[Cite as *Columbus v. Shepherd*, 2011-Ohio-3302.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

City of Columbus,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-483 (M.C. No. 2009 TR C 212048)
Brooke L. Shepherd,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 30, 2011

Richard C. Pfeiffer, Jr., City Attorney, *Lara N. Baker*, City Prosecutor, and *Orly Ahroni*, for appellee.

Favor Legal Services, and *H. Macy Favor, Jr.*, for appellant.

APPEAL from the Franklin County Municipal Court

CONNOR, J.

{¶1} Defendant-appellant, Brooke L. Shepherd ("appellant"), appeals from a judgment of conviction entered by the Franklin County Municipal Court upon her pleas of no contest to operating a vehicle while under the influence of alcohol, operating a vehicle with a prohibited alcohol content, and speeding, which appellant entered subsequent to the trial court's denial of her motion to suppress evidence. For the reasons that follow, we affirm the decision of the trial court.

{¶2} During the early morning hours of November 29, 2009, appellant was traveling on Interstate 270 near Smokey Row Road in Franklin County, Ohio, when she was stopped for speeding by a Columbus police officer. Upon noticing a moderate odor of alcohol, Sergeant Jeffrey Sowards asked appellant to perform field sobriety tests. Sergeant Sowards also administered a portable breath test ("PBT"). Following the administration of the PBT, appellant was placed under arrest. After being advised of the consequences of consenting or refusing to consent to a chemical test as set forth in BMV Form 2255, appellant submitted to a breath alcohol content ("BAC") test, which produced a result of 0.115 percent. Appellant was charged with speeding, operating a vehicle while under the influence of alcohol ("OVI impaired"), and operating a vehicle with a prohibited alcohol content ("OVI per se").[1]

{¶3} Appellant initially entered pleas of not guilty to both OVI charges and the speeding charge and requested a trial by jury. Counsel for appellant filed a motion to suppress evidence. A hearing was held on the motion to suppress on April 7, 2010. Sergeant Sowards was the only witness to testify at the hearing.

{¶4} Sergeant Sowards was assigned to freeway patrol when he clocked appellant traveling 87 m.p.h. in a 65 m.p.h. zone at approximately 4:00 a.m. on November 29, 2009. Sergeant Sowards initiated a traffic stop. The events that followed

[1] Appellant was charged with violations of the Columbus City Code, rather than the Ohio Revised Code. With respect to the OVI offenses, appellant was charged with violations of Columbus City Code 2133.01(A)(1)(a) and (d). Columbus City Code 2133.01 is the municipal equivalent of R.C. 4511.19. Both codes address the criminal offense of operating a vehicle under the influence of alcohol and/or drugs.

were recorded via his cruiser video camera. Relevant portions of that video were played for the trial judge during the course of the suppression hearing.

{¶5} After approaching appellant's vehicle, Sergeant Sowards noticed a moderate odor of alcohol. He also noticed other indicators that appellant had been drinking, including slightly slurred speech at times, difficulty in locating her insurance card, and a stamp on the back of her hand, which could have been an ID type of stamp used at a bar. Following this initial contact, Sergeant Sowards had a suspicion that appellant might be impaired, so he asked appellant to submit to field sobriety tests. Sergeant Sowards testified that he has been employed by the Columbus police for 30 years and has been certified in the administration of field sobriety tests six different times since 2000, including certification as an instructor.[2]

{¶6} First, Sergeant Sowards conducted the horizontal gaze nystagmus ("HGN") test, which tests for nystagmus, or an involuntary jerking, of the eyes. As he positioned her for the test, Sergeant Sowards noticed appellant's speech was slow and slightly slurred and she was swaying a little bit. Appellant also admitted that she had consumed one beer. Sergeant Sowards described his administration of the HGN test and testified he observed six out of six clues. Four out of six clues must be exhibited in order for the HGN test to be a reliable indicator that an individual's BAC will likely be above .10.

