[Cite as *State v. Richards*, 2015-Ohio-669.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 14CA1
vs.	:	
JASON RICHARDS,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT:	Timothy Young, Ohio Public Defender, and Stephen A. Goldmeier, Ohio Assistant Public Defender 250 East Broad Street, Suite 1400, Columbus, Ohio 43215
COUNSEL FOR APPELLEE:	Keller J. Blackburn, Athens County Prosecuting Attorney, and Merry M. Saunders, Athens County Assistant Prosecuting Attorney, 1 South Court Street, 1st Floor, Athens, Ohio 45701

CRIMINAL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 2-18-15

ABELE, J.

{¶ 1} This is an appeal from an Athens County Common Pleas Court judgment of conviction and sentence. The trial court found Jason Richards, defendant below and appellant herein, guilty of aggravated vehicular assault in violation of R.C. 2903.08(A)(1)(a). Appellant assigns the following error for review:

> "BECAUSE THERE WAS NOT SUFFICIENT PROBABLE CAUSE TO ARREST MR. RICHARDS, AND BECAUSE THE ALCOHOL TEST PERFORMED ON HIS URINE SAMPLE DID NOT SUBSTANTIALLY COMPLY WITH STATE LAW REQUIREMENTS FOR THAT TEST, THE TRIAL COURT ERRED WHEN IT DENIED MR. RICHARD'S MOTION TO SUPPRESS THE RESULTS OF THE URINE TEST."

{¶ 2} On June 4, 2011, at approximately 9:30 p.m., Lawrence Kamody heard what he believed to be an automobile accident. He and his companion, Dave Halupka, went to investigate and, upon their arrival at the scene, they noticed the occupants of a vehicle "frantically trying to push the car back onto the road." Kamody noted that the vehicle had "obviously crashed," as the vehicle had a bent wheel and smoke emanating from the hood area. Kamody and Halupka asked the occupants if they were okay. The occupants indicated that they were, then "took off."

{¶ 3} As the vehicle left the scene, Kamody and Halupka also observed another vehicle with a female occupant standing nearby. She appeared "very distraught" and was "bleeding profusely out of her nose."

{¶ 4} Ohio State Highway Patrol Sergeant Virgil Conley arrived at the scene at 10:01 p.m. After he spoke with Kamody and Halupka, he notified the patrol post that a "hit-skip" had occurred. Soon, law enforcement officers located the vehicle that had fled the scene. Sergeant Conley drove to the vehicle's location and found the vehicle "up a very dark driveway, up in an

incline, a driveway that didn't look like it was used very often." Sergeant Conley further explained that the vehicle "wasn't just pulled off the side of the road. It was actually off the road, up a hill, and slightly around a curve. So you had to be looking for it to find it."

{¶ 5} As Sergeant Conley approached the "heavily damaged" vehicle and the four occupants, he noticed that the vehicle "sustained damage to the right fender, hood, right headlight assembly, front bumper, scratch marks and dents down the right side of the vehicle, and a dented right front quarter panel, along with a right front flat tire." When Sergeant Conley approached appellant and the other passengers, "[i]t was obvious that they had all been drinking just from, one, the odor, the way they were acting, and red, bloodshot, glassy eyes. The typical indicators were all there. And they all admitted to drinking." Sergeant Conley stated that he had "no doubt" that appellant had been drinking alcohol.

{¶ 6} Ohio State Highway Patrol Trooper Melanie Provenzano arrived at the scene shortly after Sergeant Conley. When she and Conley initially spoke with the occupants, appellant's wife informed them that she had been driving. Appellant, however, later admitted that he had been driving. The officers also learned that appellant's wife had been ejected from the vehicle during the accident. When Trooper Provenzano spoke with appellant, she also "noticed a strong odor of alcoholic beverage" emanating from appellant's breath. She further observed that appellant's eyes were red, bloodshot, and glassy. Trooper Provenzano asked appellant how much alcohol he consumed before the crash, and he admitted that he had consumed eight to twelve beers. After Trooper Provenzano performed the Horizontal Gaze Nystagmus (HGN) test (appellant exhibited four out of six clues) and a portable breath test (appellant tested .073), she arrested appellant for operating a motor vehicle while under the influence and transported him to the patrol post.

{¶ 7} After appellant arrived at the patrol post, he submitted to a urine test. The analysis later revealed that appellant's urine contained .114 grams by weight of alcohol per one hundred millimeters of urine, which exceeds the statutory limit. See R.C. 4511.19(A)(1)(e).

{¶ 8} Subsequently, the Athens County Grand Jury returned an indictment that charged appellant with aggravated vehicular assault in violation of R.C. 2903.08(A)(1)(a). Appellant entered a not guilty plea.

{¶ 9} Appellant filed a motion to suppress evidence and asserted that (1) law enforcement officers lacked probable cause to arrest him for driving while under the influence; and (2) the urine test results should be suppressed because the state failed to substantially comply with applicable Ohio Department of Health (ODH) rules and regulations. Appellant further asserted that his "test results were not over the legal limit." He noted that he tested .114, which is .004 over the legal limit, and because this .004 difference amounted to the rate of error inherent in the test, his test could not have been over the legal limit.

