[Cite as *State v. Morgan*, 2009-Ohio-2795.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-P-0098**
- vs -	:	
MATTHEW A. MORGAN,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Municipal Court, Kent Division, Case No. 2008 TRC 1284 K.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Guy V. Nerren and *Dennis F. Butler,* 2401 Superior Viaduct, Cleveland, OH 44113 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Matthew Morgan, appeals the denial of his Motions to Suppress Evidence and subsequent convictions for Operating a Vehicle Under the Influence of Alcohol, in the Portage County Municipal Court, Kent Division. For the following reasons, we affirm the decision of the court below.

{¶2} On March 30, 2008, Morgan was issued a Complaint for Operation [of a motor vehicle] while under the Influence of Alcohol or with Specified Concentration of

Alcohol in Certain Bodily Substances, a misdemeanor of the first degree in violation of R.C. 4511.19(A) and (D).

{¶3} On April 4, 2008, Morgan filed a Motion to Suppress Evidence, which was supplemented with separate Motions filed on May 19 and 22, 2008. On June 26 and September 11, 2008, hearings were held on Morgan's Motions. At the hearings, the State presented the testimony of Officer John Gormsen of the Kent City Police Department, Detention Officer Michael Finklestein, and Dispatcher, Rebecca Schneider.

{¶4} On September 25, 2008, the municipal court denied Morgan's Motions. The court made the following findings of fact:

{¶5} "[Schneider] testified that on March 30, 2008, between 4 and 5 AM, [Morgan] and another individual had entered the lobby of the Kent Police Department to pick up an inmate at the Kent jail who was being released. Ms. Schneider could tell they were drinking by the odor and the way they were talking. She told them to come back in 6-8 hours when they were sober. [Morgan] and his friend seemed confused. They could not understand what she was saying and kept asking the same questions over and over again. Because they were giving her such a hard time, she told them they could be arrested if they did not leave and called Officer Gormsen about the situation."

{¶6} "About 6:45 AM, they came back, only a few hours after they had left. She told them that not enough time had passed. [Morgan] claimed he did not drive there and they left. Another dispatcher came in. [Schneider] watched on the monitor as they went into the parking lot. She saw [Morgan] get into the driver's seat of a small silver hatchback. When she saw the vehicle move, she called Officer Gormsen and advised

him of the situation. She also told him that they were not sober two hours earlier and that [Morgan] was *** possibly operating a vehicle under the influence."

{¶7} "[Officer Gormsen] testified that on 3-30-08 he received a call from the dispatcher of a possible drunk driver leaving the police station. He pulled over the vehicle based on the dispatcher's report. Two subjects were in the vehicle. He noticed an odor of an alcoholic beverage coming from the car. When he asked [Morgan] to step out of the car, the Officer could tell it was coming from [him]. He told Officer Gormsen that he was drunk earlier, but thought he was okay now. He also could not tell the officer how much he had to drink, his speech was slurred and his eyes were glassy and watery."

{¶8} "[Morgan] was asked to do some field tests. [Officer Gormsen] testified that he has observed over 1,000 intoxicated persons. He testified to his training in the detection and arrest of impaired drivers. He checked for equal pupils, equal tracking and vertical nystagmus. He observed six clues on the Horizontal Gaze Nystagmus test. He also gave him the walk and turn test where the officer found 4 clues which would indicate an 80% of [Morgan] testing over .08[1] The last test was the one leg stand [test] where [Morgan] swayed while balancing. After completion of the tests, [Morgan] was arrested. No Miranda rights were given at the time of arrest."

{¶9} "[Morgan] was taken to the Kent City Police Department where he was booked and offered the breath test after being read the 2255 form. [Morgan] agreed to

1. Morgan correctly notes that Officer Gormsen only testified to observing three clues, rather than four, on the walk-and-turn test. This oversight, however, does not affect the trial court's conclusion that probable cause existed to arrest Morgan. The DWI Detection and Standardized Field Sobriety Testing Manual, submitted into evidence, provides that "if the suspect exhibits two or more clues on this test *** classify the suspect's BAC as above 0.10." Additionally, by "combining four of more clues of HGN and two or more clues of the Walk-and-Turn, suspects can be classified as above 0.10 BAC 80% of the time."

take the test, but because the machine kept indicating there was radio frequency interference, the test was not conducted at that department."

