[Cite as *State v. Baker*, 2010-Ohio-1289.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-06-079
	:	O P I N I O N
- vs -		3/29/2010
	:	
KRISTINA M. BAKER,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM MASON MUNICIPAL COURT
Case No. 08TRC06433

Bethany S. Bennett, 5950 Mason Montgomery Road, Mason, Ohio 45040, for plaintiff-appellee

Lyons & Lyons, Jeffrey C. Meadows, 8310 Princeton-Glendale Road, West Chester, Ohio 45069, for defendant-appellant

HENDRICKSON, J.

{¶1} Defendant-appellant, Kristina M. Baker, appeals a decision of the Mason Municipal Court partially overruling her motion to suppress evidence obtained in connection with a traffic stop. For the reasons outlined below, we affirm in part, reverse in part, and remand.

{¶2} In the early morning hours of November 23, 2008, Trooper Sidney Michael

Steele of the Ohio State Highway Patrol was traveling on Interstate 71 when he observed a vehicle that appeared to be sitting stationary on Columbia Road in Deerfield Township. Trooper Steele exited the interstate and approached the vehicle, which he found to be moving as he drew near. The trooper paced the vehicle at about 20 m.p.h. in a 45 m.p.h. zone. After observing the vehicle commit several marked lane violations and nearly strike another vehicle, the trooper initiated a traffic stop.

{¶3} Trooper Steele exited his cruiser and made contact with the driver, appellant, from the passenger side of the vehicle. He tapped on the passenger window, which appellant rolled down about halfway. Trooper Steele informed appellant that he pulled her over for poor driving, at which time appellant replied "it's okay, I'm a police officer." The trooper observed an unopened 12-pack of beer on the passenger side floorboard. When he asked if appellant had been drinking, she responded in the affirmative. The trooper testified that he detected a strong odor of an alcoholic beverage on or about appellant. He also noticed that her speech was very slurred, her movements were slow, and she had a puzzled, blank look on her face. According to Trooper Steele, appellant implored him to "just take her home" a number of times. When appellant exited her vehicle, the trooper observed that she was very uneasy on her feet.

{¶4} After conducting a brief field investigation, Trooper Steele placed appellant under arrest. He transported her to the Ohio State Highway Patrol Post in Lebanon, where she consented to a breath alcohol content test ("BAC test"). The result of the test indicated that the sample provided by appellant contained 0.258 grams of alcohol per 210 liters of breath.

{¶5} Appellant was charged with one count of operating a vehicle while under the influence of alcohol (hereinafter "OVI impaired") in violation of R.C. 4511.19(A)(1)(a), a first-degree misdemeanor; one count of operating a vehicle with a prohibited blood alcohol

concentration (hereinafter "OVI blood alcohol content") in violation of R.C. 4511.19(A)(1)(h), a first-degree misdemeanor; and one count of failure to drive within marked lanes in violation of R.C. 4511.33, a minor misdemeanor.

{¶6} On February 6, 2009, appellant moved to suppress the evidence obtained against her in connection with the traffic stop. Following a hearing, the trial court partially granted and partially overruled the motion. Thereafter, appellant pled no contest to the OVI blood alcohol content charge in exchange for the dismissal of the OVI impaired and marked lane violation charges. The trial court entered a finding of guilty and sentenced appellant accordingly. Appellant timely appeals, raising three assignments of error.

{¶7} Assignment of Error No. 1:

{¶8} "THE TRIAL COURT ERRED IN GRANTING STATE'S MOTION TO QUASH APPELLANT'S SUBPOENA DUCES TECUM FOR THE BREATH INSTRUMENT AND ITS' [SIC] RECORDS."

{¶9} On February 5, 2009, appellant served Trooper Steele with a subpoena duces tecum. The subpoena commanded Trooper Steele to appear in the Mason Municipal Court on the date set for a hearing on appellant's motion to suppress and to bring the following items with him: "The BAC DataMaster serial #130675, along with all operator's manuals, [the] Department of Health DataMaster Training Manual, and ALL maintenance records for said instrument." (Emphasis in original.)

