**[Cite as *State v. Calder*, 2009-Ohio-3329.]**

STATE OF OHIO, MONROE COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

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| STATE OF OHIO, | ) | |
| | ) | CASE NO. 08 MO 5 |
| PLAINTIFF-APPELLEE, | ) | |
| | ) | |
| - VS - | ) | O P I N I O N |
| | ) | |
| JONATHAN CALDER, | ) | |
| | ) | |
| DEFENDANT-APPELLANT. | ) | |

CHARACTER OF PROCEEDINGS: Criminal Appeal from County Court, Case No. 08TRC2.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

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JUDGES:

Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: June 29, 2009

VUKOVICH, P.J.

**¶{1}** Defendant-appellant Jonathan Calder appeals the decision of the Monroe County Court finding him guilty of driving under the influence of alcohol, a violation of R.C. 4511.19(A)(1)(a) and (A)(1)(d), a first degree misdemeanor. The issue presented in this case is whether the trial court erred when it failed to suppress the one leg stand and walk and turn field sobriety tests and the results of the BAC DataMaster breath test. For the reasons expressed below, there is no merit with any argument that the breath test should be suppressed. Regarding the one leg stand and walk and turn tests, even if there is any merit with the argument that those test results should have been suppressed, such error was harmless. Thus, the judgment of the trial court is affirmed.

STATEMENT OF THE CASE

**¶{2}** On January 1, 2008 at approximately 2:30 a.m. Trooper Rocky Hise observed Calder driving a Gray Mitsubishi on East Alley going towards State Route 78. The vehicle did not have an operational license plate light and while turning right onto State Route 78, Calder drove through a parking spot and over the street curb. (Tr. 6, 27). The trooper testified that he was unsure whether Calder was trying to park the car. (Tr. 27). Trooper Hise then activated his overhead lights and initiated a traffic stop. (Tr. 6-7). Upon speaking with Calder, the trooper noticed a strong odor of alcohol emanating from Calder, that his eyes were bloodshot and glassy, and that his speech was slurred. (Tr. 7). Calder was asked whether he had anything to drink that night and he responded that he had a few beers. (Tr. 10). The trooper then had Calder perform three field sobriety tests – the HGN test, the walk and turn test, and the one leg stand test. (Tr. 11-17). After exhibiting impairment from those tests, Calder was placed under arrest and transported to the Woodsfield Police Department for a breath test; he blew a 0.157, which is above the legal limit. (Tr. 19; State's Exhibit 8).

**¶{3}** Calder was charged with R.C. 4511.19(A)(1)(a) and (A)(1)(d), first degree misdemeanors because this was his first offense. He pled not guilty to the charges and filed a motion to suppress. The suppression motion asserted that there was: 1) no probable cause for the stop; 2) the field sobriety tests were not performed in accordance with the National Highway Traffic and Safety Administration (NHTSA) Manual and there was no evidence that the trooper was authorized by the NHTSA to

perform those tests; and 3) that the BAC DataMaster breath test was not performed in accordance with the rules of the Ohio Department of Health (ODH) in that Calder was not continuously monitored for twenty minutes prior to the test being performed, that the calibration and sample procedures were not performed in compliance with the ODH regulations, and that the BAC DataMaster was not properly calibrated. 02/13/08 Motion. A hearing was held on the motion on March 26, 2008, and on May 21, 2008. At the hearing, the state stipulated that it would not be admitting the HGN test results at trial. (Suppression Tr. 4). Thus, the only tests and results from those tests that the state was seeking to be admitted at trial was the walk and turn test and the one leg stand test.

**¶{4}** On July 2, 2008, the trial court overruled the suppression motion and thus the walk and turn test, one leg stand test and the results of the BAC DataMaster breath test were deemed admissible. Days later, Calder pled no contest to the charges, was found guilty and was sentenced to 20 days in jail with 15 days suspended, his license was suspended for 180 days, he was fined $250 and ordered to pay costs. 07/16/08 J.E. He now timely appeals the suppression ruling.