{¶10} "[Morgan] was transported to the Kent State University police department where he was given the breath test. Officer Gormsen observed him for more than twenty minutes before the test, except when he left the Kent police department to pull the cruiser from the lot into the carport to transport [Morgan] to the Kent State University [Police] Department. While [Officer Gormsen] was gone, [Morgan] was observed by Detention officer Finklestein in the booking room who did not observe [Morgan] ingest any substance. In addition, Officer Gormsen viewed the booking tape for the period he was gone, and did not observe [Morgan] ingest anything. This court also reviewed that tape, in chambers, as requested by both parties, and did not observe [Morgan] ingest anything while he was in [Finklestein's] presence. No evidence was presented by [Morgan] that he did put anything in his mouth or that he had something in his mouth 20 minutes before the test. The test was conducted and [Morgan] tested .098."

{¶11} On September 25, 2008, Morgan entered a No Contest plea to the charge of OVI and was sentenced as follows: a $1,000 fine ($750 suspended); 180 days in the Portage County Jail (177 days suspended pending the completion of community work service and other conditions); and the suspension of his operator's license for six months. The municipal court did not stay execution of the sentence pending appeal.

{¶12} On October 21, 2008, Morgan filed a Notice of Appeal, raising the following assignment of error: "The Trial Court erred to the prejudice of Defendant-Appellant by overruling in their entirety his Motions to Suppress."

{¶13} "The trial court acts as trier of fact at a suppression hearing and must weigh the evidence and judge the credibility of the witnesses." *State v. Hurtuk*, 11th

Dist. Nos. 2008-P-0077 and 2008-P-0096, 2009-Ohio-1004, at ¶10 (citations omitted). "The trial court is best able to decide facts and evaluate the credibility of witnesses. Its findings of fact are to be accepted if they are supported by competent, credible evidence." *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, at ¶41 (citation omitted). "Once the appellate court accepts the trial court's factual determinations, the appellate court conducts a de novo review of the trial court's application of the law to these facts." *Hurtuk*, 2009-Ohio-1004, at ¶10 (citation omitted); *Mayl*, 2005-Ohio-2304, at ¶41 ("we are to independently determine whether [the trial court's factual findings] satisfy the applicable legal standard") (citation omitted).

{¶14} In his first argument, Morgan maintains that Officer Gormsen's initial stop of him was not based on a reasonable and articulable suspicion of criminal activity. Morgan notes that neither Gormsen nor Schneider observed anything at 6:45 a.m., suggesting that he was presently impaired and unable to safely operate a motor vehicle.

{¶15} "The United States Supreme Court has interpreted the Fourth Amendment to permit police stops of motorists in order to investigate a reasonable suspicion of criminal activity." *Maumee v. Weisner*, 87 Ohio St.3d 295, 299, 1999-Ohio-68, citing *Terry v. Ohio* (1968), 392 U.S. 1, 22. "The reasonable suspicion necessary for such a stop *** involves a consideration of 'the totality of the circumstances.'" Id., citing *United States v. Cortez* (1981), 449 U.S. 411, 417. "Under this analysis, 'both the content of information possessed by the police and its degree of reliability' are relevant to the court's determination." Id., citing *Alabama v. White* (1990), 496 U.S. 325, 330; *State v. Andrews* (1991), 57 Ohio St.3d 86, 87-88 ("these circumstances are to be viewed through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold") (citation omitted).

{¶16} Reasonable suspicion may be based on conduct that is entirely lawful. *United States v. Sokolow* (1989), 490 U.S. 1, 9 (citations omitted). "Since a *Terry* stop is an investigatory tool, it does not require certainty or probability that criminal activity is occurring, just a reasonable suspicion." *State v. Wortham*, 145 Ohio App.3d 126, 129, 2001-Ohio-1506 (citations omitted).

