

[Cite as *Cleveland v. Dargo*, 2018-Ohio-4430.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106157

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

JASON DARGO

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cleveland Municipal Court
Case No. 2017 TRC 006062

BEFORE: Celebrezze, J., Stewart, P.J., and Keough, J.

RELEASED AND JOURNALIZED: November 1, 2018

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FRANK D. CELEBREZZE, JR., J.:

{¶1} Defendant-appellant, Jason Dargo (“appellant”), appeals from his conviction of operating a vehicle under the influence of alcohol (“OVI”). Specifically, appellant argues that the trial court erred by not allowing him to challenge at the suppression hearing whether the arresting officer instituted the field sobriety tests in substantial compliance with the National Highway Traffic Safety Administration (“NHTSA”) manual guidelines, and that the trial court erred in denying his motion to suppress. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶2} On March 2, 2017, Ohio State Highway Patrol Trooper Hiram Morales conducted a traffic stop of appellant's vehicle at 2:00 a.m. for improperly turning left while stopped at a red light. As Trooper Morales conducted the traffic stop, he detected an odor of an alcoholic beverage emanating from appellant's person and observed appellant to have red and glossy eyes.

When asked if he had consumed any alcohol that evening, appellant stated that he had a beer earlier in the evening at approximately 6:00 p.m. Trooper Morales then escorted appellant out of his vehicle, and because it was a cold evening with light snow flurries, Trooper Morales provided the field sobriety tests instructions to appellant while both were seated inside the patrol vehicle. It was at this time that Trooper Morales continued to smell the odor of an alcoholic beverage on appellant and observed appellant's speech to be slurred.

{¶3} While outside of the vehicle on the side of the roadway, Trooper Morales demonstrated each test for appellant. Trooper Morales then had appellant perform various field sobriety tests. Trooper Morales first conducted the horizontal gaze nystagmus ("HGN") test, and noted that appellant showed six out of six clues of intoxication. Trooper Morales then conducted the walk-and-turn test. Appellant was instructed to walk nine steps, turn around, and walk nine steps back. Appellant walked 13 steps, turned around, and walked 17 steps back. Trooper Morales observed a total of five clues with the walk-and-turn test. Lastly, Trooper Morales conducted the one-legged stand test, to which appellant also showed clues.

{¶4} Trooper Morales then arrested appellant for OVI based on his observations of appellant and the field sobriety tests clues that demonstrated appellant was under the influence of alcohol. Appellant was issued a traffic citation for OVI, in violation of R.C. 4511.19(A)(1)(a); disobeying traffic signal-red light, in violation of R.C. 4511.13(C); and failure to wear a seatbelt-driver, in violation of R.C. 4513.263(B)(1).

{¶5} Appellant was arraigned in Cleveland Municipal Court on March 6, 2017, on the above listed charges. Appellant pled not guilty to the charges.

{¶6} On April 27, 2017, appellant filed a motion to suppress, and the city of Cleveland (“city”) responded with its objection to appellant’s motion. On June 1, 2017, the court held a hearing on appellant’s motion to suppress and subsequently denied appellant’s motion.

{¶7} The case proceeded to a jury trial, and appellant was found guilty on all counts. Appellant was sentenced to a three-day jail sentence and \$375 fine. Appellant elected to enroll in the Driver’s Intervention Program in lieu of the jail sentence. Thereafter, appellant filed the instant appeal assigning two errors for our review.

I. The trial court erred by not allowing [a]ppellant to challenge substantial compliance with NHTSA at the suppression hearing.

II. The trial court erred in denying [a]ppellant’s [m]otion to [s]uppress evidence of field sobriety tests and admitting prejudicial evidence.

II. Law and Analysis

A. Notice of the Suppression Issues

{¶8} In his first assignment of error, appellant argues that the trial court erred when it did not allow him to challenge Trooper Morales’s compliance with the NHTSA manual at the suppression hearing.

