

NO. 2016-0172, 2016-0282

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 102835

CITY OF CLEVELAND,
Plaintiff-Appellant

-vs-

BENJAMIN S. OLES,
Defendant-Appellee

**BRIEF OF AMICUS CURIAE OHIO PROSECUTORS ATTORNEYS ASSOCIATION
AND CUYAHOGA COUNTY PROSECUTOR'S OFFICE IN SUPPORT OF
APPELLANT CITY OF CLEVELAND**

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**STATEMENT OF INTEREST OF AMICUS CURIAE OF THE OHIO PROSECUTING
ATTORNEYS ASSOCIATION**

The Cuyahoga County Prosecutor’s Office, regularly prosecutes felony OVI cases, aggravated vehicular assaults and homicides, drug trafficking and possession cases and other felonies. Between 2011 and 2015, the Cuyahoga County Prosecutor’s Office (“CCPO”) indicted 620 cases involving violations of R.C. 4511.19 (“OVI cases”).

The thirty-four judges of the Cuyahoga County Court of Common Pleas will be bound by the constitutional precedence established by the Eighth District Court of Appeals (“Eighth District”) in *City of Cleveland v. Oles*, 8th Dist. Cuyahoga No. 102835, 2016-Ohio-23. Inevitably, felony prosecutions, including those for OVI offenses, will involve suppression motions whether they be attacks on the scientific evidence or whether they be constitutional challenges.

As a result the opinion in *City of Cleveland v. Oles*, 8th Dist. Cuyahoga No. 102835, 2016-Ohio-23 affects felony prosecutions in Cuyahoga County and limits how law enforcement may investigate traffic stops that involve individuals suspected of operating a vehicle under the influence.

The concerns of the Cuyahoga County Prosecutor’s Office are shared by the Ohio Prosecuting Attorneys Association (“OPAA”). The OPAA joins the Cuyahoga County Prosecutor’s Office amici brief in support of the City of Cleveland’s and advocates for reversal of the Eighth District Court of Appeals decision and asks that the certified question be answered in the negative.

The OPAA founded in 1937 is a private non-profit trade organization that was founded for the benefit of the 88 elected county prosecutors. The mission statement of the OPAA is as follows:

The Ohio Prosecuting Attorneys Association assists county prosecuting attorneys to pursue truth and justice as well as promote public safety. The Association advocates for public policies that strengthen prosecuting attorneys’ ability to secure

justice for crime victims and serve as legal counsel to county and township authorities. Further, the Association sponsors continuing legal education programs and facilitates access to best practices in law enforcement and community safety. The Association also offers information to the public about the role of prosecutors in the justice system.

Although the OPAA does not routinely offer amicus support in cases originating from Ohio's municipal or county courts, it recognizes the profound effect this case will have on felony cases handled by Ohio's elected county prosecuting attorneys. Moreover, the OPAA recognizes that OVI traffic stops can become felony matters to be prosecuted by the elected county prosecutor. The Ohio Prosecuting Attorneys Association ("OPAA") has an interest in the effective prosecution of drunk drivers - prosecution which relies in part upon the admission of statements made by motorists during traffic stops pursuant to investigative questioning and in part upon the results of field sobriety and blood tests. This misdemeanor case raises constitutional issues that can arise in felony prosecutions for OVI and related offenses throughout the State of Ohio. The OPAA urges reversal of the lower court's determination that merely placing a motorist in the front seat of a patrol car, without more, renders the motorist in custody thereby requiring a *Miranda* warning.

Only in the Eighth District Court of Appeals does placing a motorist in a patrol car during a traffic stop transform a temporary detention into a custodial interrogation requiring a *Miranda* warning. Every other district in Ohio to address the issue has determined that mere presence in the patrol car is insufficient. Their conclusion is consistent with this Court's holding in *State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 895 that "a motorist who is temporarily detained as the subject of an ordinary traffic stop is not 'in custody' for the purposes of *Miranda*." Other states have similarly held that the presence of a motorist in the patrol car is not dispositive of whether *Miranda* rights are triggered.

Even if this Court were to accept that the defendant's un-Mirandized statements were taken during a custodial interrogation, the lower court's decision as well as the appellate court's decision improperly excluded the results of field sobriety tests by vastly expanding the exclusionary rule to include evidence that was not obtained as a result of the defendant's statements.