{¶10} On the morning of February 17, 2009, the day of the suppression hearing, the state filed a written motion to quash appellant's subpoena duces tecum. The state argued that it was unreasonable to request that the BAC DataMaster be brought to the municipal court because the absence of the machine would prohibit the Ohio State Highway Patrol from testing other suspects. In addition, the state was concerned that the machine could be damaged during transport. The state also indicated that it was "willing to satisfy any

reasonable request with reference to the production of books and documents properly identified," but advised that full compliance with the subpoena would significantly disrupt operations at the Ohio State Highway Patrol.

{¶11} At the commencement of the suppression hearing, defense counsel attempted to argue in favor of appellant's subpoena duces tecum. Rather than permitting arguments on the subject, the trial court indicated that it would review the state's motion to quash and issue a ruling at a later time. The court then proceeded with the hearing on appellant's motion to suppress. At the close of the hearing, defense counsel again revisited the topic of the subpoena duces tecum and expressed his desire to argue against the state's motion to quash at that time. Instead, the trial court instructed the parties to submit written arguments addressing the issues raised at the suppression hearing.

{¶12} In a decision rendered on February 27, 2009, the trial court granted the state's motion to quash appellant's subpoena duces tecum with respect to the BAC DataMaster. The court expressly limited its decision to the BAC machine, but did not directly address the subpoena duces tecum regarding the documentary evidence demanded by appellant.

{¶13} In her first assignment of error, appellant argues that the trial court improperly granted the state's motion to quash her subpoena duces tecum. Appellant concedes that she filed a boilerplate motion to suppress, and insists that the trial court's decision quashing the subpoena undermined her effort to raise the burden on the state by utilizing formal discovery.

{¶14} A court may require the production of books, papers, documents, or other objects through its subpoena power. *City of Findlay v. Reichenbach* (Dec. 29, 1992), Hancock App. No. 5-92-30, 1992 WL 389991 at * 2. Under Crim.R. 17(C), a subpoena duces tecum may order the person to whom it is directed to produce certain documents or other objects designated therein at a formal court proceeding. *State v. Cleveland Plain*

Dealer (June 15, 1979), Cuyahoga App. Nos. 40531, 40532, 40533, 1979 WL 210746, at *5-6.

{¶15} Crim.R. 17(C) bestows upon the trial court discretion to quash or modify a subpoena, on motion of a party, if compliance would be "unreasonable or oppressive." *State v. Russ* (June 26, 2000), Clermont App. No. CA99-07-074, at 10. Generally, a trial court's decision on a motion to quash a subpoena is reviewed for an abuse of discretion. *State v. Strickland*, 183 Ohio App.3d 602, 2009-Ohio-3906, ¶37. An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶130.

{¶16} After reviewing the circumstances surrounding the present appeal, we find a case issued by the Ohio Supreme Court to be controlling over this issue. In the case of *In re Subpoena Duces Tecum Served Upon Atty. Potts*, 100 Ohio St.3d 97, 2003-Ohio-5234, the high court reviewed a lower court decision finding attorney John Potts in contempt of court for failing to comply with a subpoena duces tecum. The subpoena commanded Potts to appear as a state's witness at a trial featuring one of Potts' clients as the defendant. The defendant was charged with multiple counts of money laundering. The subpoena commanded Potts to convey to trial certain documents pertaining to legal fees paid to him by the defendant over a specified period of time.

{¶17} Potts filed motions to quash the state's subpoena duces tecum on behalf of himself and his client. In support, Potts argued that the state failed to show that the documents were relevant or unavailable, that the state did not establish that an in-camera review of the documents was necessary, and that the documents were privileged. The trial court subsequently ordered Potts to bring a portion of the requested documents for an in-camera review. Potts appeared on the schedule date without the documents. He was found guilty of criminal contempt and fined. The court of appeals upheld the judgment ordering the

in-camera inspection of the documents, but reversed the contempt finding.

{¶18} After accepting a discretionary appeal, the Ohio Supreme Court reversed the decision of the appellate court. Noting the substantive uniformity between Ohio Crim.R. 17(C) and Fed.R.Crim.P. 17(c), the high court quoted a United States Supreme Court case providing that "Rule 17(c) was not intended to provide an additional means of discovery" and "[i]ts chief innovation was to expedite the trial by providing a time and place before trial for the inspection of the subpoenaed materials." *In re Subpoena Duces Tecum Served Upon Atty. Potts* at ¶12, quoting *Bowman Dairy Co. v. United States* (1951), 341 U.S. 214, 220, 71, S.Ct. 675.