{¶ 10} The trial court held a hearing to consider appellant's motion to suppress. At the hearing, Trooper Provenzano testified that she arrested appellant for driving while under the influence of alcohol based upon the following circumstances: (1) appellant had a "strong odor" of alcohol; (2) appellant had red, bloodshot, and glassy eyes; (3) appellant exhibited four clues on the HGN test; (4) appellant fled the scene of an accident; and (5) appellant admitted that he drove the vehicle that was involved in the accident.

{¶ 11} Trooper Provenzano also testified that she helped administer the urine test at the patrol post. She explained that she removed the urine test container from a box and handed it to Auxiliary Officer (AO) Daniel Norris. She stated that, although she did not recall the kit's

expiration date, the OSHP does not keep expired kits. She also stated that AO Norris wore rubber gloves, that he accompanied appellant to the restroom, and that he witnessed appellant urinate into the collection container. Trooper Provenzano testified that the container's lid had already been secured when AO Norris handed the specimen container to her. After AO Norris gave the container to Trooper Provenzano, she placed the label on the container. Trooper Provenzano explained that she placed the label over the top of the container and down the sides. She stated that the purpose of this placement is to allow law enforcement officials to determine whether someone has tampered with the urine specimen.

{¶ 12} BCI analyst Emily Adelman testified that she examined appellant's urine specimen. Adelman explained that an evidence technician noted that the urine sample arrived at the lab in a sealed biological kit, but the container inside the kit was leaking. Adelman explained that "sometimes the lids just aren't fully screwed down tight when they are put on." Adelman stated that the leaking may have resulted if the lid became loose during transit.

{¶ 13} Adelman further testified that even though the container had leaked, the label remained intact and she found no indication that a foreign substance had entered the container or that the sample had been otherwise contaminated. Adelman explained:

> "The seal was still intact[] when both the evidence technician received it as well as I received it. There wasn't any kind of indication to say that * * * there was anything the matter with the outer container itself to indicate that anything would have penetrated that barrier to then later get inside to penetrate the second barrier to then contaminate the sample itself."

{¶ 14} Adelman stated that she performed two tests on appellant's urine specimen. One

test revealed that the urine contained .115 grams by weight of alcohol per one hundred milliliters of urine, and the other test revealed .114 grams by weight of alcohol per one hundred milliliters of urine. Adelman explained that their policy is to report the lower of the two numbers to law enforcement.

{¶ 15} Lab director Dana Nielson testified that the BCI lab used head space gas chromatography to examine appellant's urine specimen. Nielson stated that she reviewed Adelman's work and ensured that the machine had been properly calibrated. Defense counsel questioned Nielson whether the testing procedure carried any margin of error, and Nielson stated that she "calculated [a four percent] uncertainty of the measurement." She explained: "So in this particular case the value of .114 gram percent * * * can be plus or minus .004 gram percent." The state then asked Nielson if the result reported, .114, had "some built in error." Nielson responded:

> "The analytical result * * * showed * * * [appellant's] urine sample to contain ethanol at a level of .114 and .115 in duplicate and we reported the .114 gram percent. This uncertainty of measurement is something that we are required to have by our accrediting body that just takes into account * * * every step of our procedure and any * * * uncertainty of measurement that could be introduced at each step of the procedure and again * * * at a ninety-five percent confidence level * * * shows a four percent uncertainty of measurement."

{¶ 16} The state then asked Nielson whether the uncertainty of measurement is "not to be blanketedly (sic) applied to the result * * * that a technician researches as far as the urine test analysis." Nielson responded: "Correct. The result that appears on the report was what was analytically determined on that day of analysis."

{¶ 17} After considering the evidence, the trial court denied appellant's motion to suppress evidence. The court determined that Trooper Provenzano possessed probable cause to arrest

appellant based upon the totality of the following facts and circumstances: (1) appellant was the driver of a vehicle involved in a crash that resulted from appellant failing to stop at a stop sign; (2) appellant's wife was ejected from the vehicle; (3) appellant's vehicle sustained significant damage; (4) appellant fled the accident scene; (5) appellant's vehicle had a flat tire; (6) appellant chose to change the vehicle's tire in a dark, steep driveway (described by Sergeant Conley as "suspicious"), instead of changing it on the side of the road; (7) appellant did not call 911 or otherwise report the crash; (8) appellant's wife attempted to take the blame, but appellant eventually admitted responsibility for the accident; (9) appellant admitted that he drank eight to twelve beers before the crash; (10) appellant had a strong smell of alcoholic beverage coming from his breath; (11) appellant had red, bloodshot, glassy eyes; (12) appellant tested .073 on the portable breath test; and (13) appellant exhibited four out of six clues on the HGN test.