Because the Eighth District's decision is outside the mainstream of case law on this issue and because it will frustrate the enforcement of drunk driving throughout the State of Ohio if it were adopted by this Honorable Court, the Ohio Prosecuting Attorney's Association and Cuyahoga County Prosecutor's Office respectfully asks this Court to reverse.

STATEMENT OF THE CASE AND FACTS

Amici curiae adopts and incorporates by reference the Statement of the Case and Statement of the Facts as set forth by the Appellant, City of Cleveland, in its memorandum in support of jurisdiction. Further, the Eighth District provided its own summary in *City of Cleveland v. Oles*, 8th Dist. Cuyahoga No. 102835, 2016-Ohio-23, ¶1-9.

The testimony at the hearing indicated that, Lieutenant Eric Sheppard of the Ohio State Highway Patrol was patrolling Interstate-90 on September 19, 2014. (Tr. 6). Benjamin Oles' vehicle made a sudden lane change over marked lanes at the I-90 West and I-71 South split and came close to hitting Lt. Sheppard's patrol car. (Tr. 9). Lt. Sheppard got into a vehicle and initiated a traffic stop. (Tr. 9). Benjamin Oles' stopped his car, partly in the I-90 lane and partly in the I-71 lane. (Tr. 12). Lt. Sheppard exited his vehicle and told Oles to move his car for safety. (Tr. 12). Lt. Sheppard approached the vehicle and asked Oles to provide a license, registration and insurance. (Tr. 13). Oles' movement were observed to be slow. (Tr. 13). Sheppard advised Oles the reason for the stop. Sheppard then asked Oles where he was coming from. Oles advised that he was coming from a wedding in downtown Cleveland. As they were talking Sheppard could

smell an odor of alcohol which was described as moderate. (Tr. 14). Lt. Sheppard described the odor as not being overpowering but very distinct. (Tr. 14). Lt. Sheppard asked Oles to step out of the vehicle to determine the source of the alcoholic smell. (Tr. 14). As Oles was being taken to the police cruiser, Oles was observed to be walking slow and as if he was intentionally walking slow or trying to make sure he was not losing his balance. (Tr. 15). As Lt. Sheppard was talking to Oles in the police cruiser, it was evident that the smell of alcohol was coming from Oles' breath. (Tr. 15). After that Oles admitted that he had consumed four mixed drinks while at the wedding. (Tr. 15). Lt. Sheppard then conducted a field sobriety test

In *City of Cleveland v. Oles*, 8th Dist. Cuyahoga No. 102835, 2016-Ohio-23, ¶1-9, the Eighth District affirmed the decision of the trial court which suppressed both the statement and the field sobriety tests. The Eighth District agreed that Oles was under custodial interrogation and that any statements had to be suppressed because Oles was not given his *Miranda* rights. In addition, the Eighth District affirmed the suppression of the field sobriety tests. *Oles*, ¶20-23. The Eighth District affirmed the judgment of the trial court but certified a conflict with decisions from the First, Fifth, Seventh, and Eleventh appellate districts, discussed below. The City of Cleveland filed a notice of certified conflict in *City of Cleveland v. Benjamin S. Oles*, Sup. Ct. Case No. 2016-0172 and sought a jurisdictional appeal. This Court accepted for review both the certified conflict and the discretionary appeal.

LAW AND ARGUMENT

“No person . . . shall be compelled in any criminal case to be a witness against himself”. Fifth Amendment to the U.S. Constitution. “[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of the procedural safeguards effective to secure the privilege against self-

incrimination.” *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602 (1966). The Supreme Court defined ‘custodial interrogation’ as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Miranda*, 384 U.S. at 444.