[2]Both parties stipulated that Sergeant Sowards was certified and qualified to perform the field sobriety tests at issue and that he performed said tests in compliance with the National Highway Traffic Safety Administration manual standards. Counsel for appellant informed the trial court that appellant's challenge was with the officer's observations, rather than with the proper administration of the field sobriety tests.

{¶7} Next, Sergeant Sowards used a piece of chalk to draw a line on the asphalt and administered the walk-and-turn test. Sergeant Sowards testified appellant exhibited two out of eight clues on the walk-and-turn test, although Sergeant Sowards mistakenly only marked one clue box on the alcohol influence report. Two out of eight clues are sufficient to indicate impairment on this test. He testified appellant stepped off the line on the first step and also had spaces between some of her steps. However, Sergeant Sowards testified that these "spaces" were not able to be reflected on the cruiser video. He also testified that he detected an odor of alcohol while appellant was performing this test.

{¶8} The third field sobriety test administered was the one-leg stand test. Appellant displayed two out of four clues in performing this test. Two out of four clues is a strong indicator the person is impaired and will test higher than .10. Sergeant Sowards observed appellant put her foot down twice and also sway during the administration of the test. He testified that he continued to detect an odor of alcohol while this test was being conducted.

{¶9} Besides the three standardized National Highway Traffic Safety Administration field sobriety tests, Sergeant Sowards also administered the Romberg test and the lack of convergence test, based on his specialized training. The lack of convergence test is used to detect usage of large amounts of depressants and marijuana. Appellant did not display any clues on the lack of convergence test. On the Romberg test, which is a timed, 30-second test used to detect use of a stimulant or depressant, appellant did exhibit a clue indicating use of a depressant.

{¶10} In addition to his other observations, Sergeant Sowards noted that appellant had glassy eyes and relaxed facial muscles, and he testified both conditions can indicate alcohol consumption. Sergeant Sowards also acknowledged that consumption of one beer would not impair someone of appellant's height and weight.

{¶11} Sergeant Sowards testified that following appellant's performance of the field sobriety tests, he did not immediately arrest appellant. Instead, he advised her, "I got one more test here and we're going to get you out of here." (Tr. 51.) That test was the PBT. Sergeant Sowards testified that by the time he went to retrieve the PBT, he had already determined he was going to arrest appellant. Despite this determination, he administered the PBT because (1) it is procedure within his unit to administer it; and (2) he needed a general sense of her impairment in order to know whether he needed to take her to the station to be tested on a BAC machine right away, and thus he would need assistance from another officer, or whether he could wait there with appellant for the tow truck to pick up her vehicle and then take her to the station.

{¶12} After the PBT was administered, appellant was placed under arrest.[3] Sergeant Sowards testified that prior to administration of the PBT, he did not read BMV Form 2255 to appellant. However, after he arrested appellant for OVI and placed her in the rear of his cruiser, Sergeant Sowards read the form to her and advised her of the statutory consequences of consenting or refusing to consent to a chemical test.

[3] Although the prosecution did not directly elicit evidence regarding the results of the PBT (and in fact, the prosecution requested that the court *not* consider the results of the PBT in determining whether or not probable cause existed because there had been no expert testimony introduced as to the accuracy or reliability of the PBT), other evidence in the record indicates that the test produced a result of .137.

Appellant later consented to a chemical test at the police station, which produced a test result of 0.115.

{¶13} On April 13, 2010, the trial judge issued a written decision and entry denying appellant's motion to suppress. Specifically, the trial judge determined that R.C. 4511.191 does not mandate that an officer arrest the accused and inform her of Ohio's implied consent law prior to administering a PBT, nor does R.C. 4511.192 require an officer to arrest the accused and read her BMV Form 2255 prior to administering a PBT. Without considering the PBT results, the trial judge further found the officer had probable cause to arrest appellant for an OVI impaired offense.