{¶9} In our review of the record, we note that appellant’s written motion to suppress did not explicitly argue that Trooper Morales failed to administer the tests in substantial compliance with NHTSA. In his suppression motion before the trial court, appellant sought to exclude the following:

(1) [The test of appellant's] coordination, sobriety and/or alcohol level, including but not limited to chemical tests of [appellant's] alcohol level * * * (2) [s]tatements taken from or made by the [appellant], and (3) [o]bservations and opinions of the police officer(s) who stopped the [appellant], arrested and/or tested the [appellant] regarding the [appellant's] sobriety and/or alcohol level.

Appellant's motion to suppress at 1. Furthermore, at the suppression hearing, appellant's counsel did not specifically challenge whether Trooper Morales substantially complied with NHTSA on cross-examination. Appellant's counsel's first mention of lack of substantial compliance with NHTSA was during closing arguments at the suppression hearing when he stated "and certainly whether [appellant having started the tests before Trooper Morales's instructions were completed] would meet the compliance with the standards of the NHTSA requirements." (Tr. 36.) The prosecutor promptly objected, arguing appellant's counsel had not briefed this particular issue; thus, the prosecutor did not have proper notice and appellant's counsel was barred from arguing this issue at the suppression hearing. The trial court sustained the objection.

{¶10} The Ohio Supreme Court has made it clear that a defendant who challenges the admission of evidence must raise his arguments in support of suppressing the evidence in such a manner as to give the prosecutor notice of the basis for the challenge. *Xenia v. Wallace*, 37 Ohio St.3d 216, 218, 524 N.E.2d 889 (1988).

The prosecutor must know the grounds of the challenge in order to prepare his case, and the court must know the grounds of the challenge in order to rule on evidentiary issues at the hearing and properly dispose of the merits. *State v. Johnson* (1974), 16 Ore.App. 560, 567-570, 519 P.2d 1053, 1057. Therefore, the defendant must make clear the grounds upon which he challenges the submission of evidence pursuant to a warrantless search or seizure. *Id.* *United States v. Culotta* (C.A. 2, 1969), 413 F.2d 1343, 1345; *Duddles v. United States* (D.C. App. 1979), 399 A.2d 59, 61-62. Failure on the part of the defendant to adequately raise the basis of his challenge constitutes a waiver of that issue on appeal. *State v. Carter* (Utah 1985), 707 P.2d 656; *see, also, United States v. Di Stefano* (C.A. 2, 1977), 555 F.2d 1094; *United States v. Arboleda* (C.A. 2, 1980), 633 F.2d 985;

United States v. Hensel (C.A. 1, 1983), 699 F.2d 18, 41; *State v. Kremer* (1976), 307 Minn. 309, 239 N.W.2d 476; *People v. Lyles* (1985), 106 Ill.2d 373, 478 N.E.2d 291.

Xenia at 218-219.

{¶11} Relevant to the instant case, in moving to suppress the results of a field sobriety test, the defendant must provide an “adequate basis,” which includes stating the legal and factual bases “with sufficient particularity to place the prosecutor and [the] court on notice as to the issues contested.” *Cleveland v. Hunter*, 8th Dist. Cuyahoga No. 91110, 2009-Ohio-1239, ¶ 24, citing *State v. Shindler*, 70 Ohio St.3d 54, 58, 636 N.E.2d 319 (1994); Crim.R. 47. Where the defendant establishes an adequate basis, the prosecutor then bears the burden of demonstrating substantial compliance. *Hunter* at ¶ 25, citing *Xenia* at 220. If the prosecutor demonstrates substantial compliance, the burden then shifts to the defendant to overcome the presumption of admissibility. *Id.*, citing *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 24.

{¶12} In his motion to suppress, appellant argued that the trooper’s “evaluation of defendant’s condition and coordination was inadequate to justify a warrantless arrest for OVI.” Appellant further argued that because Trooper Morales based his probable cause determination on the results of the field sobriety tests, the prosecutor was on notice that the reliability of the tests would have to be proven at the suppression hearing. Thus, the essence of appellant’s motion to suppress argued that Trooper Morales did not have probable cause to arrest appellant for OVI.

