[Cite as *State v. Wright,* 2015-Ohio-2600.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2013-L-088**
- vs -	:	
THOMAS WRIGHT, JR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas.
Case No. 12 CR 000744.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, Lake County Administration Building, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Richard J. Perez, Rosplock & Perez, Interstate Square Building I, 4230 State Route 306, Suite 240, Willoughby, OH 44094-9204 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Thomas Wright, Jr., appeals the judgment of the Lake County Court of Common Pleas finding him guilty of operating a vehicle under the influence and sentencing him to a term of incarceration of 24 months in prison after entering a plea of no contest to Count 1, operating a vehicle under the influence of alcohol, a drug of abuse, or a combination of them, a felony of the fourth degree, in violation of R.C. 4511.19(A)(1). Appellant's prison sentence is to be served consecutive to the

sentenced imposed in case No. 12-CR-000326, for a total term of seven years in prison.[1] Based on the following, we affirm.

{¶2} On December 7, 2012, appellant was indicted on two counts of operating a vehicle under the influence of alcohol, a drug of abuse, or a combination of them ("OVI"), fourth-degree felonies, in violation of R.C. 4511.19(A)(1)(a) and R.C. 4511.19(A)(1)(h), respectively. Both counts carried a specification of five or more prior violations of R.C. 4511.19 or an equivalent offense within the last 20 years. R.C. 2941.1413. Appellant was also indicted on one count of driving under OVI suspension, a first-degree misdemeanor, in violation of R.C. 4510.14(A), and one count of driving in marked lanes, in violation of R.C. 4511.33(A)(1). Appellant pled not guilty.

{¶3} As noted, the indictment charging appellant under R.C. 4511.19 alleged that he had been previously convicted of five similar OVI offenses within 20 years of the instant offense, to wit: Medina Municipal Court, Case No. 93TRC11571, dated April 22, 1994; Willoughby Municipal Court, Case No. 95TRC06016, dated July 12, 1995; Willoughby Municipal Court, Case No. 98TRC01658, dated March 10, 1998; Euclid Municipal Court, Case No. 00TRC03186, dated June 1, 2000; and Willoughby Municipal Court, Case No. 11TRC04802, dated September 14, 2011. R.C. 4511.19(G)(1)(d) provides in part that "an offender who, within twenty years of the offense, previously has been convicted of or pleaded guilty to five or more violations of that nature is guilty of a felony of the fourth degree."

{¶4} Appellant filed a motion in limine and a motion to dismiss the prior offense specification, arguing that one of his convictions, to wit: his prior OVI conviction in Willoughby Municipal Court, Case No. 95TRC06016, resulted from an uncounseled

1. *See State v. Wright*, 11th Dist. Lake No. 2013-L-089, 2015-Ohio-XXX.

conviction and, as a result, the state could not use this conviction to enhance his underlying OVI charge to a felony of the fourth degree.

{¶5} After a hearing, the trial court denied appellant's motion in limine to prohibit the introduction of evidence of his conviction for OVI from Willoughby Municipal Court, Case No. 95TRC06016. The trial court also denied his motion to dismiss the prior offense specifications to Counts One and Two.

{¶6} Appellant also filed a motion to suppress/motion in limine arguing the officer did not have probable cause to stop appellant and that, once stopped, the officer had no justification to further detain or arrest the defendant.

{¶7} The following facts were adduced at the suppression hearing.

{¶8} On November 6, 2012, Officer Jeffrey Balaga, of the Mentor Police Department, was on patrol near Heisley Road when he received a notification from dispatch that it received several calls regarding the possibility of an impaired driver. Dispatch advised Officer Balaga that the vehicle was a red Mazda and relayed the license plate number. While on Heisley Road, Officer Balaga observed the identified vehicle drifting from left to right. Officer Balaga testified that he observed the vehicle's tires cross the white line and went onto the double-yellow line. With respect to the white fog line, Officer Balaga testified that appellant's tires crossed the white line: "I just saw the tires and I saw the car drift over, because I could see the white line inside of his tires because I was behind him with my headlights on." With respect to the double-yellow line, Officer Balaga testified that he could not recall if the tires crossed over the double-yellow line, but that the "tire went over into it. I can't recall if he did it five times totally over the double-yellow, or just kissed it." Upon further inquiry, Officer Balaga stated that

appellant went onto the double-yellow line with his tires, but he could not recall if appellant crossed both of the lines all five times. Officer Balaga stated that he had followed appellant for approximately one-half mile before effectuating a traffic stop.

