, ¶15 (8th Dist.)

{¶25} "With regard to the risk of prejudice [under Evid.R. 403(A)], it must be shown that the prejudicial effect was unfair because it might have provided the jury with an improper basis for rendering its decision." *State v. Comstock*, 11th Dist. Ashtabula No. 96-A-0058, 1997 Ohio App. LEXIS 3670, *30 (Aug. 15, 1997).

{¶15} "[3.] The trial court erred to the prejudice of the appellant in admitting evidence of the appellant's two prior convictions, in that the evidence'[s] probative value was outweighed by unfair prejudice.

{¶16} "[4.] The verdict of guilty is against the manifest weight of the evidence.

{¶17} "[5.] The trial court erred to the prejudice of the appellant in denying the motion for dismissal pursuant to Rule 29 of the Ohio Rules of Criminal Procedure, in that the evidence presented was insufficient as a matter of law."

{¶18} We commence with assignment of error three, finding it dispositive of this appeal.

{¶19} In October 2008, Mr. Baird pled guilty to two counts of OVI, in separate cases, in the trial court. In this case, he refused a breathalyzer test, and was charged not merely with OVI, but with violating R.C. 4511.19(A)(2)(a) and (b), which provides, in pertinent part:

{¶20} "(2) No person who, within twenty years of the conduct described in division (A)(2)(a) of this section, previously has been convicted of or pleaded guilty to a violation of this division, a violation of division (A)(1) or (B) of this section, or any other equivalent offense shall do both of the following:

{¶21} "(a) Operate any vehicle * * * within this state while under the influence of alcohol, a drug of abuse, or a combination of them;

{¶22} "(b) Subsequent to being arrested for operating the vehicle * * * as described in division (A)(2)(a) of this section, being asked by a law enforcement officer to submit to a chemical test or tests under section 4511.191 of the Revised Code, and being advised by the officer in accordance with section 4511.192 of the Revised Code

{¶9} Mr. Baird's gait is somewhat shambling. His voice is very gruff, and his speech pattern sometimes moves from fast to slow without warning or apparent reason. At the trial in this matter, his mother Judy Baird, with whom he lives, testified. She stated this was his normal manner of speech. She also testified that on the day of arrest, she returned home at 4:00 p.m., and left again at 7:30 p.m., an hour before the arrest, and that Mr. Baird drank nothing during that time.

{¶10} Mr. Baird was charged with the two aforementioned violations. April 17, 2014, he filed a motion to suppress, which was denied by the trial court after hearing. Jury trial was held August 1, 2014. Defense counsel offered to stipulate that Mr. Baird had a prior OVI conviction. The state refused the stipulation, and the judgments against him for two prior OVI convictions were entered into evidence.

{¶11} The jury found Mr. Baird guilty of both charges. The trial court merged the convictions for sentencing purposes, sentencing Mr. Baird to 365 days in jail, 215 being suspended, credit for time served, and two years probation. His driver's license was suspended for five years.

{¶12} This appeal timely ensued, Mr. Baird assigning five errors:

{¶13} "[1.] Appellant's right to be free from unreasonable searches and seizures under the Fourth Amendment to the U.S. Constitution and Article I, Section 14 of the Ohio Constitution was violated when the police conducted an investigatory stop based on an anonymous tip without first corroborating the allegations of criminal conduct.

{¶14} "[2.] The trial court abused its discretion to the prejudice of the appellant by admitting into evidence the appellant's booking video, as the recording's probative value is substantially outweighed by the danger of unfair prejudice.

due to medical issues. Mr. Baird was badly beaten by his father when young, and suffered a fractured skull. He has a problem with his balance, due to damage to his inner ear. He takes several medications, including a muscle relaxer, and blood thinner.

{¶5} Nevertheless, Officer Isabella administered the horizontal gaze nystagmus test, which Mr. Baird failed completely.

{¶6} There is no dash cam video of this encounter, since the camera in Officer Isabella's cruiser was disabled.