{¶17} "A police officer need not always have knowledge of the specific facts justifying a stop and may rely *** upon a police dispatch ***." *Weisner*, 87 Ohio St.3d at 297, citing *United States v. Hensley* (1985), 469 U.S. 221, 231. "[T]he admissibility of the evidence uncovered during such a stop does rest upon whether the officers *relying upon a dispatch* *** 'were themselves aware of the specific facts which led their colleagues to seek their assistance.'" Id. (citation omitted) (emphasis sic). "It turns instead upon 'whether the officers who *issued* ***' [the] dispatch possessed reasonable suspicion to make the stop." Id., citing *Hensley*, 469 U.S. at 231 (emphasis sic).

{¶18} In the present case, Officer Gormsen's decision to stop Morgan's vehicle was based entirely upon Schneider's dispatch. Accordingly, the propriety of the stop depends upon whether Schneider possessed a reasonable suspicion to issue the dispatch.

{¶19} Schneider has been a dispatcher for the Kent Police Department for about five years and interacts with intoxicated persons on a regular basis.

{¶20} Schneider testified that, between four and five a.m., Morgan and a companion entered the lobby of the Kent Police Department to obtain the release of a friend, arrested earlier that evening. Although separated from them by a glass window, Schneider could smell an odor of alcohol about them. Morgan and his companion repeatedly asked the same questions about obtaining their friend's release and did not

seem to understand Schneider's responses. Schneider overheard Morgan say to his companion that he was not sober and the companion told Schneider that if they had something to eat they would be sober. Schneider told them to leave and return in six to eight hours with a valid, sober driver. Morgan and his companion continued to give Schneider "a hard time" until she threatened to have them arrested.

{¶21} About two hours later, Morgan and his companion returned. Schneider again told them to return in six to eights hours and, further, asked if they were driving. They said that they were not driving and left the station. When Schneider observed Morgan, on a security camera, enter a vehicle in the police department parking lot, she issued a dispatch to Officer Gormsen regarding a possible Operation Under the Influence.

{¶22} These facts are sufficient to create a reasonable suspicion that Morgan was driving while intoxicated and justify his stop by Officer Gormsen. Schneider's initial suspicion was founded on the odor of alcohol, Morgan's behavior, and the comments made by Morgan and his companion to the effect that they were not sober. Based on these impressions, Schneider, a person of some experience with intoxicated persons, judged that it would take six to eight hours before she could release their friend to them. Instead, Morgan returned after only two hours and lied about operating a vehicle. Schneider could reasonably conclude that two hours was not enough time for Morgan to become sober and that, by claiming not to have driven, Morgan was trying to avoid creating the suspicion that we was driving intoxicated. [2] Cf. *State v. Bobo* (1988), 37

2. We note that the problem of intoxicated persons attempting to obtain the release of other intoxicated persons is a recurring pattern in Portage County. See *State v. Hurtuk*, 11th Dist. Nos. 2008-P-0077 a 2008-P-0096, 2009-Ohio-1004; *State v. Phipps*, 11th Dist. No. 2006-P-0098, 2007-Ohio-3842.

Ohio St.3d 177, 179 (reasonable suspicion for investigatory stop may be based on an officer's experience with particular types of crime and a suspect's suspicious behavior).

{¶23} This situation is distinguishable from our decision in *State v. Anderson*, 11th Dist. No. 2003-G-2540, 2004-Ohio-3192, and relied on by Morgan, where an officer effected a traffic stop based solely on a dispatch of a "suspicious little blue car." Id. at ¶2. Apart from the description of the vehicle as suspicious, "there were no other articulable facts to support a conclusion that Anderson was engaging in or was about to engage in criminal activity." Id. at ¶13. In the present case, the dispatcher's report of a possible Operation While Intoxicated was based on specific observations, testified to in court and suggesting that Morgan was operating a vehicle while intoxicated.

{¶24} Considering the totality of the circumstances, Schneider had a sufficiently reasonable suspicion of criminal activity to issue the dispatch to Officer Gormsen. Cf. *State v. Malco*, 2nd Dist. No. 17817, 2000 Ohio App. LEXIS 901, at *2 (holding that "a police officer's observations of suspected alcohol impairment of a driver before he enters his car can provide a reasonable articulable suspicion of DUI after the driver enters the car and operates it, justifying a traffic stop, even though no erratic operation is observed").