Conflict certified: *In the course of a traffic stop, do the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution require a law enforcement officer to provide Miranda warnings to a suspect who is removed from his vehicle and placed in the front seat of a police vehicle for questioning?*

Appellant’s Proposition of Law 1: *The investigative questioning of a driver in the front seat of a police vehicle during a routine traffic stop does not rise to the level of custodial interrogation and any statements elicited do not incur the protections of Miranda.*

The Supreme Court of the United States held that “whether the roadside questioning of a motorist detained pursuant to a routine traffic stop should be considered ‘custodial interrogation’” is a case-by-case question. *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138 (1984) (“[W]e decline to accord talismanic power to the phrase in the *Miranda* opinion.”). The *Berkemer* Court held that there was less danger of police coercion during a traffic stop because “detention of a motorist pursuant to a traffic stop is presumptively temporary and brief”. “In this respect questioning incident to an ordinary traffic stop is quite different from a stationhouse interrogation, which frequently is prolonged, and in which the detainee often is aware that questioning will continue until he provides his interrogators the answers they seek.” *Berkemer*, 468 U.S. at 438. Additionally, “the atmosphere surrounding an ordinary traffic stop is substantially less ‘police dominated’ than that surrounding the kinds of interrogation at issue in *Miranda* itself”. *Id.* at 439.

In *Berkemer*, the Supreme Court considered several factors relevant to its determination that the motorist was not in custody: 1) the length of time between stop and arrest; 2) whether the motorist knew his detention would not be temporary; 3) the number of officers present during the

interrogation; 4) the number of questions asked; and 5) the location and visibility of the interrogation to the public. *Berkemer*, 468 U.S. at 441-42.

This Court held that a motorist was in custody during a traffic stop based on the facts in *State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985. That holding was based on the facts that the motorist was “patted down”, his “car keys” were taken, he was placed in the patrol car, and was told that the officer was going to search the motorist’s vehicle. *Farris*, ¶ 14. Based on these facts, this Court held that a “reasonable man in Farris’ position would have understood himself to be in custody of a police officer as he sat in the cruiser.” *Id.* But none of these facts exist here and the Eighth District over-extended the holding of *Farris* when it rejected the reasoning of the First, Second, Fifth, Seventh and Eleventh appellate districts.

This appeal presents the less coercive situation, where only the fact that the motorist was placed in the patrol car is present.

I. The First, Second, Fifth, Seventh, and the Eleventh District Courts of Appeals have held that a motorist’s mere presence in the patrol car during questioning does not render a motorist in custody.

The First District Court of Appeals has addressed the underlying issue multiple times. In *Leonard*, a motorist was stopped on suspicion of excessive window tint. *State v. Leonard*, 1st Dist. Hamilton No. C-060595, 2007-Ohio-3312, ¶ 4. The officer smelled alcohol and observed an opened beer in the console as well as bloodshot eyes of the motorist. *Id.* ¶ 5. The motorist was placed in the front seat of the patrol car and admitted to having “a couple” drinks. *Id.* ¶ 6. The First District held “[c]ompared to the facts in *Farris*, the intrusion in this case was minimal. Trooper Hayslip did not conduct a pat-down search . . . and did not take Leonard’s car keys or search his van. And Trooper Hayslip did not handcuff Leonard or subject him to lengthy

detention.” *Id.* ¶ 22. Therefore, it concluded that “a reasonable person in Leonard’s position would have understood that he was not in police custody for practical purposes.” *Id.* ¶ 23.

Even under comparatively more coercive facts, the First District reached the same result in *State v. Rice*, 1st Dist. Hamilton Nos. C-090071, C-090072, C-090073, 2009-Ohio-6332. A motorist was pulled over after failing to yield to a motorcycle. *Id.* ¶ 2. When the officer approached the car he observed the strong odor of alcohol and the motorist’s bloodshot eyes. *Id.* ¶ 2. In *Rice*, the officer conducted a pat-down search and placed the motorist in the *back seat* of the cruiser. *Id.* ¶ 2. At that time, the motorist “stated that he had consumed four 16-ounce beers.” ¶ 2. In holding that Rice was not in custody, the First District emphasized that “he was not handcuffed” and the “interaction between Rice and [the officer] was neither combative nor intimidating.” *Id.* ¶ 14.

The Second District held that a motorist was not in custody when placed in a patrol car during a traffic stop in *State v. Simmons*, 2d. Dist. Montgomery No. 23992, 2011-Ohio-5561. In that case, the motorist was stopped upon suspicion of fictitious plates. *Id.* ¶ 4. The officer smelled alcohol and observed the motorist had red and watery eyes. *Id.* ¶ 5. The motorist was placed in the *rear* of the police cruiser and admitted to consuming one beer. *Id.* ¶ 7. The Second District emphasized that the motorist “had not been handcuffed” and “police took no actions that would lead a reasonable person in the defendant’s position to believe that he was going to be detained indefinitely.” *Id.* ¶ 24. Therefore, it held that the motorist was not in custody for purposes of *Miranda*. *Id.* ¶ 25.

The Fifth District similarly held that *Miranda* was not implicated where a motorist was placed in a patrol car. *State v. Mullins*, 5th Dist. Licking No. 2006-CA-00019, 2006-Ohio-4674. The motorist in *Mullins* was stopped after he was driving with his high beams on. *Id.* ¶ 2. The

officer noticed “an open container of what appeared to be an alcohol beverage, a strong odor of an alcohol beverage, and slow and deliberate movements”. *Id.* ¶ 3. “As part of his normal procedure, Trooper asked the [motorist] to exit the vehicle and have a seat in the front of his cruiser”. *Id.* ¶ 4. “during that conversation the [motorist] admitted to consuming alcohol.” *Id.* ¶ 4. The *Mullins* Court stressed that at the time of questioning the motorist was “not under arrest”, “was not handcuffed and was permitted to sit in the front seat of the cruiser”. *Id.* ¶ 29. Therefore, the *Mullins* Court held that the motorist was not in custody and his statements were made in response to “general on-the-scene questioning”. *Id.* ¶ 28.

In *State v. Crowe*, 5th Dist. Delaware No. 07CAC030015, 2008-Ohio-330, the Fifth District reinforced its holding in *Mullins*. In *Crowe*, a motorist was pulled over for “excessive speed” and the officer detected odor from the vehicle and noticed the motorist’s eyes were glassy and bloodshot. *Id.* ¶ 2-3. “At the trooper’s request, the appellant got out of his vehicle and was seated in the front seat of the patrol cruiser”. *Id.* ¶ 4. Eventually the motorist “admitted that he had a beer about an hour and half ago.” *Id.* ¶ 5. The Fifth District held that *Crowe* was “distinguishable” from *Farris* because the motorist was not patted down, was not handcuffed, his keys were not taken away, he was not subjected to lengthy detention, and he was not told his vehicle was going to be searched. *Id.* ¶ 35.

The Seventh District also held that a motorist placed in a patrol car was not in custody pursuant to *Miranda*. *State v. Coleman*, 7th Dist. Mahoning No. 06MA41, 2007-Ohio-1573. In *Coleman*, a motorist was stopped for speeding. *Id.* ¶ 3. The officer approached the car and noticed a “moderate smell of alcohol” and the motorist could not produce a driver’s license. *Id.* ¶ 5. The motorist was placed in the patrol car while the officer verified his identification. *Id.* ¶ 6. Initially the motorist denied drinking but after he failed several sobriety tests he admitted to having a couple

beers at work. *Id.* ¶ 6-7. The Seventh District held that the motorist was not in custody because the motorist “had not been handcuffed”, “was not patted down, his car was not searched and his statements were not made about an impending search, his “keys were not confiscated”, he was “placed in the front seat”, and there was “only one officer on the scene”. *Id.* ¶ 37.

Finally, the Eleventh District came to the same conclusion in *State v. Serafin*, 11th Dist. Portage No. 2011-P-0036, 2012-Ohio-1456. The motorist in that case was stopped for speeding and the officer observed the “distinct odor of alcohol coming from the car”. *Id.* ¶ 6-8. The motorist consented to a pat-down search and sat in the front seat of the patrol car. *Id.* ¶ 11-13. At that point, the motorist admitted that he had a couple beers over dinner. *Id.* ¶ 13. The *Serafin* Court held that the motorist was not in custody because he “was allowed to keep his keys” and the officer “gave no indication that the detention would extend beyond the purposes of the initial stop for Speeding.” *Id.* ¶ 35.

The Eleventh District reaffirmed its decision in 2015. *State v. Brocker*, 11th Dist. Portage No. 2014-P-0070, 2015-Ohio-3412. The motorist in that case was stopped for speeding and the officer noticed a “strong odor of alcoholic beverage”. *Id.* ¶ 2-3. “He asked [the motorist] to step out of his vehicle so that he could conduct his interview and to see if he could continue to smell alcohol. [The motorist] consented to a pat down search, and the trooper had him enter his patrol car.” *Id.* ¶ 3. The motorist then admitted to drinking a single beer three hours earlier. *Id.* ¶ 4. The Eleventh District held that the motorist was not in custody because the “detention was brief” and the officer did not take the motorist’s keys or search his vehicle. *Id.* ¶ 18.