{¶19} In deciding to reverse the lower court's ruling, the Ohio Supreme Court determined that the lower court did not properly conduct the requisite analysis in disposing of Potts' motions to quash. The high court explicitly adopted a four-part test enunciated by the United States Supreme Court in *United States v. Nixon* (1974), 418 U.S. 683, 94 S.Ct. 3090, for determining whether a subpoena duces tecum is "unreasonable or oppressive" within the meaning of Crim.R. 17(C):

{¶20} "At the hearing, which may be held in camera, the proponent of the subpoena must demonstrate that the subpoena is not unreasonable or oppressive by showing '(1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition." ' " *In re Subpoena Duces Tecum Served Upon Atty. Potts* at ¶16, quoting *Nixon* at 699-700. See, also, *State v. Geis* (1981), 2 Ohio App.3d 258, 260.

{¶21} Pursuant to Crim.R. 17(C), the *Potts* court pronounced, a trial court is required

to conduct a separate evidentiary hearing when deciding a motion to quash a subpoena duces tecum. *In re Subpoena Duces Tecum Served Upon Atty. Potts* at ¶14-15. See, also, *State v. Sims*, Summit App. No. 22677, 2006-Ohio-2415, ¶13. As stated, the hearing may be held in camera. *In re Subpoena Duces Tecum Served Upon Atty. Potts* at ¶16. The trial court may not simply apply the *Nixon* test without conducting a hearing. Id. at ¶15. Rather, the *Potts* decision expressly mandated that a trial court conduct a *separate* evidentiary hearing to determine whether a subpoena duces tecum is unreasonable or oppressive under *Nixon*. Id. at ¶14-15.

{¶22} The Ohio Supreme Court further decreed that the proponent of a subpoena duces tecum bears the burden to demonstrate that the subpoena is not unreasonable or oppressive by demonstrating that the four elements in the *Nixon* test are satisfied. Id. at ¶16. Due to the use of the coordinating conjunction "and" in the *Nixon* Court's formulation of the test, all four elements must be met in order for the proponent of the subpoena duces tecum to avoid a motion to quash. Cf. *State v. Williams*, Fayette App. No. CA2005-11-030, 2006-Ohio-5660, ¶21.

{¶23} In the present matter, the record indicates that the trial court neither conducted a separate evidentiary hearing on the state's motion to quash appellant's subpoena duces tecum, nor solicited evidence from appellant, the proponent of the subpoena, on the four *Nixon* elements. In view of the high court's directives in the *Potts* decision, we find that the trial court erred in ruling on the state's motion to quash.

{¶24} Appellant's first assignment of error is sustained.

{¶25} Assignment of Error No. 2:

{¶26} "THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS."

{¶27} Appellant contends that the results of the field sobriety tests should have been

suppressed because the tests were not conducted in substantial compliance with National Highway Traffic Safety Administration (NHTSA) standards. In addition, appellant argues that the results of the BAC test should have been suppressed because the test was not administered in substantial compliance with Ohio Department of Health (ODH) regulations.

{¶28} Appellate review of a ruling on a motion to suppress evidence presents a mixed question of law and fact. *State v. Long* (1998), 127 Ohio App.3d 329, 332. The trial court, as the trier of fact, is in the best position to resolve questions of fact and evaluate witness credibility. *State v. Mai*, Greene App. No. 2005-CA-115, 2006-Ohio-1430, ¶9. A reviewing court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Id. The appellate court then determines as a matter of law, without deferring to the trial court's conclusions, whether the trial court applied the appropriate legal standard. Id.

{¶29} Our resolution of appellant's second assignment of error necessarily invokes consideration of the respective burdens on the parties when a motion to suppress evidence is filed in an OVI case. This court has repeatedly attempted to refine the law on this subject in the interests of expediency and fairness.

{¶30} Crim.R. 47 requires that a motion in a criminal proceeding state with particularity the grounds upon which it is made and identify the relief or order sought. *State v. Shindler*, 70 Ohio St.3d 54, 56-57, 1994-Ohio-452. In accordance with this rule, a defendant seeking to secure a hearing on a motion to suppress evidence "must state the motion's legal and factual bases with sufficient particularity to place the prosecutor and the court on notice of the issues to be decided." Id. at syllabus. In the context of an OVI case, once a defendant seeking suppression of the results of field sobriety and/or BAC tests satisfies this initial burden, the burden shifts to the state to demonstrate substantial compliance with the applicable testing standards. *State v. Plunkett*, Warren CA2007-01-012, 2008-Ohio-1014, ¶11.