{¶25} Morgan next argues that, assuming the initial stop was justified, Officer Gormsen lacked a reasonable suspicion to conduct field sobriety tests.

{¶26} "An officer may not expand the investigative scope of the detention beyond that which is reasonably necessary to effectuate the purposes of the initial stop unless any new or expanded investigation is supported by a reasonable, articulable suspicion that some further criminal activity is afoot." *State v. Seal*, 11th Dist. No. 2003-L-163, 2004-Ohio-5938, at ¶21 (citations omitted); *State v. Maloney*, 11th Dist. No.

2007-G-2788, 2008-Ohio-1492, at ¶36 (citations omitted). Since "a request that a driver perform field sobriety tests constitutes a greater invasion of liberty than the initial stop, [it] 'must be separately justified by specific, articulable facts showing a reasonable basis for the request.'" *State v. Penix*, 11th Dist. No. 2007-P-0086, 2008-Ohio-4050, at ¶10 (citations omitted).

{¶27} In the present case, Officer Gormsen's initial suspicion, based on the dispatch, that Morgan may be intoxicated was corroborated by his own observations after effecting the stop. Officer Gormsen noticed a "moderate odor" of alcohol about his person, his eyes were bloodshot and glassy, and his speech slightly slurred. Moreover, Morgan admitted that he had been "drunk" earlier in the evening but was unable to say how much he had had to drink and believed that he was presently "okay" to drive. Indicators such as these are considered sufficient to justify the administration of field sobriety tests. *State v. Slocum*, 11th Dist. No. 2007-A-0081, 2008-Ohio-4157, at ¶28, citing *State v. Evans* (1998), 127 Ohio App.3d 56, 63 n. 2; *State v. Stanley*, 11th Dist. No. 2007-P-0104, 2008-Ohio-3258, at ¶19.

{¶28} This court's decision in *State v. Brown*, 166 Ohio App.3d 638, 2006-Ohio-1172, relied upon by Morgan, is distinguishable. In *Brown*, this court held that an odor of alcohol, glassy and bloodshot eyes, and lack of coordination were insufficient probable cause to arrest defendant for Operation of a Vehicle While Intoxicated where the results of the field sobriety tests should have been suppressed. Id. at ¶29. While such signs of intoxication may, by themselves, be inadequate as probable cause to arrest, they do provide a reasonable suspicion for expanding the scope of a stop to conduct field sobriety tests.

{¶29} Morgan argues that the results of the field sobriety tests should have been suppressed because the State failed to demonstrate that they were conducted in substantial compliance with the standards established by the National Highway Traffic Safety Administration.

{¶30} "In any criminal prosecution [for Operating a Vehicle Under the Influence of Alcohol] ***, if a law enforcement officer has administered a field sobriety test to the operator of the vehicle *** 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, *** [t]he officer may testify concerning the results of the field sobriety test so administered." R.C. 4511.19(D)(4)(b). In order for the results of such tests to be admissible, the State must lay a foundation "as to the administering officer's training and ability to administer the test and as to the actual technique used by the officer in administering the test." *State v. Boczar*, 113 Ohio St.3d 148, 2007-Ohio-1251, at ¶27.

{¶31} "The state has the burden to demonstrate that the field sobriety tests were conducted in substantial compliance with the NHTSA standards. *** Part of this burden includes demonstrating what the NHTSA requirements are, through competent testimony and/or introducing the applicable portions of the NHTSA manual." *State v. Djisheff*, 11th Dist. No. 2005-T-0001, 2006-Ohio-6201, at ¶21 (citations omitted).

{¶32} In the present case, the State introduced the February 2006 Student Edition Manual for DWI Detection and Standardized Field Sobriety Testing, issued by the NHTSA. Officer Gormsen testified that he was trained to conduct the field sobriety

tests in 2002 according to the standards contained in the manual for that year. Gormsen further testified that he has read the subsequent editions of the training manual, including the 2006 edition, and conducted the tests in accordance with current standards. Gormsen described the differences between the 2002 and 2006 manual as "small."

{¶33} Morgan argues the State failed to meet its burden to show substantial compliance by failing to introduce evidence of the testing standards that were in effect in March 2008, when Officer Gormsen performed the tests. We disagree.