In sum, eight Ohio appellate district cases have held that presence in a patrol car during a traffic stop does not render a motorist in custody for purposes of *Miranda*. In two of those cases, the motorist was placed in the *backseat* of the patrol car. *Rice*, ¶ 2; *Simmons*, ¶ 5. The backseat

of the patrol car is inherently more coercive a setting for questioning than the front seat because the back seat door is typically locked from the inside and contains a safety barrier. *See United State v. Clark*, 22 F.3d 799, 802 (8th Cir.1994) (The backseat of a police car “is frequently used as a temporary jail for housing and transporting arrestees and suspects.”) Additionally, three of those district cases involve a motorist who was actually patted down prior to entering the patrol car. *Rice*, ¶ 2; *Serafin*, ¶ 11 (consent to pat down); *Brocker*, ¶ 3 (consent to pat down). In stark contrast, the motorist in this case was placed in the front seat of the patrol car, unhandcuffed, and no pat down occurred.

II. Multiple state supreme courts have held that mere presence in a patrol car does not constitute ‘custody’ for purposes of *Miranda*.

In *State v. Stover*, the Missouri State Highway Patrol pulled over a vehicle for following a tractor-trailer too closely. *State v. Stover*, 388 S.W.3d 138, 142 (Mo.2012). After receiving the driver’s license, the officer asked him to sit in the patrol car. *Id.* at 143. While in the patrol car, the driver claimed to be returning from a trip to Las Vegas. *Id.* at 144. However, the officer noticed there was no luggage visible in the car. *Id.* at 144. The passenger made statements inconsistent with the driver. *Id.* at 144. The officer then called for a canine unit which alerted on the trunk of the car, revealing 10 gallons of PCP. *Id.* at 144. The defendant argued that the drugs should have been suppressed because he was never was advised of his *Miranda* rights. However, the Supreme Court of Missouri held that because of the non-coercive aspect of ordinary traffic stops, the statements made “during the traffic stop, however, did not occur during custodial interrogation.” *Id.* at 155.

The Supreme Court of Kansas similarly held that mere presence in a patrol car was insufficient to transform a traffic stop to a custodial interrogation. *Smith v. Kan. Dep’t of Revenue*, 291 Kan. 510, 242 P.3d 1179 (2010). In *Smith*, a motorist was stopped for faulty lights. *Id.* at 511.

Upon approaching the motorist, the officer noticed “a strong alcohol odor” and that the motorist’s eyes were “bloodshot and watery”. *Id.* at 511. The officer “asked Smith to sit in the patrol car while he issued a warning for the equipment violation”. *Id.* at 511. Once in the patrol car, the officer asked if Smith had been drinking and Smith replied by saying either “a few” or “three or four”. *Id.* at 511. Smith then failed the preliminary breath test and was arrested. *Id.* at 512.

The *Smith* Court noted that the facts were “nearly indistinguishable” from the Supreme Court of the United States’ decision in *Berkemer*. *Id.* at 518. However, “one difference is that Smith was seated in the patrol car when questioned and Berkemer was not.” *Id.* at 518. The Supreme Court of Kansas held that the sole fact of Smith’s presence in the patrol car did not mean Smith was in custody: “[p]rior Kansas courts have held that a defendant was not in custody despite being seated within a patrol car.” *Id.* at 518. The Court also noted that the officer “asked a limited number of questions” and the “inquiry did not prolong the encounter”. *Id.* at 518.

The Supreme Court of Wisconsin addressed whether a motorist was in custody for purposes of *Miranda* under much more coercive circumstances. *State v. Martin*, 343 Wis.2d 278, 816 N.W.2d 270 (2012). In *Martin*, an officer observed Martin exit an SUV and shout at the driver of another car. Martin approached the driver’s car and was holding something in his hand. When the officer approached, Martin placed the item back in his pocket. Martin was placed in handcuffs and the officer found a collapsible baton in Martin’s pocket. A search of Martin’s SUV revealed a revolver. Martin admitted the revolver was his and was never advised of his *Miranda* rights.