{¶9} Officer Balaga activated his flashing lights, but appellant's vehicle continued traveling; he had to activate his siren. Appellant slowed his vehicle to 10 to 15 miles per hour and eventually stopped, resting the vehicle's tires on the curb. Officer Balaga testified that appellant's eyes were glossy and wet, and his pupils were constricted. Officer Balaga also observed that appellant was slow moving and "lethargic." Appellant's passenger indicated that appellant had been driving erratically, and she thought he was overdosing on pain medication. Appellant was driving with a suspended license and without insurance.

{¶10} At this time, Officer Mazany, an officer for the city of Mentor, arrived. Officer Mazany also testified that appellant's pupils were constricted, which was indicative of drug use. Appellant informed Officer Mazany that he was taking prescription medication for his back. Officer Mazany conducted a horizontal and vertical gaze nystagmus test ("HGN" and "VGN"), a one-leg stand test, and a walk-and-turn test. Appellant displayed four clues of impairment during the one-leg stand test and displayed three clues on the walk-and-turn test. Appellant was arrested for OVI.

{¶11} After the hearing, the trial court denied appellant's motion to suppress.

{¶12} Appellant pled no contest to the charge of OVI and to the specification in violation of R.C. 4511.19(A)(1)(a). Appellant was found guilty and sentenced to a term of incarceration of 24 months in prison, consecutive to the sentence imposed in case No. 12-CR-000326, for a total term of seven years in prison. Appellant's driver's license

was also suspended for a ten-year term; a fine of $1,350 was imposed; and appellant's driving record was assessed six points.

{¶13} Appellant filed a timely notice of appeal.

{¶14} As his first assignment of error, appellant alleges:

> The trial court erred when it overruled the defendant-appellant's motion to dismiss the indictment where the seriousness of the crime was increased due to a previous uncounseled conviction, in violation of the defendant-appellant's due process rights and rights to counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 10 of the Ohio Constitution.

{¶15} Appellant argues the trial court erred in finding that the state proved he was represented by counsel in the 1995 conviction for OVI in Willoughby Municipal Court, Case No. 95TRC06016. Appellant argues the state should not be allowed to use the 1995 OVI conviction to enhance the penalty for the current offense, as the prior conviction is constitutionally infirm. Absent five prior valid OVI convictions, appellant's most recent OVI conviction would not have been able to be prosecuted as a felony. In *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, ¶9, the Ohio Supreme Court held that "[a] conviction obtained against a defendant who is without counsel, or its corollary, an uncounseled conviction obtained without a valid waiver of the right to counsel, has been recognized as constitutionally infirm."

{¶16} Generally, a past conviction cannot be attacked in a subsequent case; there is, however, "a limited right to collaterally attack a conviction when the state proposes to use the past conviction to enhance the penalty of a later criminal offense." *Id*. The Ohio Supreme Court, in *Brooke* and later in *State v. Thompson*, 121 Ohio St.3d 250, 2009-Ohio-314, explained that when a defendant challenges a prior conviction as

unconstitutional, a burden-shifting analysis occurs. In *Brooke*, *supra*, at ¶11, the Court stated:

> 'Where questions arise concerning a prior conviction, a reviewing court must presume all underlying proceedings were conducted in accordance with the rules of law and a defendant must introduce evidence to the contrary in order to establish a prima-facie showing of constitutional infirmity.' *State v. Brandon*, 45 Ohio St.3d 85, syllabus. Once a prima facie showing is made that a prior conviction was uncounseled, the burden shifts to the state to prove that there was no constitutional infirmity. *Id.* at 88. For purposes of penalty enhancement in later convictions under R.C. 4511.19, when the defendant presents a prima facie showing that prior convictions were unconstitutional because they were uncounseled and resulted in confinement, the burden shifts to the state to prove that the right to counsel was properly waived.

{¶17} Subsequently, in *Thompson*, *supra*, at ¶6, the Court clarified its decision in *Brooke*, stating:

> [N]othing in the body of *Brooke* can be construed as suggesting that 'a prima facie showing that prior convictions were unconstitutional' can be established merely by stating that the defendant had not been represented in the prior convictions and that the convictions had resulted in confinement[.] * * * [F]or purposes of penalty enhancement in later convictions under R.C. 4511.19, after the defendant presents a prima facie showing that the prior convictions were unconstitutional because the defendant had not been represented by counsel and had not validly waived the right to counsel and that the prior convictions had resulted in confinement, the burden shifts to the state to prove that the right to counsel was properly waived.