STANDARD OF REVIEW

**¶{5}** Calder attacks the propriety of the suppression ruling in each of his three assignments of error. Thus, for each assignment we review the trial court's ruling under the following standard of review. In reviewing a suppression ruling we are presented with a two-fold review. *State v. Dabney,* 7th Dist. No. 02BE31, 2003-Ohio-5141, ¶9, citing *State v. Lloyd* (1998), 126 Ohio App.3d 95, 100-101. Since the trial court is in the best position to evaluate witness credibility, we must uphold the trial court's findings of fact if they are supported by competent, credible evidence. *Dabney*, supra, citing *State v. Winand* (1996), 116 Ohio App.3d 286, 288, citing *Tallmadge v. McCoy* (1994), 96 Ohio App.3d 604, 608. However, once those facts are accepted as true, we must independently determine as a matter of law whether the trial court met the applicable legal standard. *Dabney,* supra, citing *State v. Clayton* (1993), 85 Ohio App.3d 623, 627. This determination is a question of law of which an appellate court cannot give deference to the trial court's conclusion. *Dabney*, supra, citing *Lloyd,* supra.

FIRST ASSIGNMENT OF ERROR

**¶{6}** "IT IS PREJUDICIAL ERROR TO ADMIT EVIDENCE OF FIELD SOBRIETY TESTS WITHOUT OFFERING THE NHTSA TRAINING MANUAL OR FAILURE OF THE STATE TO REQUEST JUDICIAL NOTICE OF THE METHOD OF PROPER ADMINISTRATION OF NHTSA OR OTHER FIELD SOBRIETY TESTS."

**¶{7}** Under this assignment of error, Calder argues that there was no credible proof presented at the suppression hearing that the field sobriety tests were performed in accordance with the NHTSA training manual and the state did not request that the trial court take judicial notice of the standards required for the admissibility of these tests. He then states that because case law requires the state to introduce evidence that the tests were performed in a standardized manner or request that the court take judicial notice that the tests were performed in compliance with the NHTSA standards and neither of those options were taken by the state, that there was no probable cause to compel Calder to submit to a breath test.

**¶{8}** It has been held that, "'[t]he propriety of the administration of the breath-alcohol test is therefore dependent upon the propriety of the arrest. Before an officer can arrest an individual, the officer must have probable cause to believe that the individual has committed a crime.' *State v. Medcalf* (1996), 111 Ohio App.3d 142, 147, citing *State v. Timson* (1974), 38 Ohio St.2d 122, paragraph one of the syllabus." *Village of Kirtland Hills v. Fuhrman*, 11th Dist. No. 2007-L-151, 2008-Ohio-2123, ¶12.

**¶{9}** The standard for determining whether the police have probable cause to arrest an individual for driving under the influence is whether, at the moment of 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. *State v. Homan,* 89 Ohio St.3d 421, 427, 2000-Ohio-212 (superseded on other grounds as stated in R.C. 4511.19(D)(4)(b)). In making this determination, courts should consider the totality of facts and circumstances surrounding the arrest. Id.

**¶{10}** In order for the results of the field sobriety test to serve as evidence of probable cause to arrest, the results of field sobriety tests are admissible if the tests were administered in substantial compliance with testing standards set by the NHTSA. *State v. Flowers*, 7th Dist. No. 07MA68, 2007-Ohio-6920, ¶15. See, also, *State v. Schmitt*, 101 Ohio St.3d 79, 2004-Ohio-0037, ¶9. Pursuant to R.C. 4511.19(D)(4)(b), the tests can be admitted "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." Consequently, the tests can be in compliance with the NHTSA standards or any other reliable, credible and generally accepted field sobriety tests.

**¶{11}** At the suppression hearing, the trooper's testimony included the instructions he gave to Calder for the walk and turn and one leg stand tests. For the one leg stand test, the trooper testified that he instructed:

**¶{12}** "A. I first asked him to place his feet together and his hands down to his sides, and don't begin the test until I instruct him to do so.

**¶{13}** "I asked him if he understood, and he said yes.

**¶{14}** "I said when I tell you to begin, take whatever foot you're comfortable with, raise it approximately six inches above the ground with toe pointed out, keeping your leg straight and your hands down to your sides.

**¶{15}** "Q. Did you demonstrate while you were telling him this?

**¶{16}** "A. Yes, sir, I did.

**¶{17}** "Q. Okay.

**¶{18}** "A. Keeping your hands down to your sides, and you're looking down at your raised toe, you're going to count out loud in this manner. One thousand one, one thousand two, one thousand three.