{¶14} On May 17, 2010, appellant entered no contest pleas to both OVI offenses, as well as the speeding offense. The two OVI offenses were merged and appellant was sentenced on the OVI impaired offense. Appellant was sentenced to 60 days in jail with 57 days suspended, a 3-day intervention program in lieu of 3 days in jail, and 1 year of community control. The trial court also imposed a fine of $375 and court costs, as well as a 6 month driver's license suspension. On the speeding offense, appellant was ordered to pay court costs. Appellant has filed a timely appeal and asserts the following assignments of error for our review:

ASSIGNMENT OF ERROR I

> I. THE TRIAL COURT ERRED IN ITS DECISION AND ENTRY FILED ON APRIL 13, 2010, HOLDING OHIO'S IMPLIED CONSENT STATUTE IS NOT APPLICABLE TO PRE-ARREST CHEMICAL TESTING WITH A PORTABLE BREATHALYZER TESTER.

ASSIGNMENT OF ERROR II

> II. THE TRIAL COURT ERRED IN ITS DECISION AND ENTRY FILED ON APRIL 13, 2010, DENYING DEFENDANT-APPELLANT'S MOTION TO DISMISS/SUPPRESS FILED ON MARCH 11, 2010 STATING THE POLICE OFFICER HAD PROBABLE CAUSE TO ARREST DEFENDANT.

{¶15} Because appellant's assignments of error are intertwined, we shall address them together.

{¶16} In her first assignment of error, appellant argues that prior to an actual arrest, Ohio's implied consent statute is not triggered, and thus, in order to legally administer a chemical test prior to arrest, including a PBT, the officer must get the driver to voluntarily consent to the test. Appellant claims she believed she was required to comply with the officer's order to take the PBT, and because she was not advised of the right to refuse to take the test or of the consequences, she did not voluntarily consent to the PBT. Consequently, appellant argues her constitutional rights were violated, as well as the implied consent law, which in turn requires the suppression of the result of the PBT as well as any evidence taken after her unlawful arrest, including the results of the BAC test conducted at the police station. In support of her position, appellant cites to *State v. Hoover*, 123 Ohio St.3d 418, 2009-Ohio-4993, *City of Fairfield v. Regner* (1985), 23 Ohio App.3d 79, and *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 93 S.Ct. 2041.

{¶17} In her second assignment of error, appellant contends Sergeant Sowards lacked probable cause to arrest her for OVI. The essence of appellant's argument is that, without consideration of the PBT results, there was not sufficient evidence to establish

probable cause to arrest. In support of this argument, appellant points to: Sergeant Sowards' acknowledgment that consumption of one beer would not impair a person of appellant's size and weight; errors in the alcohol influence report; the presence of only one clue in the walk-and-turn test; Sergeant Sowards' "we're going to get you out of here" statement, which implied that appellant had passed the field tests; and the lack of action on the part of Sergeant Sowards demonstrating that he had constructively arrested or was going to arrest appellant prior to the administration of the PBT. Because probable cause was not established, appellant argues that her arrest was unlawful, as was the evidence obtained subsequent to her unlawful arrest, specifically, the results of the BAC test administered at the police station. Thus, appellant argues the trial court erred in failing to grant her motion to suppress.

{¶18} Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact, and therefore is in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. As a result, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Id. Then, the appellate court must independently determine whether the facts satisfy the applicable legal standard, pursuant to a de novo review and without giving deference to the conclusion of the trial court. Id.

{¶19} Under R.C. 4511.191, Ohio's implied consent statute, "[a]s part of obtaining the privilege to drive in Ohio, a driver implicitly consents to a search, through means of a chemical test, to determine the amount of intoxicating substances in the driver's body,

upon the driver's arrest for [OVI]." *Hoover* at ¶14, citing R.C. 4511.191. "Ohio police officers are not statutorily authorized to randomly demand chemical alcohol testing of Ohio drivers in the absence of an arrest for [OVI]." Id. at ¶24, citing *State v. Gustafson*, 76 Ohio St.3d 425, 439, 1996-Ohio-299. An officer must have probable cause to arrest a driver for OVI before asking that driver to submit to a chemical test. *Hoover* at ¶23.