{¶13} Although appellant’s brief does not explicitly state that the field sobriety tests were not conducted in substantial compliance with NHTSA, we do not find this omission to be dispositive. In our review of appellant’s motion to suppress, we find that appellant sufficiently

placed the city on notice of its challenge to substantial compliance with NHTSA. *See State v. Holmes*, 8th Dist. Cuyahoga No. 92720, 2010-Ohio-1745, ¶ 14. *See also State v. Bennett*, 8th Dist. Cuyahoga No. 86962, 2006-Ohio-4274, ¶ 38. *See also State v. Jones*, 8th Dist. Cuyahoga No. 92820, 2009-Ohio- 5701, ¶ 46.

{¶14} To the extent the city argues that it did not have notice of appellant’s intentions to challenge the field sobriety tests, we note that the city anticipated this argument by appellant and incorporated the substantial compliance with NHTSA argument into its brief at the trial court.¹ Thus, the city is precluded from making such an argument now on appeal. Accordingly, appellant sufficiently placed the city on notice as to his challenge of substantial compliance with NHTSA.

{¶15} Moreover, to the extent the city relies upon *State v. Roubideaux*, 8th Dist. Cuyahoga No. 92948, 2010-Ohio-73, that case is factually distinguishable from the instant case. In *Roubideaux*, the defendant argued for the first time on appeal that his oral statements should be suppressed. However, at the trial court level, defendant argued that the arresting officers did not have reasonable suspicion to detain the defendant for questioning. Thus, when the defendant argued on appeal that his oral statements were obtained in violation of *Miranda*,² this court noted that the defendant waived those arguments. *Id.* at ¶ 44.

{¶16} In the instant case, appellant challenged the probable cause determination for his arrest for OVI from the onset. Specifically, appellant argued in his motion that the “evaluation of [appellant’s] condition and coordination was inadequate to justify a warrantless arrest for

¹ Indeed, the city briefed the substantial compliance issue, devoting an entire section of its brief to the issue, titled: “IV. THE OFFICER CONDUCTED THE FIELD SOBRIETY TESTS IN SUBSTANTIAL COMPLIANCE WITH NHTSA STANDARDS.” City’s response to defendant’s motion to suppress at 7.

² *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

OVI.” Had appellant challenged only whether Trooper Morales had reasonable suspicion to initiate the traffic stop in his motion to suppress, he would have been precluded from arguing lack of substantial compliance with NHTSA either at the suppression hearing or on appeal. *Roubideaux*. See also *Bennett*, 8th Dist. Cuyahoga No. 86962, 2006-Ohio-4274, at ¶ 38 (where the defendant only argued in his motion to suppress that the initial traffic stop was impermissibly based on his race, he waived contesting the reliability of the subsequent dog sniff on appeal).

{¶17} Notwithstanding that we find appellant’s motion to suppress properly placed the city on notice, we also note that “if a defendant fails to raise a suppression issue in his or her written motion, he or she can raise it orally at the suppression hearing where the issues stem from common facts.” *Roubideaux* at ¶ 43, citing *State v. Wells*, 11 Ohio App.3d 217, 464 N.E.2d 596 (6th Dist.1983). Thus, we note that appellant’s trial counsel cross-examined Trooper Morales regarding the windy conditions. In particular, appellant’s trial counsel suggested through cross-examination of Trooper Morales that appellant’s deficient performance during the field sobriety tests was a result of windy conditions, rather than intoxication. Therefore, even if appellant had failed to adequately argue lack of substantial compliance with NHTSA in his motion to suppress, the argument was raised orally at the suppression hearing during cross-examination.

{¶18} Based on the foregoing analysis, the trial court erred when it sustained the city’s objection. However, the trial court’s error in this instance, considering the entirety of the record, was harmless. Pursuant to Crim.R. 52(A), “[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.” As such, appellant has failed to demonstrate to this court how he was prejudiced by the trial court sustaining the objection during closing arguments. In other words, appellant has failed to demonstrate that the result of the

proceedings would have been different given the fact that appellant's counsel was not precluded from arguing lack of substantial compliance with NHTSA on cross-examination of Trooper Morales.

{¶19} Accordingly, although we agree with appellant that the trial court erred in sustaining the objection, we overrule appellant's first assignment of error because the error was harmless.