{¶18} At the hearing, appellant testified that when he entered into a no contest plea in the Willoughby Municipal Court, he was not represented by counsel. Appellant stated that he did not waive his right to an attorney orally or in writing and that he was also not advised of his right to an attorney. Appellant submitted an affidavit, which averred, in part:

> At no time did the Judge personally advise me of my right to an attorney or discuss any waiver of attorney or discuss any of my rights. Basically I met with the prosecutor and pled 'no contest' to the charges. I never waived my right to an attorney before the Judge nor did I sign any documents waiving an attorney.
>
> I was not represented by an attorney, nor did I understand my constitutional rights including my absolute right to have an attorney represent me nor was I advised of the ramifications and effect of entering a plea of guilty or no contest.

{¶19} The court file for Willoughby Municipal Court, Case No. 95TRC06016 was admitted into evidence. It demonstrates that appellant was arrested for OVI on the evening of July 5, 1995, and was arraigned the next day. The judgment entry indicated that "Defendant appeared. Constitutional rights and pleas explained."

{¶20} The court file also shows that appellant was appointed a public defender, David Farren, Esq. Although Attorney Farren was appointed, appellant testified that Attorney Farren did not represent him in the matter. Attorney Farren testified at the Lake County hearing, but had no recollection of representing appellant in this matter. Attorney Farren noted that he represented, on average, ten clients per day as the public defender assigned to Willoughby Municipal Court.

{¶21} Appellant testified that he spoke with the prosecutor without an attorney present. Court records show that a pre-trial hearing was held on July 12, 1995. The "Report of Pre-Trial Discussion" documented the recommendation by the prosecutor. That form was signed by the prosecutor, and although there was a signature line for "Attorney for Defendant," the line was left blank. The trial court noted that "there is no indication whether the public defender or the defendant was present at the pretrial hearing."

{¶22} Lisa Mastrangelo, the Clerk of the Willoughby Municipal Court, testified that the absence of a signature on the "Report of Pre-Trial Discussion" form is not conclusive evidence that a defense attorney was not present. She both testified and averred that she reviewed the records of the court, and there was no audio tape or transcript of the change of plea hearing on July 12, 1995, in appellant's case. Further, Ms. Mastrangelo testified that if appellant had waived the presence of an attorney, it would have been accomplished through writing. She further testified that the written waiver of attorney would be utilized in all such cases if the defendant proceeds without an attorney. The court file did not contain a written waiver.

{¶23} R.C. 2945.75(B)(3), enacted after *Brooke*, but before *Thompson,* indicates that appellant must establish his prima facie case "by a preponderance of the evidence." The trial court found that appellant "met his burden of presenting a prima facie showing that he was not represented by counsel and had not waived the right to counsel." Although the trial court did not expressly state appellant established by a preponderance of the evidence that he met his burden, it can be reasonably inferred, by the court's statement regarding appellant's "prima facie showing" of a constitutional infirmity, that appellant did, indeed, meet his burden of production.

{¶24} Once the trial court determined that appellant established his prima facie case by a preponderance of evidence, the state was then required to present evidence to rebut the contention. In essence, the state must establish it is more likely than not appellant either (1) properly waived counsel or (2) was represented by counsel in the prior case.

{¶25} The trial court accurately assessed this burden and stated:

> The burden now shifts to the state to show that Wright either was represented by counsel or that his right to counsel was properly waived. * * * [T]here is no written evidence that [appellant] waived his right to counsel or that he waived it on the record as required by *Brooke*. However, neither of the above is required if the state can show that [appellant] was represented by counsel during the change of plea and sentencing on July 12, 1995. If he was represented by counsel, then his OVI conviction is not constitutionally infirm and it may be used to enhance his punishment in his current case. Essentially at issue is whether [appellant] was represented by an attorney when he pled no contest and was sentenced in the 1995 conviction. The court concludes he was.

{¶26} The trial court cited to appellant's testimony that having an attorney was important to him; that appellant was represented in the preceding OVI case and in the three subsequent OVI cases; and that when appellant was arraigned, he promptly requested an attorney. Although this request was initially denied, the court records demonstrate that appellant renewed his request for appointment of counsel, which was granted. The form granting appellant an attorney indicates it was personally served on Attorney Farren, the public defender. Attorney Farren was appointed at 8:45 a.m., the same day the pretrial hearing took place at 9:00 a.m. Attorney Farren's testimony notes that he was able to resolve cases quickly when the prosecutor's offer was reasonable and the client consented. The record indicates that the case was resolved the same day Attorney Farren was appointed; two separate judgment entries filed at the same time, July 12, 1995, at 11:35 a.m., illustrate that appellant withdrew his not guilty plea and entered a plea of no contest to the OVI and other charges. The trial court recognized that the absence of a written waiver of counsel suggests appellant had an attorney present at the change of plea and sentencing hearing.

{¶27} The determination of whether appellant was represented by an attorney is not a legal question but a factual determination. Because the trial court had the ability to judge the credibility of the witnesses, we defer to the trial court's finding that appellant's "testimony is suspect because he was unable to recollect many details," including his second attempt at requesting legal counsel and his residence at the time of the prior proceedings. If the findings are supported by some competent, credible evidence, the findings will not be disturbed.

{¶28} After reviewing the record, we conclude that the trial court's decision to overrule appellant's motion was supported by the evidence in the record. The testimony, as well as the prior court record, indicates that appellant was represented by counsel at the time of his plea. As noted by Ms. Mastrangelo, the significance of not having a "waiver of counsel" form in the file "would suggest that there was an attorney." Indeed, appellant sought court-appointed counsel on two occasions. Appellant's second request, made July 12, 1995, was granted, and Attorney Farren was appointed the same day the pretrial was scheduled. The trial court recognized that Attorney Farren's signature was not on the "Report of Pre-Trial Discussion" form. However, it did not consider this fact dispositive as to whether he was present. Further, while Attorney Farren did not recollect representing appellant, there was evidence that he represented countless clients over the past 18 years, and from that, the trial court was able to conclude his lack of recollection was inconsequential. We find the trial court had sufficient competent, credible evidence upon which it could base its determination that appellant's 1995 OVI conviction was counseled, and could be used by the prosecution

to enhance the degree of appellant's current offense from a misdemeanor to a felony of the fourth degree.

{¶29} Appellant's first assignment of error is without merit.

{¶30} Appellant's second assignment of error alleges:

{¶31} "The trial court erred when it required the defendant-appellant to prove by a preponderance of the evidence that the prior conviction was uncounseled in violation of his right to due process."

{¶32} Under his second assignment of error, appellant argues that R.C. 2945.75 is unconstitutional based on the following: (1) it places the burden of going forward, as well as the burden of proof, on a defendant challenging the constitutionality of a prior conviction in a criminal case; (2) it shifts the burden of proof of an element of the offense, thereby relieving the state from having to prove that element, in enhancing OVI cases, beyond a reasonable doubt; and (3) it requires the defendant to prove a constitutional infirmity by a preponderance of the evidence. We disagree.

> The ability to invalidate legislation is a power to be exercised only with great caution and in the clearest of cases. That power, therefore, is circumscribed by the rule that laws are entitled to a strong presumption of constitutionality and that a party challenging the constitutionality of a law bears the burden of proving that the law is unconstitutional beyond a reasonable doubt.

Yajnik v. Akron Dept. of Health, Hous. Div., 101 Ohio St.3d 106, 2004-Ohio-357, ¶16, citing *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142 (1955), paragraph one of the syllabus.

{¶33} Contrary to appellant's argument that the state is relieved from its burden of proof, the Ohio Supreme Court has stated, in cases where "existence of a prior conviction does not simply enhance the penalty but transforms the crime itself by

increasing its degree, the prior conviction is an essential element of the crime and must be proved by the state." *Brooke*, *supra*, at ¶8. The state is neither relieved from its burden of proof nor is the burden of proof shifted to the defendant. *See* R.C. 2945.75 (B)(1) & (2). R.C. 2945.75(B)(2) requires the state to make a prima facie showing of the defendant's prior convictions. *See State v. Curtis*, 10th Dist. Franklin No. 09AP-1199, 2011-Ohio-3298, ¶49 ("Appellant has not presented an argument as to how this subsection of the statute would fail under a rational basis review and we fail to see how R.C. 2945.75(B)(2) implicates appellant's constitutional rights.").

{¶34} The statute then allows the defendant to allege a constitutional defect in the prior conviction. If the defendant does allege a constitutional defect, "the defendant has the burden of proving the defect by a preponderance of the evidence." R.C. 2945.75(B)(3). The fact that a defendant must establish his plea was uncounseled and that a proper, valid waiver did not occur, does not mean the burden to establish an element of the offense shifted to the defendant. The state clearly must establish the fact of the *conviction.* If the defendant contends there is a problem with the conviction, the statute merely requires he or she establish a prima facie case of that defect. This is simply a defense to an element of the charge, not unlike many other defenses to elements of other offenses.

{¶35} Appellant's second assignment of error is without merit.

{¶36} Appellant's third, fourth, and fifth assignments of error relate to the trial court's denial of his motion to suppress.

{¶37} "Appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. The

appellate court must accept the trial court's factual findings, provided they are supported by competent, credible evidence. *Id*. Thereafter, the appellate court must determine, without deference to the trial court, whether the applicable legal standard has been met. *Id*. Thus, we review the trial court's application of the law to the facts de novo. *State v. Holnapy*, 194 Ohio App.3d 444, 2011-Ohio-2995, ¶28 (11th Dist.).

{¶38} Appellant's third assignment of error alleges:

> The trial court erred when it overruled the defendant-appellant's motion to suppress where the officer had no specific and articulable suspicion upon which to base his stop the defendant-appellant's vehicle, in violation of the defendant-appellant's right to be free from unreasonable search and seizure as guaranteed by the fourth, fifth, and fourteenth amendments of the United States Constitution and Article I, Sections 10 and 14 of the Ohio Constitution.

{¶39} Appellant maintains that Officer Balaga did not possess a specific and articulable reason to conduct the stop, as the evidence does not demonstrate appellant committed a marked lanes violation. Appellant argues that at the suppression hearing, Officer Balaga testified he could not say that the vehicle's tires crossed the double-yellow line or that the tires went so far right as to "go into the stone berm area."

{¶40} An officer may constitutionally stop a motorist if the seizure is premised upon either a reasonable suspicion or probable cause. *See, e.g., Ravenna v. Nethken*, 11th Dist. Portage No. 2001-P-0040, 2002-Ohio-3129, ¶28. Probable cause is defined in terms of those facts and circumstances sufficient to warrant a prudent law enforcement officer in believing that a suspect committed or was committing an offense. *See Beck v. Ohio*, 379 U.S. 89, 91 (1964). It is well-settled that an officer's observation of a traffic violation furnishes probable cause to stop a vehicle. *See, e.g., State v.*

Korman, 11th Dist. Lake No. 2004-L-064, 2006-Ohio-1795; *Wickliffe v. Petway*, 11th Dist. Lake Nos. 2011-L-101 & 2011-L-102, 2012-Ohio-2439, ¶12.

{¶41} R.C. 4511.33 provides, in relevant part:

> (A) Whenever any roadway has been divided into two or more clearly marked lanes for traffic, or wherever within municipal corporations traffic is lawfully moving in two or more substantially continuous lines in the same direction, the following rules apply:
>
> (1) A vehicle or trackless trolley shall be driven, as nearly as is practicable, entirely within a single lane or line of traffic and shall not be moved from such lane or line until the driver has first ascertained that such movement can be made with safety.

{¶42} In *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, the Supreme Court of Ohio resolved the following issue: "May a police officer who witnesses a motorist cross a right white edge line and without any further evidence of erratic driving or that the crossing was done in an unsafe manner make a constitutional stop of the motorist?" *Id.* at ¶1. The Court answered in the affirmative.

{¶43} In *Mays*, an officer driving behind a vehicle witnessed the vehicle drift across the white fog line by approximately one tire width. A moment later, the officer witnessed the vehicle do the same thing again. The officer continued to follow the vehicle for approximately one and one-half miles; the vehicle did not commit any further violations. *Id.* at ¶2.

{¶44} The *Mays* Court stated: "When an officer observes a vehicle drifting back-and-forth *across* an edge line, the officer has a reasonable and articulable suspicion that the driver has violated R.C. 4511.33." *Id.* at ¶16. (emphasis added.).

{¶45} Here, although appellant cites to cases where courts have held that a marked lanes violation did not occur when a vehicle's tires touch the line dividing the

lanes, the evidence presented before the trial court demonstrated that appellant violated R.C. 4511.33. *See, e.g., Mentor v. Phillips*, 11th Dist. Lake No. 99-L-119, 2000 Ohio App. LEXIS 6207, *5 (Dec. 29, 2000) ("Given that appellant was driving a large pick-up truck with no cars traveling in the lane next to him, appellant did not violate the marked lanes statute by momentarily touching the white broken line that divides the two eastbound lanes of Mentor Avenue.").

{¶46} Here, the trial court found, and the record before us demonstrates, that the tires of appellant's vehicle crossed *over* the white line. Although the trial court did note that appellant's tires did not "completely cross * * * into the berm on the right side of the road[,]" the record discloses this berm area was approximately one foot of pavement beyond the white line. Officer Balaga unequivocally testified that appellant's tires crossed the white line: "Tires were on it, drifted over it, didn't go into the stone side road * * * but, yes, he did go over the white line."

{¶47} Like the officer in *Mays*, Officer Balaga was traveling behind apellant's vehicle. Officer Balaga observed the white line on the inside of appellant's tires. This crossing of the white line, standing alone, was sufficient for Officer Balaga to make a constitutional stop of appellant's vehicle. *C.f., State v. Shaffer*, 3rd Dist. Paulding No. 11-13-02, 2013-Ohio-3581, ¶27 ("we cannot conclude that the act of [the defendant] driving onto the while fog line one time for a matter of three seconds is alone sufficient to establish the requisite reasonable and articulable suspicion to stop [the defendant] for a violation of R.C. 4511.33(A)(1)"). We note also that Officer Balaga observed appellant's vehicle swerve within his lane; he further witnessed the vehicle's tires cross or go on the portion of the double-yellow line nearest to his lane five times within one-

half mile, and there were multiple calls to dispatch that appellant's vehicle was driving erratically.

{¶48} Based on the above, we conclude the trial court did not err in determining that Officer Balaga had a reasonable, articulable suspicion to believe appellant violated R.C. 4511.33(A)(1).

{¶49} Appellant's third assignment of error is without merit.

{¶50} Appellant's fourth assignment of error alleges:

> The trial court erred when it overruled the defendant-appellant's motion to suppress where the officer had no specific and articulable suspicion upon which to remove the defendant-appellant from the vehicle to perform field sobriety tests, in violation of the defendant-appellant's right to be free from unreasonable search and seizure as guaranteed by the Fourth, Fifth, and Fourteenth amendments of the United States Constitution and Article I, Sections 10 and 14 of the Ohio Constitution.

{¶51} Encounters between police and citizens can generally be classified into one of three categories: consensual encounter, brief investigatory stop, and formal arrest. Each category requires a different evidentiary standard. Consensual encounter, the first level, requires the lowest evidentiary standard. *State v. Trevarthen*, 11th Dist. Lake No. 2010-L-046, 2011-Ohio-1013, ¶12. When an officer approaches an individual in or near a parked car, the encounter is considered consensual. *State v. Ball*, 11th Dist. Trumbull No. 2009-T-0013, 2010-Ohio-714, ¶12, quoting *State v. Staten*, 4th Dist. No. 03CA1, 2003-Ohio-4592, ¶18.

{¶52} Because a request that an individual perform field sobriety tests is a greater invasion of one's liberty interests, these tests must be separately justifiable by specific, articulable facts which show a reasonable basis for the request. *State v.*

Evans, 127 Ohio App.3d 56, 62 (11th Dist. 1998) (citation omitted). Reasonableness is shown by considering the circumstances in whole. *Id.* at 60.

{¶53} In *Evans*, this court outlined a non-exclusive list of factors to consider in determining whether a police officer has reasonable suspicion to justify administering field sobriety tests. The factors to be considered include, but are not limited to, the following:

> (1) the time and day of the stop (Friday or Saturday night as opposed to, e.g., Tuesday morning); (2) the location of the stop (whether near establishments selling alcohol); (3) any indicia of erratic driving before the stop that may indicate a lack of coordination (speeding, weaving, unusual braking, etc.); (4) whether there is a cognizable report that the driver may be intoxicated; (5) the condition of the suspect's eyes (bloodshot, glassy, glazed, etc.); (6) impairments of the suspect's ability to speak (slurred speech, overly deliberate speech, etc.); (7) the odor of alcohol coming from the interior of the car, or, more significantly, on the suspect's person or breath; (8) the intensity of that odor, as described by the officer ('very strong,' 'strong,' 'moderate,' 'slight,' etc.); (9) the suspect's demeanor (belligerent, uncooperative, etc.); (10) any actions by the suspect after the stop that might indicate a lack of coordination (dropping keys, falling over, fumbling for a wallet, etc.); and (11) the suspect's admission of alcohol consumption, the number of drinks had, and the amount of time in which they were consumed, if given. All of these factors, together with the officer's previous experience in dealing with drunken drivers, may be taken into account by a reviewing court in determining whether the officer acted reasonably. No single factor is determinative.