{¶20} After a driver is arrested for OVI, the officer must explain the consequences of consenting or refusing to consent to a chemical test prior to asking the individual to submit to a chemical test used to determine breath alcohol content. See R.C. 4511.192. This advisement is contained in BMV Form 2255. (R. at 2.) An administrative license suspension is also imposed if a driver arrested for OVI refuses to submit to a chemical test or submits to a chemical test which produces a result with a prohibited concentration of alcohol. Id. at ¶16, 20; R.C. 4511.191.

{¶21} Appellant submits that because she was administered the PBT prior to being arrested for OVI, the implied consent statute was not triggered and therefore she did not impliedly consent to the test. She further asserts that her submission to the PBT was not voluntary, thus the results of the PBT could not be used in conjunction with the field tests to find probable cause to arrest her for OVI, and therefore, her arrest was improper and suppression of all evidence obtained subsequent to the PBT is required.

{¶22} The Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution prohibit unreasonable searches and seizures. See *State v. Moore*, 90 Ohio St.3d 47, 2000-Ohio-10. In order for a search or seizure to be reasonable under the Fourth Amendment, it must be based upon probable cause and

executed pursuant to a warrant, unless an exception to the warrant requirement is applicable. Id. at 49. "Because the Fourth Amendment's ultimate touchstone is 'reasonableness,' the warrant requirement is subject to certain exceptions." *Brigham City, Utah v. Stuart* (2006), 547 U.S. 398, 126 S.Ct. 1943, syllabus.

{¶23} "One exception permits police to conduct warrantless searches with the voluntary consent of the individual." *City of Columbus v. Bickis*, 10th Dist. No. 09AP-898, 2010-Ohio-3208, ¶19, citing *Schneckloth* at 222, 2045. Another exception permits an officer to stop and detain an individual without a warrant when the officer has a reasonable suspicion, based on specific, articulable facts, that criminal activity has occurred or is about to occur. *Bickis* at ¶19, citing *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868. Pursuant to a valid, investigatory stop, an officer possessing a reasonable, articulable suspicion that a driver is intoxicated can perform field sobriety tests. Id. at ¶19; *State v. Perkins*, 10th Dist. No. 07AP-924, 2008-Ohio-5060, ¶8.

{¶24} If we assume, without deciding but for purposes of our analysis here, that a PBT is a "search" pursuant to the Fourth Amendment, and we also assume for the purposes of this argument that appellant's voluntary consent is required in order for the search to be a valid warrantless search, we believe the evidence in the record supports a finding that appellant voluntarily consented to the PBT.

{¶25} The question of whether or not an individual has voluntarily consented to a search is a question of fact that must be determined from the totality of the circumstances. *Schneckloth* at 227, 2047-48. In *Schneckloth*, and as reiterated in *Ohio v. Robinette* (1996), 519 U.S. 33, 39, 117 S.Ct. 417, 421, the United States Supreme

Court rejected a per se rule that consent could not be valid unless the defendant knew that she had a right to refuse the request. "While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent." *Schneckloth* at 227, 2048. It would be unrealistic to require officers to always inform detainees that they are free to go before consent to search is deemed voluntary. *Robinette* at 39-40, 421.

{¶26} In the case at bar, there is no testimony and no other evidence within the record which demonstrates that Sergeant Sowards acted coercively or that appellant felt she was being coerced. While counsel for appellant has argued that Sergeant Sowards' statement that he would "get [appellant] out of here" implied that appellant had passed the field sobriety tests and would be released to go home if she simply took the PBT, there is nothing in the record to support this. To the contrary, Sergeant Sowards testified that he never told appellant he would release her if she submitted to the PBT, and he testified that his statement simply meant that appellant would no longer be standing outside along the side of Interstate 270, but instead would either be leaving in the back of his police cruiser or another cruiser. Sergeant Sowards also testified that he had decided to arrest appellant whether or not she consented to take the PBT. In addition, there is nothing on the cruiser video which demonstrates that appellant's consent to provide a breath sample for the PBT was involuntary or coerced.