B. Denial of Motion to Suppress

{¶20} In his second assignment of error, appellant argues that the trial court erred in denying his motion to suppress because Trooper Morales did not substantially comply with NHTSA regulations when he conducted the field sobriety tests. Appellant contends that because Trooper Morales did not substantially comply with NHTSA, he lacked sufficient probable cause to arrest appellant for OVI.

{¶21} Appellate review of the denial of a motion to suppress presents a mixed question of law and fact. *Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, at ¶ 24. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Carter*, 72 Ohio St.3d 545, 552, 651 N.E.2d 965 (1995); *State v. Mills*, 62 Ohio St.3d 357, 366, 582 N.E.2d 972 (1992). Further, when reviewing a ruling on a motion to suppress, deference is given to the trial court's findings of fact so long as they are supported by competent, credible evidence. *Burnside* at ¶ 8. The reviewing court, however, must independently determine whether those facts satisfy the applicable legal standard. *Id.* at ¶ 8, citing *State v. McNamara*, 124 Ohio App.3d 706, 707 N.E.2d 539 (4th Dist.1997).

{¶22} As an initial matter, appellant argues that the trial court did not make findings of fact regarding its decision to deny his motion to suppress. As such, appellant argues that there are no findings of fact for this court to accept, and that this court must review the evidence in the record de novo to determine whether the trial court erred in denying the suppression motion.³ After reviewing the record, we disagree.

{¶23} The record reflects that the trial court did, in fact, make findings of fact regarding its ruling on appellant's suppression motion. Specifically, the trial court made the following statements after closing arguments at the suppression hearing:

After hearing the evidence in this case, the [c]ourt is going to deny the [m]otion to [s]uppress.

The [c]ourt finds that given the totality of the circumstances of the field sobriety test[s], [Trooper Morales] did testify that four out of six clues were present on the HGN test.

The video demonstrated that [appellant] was unable to perform the [o]ne-[l]eg [s]tand and was unable to follow the instructions, as well as maintain his balance on the [w]alk-[and]-[t]urn [t]est.

And the [c]ourt does note that it appears [appellant] did well on the alphabet; however, there were several other tests that did indicate impairment, and the [c]ourt does find that [Trooper Morales] had probable cause to arrest [appellant] on the charge of OVI, at this time the, the [m]otion to [s]uppress is denied.

(Tr. 43-44.) We find that these statements sufficiently establish that the trial court made findings of fact in support of its ruling. Thus, we find no merit to appellant's argument.

{¶24} In the instant case, the state is not required to demonstrate strict compliance with testing standards in order for the results of the field sobriety tests to be admissible. However, the state must demonstrate that the officer substantially complied with NHTSA standards.

³ In support of this argument, appellant directs this court to *State v. Milan-Wade*, 8th Dist. Cuyahoga No. 98347, 2013-Ohio-817, ¶ 16, and *Cleveland v. Oko*, 2016-Ohio-7774, 73 N.E.3d 1122, ¶ 18 (8th Dist.).

Parma Hts. v. Dedejczyk, 8th Dist. Cuyahoga No. 97664, 2012-Ohio-3458, ¶ 42, citing R.C. 4511.19(D)(4)(b). “The state may demonstrate what the NHTSA standards are through competent testimony and/or by introducing the applicable portions of the NHTSA manual.” *Id.* at ¶ 42, citing *State v. Boczar*, 113 Ohio St.3d 148, 2007-Ohio-1251, 863 N.E.2d 155, ¶ 28.

{¶25} This court recently articulated in *Cleveland v. Collins*, 8th Dist. Cuyahoga No. 105804, 2018-Ohio-958:

Under R.C. 4511.19(D)(4)(b), an officer may testify concerning the results of the field sobriety test if the officer administered the test in “substantial compliance” with the testing standards. Therefore, “in order for the results of the field sobriety tests to be admissible, the city must demonstrate by clear and convincing evidence that the officer performing the testing substantially complied with accepted testing standards.” *Cleveland v. Hyppolite*, [2016-Ohio-7399, 76 N.E.3d 539, ¶ 47 (8th Dist.)], citing *Middleburg Hts. v. Gettings*, 8th Dist. Cuyahoga No. 99556, 2013-Ohio-3536, ¶ 12; *Dedejczyk*, 8th Dist. Cuyahoga No. 97664, 2012-Ohio-3458, at ¶ 42. The city may demonstrate what the NHTSA standards are through competent testimony and/or by introducing the applicable portions of the NHTSA manual. *State v. Boczar*, 113 Ohio St.3d 148, 2007-Ohio-1251, 863 N.E.2d 155, ¶ 28; *see State v. Jackman*, 8th Dist. Cuyahoga No. 89835, 2008-Ohio-1944, ¶ 24 (“Under Ohio law, the state is not required to introduce the NHTSA guidelines or expert testimony.”).

Id. at ¶ 41.

{¶26} This court in *Collins* continued stating that “[s]ubstantial compliance is not defined in R.C. 4511.19(D)(4)(b); therefore, courts have some discretion in determining the

““substantiability of the compliance.””” *Collins* at ¶ 42, quoting *Hyppolite* at ¶ 48, quoting *State v. Perry*, 129 Ohio Misc.2d 61, 2004-Ohio-7332, 822 N.E.2d 862, ¶ 45 (M.C.). “Thus, a determination of whether the facts satisfy the substantial compliance standard is made on a case-by-case basis.” *Collins*, citing *Hyppolite*; *Dedejczyk* at ¶ 42.

{¶27} In the instant case, Trooper Morales testified at the suppression hearing as to his qualifications and training in field sobriety testing. Trooper Morales also provided detailed testimony regarding how he conducted each test upon appellant and how appellant performed on each test. A copy of the applicable portions of the NHTSA manual were not admitted as an exhibit at the suppression hearing. However, we do not find this omission to be dispositive. “Under Ohio law, the state is not required to introduce the NHTSA guidelines or expert testimony. The state only has to show that the officer is trained to administer the test and that the officer properly administered the test.” *State v. Jackman*, 8th Dist. Cuyahoga No. 89835, 2008-Ohio-1944, ¶ 24; *see also Cleveland v. Krivich*, 2016-Ohio-3072, 65 N.E.3d 279 (8th Dist.) (where this court affirmed a trial court’s granting of a motion to suppress where the trial court found no substantial compliance where the officer administering the field sobriety tests failed to properly instruct the defendant).

{¶28} Appellant argues that the results of the field sobriety tests cannot be considered because the field sobriety tests were not conducted in substantial compliance with NHTSA due to the circumstances under which the tests were conducted. On cross-examination of Trooper Morales, appellant’s trial counsel argued that the inclement weather caused Trooper Morales to incorrectly evaluate appellant’s performance on the field sobriety tests. Appellant further argued that, in essence, Trooper Morales ignored the effect that inclement weather had on appellant’s performance during the field sobriety tests. Appellant argues that the dash-cam video of the

traffic stop shows the wind muffling Trooper Morales's voice as he provided instructions to appellant.

{¶29} Appellant does not cite any NHTSA regulations that prohibit a police officer from conducting the field sobriety tests in windy conditions; nor are we aware of any statutory authority or case law that would exclude the results unless the conditions are not windy. When conducting field sobriety tests, police officers must take into account a series of factors that would affect the administration of the tests, i.e. wind, weather, age, weight and footwear. *See State v. Tyner*, 2d Dist. Montgomery No. 25405, 2014-Ohio-2809, ¶ 9. Trooper Morales testified at the suppression hearing that he took the wind and weather into consideration in his determination that appellant failed the field sobriety tests. In our review of the NHTSA manual and applicable case law, Trooper Morales was not required to do any more. Thus, appellant fails to demonstrate that Trooper Morales's administration of the field sobriety tests was not in substantial compliance.

{¶30} To the extent that appellant argues that Trooper Morales did not explicitly testify as to the manner in which he conducted the tests, we disagree. Indeed, nothing in the record, including the dash-cam video, indicates that Trooper Morales failed to substantially comply with NHTSA either in his instructions to appellant or in administering the field sobriety tests.