{¶ 18} The trial court additionally found that the urine test procedure substantially complied with the ODH regulations: (1) "the collection of the urine specimen * ** was witnessed"; (2) the urine was deposited "into a clean glass or plastic screw top container that was capped and collected according to BCI's laboratory protocol"; and (3) "the urine container was sealed in a manner so that tampering could be detected and with a label contain[ing] the name of the suspect, date and time of collection, name/initials of the person collecting the sample and the name or initials of the person sealing the sample."

{¶ 19} The trial court also found that appellant's test exceeded the statutory limit. The court noted that BCI analyst Adelman testified that appellant's urine specimen contained 0.114 grams by weight of alcohol per one hundred milliliters of urine. The court also credited the testimony that any supposed margin of error did not render the test result invalid or inaccurate, and

that nothing in the process of analyzing appellant's urine rendered the result unreliable. The court, therefore, rejected appellant's argument that his test result failed to indicate that his urine-alcohol concentration was over the legal limit.

{¶ 20} Appellant eventually entered a no contest plea to the crime of aggravated vehicular assault, in violation of R.C. 2903.08(A)(1). The trial court found appellant guilty and sentenced him to serve a three-year mandatory prison term. This appeal followed.

{¶ 21} In his sole assignment of error, appellant asserts that the trial court erred by denying his motion to suppress all evidence obtained following his arrest for driving while under the influence of alcohol (DUI). Appellant contends that because the trooper lacked probable cause to arrest, the evidence obtained after his arrest must be suppressed.

{¶ 22} Appellant additionally asserts that even if the trooper possessed probable cause to arrest him for DUI, the state failed to substantially comply with the ODH urine test regulations and, thus, the trial court should have suppressed the urine test results.

{¶ 23} Finally, appellant contends that the state failed to show that the amount of alcohol in his urine exceeded the legal limit. In particular, appellant asserts that his test results revealed that the amount of alcohol detected in his urine exceeded the legal limit by only .004 gram percent, which, appellant claims, falls within the test's margin of error. As such, appellant argues that "the results of the test do not even establish clearly and convincingly that [appellant]'s urine alcohol content was over the legal limit."

I

STANDARD OF REVIEW

{¶ 24} In general, appellate review of a trial court's ruling on a motion to suppress presents

a mixed question of law and fact. State v. Codeluppi, 139 Ohio St.3d 165, 2014-Ohio-1574, 10 N.E.3d 691, ¶7; State v. Wesson, 137 Ohio St.3d 309, 2013–Ohio–4575, 999 N.E.2d 557, ¶40; State v. Burnside, 100 Ohio St.3d 152, 2003–Ohio–5372, 797 N.E.2d 71, ¶8; State v. Moore, —— Ohio App.3d ——, 2013–Ohio–5506, 5 N.E.3d 41 (4th Dist.), ¶7.

> "When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard."

Burnside at ¶8 (citations omitted).

II

PROBABLE CAUSE TO ARREST

{¶ 25} The Fourth and Fourteenth Amendments to the United States Constitution, as well as Section 14, Article I of the Ohio Constitution, protect individuals against unreasonable governmental searches and seizures. Delaware v. Prouse, 440 U.S. 648, 662, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); State v. Gullett, 78 Ohio App.3d 138, 143, 604 N.E.2d 176 (4th Dist. 1992). "Once the defendant demonstrates that he was subjected to a warrantless [arrest], the burden shifts to the State to establish that the warrantless [arrest] was constitutionally permissible." State v. Hansard, 4th Dist. Scioto No. 07CA3177, 2008–Ohio–3349, ¶14, citing Maumee v. Weisner, 87 Ohio St.3d 295, 297, 720 N.E.2d 507 (1999), and Xenia v. Wallace, 37 Ohio St.3d 216, 524 N.E.2d 889 (1988), paragraph two of the syllabus. In the case sub judice, appellant demonstrated that law enforcement officers arrested him without a warrant. Thus, the burden fell to the state to establish the constitutionality of appellant's warrantless arrest.

{¶ 26} A warrantless arrest is constitutionally valid when an arresting officer has probable cause to believe that an individual has committed a crime. E.g., Beck v. Ohio, 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed.2d 142 (1964); State v. Otte, 74 Ohio St.3d 555, 559, 660 N.E.2d 711, 717 (1996). A law enforcement officer possesses probable cause to arrest an individual for DUI when the totality of the circumstances gives rise to a reasonable belief that the individual drove while under the influence of alcohol. State v. Schmitt, 101 Ohio St.3d 79, 2004-Ohio-37, 801 N.E.2d 446, 8, citing State v. Homan, 89 Ohio St.3d 421, 427, 732 N.E.2d 952; see Illinois v. Gates, 462 U.S. 213, 230-31, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (stating that probable cause determination must be based upon the "totality of the circumstances"). This is a fact-specific inquiry. Dayton v. Erickson, 76 Ohio St.3d 3, 10, 665 N.E.2d 1091 (1996), citing United States v. Ferguson, 8 F.3d 385 (C.A.6, 1993) (stating that "'all probable cause determinations'" are "'fact-dependent'"); Oregon v. Szakovits, 32 Ohio St.2d 271, 273, 291 N.E.2d 742 (1972), quoting Mentor v. Giordano, 9 Ohio St.2d 140, 146, 244 N.E.2d 343 (1967) (stating that "'each "drunken driving" case is to be decided on its own particular and peculiar facts"). The relevant inquiry when examining the totality of the circumstances supporting probable cause "is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncrimnal acts." Gates, 462 U.S. at 243-44 n.13. Furthermore, a reviewing court "must give due weight to [the officer's] experience and training and view the evidence as it would be understood by those in law enforcement." State v. Andrews, 57 Ohio St.3d 86, 88, 565 N.E.2d 1271 (1991).