{¶27} Even if we were to interpret Sergeant Sowards' statement as meaning that appellant was going to be released to go home, that alone would not necessarily make her consent involuntary. "The use of deceit is merely '* * * a factor bearing on

voluntariness.' " *State v. Cooey* (1989), 46 Ohio St.3d 20, 27, quoting *Schmidt v. Hewitt* (C.A.3, 1978), 573 F.2d 794, 801; and *State v. Hatcher* (Feb. 17, 2000), 10th Dist. No. 99AP-460.

{¶28} Alternatively, even if we found that the evidence failed to demonstrate that appellant's consent was voluntary, the evidence still demonstrates that probable cause existed to support appellant's arrest prior to the administration of the PBT and without reliance on the PBT results. Such a determination means that only the PBT results, not the BAC test results, would need to be suppressed, based upon the application of the exclusionary rule and the independent source doctrine, as shall be explained in more detail below, following our probable cause analysis.

{¶29} To determine whether a police officer had probable cause to arrest an individual for operating a vehicle while under the influence of alcohol, a court looks at whether, at the moment of the arrest, the officer had sufficient information, from a reasonably trustworthy source, of facts and circumstances which were sufficient to lead a prudent person to believe the individual was operating a vehicle under the influence. *Bickis* at ¶21, citing *State v. Homan*, 89 Ohio St.3d 421, 427, 2000-Ohio-212; and *State v. Belmonte*, 10th Dist. No. 10AP-373, 2011-Ohio-1334, ¶11. This determination requires an examination of the totality of the facts and circumstances surrounding the arrest. *Bickis* at ¶21, citing *Homan*; and *Belmonte* at ¶11. Furthermore, "[p]robable cause to arrest does not have to be based, in whole or in part, upon a suspect's poor performance on one or more field sobriety tests." *Bickis* at ¶21. "The totality of the facts and circumstances can support a finding of probable cause to arrest even where no field

sobriety tests were administered or where * * * the test results must be excluded for lack of [substantial] compliance." *Homan* at 427; *Bickis* at ¶21.

{¶30} Prior to the administration of the PBT, there were numerous indications that appellant was impaired and these indications were sufficient to constitute probable cause to arrest. Sergeant Sowards testified that appellant was speeding, traveling 87 m.p.h. in a 65 m.p.h. zone in the early morning hours. Sergeant Sowards also detected a moderate odor of alcohol on appellant and she had what appeared to be a bar stamp on the back of her hand. Appellant's speech was slow and slightly slurred, her eyes were glassy, she had difficulty locating her insurance card, and she admitted to consuming one beer.

{¶31} During the administration of the field tests, Sergeant Sowards continued to detect an odor of alcohol. Sergeant Sowards observed appellant swaying slightly during the HGN test. Appellant exhibited six clues on the HGN test. Four or more clues on this test is a reliable indicator of a BAC above .10. During the one-leg stand test, appellant swayed and also put her foot down twice, thus displaying two clues. Two out of four clues is a strong indicator of a BAC above .10. On the walk-and-turn test, Sergeant Sowards testified he observed two clues but neglected to check one of the clue boxes. The trial court found appellant displayed at least one clue on that test, although one clue is not sufficient to indicate a BAC above .10.

{¶32} Under the totality of the circumstances, we find these indicators are sufficient to establish probable cause to arrest. We note this court has previously found probable cause to arrest under similar circumstances.

{¶33} In *City of Columbus v. Anderson* (1991), 74 Ohio App.3d 768, this court found that several factors established probable cause to arrest for OVI, including: an initial speeding violation, a moderate odor of alcohol, the time of day, glassy and bloodshot eyes, a score of six out of six on the HGN test, and a "marginal" performance on the one-leg stand test. In *State v. Morgan*, 10th Dist. No. 05AP-552, 2006-Ohio-5297, we found probable cause to arrest existed where the suspect had a strong odor of alcohol, bloodshot and glassy eyes, demonstrated 6 clues on the HGN test, demonstrated 2 out of 8 clues on the walk-and-turn test, and had a slight infraction on the one-leg stand test, and admitted to having consumed one beer, but did not have slurred speech.[4] In *Perkins*, we found probable cause where the suspect made an improper turn at a red light, was speeding approximately 8 to 10 m.p.h. above the speed limit in the early morning hours, was observed weaving within his own lane, had glassy and bloodshot eyes, the officer noticed a strong odor of alcohol, and the suspect displayed 6 out of 6 clues on the HGN test, which was the only field sobriety test completed because the suspect was on crutches.