{¶31} Appellant also argues that the prosecution must produce some evidence by way of testimony or exhibits as to what the NHTSA standards are. In support of this argument, appellant cites to *State v. Akers*, 7th Dist. Belmont No. 15 BE 0056, 2016-Ohio-7216. In *Akers*, the Seventh District noted that "[a]t no time during the [suppression hearing was] there any mention of the NHTSA manual or the requirements contained in that manual. Neither is there

the identification or mention of any other standards by which the tests performed by [the arresting officer] might be evaluated.” *Akers* at ¶ 27.

{¶32} We find *Akers* to be distinguishable to the instant case. On direct examination, the city properly established Trooper Morales’s training relative to NHTSA and also that he received “refresher” training.⁴ Moreover, the dash-cam video was admitted into evidence and provided sufficient evidence to show that Trooper Morales’s administration of the field sobriety tests substantially complied with NHTSA. Therefore, we find that the city did enter sufficient evidence into the record that Trooper Morales substantially complied with NHTSA.

{¶33} In assessing whether an officer had probable cause to arrest for OVI, “we must determine whether, at the moment of arrest, the police had information sufficient to cause a prudent person to believe that the suspect was driving under the influence.” *Middleburg Hts. v. Gettings*, 8th Dist. Cuyahoga No. 99556, 2013-Ohio-3536, ¶ 26, citing *Beck v. Ohio*, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964). “A probable-cause determination is based on the ‘totality’ of facts and circumstances within a police officer’s knowledge.” *Gettings* at ¶ 26, citing *State v. Miller*, 117 Ohio App.3d 750, 691 N.E.2d 703 (11th Dist.1997). “While the odor of alcohol, glassy eyes, slurred speech, and other indicia of alcohol use by a driver are, in and of themselves, insufficient to constitute probable cause to arrest, they are factors to be considered in determining the existence of probable cause.” *Gettings* at ¶ 26, citing *Kirtland Hills v. Deir*, 11th Dist. Lake No. 2004-L-005, 2005-Ohio-1563.

{¶34} In the instant case, as noted above, Trooper Morales observed appellant commit a traffic violation and performed a traffic stop of appellant’s vehicle at approximately 2:00 a.m.

⁴ We also note that in the city’s response brief filed in the trial court, the city sought to have the trial court take judicial notice of the NHTSA manual. However, in our review of the record, we cannot ascertain if a ruling by the trial court was ever made on that request.

Trooper Morales smelled the odor of an alcoholic beverage coming from appellant's person and observed appellant's eyes to be red and glossy. Appellant was then removed from his vehicle and placed in Trooper Morales's patrol car, and the smell of an alcoholic beverage continued to emanate from appellant. Lastly, after having originally denied consuming any alcohol, appellant admitted to drinking one beer earlier in the evening. Considering these observations by Trooper Morales, we find that he was justified in having appellant perform the field sobriety tests. These observations, coupled with Trooper Morales's 14 years of experience as a state trooper, demonstrated that he had reasonable suspicion based upon articulable facts that appellant was impaired. *Dedejczyk*, 8th Dist. Cuyahoga No. 97664, 2012-Ohio-3458, at ¶ 29.

{¶35} Thus, in considering these facts and the clues appellant exhibited in the field sobriety tests, the record reflects Trooper Morales had sufficient information to cause a prudent person to believe appellant was driving while intoxicated. Based upon these circumstances, we conclude, as the trial court did, that Trooper Morales had probable cause to arrest appellant for OVI. The second assignment of error is without merit.

{¶36} Accordingly, appellant's second assignment of error is overruled.

III. Conclusion

{¶37} Appellant did adequately raise the issue of lack of substantial compliance with NHTSA within his suppression motion, and appellant effectively raised the issue on cross-examination of Trooper Morales. Thus, the trial court erred by sustaining the city's objection to appellant's counsel's challenge of substantial compliance with NHTSA in his closing arguments; however, such error was harmless. Furthermore, the trial court did not err in denying appellant's motion to suppress. In our review of the record, Trooper Morales's evaluation and administration of the field sobriety tests substantially complied with NHTSA.

Accordingly, Trooper Morales had probable cause to arrest appellant for OVI. Appellant's conviction and sentence are affirmed.

{¶38} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cleveland Municipal Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

MELODY J. STEWART, P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR