[Cite as *State v. Derov*, 2009-Ohio-4810.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 08 MA 189
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
JESSICA DEROV,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from County Court No. 4, Case No. 07TRC6859.
JUDGMENT:	Affirmed.

APPEARANCES:

For Plaintiff-Appellee:	Attorney Paul Gains Prosecuting Attorney Attorney Ralph Rivera Assistant Prosecuting Attorney 21 West Boardman Street, 6th Floor Youngstown, Ohio 44503
For Defendant-Appellant:	Attorney Robert Kokor 394 State Route 7, SE P.O. Box 236 Brookfield, Ohio 44403

JUDGES:

Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: September 10, 2009

VUKOVICH, P.J.

¶{1} Defendant-appellant Jessica Derov appeals the decision of the Mahoning County Court No. 4 which denied her appeal of an administrative license suspension (ALS). On appeal, she claims that the trooper lacked reasonable grounds to believe she was operating a motor vehicle while intoxicated (OVI), which is a requirement for an ALS. This argument is without merit.

¶{2} Regardless of the merits of this argument, the trial court's decision can be upheld on the ground that appellant's appeal of the ALS to the trial court was untimely as it was filed more than thirty days after her initial appearance. Thus, the trial court lacked jurisdiction to hear the administrative appeal. In accordance, the trial court's denial of appellant's ALS appeal is affirmed.

STATEMENT OF THE CASE

¶{3} On December 13, 2007 at 2:30 a.m., appellant was cited by an Ohio State Highway Patrol trooper for speeding, failure to wear a seatbelt, driving under an FRA suspension and OVI (second offense). Because she refused the breath test, the officer issued an ALS.

¶{4} Her initial appearance was held on December 17, 2007. It was not until February 28, 2008 that she filed an administrative appeal to the trial court challenging the ALS. A hearing on the matter was held on June 17, 2008.

¶{5} Appellant called the trooper to the stand. He admitted that the only driving violation he observed was speeding and that there did not exist erratic driving. (Tr. 6-7). He testified that on approaching appellant, he noticed a moderate odor of alcohol about her person. (Tr. 6). Her eyes were glassy and bloodshot.

¶{6} When she informed the trooper that she had nothing to drink, he found her claim to be dishonest and opined, "that was clearly not the case" and "she definitely had been drinking alcohol". (Tr. 11). When the trooper asked appellant to exit the vehicle, she refused, stating that she wanted to speak with her attorney. The trooper found this to be highly unusual behavior. (Tr. 11-12). After she finally exited,

she refused to take field sobriety tests. She was placed under arrest, and then she refused to submit to the breath test.

¶{7} The trial court found on the record that there were reasonable grounds to believe that appellant was OVI, and the court denied her ALS appeal. (Tr. 17). On August 13, 2008, the trial court issued its judgment denying the ALS appeal.[1] Appellant filed timely notice of appeal from this judgment on September 12, 2008, resulting in the within appeal. The trial court stayed the ALS suspension pending this appeal.[2]

UNTIMELY APPEAL TO TRIAL COURT

¶{8} Pursuant to R.C. 4511.191(B)(1), an administrative license suspension "shall be subject to appeal as provided in section 4511.197 of the Revised Code." The latter statute provides that if a person is arrested for OVI and an ALS suspension is imposed:

¶{9} "the person may appeal the suspension at the person's initial appearance on the charge resulting from the arrest or within the period ending thirty days after the person's initial appearance on that charge, in the court in which the person will appear on that charge." R.C. 4511.197(A),

¶{10} Appellant's initial appearance was on December 17, 2007. She had from this date until January 16, 2008 to file an appeal of the ALS in the trial court. Her appeal filed on February 28, 2008 was thus untimely. See *Lammers v. Caltrider*, 2d Dist. No. 21565, 2007-Ohio-1745, ¶7 (one cannot challenge the ALS any time during the suspension but only within the period provided in R.C. 4511.197(A)(1)); *Columbus v. Rose*, 10th Dist. No. 06AP-579, 2007-Ohio-499, ¶6 (noting that an ALS appeal is untimely unless filed at or within thirty days of the initial appearance).

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[1]The trial court wrote in the case jacket that the ALS appeal was denied. The court initialed this entry, which is evidently intended to be a signature. On the same date, the court had a date-stamp placed partially over the entry. The clerk docketed the entry as well. Apparently, the court then had the clerk send a copy of the case jacket to the parties as this is what is attached to the notice of appeal. We note that this informal procedure has been upheld in the past. *State v. McDowell*, 150 Ohio App.3d 413, 2002-Ohio-6712, ¶7 (elements of journalized judgment: decision reduced to writing, signed by judge, and filed with the clerk so that it may become a part of the permanent record of the court); *Hrina v. Segall* (June 6, 2001), 7th Dist. No. 00CA87 (where this same trial judge used his initials).

[2]We note that after a jury trial, appellant was acquitted of OVI. As both parties point out, an ALS suspension for a refusal to be tested survives a not guilty verdict. See R.C. 4511.191(D).

¶{11} There is no reason why the time period for this type of appeal would be treated differently from the jurisdictional time periods mandated in other appellate contexts. The use of "may" in the statute does not mean that one can file an ALS appeal at the initial appearance or within thirty days of that initial appearance *or at any time the person so chooses*. See, e.g., *State ex rel. Smith v. Barnell* (1946), 109 Ohio St. 246, 256 ("may" can be construed as mandatory).

¶{12} Although a Fifth District case once found the use of "may" in an ALS appeal statute discretionary, this case applied the prior version of the ALS appeal law, which only stated that the defendant may appeal the ALS suspension at the initial appearance. See, e.g., *State v. Nichols* (Nov. 6, 2001), 5th Dist. Nos. 01CA7, 01CA8 (also noting that there would be due process problems with such a short appeal period if such were in fact mandatory), citing former R.C. 4511.191(H). We are not bound by this decision, and the Second District has held otherwise. See *State v. Cooney* (2001), 142 Ohio App.3d 773, 775 (appeal of ALS must be filed at initial appearance, and time period is not a due process violation).

¶{13} In any event, when the January 1, 2004 amendments to the ALS appeal procedure added that the defendant may appeal the ALS not only at the initial appearance but also within thirty days of the initial appearance, the statute changed sufficiently to show a clear intent on the part of the legislature to mandatorily require an ALS appeal to be filed within the specified time period. See R.C. 4511.197(B)(1) (amended in 2004 to referring solely to R.C. 4511.197(A) for the proper appellate procedure to trial court). Moreover, contrary to appellant's contention, the extended time period of thirty days within which to file an ALS appeal cannot be said to constitute a due process violation. This is all the time an appellant gets to file an appeal to this court, and notice of the right to appeal is not a requirement in this situation either. See App.R. 4(A). We also note here that an ALS appeal is civil and remedial in nature, rather than criminal in nature. See *State v. Gustafson* (1996), 76 Ohio St.3d 425, 443-444. For all of these reasons, *Nichols* is distinguishable and is not in conflict with our jurisdictional analysis here.

¶{14} We conclude that the ALS appeal is untimely if it is not filed within thirty days of the initial appearance and that an untimely ALS appeal deprives the trial court

of jurisdiction to hear the ALS appeal. Accordingly, the trial court's decision denying the ALS appeal is affirmed on this basis.

REASONABLE GROUNDS

¶{15} In any event, appellant's main argument is without merit. If a person appeals an ALS, the scope of the appeal is defined in R.C. 4511.197(C)(1) through (4). Appellant raises only division (C)(1), which provides that a defendant who was arrested can ask the court to determine whether the arresting officer had "reasonable ground to believe" the defendant was OVI.

¶{16} This reasonable ground test has been equated with probable cause to arrest. See *State v. Williams* (1996), 76 Ohio St.3d 290, 293-294 (equating issues litigated in ALS appeal with those litigated in suppression hearing); *State v. Gustafson* (1996), 76 Ohio St.3d 425, 439 (stating that probable cause is required before seeking breath test, even though statute being analyzed used "reasonable ground"). A probable cause evaluation determines whether the officer 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 OVI. *State v. Homan* (2000), 89 Ohio St.3d 421, 427.

¶{17} Appellant acknowledges that the refusal to take field sobriety tests can be a factor in a probable cause/reasonable ground evaluation. See *State v. Molk*, 11th Dist. No. 2001-L-146, 2002-Ohio-6926, ¶26, citing *State v. Arnold* (Sept. 7, 1999), 12th Dist. No. CA99-02-026; *State v. Buehl* (Jan. 26, 2000), 9th Dist. No. 19469. Appellant then notes that an officer must have reasonable suspicion to support a request to perform field sobriety tests. See *State v. Wilson*, 7th Dist. No. 01CA241, 2003-Ohio-1070, ¶17. Thus, appellant argues that the trooper lacked reasonable suspicion to seek field sobriety tests and concludes that the remaining evidence of glassy and bloodshot eyes and a moderate odor of alcohol about a person (but not said to be specifically on one's breath) is insufficient to support a finding of probable cause/reasonable ground.

¶{18} As appellant points out, in her last OVI appeal, a panel court reversed a suppression decision and vacated her conviction. *State v. Derov*, 176 Ohio App.3d 43, 2008-Ohio-1672, ¶31. She claims that the facts here are similar enough to require

reversal as well. However, the Ohio Supreme Court reversed and remanded the part of our decision regarding the use of a portable breath test. *State v. Derov*, 121 Ohio St.3d 268, 2009-Ohio-1111, ¶1. They did not end up reviewing our decision on the other assignments set forth by the state relevant to this appeal. See id. at ¶3. However, the Supreme Court specified that nothing in our opinion could be cited as authority in future cases. Id. at ¶4. Thus, contrary to appellant's position, we cannot rely on the finding of no probable cause in *Derov* as stare decisis to support our decision here. Thus, we review the facts of the case at bar and conduct an independent analysis.

¶{19} The state mentions the officer's right to arrest appellant for driving under FRA suspension. Yet, there is no indication the officer knew of this suspension when he approached the car and sought field tests. Plus, the ALS statute requires reasonable ground to believe the arrested person is OVI, not reasonable ground to arrest for any reason. See R.C. 4511.197(C)(1).

¶{20} There was no evidence of slurred speech or impaired motor coordination. However, appellant was stopped for speeding, and she was also not wearing a seatbelt. Appellant had red and bloodshot eyes. The time of the stop was 2:30 a.m. Besides being very early in the morning, this is also the time bars in Ohio are mandated to close.

¶{21} She emanated an odor of alcohol characterized as moderate. Still, she denied having anything to drink. The trooper testified that this was clearly untruthful and that she had definitely been drinking. As the state urges, such testimony could imply that the odor of alcohol was coming from her breath. Since it was appellant rather than the state who had the burden of proof in the ALS appeal, appellant should have elicited from the officer whether he noticed the odor on her breath or merely on her person. See R.C. 4511.197(D) (person appealing ALS has burden of proof by preponderance of the evidence).

¶{22} Additionally, when asked to exit the vehicle, appellant initially refused. Appellant states that we cannot use this against her in our evaluation because she asserted her right to counsel; however, she provides no citation for her claim that there

is a right to counsel prior to complying with an investigative traffic stop. Upon these facts, we find reasonable suspicion to seek field sobriety testing.

¶{23} With our acceptance of the officer's right to seek the requested field sobriety testing here, this provides an additional factor that pushes the case over the probable cause/reasonable ground threshold. As appellant here concedes, the refusal to submit to field sobriety testing is a factor to consider in probable cause evaluation. See *Molk*, 11th Dist. No. 2001-L-146 at ¶19; *State v. Blosser* (Mar. 30, 2000), 10th Dist. Nos. 99AP-816, 99AP-867; *Buehl*, 9th Dist. No. 19469; *Arnold*, 12th Dist. No. CA99-02-026. As such, appellant's arguments are overruled.

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

Donofrio, J., concurs in judgment only with concurring opinion.
Waite, J., concurs.

DONOFRIO, J. concurring in judgment only with concurring opinion.

¶{25} I concur with that portion of the majority opinion that opined that the administrative license suspension ALS must be affirmed because appellant's appeal of the ALS to the trial court was untimely and, therefore, the trial court was without jurisdiction to entertain the appeal. However, I do not believe that the majority opinion should go on to address the merits of appellant's argument as any such comment on the evidence is purely advisory. The majority plainly states that the trial court's decision is affirmed because the ALS appeal was untimely and the trial court lacked jurisdiction to hear it. Opinion at ¶14. Yet the majority then goes on to address the merits of appellant's "reasonable grounds" argument. It is well-settled that appellate courts do not generally rule on moot points or issue advisory opinions. *State ex rel. White v. Kilbane Koch,* 96 Ohio St.3d 395, 2002-Ohio-4848, at ¶18. As such, I would simply affirm the trial court's decision based on the untimeliness of the ALS appeal and the corresponding lack of jurisdiction.