{¶31} The extent of the state's burden to show substantial compliance is dictated by the level of specificity with which the defendant challenges the legality of her field sobriety and/or BAC tests. Id. Where the motion to suppress raises only general claims, even if the applicable laws are cited therein, the state's burden remains slight. Id. at ¶11-12, quoting *State v. Jimenez*, Warren App. No. CA2006-01-005, 2007-Ohio-1658, ¶25. A defendant may raise this burden by filing a more precise motion to suppress. *State v. Deutsch*, Butler App. No. CA2008-03-035, 2008-Ohio-5658, ¶12. That is, a defendant may file a motion which depicts the unique facts of her case and connects these facts to the particular NHTSA standards and/or ODH regulations that she alleges were not followed. See id.

{¶32} This court has encouraged criminal defendants to engage in formal discovery to raise the slight burden on the state generated by a boilerplate motion to suppress. See id. at ¶13. See, also, *State v. Eyer*, Warren App. No. CA2007-06-071, 2008-Ohio-1193, ¶12; *Plunkett* at ¶26; *State v. Embry*, Warren App. No. CA2003-11-110, 2004-Ohio-6324, ¶28. Indeed, where timely and efficiently utilized, discovery can act as a catalyst for stimulating a more meaningful and revealing suppression hearing. A defendant may employ formal discovery to gather facts to raise the state's burden before the suppression hearing by filing a more specific motion to suppress. *Embry* at ¶28. Alternatively, a defendant may use discovery to gather facts to raise the state's burden by way of cross-examination of the state's witnesses at the suppression hearing itself. Id. at ¶27. See, also, *Plunkett* at ¶26.

{¶33} Regardless of which of these methods is chosen, the state has an affirmative

duty to respond when a defendant makes a formal discovery demand.[1] *Eyer* at ¶14. The state has a responsibility to take reasonable steps to accommodate a defendant's retrieval of documents requested in discovery. Id. at ¶15. The state may fulfill this duty by providing the material to the defendant or by providing the defendant with the necessary access to obtain the material herself. Id. The state's duty, of course, is limited to material that is discoverable under Crim.R. 16(B)(1). *Eyer* at ¶15.

{¶34} The procedure we advocate in these cases is designed to narrow down the fact-specific issues facing a trial court, ideally *before* the hearing on a motion to suppress evidence. As reiterated above, we have placed the impetus on the defendant to raise the burden on the state imposed by a boilerplate motion to suppress, preferably by engaging in formal discovery. When a defendant avails herself of this tool and discovery conflicts arise, the state cannot sit idly by and expect the defendant to be the sole actor in resolving such conflicts. Both sides must put forth a good faith effort to resolve discovery conflicts in a reasonable and timely manner. Where the parties cannot reconcile discovery disputes, it is incumbent upon them to inform the trial court in an effort to reach a resolution, if possible, before the suppression hearing. Ways to inform the trial court of discovery conflicts include, but are not limited to, a defendant filing a motion to compel discovery or the state filing a motion to exclude evidence.

{¶35} We now turn to the merits of the present matter. In order for the results of standardized field sobriety tests to be admissible, the state must prove by clear and

1. The record indicates that appellant filed a formal discovery demand on December 10, 2008. It appears that the state responded to this demand off the record only. Where the state's discovery response is not incorporated into the record, there is no evidence that the state complied with the defendant's request for discovery. Cf. *State v. McCoy* (1969), 26 Ohio App.2d 62, paragraph two of the syllabus (stating, "[o]ccurrences in a trial court not made part of the record are nullities"). Both in her written arguments on the motion to suppress and in her appellate brief, appellant references a December 23, 2008 "form" discovery response by the state which apparently included photocopies of a number of documents. Because this response was not made part of the record, however, it is unavailable for our review. Although appellant does not take issue with the state's omission on appeal, we find this oversight particularly troubling and would not encourage such an informal discovery practice.

convincing evidence that the tests were administered in substantial compliance with accepted testing standards. R.C. 4511.19(D)(4)(b). See, also, *State v. Henry*, Preble App. No. CA2008-05-008, 2009-Ohio-10, ¶10. The standards most often employed are those enumerated in the NHTSA manual. Id. As stated, appellant admitted to filing a boilerplate motion to suppress. Consequently, the state's burden to show substantial compliance with NHTSA standards was slight.

{¶36} First, appellant insists that the results of the HGN test should have been suppressed because the rotating overhead lights on Trooper Steele's police cruiser interfered with the test. Appellant's boilerplate motion to suppress generally referenced the rotating cruiser lights, stating: "[T]he test was administered in conditions that interfered with the defendant's performance of the Horizontal Gaze Nystagmus; namely; the defendant was facing rotating lights, strobe lights and traffic passing in close proximity, and in dusty and windy conditions." The suppression motion did not enumerate facts specific to appellant's case regarding Trooper Steele's administration of the HGN test to appellant. In addition, appellant did not specifically address this issue at the suppression hearing by questioning Trooper Steele about it on cross-examination. Thus, the slight burden imposed on the state by appellant's boilerplate motion to suppress regarding this issue was not heightened.

{¶37} Appellant belatedly raises specific facts about the cruiser lights for the first time on appeal, insisting that she was not facing away from the rotating cruiser lights whenever Trooper Steele brought the stimulus to her left side. Appellant notes that the 2006 NHTSA Student Manual cautions an officer conducting the HGN test to "always face a suspect away from rotating lights, strobe lights and traffic in close proximity." Due to her allegation that the cruiser lights were visible in her periphery during parts of the test, appellant concludes that the state failed to prove by clear and convincing evidence that the HGN was administered in substantial compliance with the 2006 NHTSA standardized procedures.

{¶38} At the suppression hearing, Trooper Steele testified that he positioned appellant at the rear of her vehicle, on the right side of the road, in order to keep her clear from traffic while administering the HGN. The trooper verified that he had been trained in the administration of the HGN at the Ohio State Highway Patrol Academy, and that he followed the NHTSA guidelines in administering the test to appellant. According to Trooper Steele, appellant demonstrated six out of six possible clues on the test. We find that this evidence was sufficient to meet the state's slight burden to show that the HGN test was administered to appellant in substantial compliance with NHTSA requirements. We may not address the specific facts raised by appellant for the first time on appeal, as the trial court was not made aware of these facts prior to ruling on the motion to suppress.

{¶39} Next, appellant protests that the trial court erred in denying her motion to suppress the results of the walk-and-turn test. Immediately prior to the walk-and-turn test, Trooper Steele bypassed the one-legged stand test after appellant informed him she had bad knees. The trooper then attempted to conduct the walk-and-turn test. The test was never actually administered, however, because appellant fell twice while in the starting position. Even so, appellant argues that the trial court erred in declining to suppress the results of the walk-and-turn test because Trooper Steele failed to adapt the test for her knee problems, as required by NHTSA.

{¶40} We find appellant's arguments and the trial court's rulings on these two field sobriety tests to be curious. The trial court expressly suppressed the results of both the one-legged stand and walk-and-turn tests, citing *State v. Lange*, Butler App. No. CA2007-09-232, 2008-Ohio-3595, ¶16 (upholding the suppression of the results of a walk-and-turn field sobriety test where the administering officer failed to consider or adapt the test for the defendant's leg problems). However, as the record indicates, neither of these tests was actually administered. Technically, then, there were no results and nothing to suppress

regarding these tests. *State v. Keene*, Mahoning App. No. 08 MA 95, 2009-Ohio-1201, ¶32.

{¶41} Even where the results of field sobriety tests are properly suppressed, this does not prohibit a police officer from testifying about his *observations* of a suspect while administering or attempting to administer field sobriety tests. *State v. Schmitt*, 101 Ohio St.3d 79, 2004-Ohio-37, ¶15. NHTSA dictates the manner in which a police officer is to conduct field sobriety tests. NHTSA does not, however, constrain an officer's observations of a suspect during field sobriety tests. *State v. Johnson*, Columbiana App. No. 05 CO 67, 2007-Ohio-602, ¶25. This is because "observations are within the province of ordinary persons testifying as lay witnesses and should be admissible evidence regarding whether [a defendant] appeared intoxicated." *State v. Kirby*, Butler App. No. CA2002-06-136, 2003-Ohio-2922, ¶17. It follows that the state had no burden to show substantial compliance with NHTSA standards regarding Trooper Steele's observations while attempting to conduct the one-legged stand and walk-and-turn tests with appellant.

{¶42} Next we turn to appellant's argument challenging the BAC test. In order for the results of a BAC test to be admissible, the state must prove that the instrument was in proper working order and that the officer who administered the test met the requisite qualifications. *City of Mentor v. Giordano* (1967), 9 Ohio St.2d 140, paragraph six of the syllabus. The state must also establish that the BAC test was administered in substantial compliance with the applicable ODH regulations. *City of Defiance v. Kretz* (1991), 60 Ohio St.3d 1, 3. On appeal, appellant argues that the state did not establish that the BAC DataMaster was in proper working order. Appellant also contends that, as a result of the quashed subpoena, the state did not meet its burden to show substantial compliance with the ODH regulations requiring three years of recordkeeping regarding the breath instrument records.

{¶43} Our decision to sustain appellant's first assignment of error necessarily precludes us from addressing the merits of the trial court's decision declining to suppress the

BAC test results. Appellant's subpoena duces tecum demanded that the state produce the BAC machine and certain related documents in court. As stated, the trial court must conduct a *Nixon* hearing to determine whether the state's motion to quash appellant's subpoena duces tecum should be granted. The trial court's decision on the viability of the subpoena duces tecum affects how the case will proceed regarding the results of the BAC test. We do not yet know the outcome of the *Nixon* hearing, or the effect that that outcome will have on appellant's motion to suppress the BAC test results. Consequently, we cannot rule on whether the state substantially complied with ODH regulations relating to the BAC test at this time.

{¶44} In sum, we conclude that the HGN, the only viable field sobriety test, was conducted in substantial compliance with NHTSA standards. Insofar as appellant's second assignment of error challenges the trial court's decision denying her motion to suppress the results of the field sobriety tests, the assignment is overruled. The portion of the second assignment of error which disputes the trial court's refusal to suppress the results of the BAC test is sustained to the extent that the trial court's decision on the BAC test was premature in view of our disposition of appellant's first assignment of error.

{¶45} Appellant's second assignment of error is overruled in part and sustained in part.

{¶46} Assignment of Error No. 3:

{¶47} "THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS AS TO THE VALIDITY OF THE STOP AND ARREST."

{¶48} Appellant maintains that the trial court erred in failing to grant her motion to suppress because Trooper Steele did not have probable cause to initiate the traffic stop or to arrest her for OVI.

{¶49} It is well settled that there are two types of traffic stops, each requiring a

different constitutional standard. *State v. Moeller* (Oct. 23, 2000), Butler App. No. CA99-07-128, at 4. One is a typical noninvestigatory stop where an officer directly observes a traffic violation, giving rise to probable cause to stop the vehicle. *Whren v. United States* (1996), 517 U.S. 806, 810, 116 S.Ct. 1769. The second type of stop is an investigative or "*Terry*" stop, which occurs where an officer has a reasonable suspicion based upon specific and articulable facts that criminal behavior has occurred or is imminent. *Terry v. Ohio* (1968), 392 U.S. 1, 21, 88 S.Ct. 1868. The propriety of an investigative stop must be viewed in light of the totality of the surrounding circumstances. *State v. Batchili*, 113 Ohio St.3d 403, 2007-Ohio-2204, paragraph two of the syllabus.

{¶50} In the present matter, Trooper Steele testified that he observed appellant's vehicle while he was on patrol and that her vehicle appeared to have come to a complete stop in the middle of the road. When he drew near to the vehicle, he noticed that it was moving but opined that its speed was rather slow for the area, pacing it at about 20 m.p.h. in a 45 m.p.h. zone. Appellant insists that her slow speed was reasonable in view of the fact that she was navigating a winding road in darkness, and notes that slow speed does not constitute a violation of traffic laws. Contrary to the trooper's testimony, appellant contends that the video from the trooper's cruiser camera demonstrates prudent driving and no traffic violations on her part. Appellant concludes that the totality of circumstances do not establish probable cause to support Trooper Steele's initiation of the traffic stop.