**¶{19}** "You'll continue counting in that manner until I tell you to stop.

**¶{20}** "And then I asked him if he understood, and he stated yes." (Tr. 15-16).

**¶{21}** Following this testimony, Trooper Hise indicated that he placed his foot down three times, raised his arms for balance and swayed while balancing. (Tr. 16).

**¶{22}** For the walk and turn test, the trooper testified that he instructed as follows:

**¶{23}** "A. I gave him an example, while he was standing in front of me, I said imagine that there is a straight line between you and I.

**¶{24}** "Q. Okay. Was there a line there at that point or did he need to imagine one.

**¶{25}** "A. Not where the test was at, no, sir.

**¶{26}** "Q. Okay. Go ahead.

**¶{27}** "A. I asked him to place his left foot on that line, and his right foot in front of his left foot, with his hands down to his sides, with his left toes touching his right heel, and I gave an example on how he needed to get into that position.

**¶{28}** "Q. You demonstrated that yourself?

**¶{29}** "A. Yes, sir, I did.

**¶{30}** "Q. Okay. Go ahead.

**¶{31}** "A. I then said to stay in that position and don't begin the test until I instructed him to do so.

**¶{32}** "And I asked him if he understood and he stated yes. At which point, I said okay, what I need you to do, when I tell you to begin, you're going to take nine heel to toes steps, in that straight line, turn around and take nine steps back, keeping your hands down to your sides, looking down at your feet and counting out loud each step.

**¶{33}** "And when you begin the test, don't stop until you finish the test.

**¶{34}** "And I gave an example of three steps up, I gave an example of how you needed to turn with a series of small steps, while keeping your foot stationary.

**¶{35}** "And then I explained how to take nine steps back.

**¶{36}** "Q. Okay. Did you ask him if he understood those instructions?

**¶{37}** "A. Yes, sir, I did." (Tr. 17-18).

**¶{38}** He then testified that Calder, during the instruction, moved his feet to maintain balance, raised his arms during the test, and stepped off the line once during the test. (Tr. 19).

**¶{39}** As can be seen, while the instructions given were detailed and could possibly be in compliance with a reliable standard, the trooper did not testify that he received specialized training to perform the tests or that the tests were administered in compliance with the NHTSA or comparable reliable standards.

**¶{40}** However, in the matter at hand, we do not need to determine whether the testimony demonstrates substantial compliance with an applicable standard because even if there was not substantial compliance and the trial court committed error in denying the suppression of the walk and turn and one leg stand tests, that error is harmless. Probable cause to arrest does not necessarily have to be based, in whole or in part, upon a suspect's poor performance on one or more of the field sobriety tests. The totality of the facts and circumstances can support a finding of

probable cause to arrest (and for the administration of a breath test) even where no field sobriety tests were administered or where the test results must be excluded for lack of compliance with the NHTSA standards. *Flowers*, 7th Dist. No. 07MA68, 2007-Ohio-6920, ¶15, citing *Homan*, 89 Ohio St.3d at 427.

**¶{41}** Here, we have other sufficient evidence of impairment for a finding of probable cause to arrest Calder for driving under the influence. The trooper testified that Calder drove through a parking spot on State Route 78 and his vehicle's entire tire went over the street curb, a strong odor of alcohol emanated from Calder's person, his eyes were bloodshot and glassy, his speech was slurred, he admitted to having a couple of beers and it was 2:30 a.m. on New Year's Day.

**¶{42}** The above facts are similar to those in *Homan* and the Court there stated that there was probable cause for the arrest. The *Homan* Court excluded the three standardized NHTSA field sobriety tests because the officer did not comply with NHTSA instructions for administering the tests (strict compliance was the standard at that time). The Court nonetheless found sufficient probable cause in *Homan* based upon the fact that the defendant admitted to drinking, and the officer observed erratic driving, red and glassy eyes, and an odor of alcohol on the defendant's breath.