{¶34} The 2006 testing manual was referred to during the suppression hearing as "the most recent one" and "the last one." Officer Gormsen testified that "when [new revisions] come out I read them." The only reasonable inference from the evidence presented was that the standards contained in the 2006 edition were the current standards in March 2008. Morgan did not raise any argument or introduce any evidence to the contrary. Cf. *Brookpark v. Key*, 8th Dist. No. 89612, 2008-Ohio-1811, at ¶54 (where the defendant failed to introduce the "most current manual into evidence," the court was unable to compare "the most current standards" to those submitted by the prosecution). Accordingly, we reject the argument that the 2006 NHSTA standards were not current in 2008.

{¶35} Morgan further argues the results of the one-leg stand test were invalid because Officer Gormsen failed to adequately testify to a legitimate clue. Gormsen testified that Morgan "was swaying" during the test, thus providing one clue. The 2006 manual provides that one of the clues in the one-leg stand test is whether "the suspect sways while balancing." The manual further adds that "this refers to side-to-side or back-and-forth motion." Morgan maintains that Gormsen failed to describe the swaying

with sufficient detail. We disagree. Gormsen testified that Morgan swayed and this is sufficient to demonstrate a clue. If there were doubts about what Gormsen meant by "swaying," they could have been explored on cross-examination. *Maloney*, 2008-Ohio-1492, at ¶57 (citation omitted).

{¶36} Morgan argues the results of the horizontal gaze nystagmus test should have been suppressed because he was unable to testify to the total length of time spent administering the test. Morgan relies on *State v. Derov*, 176 Ohio App.3d 43, 2008-Ohio-1672, where the Seventh District determined, based on an officer's testimony and NHSTA guidelines, that it requires a minimum of sixty-eight seconds to perform the HGN test. Id. at ¶16.

{¶37} In the present case, Morgan did not establish the minimum time necessary to conduct the HGN through testimony or reference to the training manual. Although Officer Gormsen was unable to testify to the amount of time it took him to administer the HGN test, he did testify that he checked for lack of smooth pursuit by moving the stimulus for two seconds out and in before each eye; that he checked for the onset of nystagmus prior to forty-five degrees in each eye by moving the stimulus out toward the shoulders for four seconds; and that he checked for nystagmus as maximum deviation by holding the stimulus before each eye for a minimum of four seconds. Gormsen testified that he repeated the HGN test for each of the possible clues. These times and procedures are consistent with the standards prescribed in the 2006 manual. Thus, the failure to testify to the amount of time spent conducting the HGN test does not demonstrate a lack of substantial compliance with the NHTSA standards.

{¶38} Morgan argues the trial court erred in failing to suppress the results of the portable breath test device administered by Officer Gormsen following the field sobriety tests. Morgan registered a .098 breath alcohol reading on the test.

{¶39} Morgan relies on this court's decision in *State v. Delarosa*, 11th Dist. No. 2003-P-0129, 2005-Ohio-3399, affirming the trial court's suppression of the results of a portable breath test. Id. at ¶57. "The results of a PTB *** are generally not admissible as evidence" because they have been deemed unreliable by the Ohio Department of Health. *State v. Janick*, 11th Dist. No. 2007-A-0070, 2008-Ohio-2133, at ¶28, citing *State v. Durnwald*, 163 Ohio App.3d 361, 2005-Ohio-4867, at ¶39; *State v. Smith*, 11th Dist. Nos. 2006-P-0101 and 2006-P-0102, 2008-Ohio-3251, at ¶2 fn. 1 ("[v]arious courts, including this one, have *** determined that the results of PBTs are not admissible, even for a determination of probable cause").[3]

{¶40} The State, in response, cites to a decision of this court subsequent to *Delarosa* in which the use of a portable breath test was considered acceptable for establishing probable cause. *Maloney*, 2008-Ohio-1492, at ¶58 ("[e]ven if we were to find that the HGN and walk and turn tests were not administered in substantial compliance with NHTSA standards, sufficient probable cause exists for Mr. Maloney's arrest since he *** tested a .134 on the portable breathalyzer test").