{¶34} Other appellate courts have made similar determinations. See also *State v. Deegan*, 7th Dist. No. 05 BE 18, 2007-Ohio-1122 (probable cause to arrest where suspect was speeding and weaving onto center line, had glassy eyes, smelled of alcohol, and displayed six clues on the HGN test, despite displaying only one clue on the one-leg

[4] We note that in *Morgan*, the officer administered a PBT to the suspect, without objection by the suspect, prior to arresting the suspect for operating a vehicle under the influence of alcohol. Following his arrest, the suspect submitted to a BAC test, which produced results of .110. We found probable cause to arrest without considering the PBT results and did not address the admissibility of the PBT results.

stand test); *State v. Tournoux*, 11th Dist. No. 2009-P-0065, 2010-Ohio-2154 (probable cause to arrest where suspect drove without headlights illuminated, had difficulty opening his car door, had a moderate to strong odor of alcohol, had glossy and bloodshot eyes, admitted consumption of two beers, had tired and slightly slurred speech, and displayed two clues on the HGN test, as well as one clue on the walk-and-turn test, and one clue on the one-leg stand test); and *State v. Strope*, 5th Dist. No. 08CA 50, 2009-Ohio-3849 (probable cause to arrest where suspect had a moderate odor of alcohol, red and glassy eyes, admitted consumption of alcohol, displayed six clues on the HGN test, two clues on the one-leg stand test, and no clues on the walk-and-turn test; probable cause was found without considering the results of the PBT taken prior to Strope's arrest).

{¶35} As previously noted, the prosecution did not seek to use the results of the PBT in presenting its evidence to demonstrate there was probable cause to arrest appellant for OVI. In fact, the prosecution did not attempt to elicit testimony regarding the PBT results and even asked the trial court not to consider the PBT results, given that there had been no expert testimony introduced to verify the accuracy or reliability of the PBT. More importantly, we note the trial court pointedly did not consider the PBT results in reaching its conclusion that probable cause existed to arrest appellant for OVI following completion of the field tests. Thus, it is clear that the trial court determined there was probable cause to arrest appellant for OVI based only upon the results of the field sobriety tests and Sergeant Sowards' observations, but not upon the results of the PBT. This approach is similar to our approach taken in *Morgan* and to the approach used by the

Fifth District Court of Appeals in *Strope*, whereby it was determined that probable cause existed without consideration of the PBT and therefore, the arrests were lawful.

{¶36} Our decision today should not be interpreted to hold that where a PBT is administered and the results of the PBT are sought to be used to establish probable cause and/or a suspect's BAC that compliance with the statutory notice requirements set forth in R.C. 4511.191 and 4511.192 is never required. We note that the circumstances here are unique in that the PBT was administered pre-arrest, and the results were not actually used to determine probable cause or to prove the alcohol content of appellant's breath. Thus, appellant did not suffer any prejudice, regardless of whether or not her consent was voluntary and regardless of whether or not such statutory notification is in fact required in order to use the results. The determination of whether R.C. 4511.191 requires an officer to notify a suspect of Ohio's implied consent law prior to administering a PBT, and whether R.C. 4511.192 requires an officer to arrest a suspect and read her BMV Form 2255 prior to administering a PBT under other circumstances is an issue which need not be definitively determined here, given the unique circumstances at bar.

{¶37} Because we find there was probable cause to arrest appellant for OVI without consideration of the PBT results, we find the trial court did not err in denying appellant's motion to suppress on that ground and in finding there was probable cause to arrest appellant.