{¶51} Despite the alleged discrepancy between Trooper Steele's testimony and the cruiser video, we find that the totality of the circumstances support that the trooper had probable cause to initiate a stop of appellant's vehicle. "Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed." *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, ¶73, quoting *Henry v. United States* (1959), 361 U.S. 98, 102, 80 S.Ct. 168. On direct examination at the

suppression hearing, Trooper Steele testified that he observed appellant commit several marked lane violations and that she nearly hit another vehicle while executing a right-hand turn onto another road. Appellant protests that the video from the cruiser failed to capture any indications of poor driving on her part. On cross-examination, Trooper Steele clarified that he turned on the video recorder after he observed appellant commit a marked lanes violation. The trial court evidently believed the trooper as to appellant's unrecorded impaired driving.

{¶52} With regard to a traffic stop, the focus is not on whether an officer could have stopped the suspect because a traffic violation had in fact occurred, but whether the arresting officer had probable cause to believe a traffic violation had occurred. *State v. Pfeiffer*, Butler App. No. CA2003-12-329, 2004-Ohio-4981, ¶22-23. Trooper Steele's testimony establishes that he believed appellant committed several marked lane violations. Accordingly, the stop was not unreasonable under the Fourth Amendment, even if the trooper "had some ulterior motive for making the stop, such as a suspicion that the violator was engaging in more nefarious criminal activity." *Dayton v. Erickson*, 76 Ohio St.3d 3, 1996-Ohio-431, syllabus.

{¶53} We also find that there was overwhelming evidence establishing probable cause in support of appellant's arrest for OVI. Trooper Steele testified that he based appellant's arrest on his observations. As stated, he observed appellant commit several marked lane violations and almost hit another vehicle. Appellant rolled the car window down just halfway when the trooper approached, which could have been construed as suspicious. Other observations relayed by Trooper Steele were the unopened 12-pack of beer in the car, appellant's admission that she had been drinking, the strong odor of an alcoholic beverage on or about appellant, as well as appellant's exceedingly slurred speech, slow movements, and puzzled facial expression. In addition, appellant repeatedly asked if he would just take her home. Trooper Steele also testified that appellant was very unsteady on her feet when

she exited her vehicle.

{¶54} In addition to the above evidence, the record contains Trooper Steele's observations during the field sobriety tests. While administering the HGN, the trooper noticed that appellant was weaving back and forth towards him and was unable to stand still. The trooper had to have appellant place her hands on her cheeks to help keep her from moving her head during the test. As stated, Trooper Steele testified that appellant completed the HGN test, that he followed the proper procedure for the test, and that appellant demonstrated six of six clues on the test. While attempting to begin the walk-and-turn test, appellant fell twice and the test was not completed. After falling the second time, appellant looked at Trooper Steele and said "take me in."

{¶55} Even without considering the results of the BAC test, we conclude that the trial court did not err in denying appellant's motion to suppress because, in view of the totality of the circumstances, Trooper Steele had probable cause to initiate the traffic stop and to arrest appellant for OVI.

{¶56} Appellant's third assignment of error is overruled.

{¶57} The portion of the trial court's decision denying appellant's motion to suppress the results of the HGN test is affirmed. The portion of the trial court's decision declining to suppress the results of the BAC test is reversed. Appellant's conviction is vacated and this matter is remanded for the trial court to conduct an evidentiary hearing on the state's motion to quash appellant's subpoena duces tecum. At the hearing, appellant, as the proponent of the subpoena duces tecum, bears the burden to convince the court that the information sought in the subpoena satisfies all four elements of the *Nixon* test. *In re Subpoena Duces Tecum Served Upon Atty. Potts*, 2003-Ohio-5234 at ¶16.

{¶58} Following the *Nixon* hearing, the trial court shall issue a new decision on the state's motion to quash appellant's subpoena duces tecum. If the trial court grants the

motion to quash in its entirety, the court may reinstate appellant's conviction and need not conduct a new suppression hearing. If the trial court denies the motion to quash either in whole or in part, the court must then conduct a limited hearing on appellant's motion to suppress, addressing *only* the BAC test and whether the state showed substantial compliance with the ODH regulations applicable to that test.

{¶59} Judgment affirmed in part, reversed in part, and remanded.

YOUNG, P.J., and BRESSLER, J., concur.

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