{¶ 27} We note that probable cause deals "with probabilities-the factual and practical nontechnical considerations of everyday life on which reasonable and prudent men act-and is a

fluid concept, to be based on the totality of the circumstances, and not reduced to a neat set of legal rules." State v. Ingram, 20 Ohio App.3d 55, 61, 484 N.E.2d 227, 230 (1984), citing Illinois v. Gates, 462 U.S. 213, 232-33, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); accord Ornelas, supra; State v. Perez, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, ¶73 (2009). Thus, "[p]robable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction." Adams v. Williams, 407 U.S. 143, 149, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972). Instead, "[p]robable cause is a flexible, common-sense standard." Texas v. Brown, 460 U.S. 730, 742, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983). Probable cause "merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief'" that the individual had committed or is committing a crime. Id., quoting Carroll v. United States, 267 U.S. 132, 162, 45 S.Ct. 280, 69 L.Ed.2d 543 (1925). Probable cause "does not demand any showing that such belief be correct or more likely true than false." Id.

{¶ 28} Whether the historical facts demonstrate that an officer possessed probable cause to arrest is a question of law. Ornelas, 517 U.S. at 696. Thus, an officer's subjective motivations, intentions, or beliefs "hold little sway." State v. McDonald, 4th Dist. Washington No. 04CA7, 2004–Ohio–5395, ¶31; State v. Deters, 128 Ohio App.3d 329, 333, 714 N.E.2d 972 (1st Dist.1998). Instead, "the correct test is whether there was objective justification for the detention and arrest." Id.

{¶ 29} Law enforcement officers may possess probable cause to arrest an individual for DUI even if officers do not personally observe impaired driving. Id., quoting Mentor v. Giordano, 9 Ohio St.2d 140, 146, 244 N.E.2d 343 (1967) ("'Although a charge of operating a motor vehicle while under the influence of intoxicating liquor may apply where a stationary vehicle is involved,

the evidence must show beyond a reasonable doubt that the accused was under the influence of an intoxicating liquor while operating the vehicle in that condition."); State v. Roar, 4th Dist. Pike No. 13CA842, 2014-Ohio-5214, ¶28, citing State v. Hollis, 5th Dist. Richland No. 12CA34, 2013-Ohio-2586. Thus, an officer who investigates a motor vehicle accident without having witnessed any driving may nevertheless develop probable cause to believe that an individual drove while under the influence of alcohol. Indeed, some courts have held that an officer possesses probable cause to arrest an individual for DUI "where a police officer comes to the scene of an accident wherein there was no observable driving, but a suspect is found in or near the automobile with an odor of an alcoholic beverage on or about his person." Fairfield v. Regner, 23 Ohio App.3d 79, 84, 491 N.E.2d (12th Dist. 1985); State v. Davis, 11th Dist. Lake No. 2008-L-021, 2008-Ohio-6991, ¶60; State v. King, 1st Dist. Hamilton No. C-010778, 2003-Ohio-1541, ¶29 (holding that "probable cause exists to arrest for [DUI] when in the early morning hours a vehicle clearly goes out of control, there is an accident, and the driver has an odor of alcoholic beverages on his breath"). Despite this apparent bright-line rule, we believe that even when an officer does not witness an individual operating a motor vehicle, the inquiry remains whether the totality of the circumstances would lead a prudent person to believe that the individual sought to be arrested had operated a motor vehicle while under the influence of alcohol. See State v. Belmonte, 10th Dist. Franklin No. 10AP-373, 2011-Ohio-1334, ¶11 ("Probable cause to arrest may exist * * * if supported by such factors as: evidence that the defendant caused an automobile accident; a strong odor of alcohol emanating from the defendant; an admission by the defendant that he or she was recently drinking alcohol; and other indicia of intoxication, such as red eyes, slurred speech, and difficulty walking.").

{¶ 30} In Roar, for example, we determined that the officer possessed probable cause to arrest the defendant for DUI, even though the officer did not witness the defendant operate a vehicle in an impaired manner. In Roar, the officer spoke with the defendant while he was in the hospital emergency room. The officer did not notice that the defendant had any slurred speech or difficulty understanding the officer. The officer also did not detect an odor of alcohol on the defendant. We determined that the following circumstances nonetheless provided the officer with probable cause to arrest the defendant for DUI: (1) a fatal collision occurred in the early morning hours; (2) one of the vehicles involved in the accident contained alcoholic beverages; (3) the defendant had glassy eyes; and (4) the defendant exhibited six clues on the HGN test. Id. at ¶30 and ¶21.

{¶ 31} In Belmonte, the court also determined that the officer possessed probable cause to arrest the defendant for DUI, even though the officer did not witness the defendant operate a motor vehicle. The court found that the following circumstances showed that the defendant had operated a motor vehicle while under the influence of alcohol: (1) the defendant had been in an automobile accident; (2) the defendant carried a slight to moderate alcoholic odor of alcohol; (3) the defendant admitted that he had consumed a couple of beers; and (4) the defendant admitted that he may have traveled left of center. The court further noted that even though the defendant did not have slurred speech, red eyes, or difficulty walking, the remaining facts nonetheless constituted sufficient information to cause a prudent person to believe appellant had driven while under the influence of alcohol. Id. at ¶14.

{¶ 32} In State v. Heiney, 11th Dist. Portage No. 2006-P-0073, 2007-Ohio-1199, the court likewise determined that the law enforcement officer possessed probable cause to believe that the

defendant drove while impaired, even though the officer did not witness the defendant operate a vehicle. The court examined the totality of the circumstances surrounding the defendant's encounter with the officer and noted that the evidence showed (1) the defendant had bloodshot eyes and emanated a strong alcoholic odor, (2) the defendant failed the HGN test, (3) the defendant admitted to drinking three alcoholic beverages, (4) the defendant caused a single-vehicle accident, and (5) the defendant fled the accident scene.

{¶ 33} Likewise, in State v. Hummel, 154 Ohio App.3d 123, 2003-Ohio-4602, 796 N.E.2d 558 (11th Dist.), the court determined that the officer possessed probable cause to believe that the defendant had driven while under the influence of alcohol, even though the officer did not witness the defendant driving a vehicle. The court found that the following facts established probable cause to believe that the defendant had driven while under the influence of alcohol: (1) the defendant smelled of alcohol (2) his eyes were glassy; (3) he exhibited slurred speech; and (4) an unexplained motor vehicle accident had occurred. Accord State v. Martin, 5th Dist. Licking No. 14CA5, 2014-Ohio-2948, ¶15 (concluding that officer possessed probable cause to arrest defendant when defendant had glassy eyes and odor of alcohol, defendant admitted that he had been drinking, and defendant crashed his vehicle).

{¶ 34} In the case sub judice, we believe that the trial court correctly determined that the totality of the circumstances provided the officer with probable cause to arrest appellant. Just as in all of the foregoing cases, in the case at bar an accident occurred. Appellant failed to stop at a stop sign and struck another vehicle. Appellant's wife was ejected from the vehicle as a result of the collision, and appellant's vehicle was "heavily damaged." Appellant pushed his car back onto the road and fled the scene. Law enforcement officers later found appellant and his vehicle "off

the road, up a hill, and slightly around a curve" and stopped in "a very dark driveway, up in an incline." The responding officer found the location "suspicious." When the officers first spoke with appellant and his wife, appellant's wife first claimed to have been driving. However, appellant then admitted that he had been driving. Moreover, appellant, like all of the defendants in the foregoing cases, displayed outward signs of impairment. Once Sergeant Conley approached appellant and his companions, he found their behavior "obvious[ly indicated] that they had all been drinking." Additionally, "they all admitted to drinking." Sergeant Conley stated that appellant's eyes were bloodshot and glassy eyes. Trooper Provenzano testified that she detected "a strong odor of alcoholic beverage coming from [appellant's] person." She also noticed that appellant's eyes were red, bloodshot, and glassy. The trooper performed the HGN test, and appellant displayed four clues. Like the defendants in Belmonte and Heiney, appellant admitted that he consumed alcoholic beverages before the accident. Trooper Provenzano asked appellant how much alcohol he had consumed, and appellant responded that he had consumed "about eight to twelve beers."

{¶ 35} Thus, the facts adduced in the case sub judice show that (1) appellant failed to stop at a stop sign; (2) appellant caused an accident; (3) appellant fled the accident scene; (4) appellant parked his damaged vehicle in a "suspicious" location; (5) appellant and his companions appeared "obvious[ly]" drunk; (6) appellant's eyes were red, bloodshot, and glassy; (7) appellant's wife initially claimed to have been driving but appellant later admitted he had been driving; (8) appellant admitted that he drank eight to twelve beers before the accident; (9) appellant emanated a strong alcoholic odor; and (10) he exhibited four out of six clues on the HGN test. We agree with the trial court that the foregoing circumstances gave the trooper probable cause to arrest appellant.

{¶ 36} Appellant nevertheless argues that the absence of certain traditional intoxication indicators shows that he was not under the influence at the time of the accident and, thus, Trooper Provenzano lacked probable cause to arrest. Appellant claims that the trooper did not detect slurred speech, observe appellant have difficulty walking, or notice that appellant appeared disoriented. Appellant further notes that he tested under the statutory limit when the trooper administered the PBT. We, however, are not willing to conclude that the absence of certain factors necessarily negates an officer's probable cause to arrest for DUI. Instead, we emphasize that probable cause determinations must be based upon the totality of the circumstances, not the absence of any particular factor or factors. Thus, in the case sub judice, simply because some factors exist that appellant claims may show the absence of intoxication does not mean that the trooper lacked a reasonable belief that appellant was under the influence of alcohol when he caused the accident. See Roar; Belmonte. As we outlined above, the totality of the circumstances surrounding the accident and the trooper's encounter with appellant gave the trooper probable cause to arrest appellant for DUI.

{¶ 37} Consequently, we disagree with appellant that the trooper lacked probable cause to arrest and we conclude that the trial court did not err by overruling appellant's motion to suppress evidence.

III

ALCOHOL TEST RESULT

{¶ 38} R.C. 4511.19(D)(1)(b)[1] allows a trial court to admit the results of a chemical analysis to show the alcohol concentration contained in a defendant's bodily substance. Cincinnati v. Ilg, 141 Ohio St.3d 22, 2014-Ohio-4258, 21 N.E.3d 278, ¶21♥(2014). The statute further specifies that the director of ODH shall approve methods for analyzing bodily substances. Id. R.C. 3701.143 likewise provides that the ODH

> "shall determine, or cause to be determined, techniques or methods for chemically analyzing a person's whole blood, blood serum or plasma, urine, breath, or other bodily substance in order to ascertain the amount of alcohol * * * in the person's whole blood, blood serum or plasma, urine, breath, or other bodily substance. The director shall approve satisfactory techniques or methods, ascertain the qualifications of individuals to conduct such analyses, and issue permits to qualified persons authorizing them to perform such analyses."

{¶ 39} Pursuant to this authority, ODH promulgated Ohio Adm. Code 3701-53-03, which approves gas chromatography as a technique or method for analyzing the alcohol content contained in a person's blood, urine, or other bodily substance.

{¶ 40} Ohio Adm. Code 3701-53-05 regulates the collection and handling of blood and urine specimens. The provision states, in relevant part:

> (A) All samples shall be collected in accordance with section 4511.19, or section 1547.11 of the Revised Code, as applicable.
>
> * * * *
>
> (D) The collection of a urine specimen must be witnessed to assure that the sample can be authenticated. Urine shall be deposited into a clean glass or plastic screw top container which shall be capped, or collected according to the laboratory protocol as written in the laboratory procedure manual.
>
> (E) Blood and urine containers shall be sealed in a manner such that tampering can be detected and have a label which contains at least the following

[1] R.C. 4511.19 was amended in 2013. The provisions mentioned in this opinion remain substantively the same.

information:

(1) Name of suspect;

(2) Date and time of collection;

(3) Name or initials of person collecting the sample; and

(4) Name or initials of person sealing the sample.

(F) While not in transit or under examination, all blood and urine specimens shall be refrigerated.

{¶ 41} A defendant who wants to challenge the validity of an alcohol test result must first file a motion to suppress. State v. Burnside, 100 Ohio St.3d 152, 2003–Ohio–5372, 797 N.E.2d 71, ¶24. If the defendant challenges the validity of an alcohol-test, the state bears the burden to establish that the testing procedures substantially complied with ODH regulations. Id. The substantial compliance standard is limited "to excusing only errors that are clearly de minimis," i.e., irregularities amounting to "'minor procedural deviations.'" Id. at ¶34, quoting State v. Homan, 89 Ohio St.3d 421, 426, 732 N.E.2d 952 (2000). Once the state shows substantial compliance with the regulations, the test result is presumptively admissible. Burnside at ¶24. The burden then shifts to the defendant to show prejudice resulting from "anything less than strict compliance." Id.

{¶ 42} In the case at bar, appellant contends that the state failed to demonstrate substantial compliance with the urine testing regulations. In particular, appellant asserts that because the container leaked, it was not "capped" or "sealed" and AO Norris did not recall whether he washed his hands or whether he wore gloves.

{¶ 43} First, we disagree with appellant's argument that AO Norris's inability to recall

whether he washed his hands or whether he wore gloves demonstrates that the testing procedure failed to substantially comply with ODH regulations. Ohio Adm. Code 3701-53-05 contains no such requirements, and appellant does not cite authority to support his position. Moreover, Trooper Provenzano testified that AO Norris wore gloves.

{¶ 44} We also reject appellant's argument that the leaking container necessarily demonstrates lack of substantial compliance. In State v. Rajchel, 2nd Dist. Montgomery No. 19633, 2003-Ohio-3975, the court rejected the defendant's similar argument that a leaking urine container requires a trial court to suppress the urine test results. In Rajchel, the defendant asserted that the court should suppress the urine test result because the state failed to establish the chain of custody. The defendant asserted, in part, that if the urine had leaked from the container, the urine specimen may have been contaminated. The appellate court flatly rejected this argument and explained:

> "[T]he container still had the seal on it that would have prevented tampering. The mere fact that the container leaked does not indicate that it was tampered with or contaminated. The intact seal on the container combined with the container's proper labeling and the initials of the detective who transported the sample is sufficient evidence for the State to meet its burden of showing that it is reasonably certain that substitution, alteration, or tampering did not occur."

{¶ 45} In the case at bar, we believe that the evidence shows that the state substantially–if not strictly–complied with ODH regulations, even though the urine container leaked. Auxiliary Officer Norris witnessed appellant urinate into the collection container, Auxiliary Officer Norris then sealed the container and gave the container to Trooper Provenzano. Trooper Provenzano placed a label on the container in a manner to allow law enforcement officials to determine whether someone tampered with the urine sample. Auxiliary Officer Norris thus complied with

(D), "[u]rine shall be deposited into a clean glass or plastic screw top container which shall be capped," and Trooper Provenzano complied with (E), "[b]lood and urine containers shall be sealed in a manner such that tampering can be detected."

{¶ 46} After Trooper Provenzano sealed the container, she placed the container in a plastic bag and then inside a box. Trooper Provenzano then sealed the box with evidence tape and sent it via ordinary mail to the BCI lab for analysis.

{¶ 47} When appellant's box arrived at the BCI lab, a technician opened the box and observed the leaking container. The lab analyst noted that appellant's urine container had leaked, but also noted that the seal remained intact. The lab analyst also did not detect any signs of tampering or any signs that the sample had otherwise been contaminated. Moreover, the lab analyst stated that all proper identifying information (outlined in (E)(1)-(4)) appeared on the label affixed to the container. We believe that the foregoing evidence adequately demonstrates that the state substantially–if not strictly-complied with the ODH regulations. Simply because the container leaked does not necessarily mean that the state failed to substantially comply with ODH regulations.

{¶ 48} Moreover, in the case at bar appellant did not demonstrate prejudice. Appellant speculates that the leaking container could have been contaminated, or that evaporation may have occurred and caused the test result to be unreliable. See, generally, State v. Thompson, 4th Dist. Washington No. 13CA41, 2014-Ohio-4665, 40 (stating that "speculation cannot support a finding of actual prejudice"). Appellant, however, offered no evidence during the motion to suppress hearing that the leaking container affected the outcome of the test. Instead, the state's witnesses testified that the leaking container did not affect the validity of appellant's test.

{¶ 49} Accordingly, we agree with the trial court's decision to overrule appellant's motion to suppress the urine test results on the basis that the testing procedure did not comply with ODH regulations.

IV

MARGIN OF ERROR

{¶ 50} Appellant next argues that the trial court should have suppressed his urine test result because the result fell within a supposed margin of error, and thus failed to indicate that his urine alcohol content exceeded the legal limit.

{¶ 51} Before we review the merits of appellant's margin-of-error argument, we first consider whether the issue is properly before us, or whether appellant's no contest plea waived the issue. "[A] plea of no contest * * * is an admission of the truth of the facts alleged in the indictment." State ex rel. Stern v. Mascio, 75 Ohio St.3d 422, 423, 662 N.E.2d 370 (1996); accord Crim.R. 11(B)(2). A defendant who pleads no contest "waives the right to present additional factual allegations to prove that he is not guilty of the charged offense," id. at 424, as well as "the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial." Crim.R. 11(C)(2)(c); accord State v. Estep, 73 Ohio App.3d 609, 613, 598 N.E.2d 96, (10th Dist.1991).

{¶ 52} A no contest plea generally precludes a defendant from appealing evidentiary rulings. State v. Felts, 4th Dist. Ross No. 13CA3407, 2014-Ohio-2378, ¶16; State v. House, 2nd Dist. Montgomery No. 25457, 2014-Ohio-138, ¶6. A no contest plea does not, however, preclude a defendant from appealing a trial court's ruling on a motion to suppress evidence on the ground

that the evidence was illegally obtained. Crim.R. 12(I). "[S]uppression of evidence is a remedy normally reserved for alleged violations of constitutional rights." Hilliard v. Elfrink, 77 Ohio St.3d 155, 158, 672 N.E.2d 166 (1996).

> "A 'motion to suppress' is defined as a '[d]evice used to eliminate from the trial of a criminal case evidence which has been secured illegally, generally in violation of the Fourth Amendment (search and seizure), the Fifth Amendment (privilege against self incrimination), or the Sixth Amendment (right to assistance of counsel, right of confrontation etc.), of U.S. Constitution.' Black's Law Dictionary (6 Ed.1990) 1014. Thus, a motion to suppress is the proper vehicle for raising constitutional challenges based on the exclusionary rule first enunciated by the United States Supreme Court in Weeks v. United States (1914), 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652, and made applicable to the states in Mapp v. Ohio (1961), 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081."

State v. French, 72 Ohio St.3d 446, 449, 650 N.E.2d 887 (1995).