{¶7} Mr. Baird was arrested, and taken to the police station for booking. Over defense objection, the CD of the booking was entered into evidence at trial. The objection stemmed from the quality of the CD. There are numerous glitches; frequently, the audio and visual do not match at all.

{¶8} Mr. Baird refused to take a breathalyzer test. He was asked twice again to recite the alphabet. Each time, he ran through it very quickly, and seemed to miss the letter "w." The second time, he added it immediately after "z." Generally, he sat quietly on a bench. Several times, however, he became agitated, and gesticulated, raising his voice. Twice he clapped, evidently when accusing the officers of persecuting a severely disabled man such as himself. When asked if he would like to try the field sobriety tests, he replied he could not do them sober. He stated he had three drinks over several hours. He was non-cooperative when his mug shots were taken, sticking out his tongue. Interestingly, his eyes do not appear at all red in the mug shots. He answered most questions quickly and without difficulty, and participated intelligently, if somewhat vigorously, in a discussion of the effect of two prior OVI convictions he had sustained.

{¶2} Shortly after 8:30 p.m. on February 1, 2014, Officer Richard Isabella of the Eastlake Police Department was parked in his cruiser in a commercial lot off Lakeshore Boulevard in Eastlake, when he received a message from dispatch. Dispatch told him an anonymous tipster had called to say that Dennis Baird, possibly drunk, and driving a green pickup truck, had left a bar in the City of Willoughby, and was headed eastbound on Lakeshore. Dispatch further advised that Mr. Baird was driving under license suspension. Moments later, Officer Isabella saw the green pickup, and recognized Mr. Baird, with whom the officer had previous encounters. Mr. Baird was not speeding. Officer Isabella began following. He saw Mr. Baird drift over the white line into an adjoining bicycle path. He saw Mr. Baird twice cross the center line. After a minute or two, Officer Isabella stopped Mr. Baird on a side street.

{¶3} Officer Isabella approached the truck. He testified that Mr. Baird had slurred speech, red, glassy eyes, and smelled of alcohol. On cross examination, the officer admitted that a smell of alcohol emanating from a person cannot help identify how much, or when, a person drank. Officer Isabella testified Mr. Baird stated, "I almost made it home – I think I was set up." Officer Isabella also testified he asked Mr. Baird to recite the alphabet twice, and Mr. Baird made mistakes each time. Mr. Baird admitted to having two drinks, and driving under suspension. Officer Isabella asked Mr. Baird the time of day, which was actually about 8:40 p.m. Mr. Baird replied it was 1:30 p.m.

{¶4} Officer Isabella had Mr. Baird exit the truck. The driver's door does not function: Mr. Baird had to leave through the passenger's door. Officer Isabella admitted Mr. Baird had no difficulty in doing this, nor in standing when he got out. Officer Isabella asked Mr. Baird to perform field sobriety tests, to which Mr. Baird replied he could not,

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

FILED
COURT OF APPEALS
NOV 02 2015
MAUREEN G. KELLY
CLERK OF COURT
LAKE COUNTY, OHIO

STATE OF OHIO,	:	**OPINION**
Plaintiff-Appellee,	:	**CASE NO. 2014-L-098**
- vs -	:	
DENNIS I. BAIRD,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Willoughby Municipal Court, Case No. 14 TRC 00727.

Judgment: Reversed, sentence vacated, and remanded.

Judson J. Hawkins, City of Eastlake Prosecutor, 37811 Lake Shore Boulevard, Eastlake, OH 44095 (For Plaintiff-Appellee).

Judith M. Kowalski, 333 Babbitt Road, #323, Euclid, OH 44123 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Dennis Baird appeals from the judgment of the Willoughby Municipal Court, entered on a jury verdict, convicting him of driving under the influence of alcohol in violation of R.C. 4511.19(A)(1)(a), and failing to submit to chemical testing, having been previously convicted of driving under the influence in the past 20 years, in violation of R.C. 4511.19(A)(2)(a) and (b). We reverse, vacate the sentence, and remand.

Appendix 1

JOURNALIZED 11/2/15