{¶41} In the present case, we find any error by the trial court in failing to suppress the results of the portable breath test to be harmless. In its findings of fact,

3. There is a split of authority among appellate districts regarding the admissibility of portable breath tests, "even for probable cause purposes." *State v. Derov*, 176 Ohio App.3d 43, 2008-Ohio-1672, at ¶10. The Ohio Supreme Court accepted *Derov* for review as a certified conflict with *State v. Gunther*, No. 04CA25, 2005-Ohio-3492, on the following issue: "Whether the results of a portable breath test are admissible to establish probable cause to arrest a suspect for a drunk driving offense." *State v. Derov*, 118 Ohio St.3d 1503, 2008-Ohio-5467. Ultimately, the Supreme Court reversed *Derov* on other grounds and dismissed all pending issues relative to portable breath tests. *State v. Derov*, 121 Ohio St.3d 269, 2009-Ohio-1111, at ¶¶1-3.

the trial court did not acknowledge that Officer Gormsen had administered a portable breath test to Morgan. The court concluded that Gormsen had probable cause to arrest Morgan without any reference to the results of the portable breath test. As the trial court properly determined, there was probable cause for Morgan's arrest based solely on Gormsen's observations of Morgan and the results of the field sobriety tests, which were properly found admissible.

{¶42} Morgan's final argument under his sole assignment of error is that the results of the breath test performed at the Kent State University Police Department should have been suppressed since Officer Gormsen coerced him into giving his consent to take the test.

{¶43} In Ohio, "[a]ny person who operates a vehicle *** upon a highway or any public or private property *** shall be deemed to have given consent to a chemical test *** of the person's *** breath *** to determine the alcohol *** content of the person's *** breath *** if arrested for a violation of division (A) or (B) of section 4511.19 of the Revised Code ***." R.C. 4511.191(A)(2). "[B]efore the person may be requested to submit to a chemical test *** to determine the alcohol *** content of the person's *** breath *** the arresting officer shall read the following form to the person:

{¶44} 'You now are under arrest ***. If you refuse to take any chemical test required by law, your Ohio driving privileges will be suspended immediately, and you will have to pay a fee to have the privileges reinstated. *** (Read this part unless the person is under arrest for solely having physical control of a vehicle while under the influence.) If you take any chemical test required by law and are found to be at or over the prohibited amount of alcohol *** in your *** breath *** as set by law, your Ohio driving privileges will be suspended immediately, and you will have to pay a fee to have the privileges reinstated. If you take a chemical test, you may have an independent chemical test taken at your own expense.'" R.C. 4511.192(B).

{¶45} A video of the booking process in the present case shows Officer Gormsen reading Morgan the form prescribed by R.C. 4511.192(B), Form 2255.

Gormsen advised Morgan that if he refused to take the breath test, his license would be suspended for one year, but if he took the test and blew over the limit, his license would be suspended for about ninety days. After reading the form, Gormsen asked Morgan, "so you want to take the breath test for me?" Morgan replied, "[I] might as well, right?" Gormsen and Morgan then engaged in a brief conversation about the reasons for not refusing and for Morgan's arrest. In the course of this discussion, Gormsen told Morgan, "the judge doesn't like it" when the test is refused. Morgan then signed the Form 2255 acknowledging his consent to the test.

{¶46} At the suppression hearing, the following testimony was given regarding Morgan's consent to the breath test:

{¶47} "Officer Gormsen: I read him the BMV 2255 form."

{¶48} "Defense counsel: Okay, and did you tell him that his license could be suspended for a year?"

{¶49} "Officer Gormsen: Yes. He didn't have any prior arrests so I believe if he refused the breath test and the ALS suspension could be up to a year. If he took the test and blew at or over, it could be 90 days."

{¶50} "Defense counsel: Okay, and you told him that?"

{¶51} "Officer Gormsen: Yes, sir."

{¶52} "Defense counsel: And did you also tell him that the Judge does not like people who refuse to take the test?"

{¶53} "Officer Gormsen: Not right away but eventually, yes."

{¶54} "Defense counsel: You did tell him that?"

{¶55} "Officer Gormsen: Yeah. There's a reason I do that. If you want me to explain it I can or if not I could just leave it there."