**¶{43}** Likewise, *State v. Matus*, 6th Dist. No. WD-06-072, 2008-Ohio-377, cited by Calder, also specifically supports the conclusion that any error was harmless. In *Matus*, Matus sought to suppress field sobriety tests and the blood test. The trial court granted the motion to suppress in part and denied it in part. *Matus* then pled no contest. In ruling on whether the field sobriety tests should have been suppressed, the Sixth Appellate District found merit with the argument, but found the error to be harmless:

**¶{44}** "When a trial court erroneously fails to suppress the results of field sobriety tests, if ample evidence exists to support the arrest and conviction, this error is harmless. *Village of Gates Mills v. Mace,* 8th Dist. No. 84826, 2005-Ohio-2191, at ¶29. The following factors have been held to be indications that established probable cause for the arrest and conviction of a person for DUI: erratic driving, driving left of center at least three times, stopping at an intersection for a prolonged period of time, smell of alcoholic beverage on the person or breath, failure to notice police car flashers, slurred speech, bloodshot eyes, and impairment of physical abilities. See *State v. Flowers,* 7th Dist. No. 07-MA-68, 2007-Ohio-6920.

**¶{45}** "In addition to the results of the field sobriety tests, Officer Reinhart also testified to the following indicators to demonstrate that appellant was under the influence of alcohol. Appellant was observed driving over the yellow line three times. Appellant stopped and stayed at a flashing yellow light intersection for at least 30 seconds, a prolonged amount of time, and did not notice that the officer's flashers were engaged until after he turned on his sirens. Appellant smelled of alcohol, was unsteady when he exited his vehicle, had slurred speech, and had bloodshot eyes. Appellant also admitted to drinking three beers. Thus, even without the sobriety tests, there was sufficient evidence to demonstrate that there was probable cause to stop and to convict appellant of operating a vehicle while under the influence of an alcoholic beverage. Therefore, the trial court's error in denying appellant's motion to suppress the sobriety tests was harmless.

**¶{46}** "Accordingly, although appellant's second assignment of error is well-taken, it does not constitute reversible error." Id. ¶27-29.

**¶{47}** Therefore, even if the results of the walk and turn and one leg stand tests should have been suppressed, there was still probable cause for arrest and thus, for the administration of the breath test. Consequently, any error in failing to suppress the results of those tests was harmless. This assignment of error lacks merit.

SECOND ASSIGNMENT OF ERROR

**¶{48}** "THE ADMISSION OF BREATH TEST RESULTS WITHOUT EVIDENCE OF PROPER REFRIGERATION OF THE CALIBRATION SOLUTION DOES NOT CONSTITUTE SUBSTANTIAL COMPLIANCE WITH OHIO HEALTH DEPARTMENT RULES AND REGULATIONS AND MUST BE SUPPRESSED."

**¶{49}** In the motion to suppress and during the suppression hearing, Calder argued about the refrigeration of the calibration solution. He raised issues with what the temperature was in the refrigerator, if there was a log kept for the temperature of the refrigerator, if other items were kept in the refrigerator, and if there was a back up energy source for the refrigerator in case of a power outage. His issues with refrigeration appeared to be "quality control" issues. He raises those same issues to this court.

**¶{50}** The Ohio Administrative Code dictates that calibration solutions must be kept under refrigeration after the first use and must be kept under refrigeration when not in use. At the time of the offense the Code read:

**¶{51}** "Calibration solutions shall be kept under refrigeration after first use, when not being used. The calibration solution container shall be retained until the calibration solution is discarded." Ohio Adm.Code 3701-53-04(C).[1]

**¶{52}** The Third Appellate District has explained that the refrigeration requirement puts only a "fairly slight" burden on the state to show substantial compliance with this section and it could be satisfied with minimal testimony on refrigeration. *State v. Yeaples*, 3d Dist. No. 13-08-14, 2009-Ohio-184, ¶35, citing *State v. Johnson* (2000), 137 Ohio App.3d 847, *State v. Bissaillon,* 2d Dist. No. 06CA130, 2007-Ohio-2349, and *State v. Kerr,* 6th Dist. No. H-02-028, 2002-Ohio-6358. See, also, *State v. Washington* (2000), 137 Ohio App.3d 847, 854. At the suppression hearing, officers testified that after first use, when the solution was not in use, it was refrigerated. (Tr. 63, 87). This testimony was sufficient to show substantial compliance with the Ohio Administrative Code.

**¶{53}** Moreover, the "quality control" arguments about temperature, a back up power supply, and other uses for the refrigerator fail. This is because the Ohio Administrative Code does not set forth any of these requirements. Instead, it merely requires refrigeration after initial use. As there is nothing else set out in the code about any quality control requirements for refrigeration, we cannot find that they should exist or what they are; the ODH is in the best position to set forth those requirements.