The *Martin* Court concluded that Martin was in custody because “Martin was placed under arrest, handcuffed and questioned by the police (but not as part of an investigative stop or for officer safety reasons).” *Martin*, 343 Wis.2d 278, 299. But the Supreme Court of Wisconsin also held that even “the use of handcuffs does not in all cases render a suspect in custody for *Miranda*

purposes.” *Id.* at 298. Because Martin had been arrested when the questioning started, the Supreme Court ultimately determined that “a reasonable person would not feel free to terminate the interview”. *Id.*

III. Federal case law post-*Berkemer* suggests only very rare facts will transform a traffic stop into a custodial interrogation.

The Fourth Circuit Court of Appeals has held that even “drawing weapons, handcuffing a suspect, placing a suspect in a patrol car for questioning, or using or threatening to use force does not necessarily elevate a lawful stop into a custodial arrest for *Miranda* purposes.” *United States v. Sullivan*, 138 F.3d 126, 132 (4th Cir.1998) (citing *United States v. Leshuk*, 65 F.3d 1105, 1109-1110 (4th Cir.1995)). In *Sullivan*, the motorist was asked questions while he was still in his own vehicle and admitted that there was a gun in the vehicle. *Sullivan*, 138 F.3d at 131-132. However, the Fourth Circuit’s holding strongly indicates that traffic stops will rarely transform into custodial interrogations.

IV. Oles was not under custodial interrogation subject to *Miranda*

Regardless of Lt. Sheppard’s unspoken intentions the relevant inquiry is whether a “reasonable person would feel free to leave the interview” under the totality of the circumstances presented at that time. *Cleveland v. Oles*, 8th Dist. Cuyahoga No. 102835, 2016-Ohio-23, ¶13. The court in *Oles* rightfully recognized that the other appellate district have held that the questioning of a defendant, once removed from a vehicle, regarding his alcohol consumption does not rise to the level of a custodial interrogation and that the level of intrusion that arose in *Farris* was greater and distinguishable. *Oles*, ¶14-18. Lt. Sheppard removed Oles from the vehicle to verify the source of smell of the alcohol and to further assess whether Oles was impaired. None of the concerns in *Farris* that elevated the law enforcement encounter to a custodial interrogation

exist here, and this Court should hold that Oles' was not under custodial interrogation, under the totality of the circumstances, merely because he was placed in the front seat of a police vehicle.

Appellant's Proposition of Law 2: *The evidence obtained independently in an investigation of Driving Under the Influence during a routine traffic stop cannot be suppressed.*

This Court recognized that under the U.S. Constitution suppression of un-Mirandized statements do not require the suppression of physical evidence and that violations of Miranda occur only at trial and only as to statements. *Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, ¶37-45. However, this Court held that the Ohio Constitution requires, "evidence obtained as the *direct* result of statements made in custody without the benefit of a *Miranda* warning [...] be excluded." *Id.*, ¶49. However, this Court's decision in *Farris* was borne out of the facts of *Farris* and within the context of the collection of physical evidence. In *Farris*, an officer pulled over the defendant's vehicle and smelled marijuana. The defendant was removed from the vehicle, placed in the front seat of the police cruiser and he was told that the defendant's vehicle would be searched. When questioned about the smell of marijuana the defendant admitted that marijuana pipe would be found in a bag in the trunk of the vehicle. *Id.* ¶1-5. Having found no evidence of marijuana in the interior of passenger compartment of the vehicle, the marijuana pipe was found in the trunk just as the defendant indicated. *Id.*, ¶6. This Court found that the pipe was obtained as the direct result of the statements and found that the smell of marijuana did not provide probable cause to search both the passenger compartment and the trunk of the vehicle. *Id.* ¶50-52. Therefore, *Farris* does not stand for the proposition that all evidence obtained or observed subsequent to un-Mirandized statements must be suppressed.

The City of Cleveland submits that,

The evidence obtained independently in an investigation of Driving Under the Influence during a routine traffic stop cannot be suppressed.