Id. at 63, fn. 2.

{¶54} Courts generally defer to the law enforcement officer's judgment in deciding to conduct field sobriety tests when the officer's decision was based on a number of factors. *Id.* at 63. In this case, the record demonstrates that Officer Balaga's decision to administer field sobriety tests was based on several factors, including: appellant's marked lanes violation; a report from several citizens that appellant was

driving erratically; appellant's pupils were highly constricted despite the dark conditions; appellant's responses to the officer's requests were extremely slow; and appellant acted lethargically.

{¶55} Additionally, the record reveals that when attempting to effectuate a traffic stop, appellant kept driving; Officer Balaga testified that based on his experience, it took appellant longer than average to pull over. When he did finally pull over, appellant rested his vehicle with its right front tire on the curb.

{¶56} Upon approaching the vehicle, Officer Balaga noted that appellant's reaction to his commands, i.e., retrieving his license and insurance card, were "in slow motion." Officer Balaga noticed that appellant's eyes were glassy, wet, and his pupils were constricted. Officer Mazany also noticed appellant's constricted pupils, testifying this was indicative of narcotic or medication use. Appellant also informed the officers that "he was on back medication," although he refused to give the specifics of such medication.

{¶57} Looking at the totality of the circumstances, there were articulable facts necessary to provide a reasonable basis for asking appellant to submit to field sobriety tests.

{¶58} Appellant's fourth assignment of error is without merit.

{¶59} In his fifth assignment of error, appellant alleges:

> The trial court erred when it overruled the defendant-appellant's motion to suppress where the police had no probable cause to make an arrest for operating a vehicle under the influence, in violation of the defendant-appellant's right to be free from unreasonable search and seizure as guaranteed by the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 10 and 14 of the Ohio Constitution.

{¶60} Under his fifth assignment of error, appellant presents two issues for our review. First, appellant argues Officer Mazany failed to conduct the field sobriety tests in substantial compliance with the National Highway Traffic Safety Administration's Standardized Field Sobriety Testing Manual ("NHTSA"), and thus, the results should have been suppressed. Second, he contends the officer lacked sufficient probable cause to arrest him for OVI.

{¶61} "[U]nder amended R.C. 4511.19, effective April 9, 2003, an arresting officer is no longer required to administer field sobriety tests in strict compliance with testing standards for the test results to be admissible. Rather, only substantial compliance is required." *State v. Barnett,* 11th Dist. Portage No. 2006-P-0117, 2007-Ohio-4954, ¶18, citing *State v. Brown,* 166 Ohio App.3d 638, 2006-Ohio-1172 (11th Dist.).

{¶62} The record reveals that Officer Mazany conducted HGN and VGN tests, a one-leg stand test, and a walk-and-turn test. The trial court noted the following:

> The backup officer performed the horizontal gaze nystagmus test (HGN), a vertical gaze nystagmus test (VGN), a one leg stand test (OLS) and a nine step walk and turn test (WAT). The officer concluded that Wright demonstrated lack of smooth pursuit in the HGN test (showing two of six clues of impairment), and that Wright had vertical nystagmus which indicated impairment due to drugs. Wright was unable to hold one leg off the ground for more than eight seconds and after repeated attempts told the officer that he could not do the OLS. Wright performed the WAT test but on several of the steps was unable to place his heel to the toe of his other foot and did not correctly turn at the end of nine steps. The backup officer concluded that Wright was not under the influence of alcohol but was under the influence of drugs and placed him under arrest.

{¶63} With respect to the field sobriety tests, appellant argues: (1) the HGN and VGN tests were not administered per NHTSA standard, and (2) Officer Mazany testified there were only seven clues he was looking for on the walk-and-turn test, while NHTSA sets for eight clues. Appellant does not take exception with the administration of the one-leg stand test, where he exhibited four clues.