**¶{54}** Our decision is supported by persuasive authority from our sister district. The Eleventh Appellate District was faced with an argument similar to the one made to us about the temperature of the refrigerator. It found the argument to be meritless and explained:

**¶{55}** "While we agree with appellant that there was nothing in the record to indicate the exact temperature at which the calibration solution was stored, this is of no consequence. Ohio Adm.Code 3701-53-04 does *not* set forth a particular temperature range to store the solution. Rather, the regulation merely provides that the solution be kept refrigerated after first use." *State v. McCardel* (Sept. 28, 2001), 11th Dist. No. 2000-P-0092 (internal citations omitted).

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[1]This requirement is now in Ohio Adm.Code 3701-53-04(E) which reads, "A bottle of approved solution shall not be used more than three months after its date of first use, or after the manufacturer's expiration date on the approved solution certificate, whichever comes first. After first use, a bottle of approved solution shall be kept under refrigeration when not being used. The approved solution bottle shall be retained for reference until that bottle of approved solution is discarded."

**¶{56}** Therefore, considering the above cited cases and the testimony, there was substantial compliance and no basis for the suppression of the results of the BAC DataMaster breath test on the basis of the refrigeration of the calibration solution. This assignment of error lacks merit.

THIRD ASSIGNMENT OF ERROR

**¶{57}** "IT IS PREJUDICIAL ERROR FOR THE STATE NOT TO OBSERVE A DEFENDANT FOR TWENTY-MINUTES IMMEDIATELY PRIOR TO PERFORMANCE OF THE BAC DATAMASTER TEST AND SUCH RESULT BECOMES INADMISSIBLE."

**¶{58}** Calder argues that the trooper failed to observe him for twenty minutes prior to administering the breath test. The Ohio Administrative Code provides that breath samples are to be analyzed according to the operational checklist for the instrument being used. Ohio Adm.Code 3701-53-02(C) (prior version); Ohio Adm.Code 3701-53-02(D) (current version). One item on the checklist requires observation of the subject for twenty minutes prior to conducting a breath test. *State v. Isbell*, 3d Dist. No. 17-08-08, 2008-Ohio-6753, ¶34, citing *Village of Bolivar v. Dick,* 76 Ohio St.3d 216, 218, 1996-Ohio-409. The twenty minute observation requirement is to ensure that the test subject does not orally ingest any material prior to testing. *State v. Horn*, 7th Dist. No. 04BE31, 2005-Ohio-2930, ¶13. The test does not have to occur at the twenty minute mark, rather, the subject must be observed for at least twenty minutes. See *Isbell*, supra at ¶35-36.

**¶{59}** Here, Trooper Hise testified that he began observing Calder at 2:44 a.m. and the test time was 3:09 a.m. (Tr. 22). He further testified that he had Calder within his line of sight the entire time and that Calder was cuffed with his hands behind his back and therefore there was no way Calder could have put anything in his mouth. (Tr. 23).

**¶{60}** However, further testimony revealed that Trooper Hise took the 2:44 a.m. time from his cruiser's video tape time and the 3:09 a.m. test time was taken from the BAC DataMaster. Testimony established that the machine time does not correspond with the video time or to the post time. (Tr. 102). Specifically, it is off three to five minutes. (Tr. 101). There was no testimony to dispute that the machine was off by more than three to five minutes. The testimony did not establish if the machine time is three to five minutes fast or slow.

**¶{61}** Regardless of whether the machine was three to five minutes fast or slow, Calder was observed for at least twenty minutes prior to the test being administered. As stated above, observation began at 2:44 a.m. and the test time was at 3:09 a.m. If the machine time was three to five minutes fast, then the actual test time would have occurred as early as 3:04 a.m. or as late as 3:06 a.m. Thus, if it was fast, the test occurred as early as twenty minutes after observation began or as late as twenty-two minutes after observation began. If the machine time was slow, then the test occurred as early as twenty-eight minutes after observation began or as late as thirty minutes after observation began. As can be seen by these time limits, there was clear testimony that was not disputed that Calder was observed for at least twenty minutes. Consequently, there is no merit with this assignment of error.

**¶{62}** For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Donofrio, J., concurs.
DeGenaro, J., concurs.