Stated differently and more broadly, amici curiae agrees and argues that evidence obtained independently or without infringement of constitutional rights cannot be suppressed. In this case, both the trial court and the Eighth District suppressed the results of the field sobriety tests. The Eighth District noted that the officer may have had reasonable suspicion to conduct a field sobriety test after the officer's initial interaction with Oles or based upon the odor of alcohol. *Oles*, ¶21. The Eighth District apparently determined that the suppression of the field sobriety test was required based upon the timing of when the field sobriety test was conducted when it noted that its analysis was "controlled" by Sheppard's testimony that he decided to perform a field sobriety test only after Oles' statements. *Id.* However, the decision should not be controlled on Sheppard's subjective beliefs.

In holding that the court was compelled to suppress the field sobriety test based upon the suppression of Sheppard's statements, the Eighth District failed to consider whether the field sobriety tests was based on an independent source or whether Sheppard had cause to conduct the field sobriety tests regardless of what the court determined were inadmissible statements. In simplest terms, the independent source doctrine permits the admission of evidence that has been discovered by means wholly independent of any constitutional violation. *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 79 (1964); *Kastigar v. United States*, 406 U.S. 441, 457, 458-459 (1972). See also *State v. Perkins*, 18 Ohio St.3d 193 (1985). The independent source doctrine permits the admission of evidence that has been discovered by means wholly independent of any constitutional violation. Under the independent source doctrine the suppression of statements made by Oles does not require the suppression of field sobriety tests where an officer has reasonable suspicion to conduct the field sobriety test for reasons independent of the statement. Even if the field sobriety test was not wholly independent from the statements, the admissibility

of the field sobriety test can be found under a theory of inevitable discovery for similar reasons. Under the inevitable discovery exception, “illegally obtained evidence is properly admitted in a trial court proceeding once it is established that the evidence would have been ultimately or inevitably discovered during the course of a lawful investigation.” *State v. Perkins*, 18 Ohio St.3d 193, 18 OBR 259, 480 N.E.2d 763 (1985), paragraph one of the syllabus.

The Eighth District held that Oles was under custodial interrogation and affirmed the suppression of the statements and the results of the field sobriety test. The suppression of the field sobriety tests was affirmed even though the Eighth District readily acknowledged there may have been reasonable suspicion to conduct the field sobriety test for reasons independent of the statements. *Oles*, ¶21. Even if this Court were to conclude that Oles’ statements should be suppressed, that holding alone should not automatically exclude the results of the field sobriety tests. The Eighth District suggests that there may have been grounds to conduct the field sobriety tests for reasons other than Oles’ statements. There is no compelling reason to exclude the field sobriety tests where there were independent grounds to conduct the field sobriety tests. The trial court’s exclusion of the field sobriety tests, and the Eighth District’s subsequent affirmance, ignore the independent source doctrine and exclude evidence that was not wholly derived from the defendant’s statements. The independent source doctrine permits the admission of evidence that has been discovered by means wholly independent of any constitutional violation. *Murphy v. Waterfront Comm’n of New York Harbor*, 378 U.S. 52, 79 (1964); *Kastigar v. United States*, 406 U.S. 441, 457, 458-459 (1972).

Lieutenant Sheppard had reasonable suspicion to conduct a field sobriety test based on his observations that were independent from any alleged interrogation of Oles. In *Cleveland v. Reese*, 8th Dist. Cuyahoga No. 100579, 2014-Ohio-3587, the Eighth District upheld the field sobriety test

holding that a police officer only requires a reasonable suspicion based upon articulable facts that the motorist is intoxicated. *Cleveland v. Reese*, 8th Dist. Cuyahoga No. 100579, 2014-Ohio-3587, ¶17.

Applying the independent source or inevitable discovery framework to the case at bar, the trial court and Eighth District exceeded the scope of the constitutional challenge when the courts held that both the statements and the field sobriety test be excluded as evidence. If absent the statements, there remained reasonable suspicion to conduct the field sobriety test, then suppression of those tests was totally unnecessary. Therefore, this Court should reverse the trial court's exclusion of the field sobriety test and remand this case to the trial court for further proceedings.

CONCLUSION

The Ohio Prosecuting Attorneys Association and the Cuyahoga County Prosecutor's Office respectfully urge this Court to reverse the decision of the Eighth District Court of Appeals in *City of Cleveland v. Oles*, 8th Dist. Cuyahoga No. 102835, 2016-Ohio-23 which improperly suppressed both Oles' statements as well as the resulting field sobriety test.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Appellee was provided by U.S. mail this 19th day of July, 2016 to

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