{¶38} As for appellant's seemingly vague assertion that all evidence subsequent to the traffic stop and prior to administering the PBT should be suppressed (such as the officer's observations and the field sobriety tests), we reject that argument as well. The

totality of the circumstances gave Sergeant Sowards sufficient indicia of intoxication to establish reasonable suspicion to administer field testing. See *Perkins* at ¶8, 25 (following a valid investigatory stop, an officer may investigate a suspect for impaired driving if reasonable and articulable facts exist to support that decision; probable cause is not needed before an officer can conduct field sobriety tests; reasonable suspicion is all that is needed to support further investigation); *Strope* at ¶19 ("Where a non-investigatory stop is initiated and the odor of alcohol is combined with glassy or bloodshot eyes and further indicia of intoxication, such as an admission of having consumed alcohol, reasonable suspicion exists."); See also *State v. Wells*, 2d Dist. No. 20798, 2005-Ohio-5008.

{¶39} We next address the results of the PBT. Assuming for the purposes of this argument, as we have throughout much of our analysis, that the PBT was a search, and that appellant did not voluntarily consent to take the PBT, suppression of the PBT results would be warranted. However, because the city did not seek to admit those results, and because it is clear the trial court did not consider those results in making its probable cause determination, there is no prejudice to appellant and no error here on this issue.

{¶40} We now return the focus of our analysis back to the issue of the BAC chemical test taken at the police station and appellant's contention that the BAC test results should be suppressed because the results were obtained pursuant to an unlawful arrest.

{¶41} Having already found that appellant was arrested based upon probable cause, we in turn reject appellant's argument that she was unlawfully arrested.

Consequently, we find the trial court did not err in denying the motion to suppress the results of the BAC test conducted at the police station and used to measure appellant's BAC, given the applicability of the independent source doctrine.

{¶42} Evidence that is the product of a search or seizure that violates the Fourth Amendment cannot be used to convict the victim of the illegal search or seizure. *City of Columbus v. Pierce* (May 15, 2001), 10th Dist. No. 00AP-1250, citing *Wong Sun v. U.S*. (1963), 371 U.S. 471, 83 S.Ct. 407. This concept is known as the "exclusionary rule." Under the exclusionary rule, evidence which is obtained as a result of an unreasonable search must be suppressed as representing the fruit of the poisonous tree. *State v. Barnett*, 6th Dist. No. H-03-039, 2004-Ohio-3156, ¶6, citing *State v. Carter*, 69 Ohio St.3d 57, 67, 1994-Ohio-343. "The exclusionary rule does not apply, however, if the connection between the illegal police conduct and the discovery and seizure of the evidence is so attenuated as to dissipate the taint, as where the police have an independent source for discovery of the evidence." *Carter* at 67, citing *Silverthorne Lumber Co., Inc. v. United States* (1920), 251 U.S. 385, 40 S.Ct. 182. The independent source doctrine is a well-recognized exception to the exclusionary rule which allows the admission of evidence that has been discovered by means which are entirely independent of any constitutional violation. *State v. Perkins* (1985), 18 Ohio St.3d 193.

{¶43} Here, Sergeant Sowards had obtained enough information about appellant's level of intoxication to establish probable cause to arrest her for OVI prior to requesting that appellant take the PBT. Because there was probable cause to arrest appellant without administering the PBT, appellant's arrest was not unlawful, and the BAC

test results were obtained by independent means and do not constitute "fruit of the poisonous tree." Thus, the trial court did not err in denying appellant's motion to suppress the results of the BAC test administered at the police station.

{¶44} Based upon the foregoing, we overrule appellant's first and second assignments of error. The judgment of the Franklin County Municipal Court is affirmed.

Judgment affirmed.

BROWN, J., concurs.
FRENCH, J., concurs separately.

FRENCH, J., concurs separately.

{¶45} I concur in the conclusion reached by the majority and by the trial court that Sergeant Sowards had probable cause to arrest appellant for operating a vehicle while under the influence of alcohol, without consideration of the portable breath test ("PBT") results. Because the trial court expressly declined to consider the PBT results in its ruling on appellant's motion to suppress, and because probable cause existed, I would affirm the trial court's judgment on that basis alone.