{¶ 53} Conversely, a motion that seeks to suppress evidence that was not illegally obtained in violation of the Fourth, Fifth, or Sixth Amendment ordinarily is improper. See id. However, the Ohio Supreme Court created "a narrow departure" from this general rule. Hilliard, 77 Ohio St.3d at 158. A challenge to an alcohol test on the basis that the test did not comply with ODH regulations is a challenge that the evidence was illegally obtained, i.e., it was obtained in contravention of ODH "rules governing the maintenance and operation of testing devices." State v. Edwards, 107 Ohio St.3d 169, 173, 2005-Ohio-6180, 837 N.E.2d 752, ¶11, citing French. Accordingly, a defendant who challenges the admission of an alcohol test on the basis that the test did not comply with ODH regulations must do so by filing a motion to suppress evidence. Edwards at ¶13; French, 72 Ohio St.3d at 449. Thus, "'[a] plea of no contest does not waive a defendant's appeal from an adverse ruling'" on a motion to suppress evidence based on the state's failure to substantially comply with ODH regulations. Edwards at ¶11, quoting Defiance v. Kretz,

60 Ohio St.3d 1, 5, 573 N.E.2d 32 (1991). Courts must, however, "narrowly construe[]" this exception. Hilliard, 77 Ohio St.3d at 158. "As such, unless a specific, recognized departure from the settled law applies, a motion to suppress may only be used to challenge evidence obtained in violation of one's [constitutional] rights. Id." State v. Patterson, 9th Dist. Medina No. 09CA0014-M, 2009-Ohio-6953, ¶7.

{¶ 54} "Evidentiary objections challenging the competency, admissibility, relevancy, authenticity, and credibility of [an alcohol] test" typically do not relate to an accused's constitutional rights against unreasonable search and seizure, the privilege against self incrimination, the right to assistance of counsel, or the right of confrontation under the Fourth, Fifth, or Sixth Amendments. They also do not relate to an alcohol test's compliance with ODH regulations. "Evidentiary objections challenging the competency, admissibility, relevancy, authenticity, and credibility of [an alcohol] test," therefore, are not properly raised in a motion to suppress evidence. See Edwards at ¶19; French, 72 Ohio St.3d at 452; Wellston v. Brown, 4th Dist. Jackson No. 03CA25, 2005-Ohio-532, ¶13. Instead, "a defendant at trial may challenge [alcohol]-test results on grounds other than that the results were illegally obtained because they were obtained in noncompliance with the director's rules. For example, a defendant may argue at trial that the particular device failed to operate properly at the time of testing." Edwards at ¶19.

{¶ 55} In State v. Estep, 73 Ohio App.3d 609, 613♥14, 598 N.E.2d 96, 98♥99 (10th Dist.1991), for instance, the court determined that if the alcohol testing procedure substantially complied with ODH regulations, then a defendant who pled no contest could not appeal issues relating to the reliability of the alcohol testing procedure. In Estep, the defendant pled no contest to driving with a prohibited urine-alcohol concentration. On appeal, the defendant asserted that

even though the alcohol test substantially complied with ODH regulations, the test deviated from normal procedures. The defendant thus challenged whether the alcohol test sufficiently proved the allegation that he drove with a prohibited urine-alcohol concentration. The court rejected the defendant's argument and explained that "a deviation from procedure affects the credibility, not the admissibility, of the results." Id. The defendant also asserted that the trial court erred by prohibiting him from introducing certain evidence at trial.[2] The court disagreed: "[S]ubstantial compliance with [ODH regulations] was demonstrated and the court's subsequent refusal to consider evidence concerning the reliability of the single calibration test was waived by defendant's no contest plea." Id. at 614; accord State v. Hardin, 5th Dist. Licking No. 96CA77 (Apr. 16, 1997) (stating that defendant who entered no contest plea to driving with a prohibited breath-alcohol concentration waived right to challenge weight and credibility of testing procedure).

{¶ 56} In the case sub judice, appellant's margin of error argument is not an argument that the testing procedure failed to substantially comply with ODH regulations. Instead, his margin of error argument challenges the reliability of his test result. The Ohio Supreme Court has yet to create an exception to permit a defendant to challenge the reliability of his specific alcohol test result via a motion to suppress evidence. Instead, the court has recognized that evidentiary challenges to a defendant's specific test result may be raised at trial. Cincinnati v. Ilg, supra, ¶29 (explaining that defendant may challenge "the accuracy, competence, admissibility, relevance, authenticity, or credibility of specific test results at issue in a pending case"); Edwards at ¶¶16-17 (noting difference between pretrial motion in limine to determine admissibility of evidence under the Rules of Evidence and pretrial motion to suppress to determine whether alcohol test complied

[2] The opinion fails to reveal the nature of the evidence the defendant sought to introduce.

with ODH regulations). Consequently, because appellant's margin of error argument relates to the credibility and reliability of his test, and not whether the test substantially complied with ODH regulations, his margin of error argument is not a proper issue to raise in a motion to suppress evidence. Thus, appellant's no contest plea thus precludes him from challenging the reliability and credibility of his test result on appeal.

{¶ 57} Accordingly, based upon the foregoing reasons, we overrule appellant's sole assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

Hoover, P.J. & McFarland, A.J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.