{¶56} "Defense counsel: Sure. I'd like to hear it."

{¶57} "Officer Gormsen: Well, honestly I believed that he was over the legal limit to be driving. I didn't feel that he was a high tier, meaning a real high blow."

{¶58} "Defense counsel: He was moderate?"

{¶59} "Officer Gormsen: What's that?"

{¶60} "Defense counsel: He was moderate?"

{¶61} "Officer Gormsen: Right. He would have been under .17, between .08 and a .17. That was my professional guess on that, and if he had refused the test there's a possibility he would have increased, greater penalties because if he refused, the Judge may look at it as if maybe he blew a high tier up there, and obviously he was a nice guy. He was cooperative and I didn't want to see that happen to him, but that's after he had agreed to take the test. I asked him if he wanted to take it and he said sure, why not, and --"

{¶62} "Defense counsel: You weren't speaking for the Judge at the time, you were just giving your opinion?"

{¶63} "Officer Gormsen: That's correct. I mean, you know, he said he'd take it and he kind of said why not and I just felt that I didn't want to see him --"

{¶64} "Defense counsel: All right so after you told him about the Judge then he took the BAC, right?"

{¶65} We disagree that Officer Gormsen's comment that the judge does not like it when a person refuses to be tested rendered Morgan's consent involuntary. Both the video and Gormsen's testimony demonstrate that Morgan was willing to take the breath test before the comment about the judge was made. Therefore, the comment cannot have induced Morgan to consent to the test. The conversion following Morgan's

comment, "[I] might as well," had the effect of merely reassuring Morgan that his decision was a prudent one.

{¶66} Moreover, we note that Morgan's consent to the take the test is implied by law. R.C. 4511.191(A)(2). In a situation where the suspect was not properly advised of the information contained in R.C. 4511.192(B), the Ohio Supreme Court has made clear there are no constitutional implications for such failure as would implicate the exclusionary rule. *Hilliard v. Elfrink*, 77 Ohio St.3d 155, 157, 1996-Ohio-333, citing *Schmerber v. California* (1966), 384 U.S. 757, 772 ("[t]he United States Supreme Court has held that where a defendant refused to consent to a taking of his blood sample for chemical analysis, a blood sample taken over his objection and without his consent was admissible in evidence"). Accordingly, Morgan's knowing and voluntary consent to submit to a breath test is not necessary for the admissibility of that test. Since Morgan's voluntary consent to testing was not constitutionally necessary, an officer's gratuitous comments regarding the consequences of the test would only be relevant in the situation where a suspect refuses to take the test. Cf. *Hoban v. Rice* (1971), 25 Ohio St.2d 111, at paragraphs three and four of the syllabus (the refusal to submit to a chemical test "need not have been knowingly and intentionally made" and "[i]t need not be shown that the person subjectively understood the consequences of his refusal").

{¶67} Finally, arguments that an officer's misinformation or other statements coerced a suspect's consent to submit to a chemical test have been consistently rejected by courts of appeal. See e.g. *Columbus v. Dixon*, 10th Dist. No. 07AP-536, 2008-Ohio-2018, at ¶7 ("despite the fact that the police officers informed appellant that if she refused the test she would be held in custody for 12 to 24 hours, we find that the officers did not coerce appellant into taking the Breathalyzer test"); *Wickliffe v.*

Hromulak, 11th Dist. No. 2000-L-069, 2001 Ohio App. LEXIS 1835, at *13 ("[t]he fact that appellant *** failed to recognize that he would be subject to penalties beyond the ninety-day administrative suspension *** does not call into question the validity of his consent in submitting to the BAC test"); *State v. Tino*, 1st Dist Nos. C-960393, C-960394, and C-960395, 1997 Ohio App. LEXIS 747, at *6 ("[t]he results of the [chemical] test *** were admissible in the disposition of appellant's criminal case regardless of whether the ALS provisions were properly communicated").

{¶68} Morgan's sole assignment of error is without merit.

{¶69} For the foregoing reasons, the judgment of the Portage County Municipal Court, Kent Division, overruling Morgan's Motions to Suppress, is affirmed. Costs to be taxed against appellant.

MARY JANE TRAPP, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.