{¶64} With regard to the walk-and-turn test, the record demonstrates that Officer Mazany was able to name and describe seven of the eight clues when questioned on cross-examination. Officer Mazany testified that he observed three clues when administering the test on appellant, and he was able to describe the three clues. The failure to recall one clue does not rise to the level of drawing the conclusion that the walk-and-turn test was not conducted in substantial compliance with NHTSA standards.

{¶65} With respect to the HGN test, the NHTSA manual notes that an officer should look for three clues of nystagmus in each eye: "(1) The eye cannot follow a moving object smoothy; (2) Nystagmus is distinct and sustained when the eye is held at maximum deviation for a minimum of four counts; (3) The angle of onset of nystagmus is prior to 45 degrees." The manual further states: "Based on the original research, if you observe four or more clues it is likely that the suspect's BAC is above 0.10." The NHTSA manual also outlines that after performance of each test on each eye, the test should be repeated. An officer is to conduct the HGN test two times on each eye.

{¶66} Appellant argues that Officer Mazany administered the HGN procedure only once on each eye. The record demonstrates the officer performed the HGN procedure only once on each eye. Appellant, however, presented only two out of the possible six clues. Officer Mazany testified that appellant displayed a lack of smooth

pursuit in each eye. Two out of six clues does not fall within the scope of statistical significance pursuant to the NHTSA manual to the extent that four out of six possible clues are necessary to fail the HGN test. Any error in admitting the evidence is inconsequential and would, in any event, inure to appellant's benefit.

{¶67} Appellant also argues the officer failed to substantially comply with the VGN test, as the officer did not repeat the procedure two times on each eye. The NHTSA manual outlines the procedure for an officer to administer the VGN test. It provides that the officer position the stimulus horizontally, about 12-15 inches from the front of the suspect's nose. The officer then instructs the suspect to follow the object with only the eyes and raises the object until the suspect's eyes are elevated as far as possible. The officer is to hold for approximately four seconds to observe evidence of jerking. Appellant's argument is without merit, as the NHTSA manual does not require an officer to repeat this procedure.

{¶68} Under his second issue, appellant argues that the officers did not have probable cause to believe that he committed the offense of OVI, and as a result, his arrest was unlawful. Appellant maintains that at no time did the officer observe slurred speech or an odor of alcohol; appellant also argues that his "bloodshot eyes and slow movements do not amount to 'reasonably trustworthy information.'"

{¶69} Here, the trial court concluded:

> Based on the totality of the circumstances, * * * there was sufficient competent, credible evidence to find probable cause to arrest Wright based on the officer's observation of Wright's driving and on Wright's performance of the SFSTs. These facts gave rise to a reasonable and articulable suspicion that Wright was impaired due to ingesting a drug, in violation of R.C. 4511.19.

{¶70} The law is clear that even if field sobriety tests are not administered in substantial compliance with NHTSA standards or if no field sobriety tests are administered, the totality of circumstances can support a finding of probable cause to arrest. Probable cause is defined in terms of those facts and circumstances sufficient to warrant a prudent law enforcement officer in believing that a suspect committed or was committing an offense. *See Beck v. Ohio*, *supra*, at 91 (1964). We find that, based upon a totality of the facts and circumstances, probable cause existed to arrest appellant for OVI.

{¶71} Here, several telephone calls were made by concerned citizens that appellant was driving erratically. Appellant's vehicle was identified, and Officer Balaga followed appellant's vehicle for approximately one-half mile. In that time, Officer Balaga observed appellant commit a marked lanes violation. When speaking to appellant, Officer Balaga noted that appellant had constricted pupils, was lethargic, and was slow moving. Appellant also admitted to taking pain medication for his back. We also note that appellant's passenger told the officers that appellant was possibly "OD-ing on pain medication" and that he was driving erratically.

{¶72} Appellant also displayed four clues during the one-leg stand test, which is indicative of impairment, and displayed three clues on the walk-and-turn test, which is also indicative of impairment. During the one-leg stand test, appellant hopped and terminated the test by saying he could not complete it.

{¶73} Accordingly, the totality of the evidence gave rise to probable cause to arrest appellant for OVI.

{¶74} Appellant's fifth assignment of error is without merit.

{¶75} Based on the opinion of this court, the judgment of the Lake County Court of Common Pleas is hereby affirmed.

THOMAS R. WRIGHT, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents.