[Cite as *State v. Secoy*, 2009-Ohio-5100.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Julie A. Edwards, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. CT2008-0065
MICHAEL SECOY	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Muskingum County Court, Case No. TRC0803004
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 23, 2009
APPEARANCES:	
For Plaintiff-Appellee	For Defendant-Appellant
D. MICHAEL HADDOX MARIA N. KALIS 27 North Fifth St., Box 189 Zanesville, OH 43702-0189	DERRICK E. MOOREHEAD 58 N. Fifth Street Zanesville, OH 43701

Gwin, P.J.

{¶1} Appellant, Michael Secoy, appeals a judgment of the Muskingum County Court convicting him of Operating a Vehicle under the Influence of Alcohol (OVI) in violation of R.C. 4511.19[1] upon a plea of no contest. Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} On May 31, 2008, Deputy Chris Hartman of the Muskingum County Sheriff's Department observed appellant operating a motorcycle on Frazeysburg Road. The motorcycle drifted back and forth in the lane, crossing the centerline several times and going over and across the fog line. The deputy was concerned that the motorcycle might be having mechanical difficulties. When he observed the motorcycle run through a red light, the deputy activated his overhead lights to stop the motorcycle. Appellant pulled the motorcycle into a Kroger's parking lot.

{¶3} Deputy Hartman noticed a strong odor of alcohol coming from the motorcycle; however, appellant had a passenger with him. The deputy asked the passenger to dismount and when the passenger and appellant were separated by fifteen to 20 feet, he detected a strong odor of alcohol coming specifically from appellant. The officer conducted field sobriety tests. After appellant exhibited clues of intoxication on the one-leg stand test, the walk-and-turn test, and the horizontal gaze nystagmus (HGN) test, the deputy arrested appellant for OVI and marked lanes.

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[1] The ticket and judgment of conviction and sentence do not set forth the specific subsection of R.C. 4511.19(A) with which appellant was charged and convicted. However, the ticket and judgment indicate a refusal of the BAC test. Therefore, appellant could only be charged with a violation of R.C. 4511.19(A)(1)(a). See *State v. Valdez*, Licking App. No. 05-CA-00094, 2006-Ohio-3298, ¶49 (given the fact that the ticket notified the appellant that she was charged with driving under the influence of drugs or alcohol and also indicated that she had refused a BAC test, it is inconceivable that appellant did not understand what she was being charged with).

{¶4} Appellant moved to suppress the field sobriety tests on the basis that they were not conducted in substantial compliance with the National Highway Traffic Safety Administration (NHTSA) standards. The case proceeded to an evidentiary hearing in the Muskingum County Court.

{¶5} At the hearing, appellant admitted to drinking five beers on the night in question: three Miller Lites and two Killian's reds. He testified that he had his first beer at Ruby Tuesday's in Newark, his second at the Dancing Donkey in Senecaville, the third at a tavern on a back road, the fourth at The Barn in Zanesville, and the fifth at Bogey's. He also testified that in 1979 or 1980, he had cut his foot and ankle requiring 80 stitches when he hit a coral reef while water skiing. He testified that he continued to experience tenderness, swelling and stiffness in his right foot because of the accident.

{¶6} The court overruled the motion to suppress. Appellant entered a no contest plea to both charges and was convicted. The court fined appellant $1225, suspended his license for 180 days, and sentenced him to 30 days incarceration. Appellant assigns four errors on appeal:

{¶7} "I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE HGN TESTS BECAUSE THE STATE FAILED TO LAY PROPER FOUNDATION FOR BOTH THE ADMINISTRATING OFFICER'S TRAINING AND ABILITY TO ADMINISTER THE TEST AND AS TO THE ACTUAL TECHNIQUE USED BY THE OFFICER IN ADMINISTERING THE TEST.

{¶8} "II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE ONE-LEG-STAND TEST BECAUSE THE STATE FAILED TO SATISFY ITS BURDEN TO SHOW BY CLEAR AND CONVINCING EVIDENCE THAT

THE TESTS WERE ADMINISTERED IN SUBSTANTIAL COMPLIANCE WITH THE TESTING STANDARDS FOR ANY RELIABLE, CREDIBLE AND GENERALLY ACCEPTED FIELD SOBRIETY TESTS THAT WERE IN EFFECT AT THE TIME THE TESTS WERE ADMINISTERED.

{¶9} "III. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE WALK AND TURN TEST BECAUSE THE STATE FAILED TO SATISFY ITS BURDEN TO SHOW BY CLEAR AND CONVINCING EVIDENCE THAT THE TESTS WERE ADMINISTERED IN SUBSTANTIAL COMPLIANCE WITH THE TESTING STANDARDS FOR ANY RELIABLE, CREDIBLE AND GENERALLY ACCEPTED FIELD SOBRIETY TESTS THAT WERE IN EFFECT AT THE TIME THE TESTS WERE ADMINISTERED.

{¶10} "IV. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS ALL OF THE FIELD SOBRIETY TESTS BECAUSE THE STATE FAILED TO SATISFY ITS BURDEN TO SHOW BY CLEAR AND CONVINCING EVIDENCE THAT THE TESTS WERE ADMINISTERED IN SUBSTANTIAL COMPLIANCE WITH THE TESTING STANDARDS FOR ANY RELIABLE, CREDIBLE AND GENERALLY ACCEPTED FIELD SOBRIETY TESTS THAT WERE IN EFFECT AT THE TIME THE TESTS WERE ADMINISTERED."

{¶11} Each of appellant's assignments of error challenges the trial court's ruling on his motion to suppress. There are three methods of challenging on appeal a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's findings of fact. In reviewing a challenge of this nature, an appellate court must determine whether said findings of fact are against the manifest weight of the evidence.

See State v. Fanning (1982), 1 Ohio St.3d 19, 437 N.E .2d 583; *State v. Klein* (1991), 73 Ohio App.3d 486, 597 N.E.2d 1141; *State v. Guysinger* (1993), 86 Ohio App.3d 592, 621 N.E.2d 726. Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. See *State v. Williams* (1993), 86 Ohio App.3d 37, 619 N.E.2d 1141, overruled on other grounds. Finally, assuming the trial court's findings of fact are not against the manifest weight of the evidence and it has properly identified the law to be applied, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry* (1994), 95 Ohio App.3d 93, 641 N.E.2d 1172; *State v. Claytor* (1993), 85 Ohio App.3d 623, 620 N.E.2d 906; *Guysinger*, supra. As the United States Supreme Court held in *Ornelas v. U.S.* (1996), 517 U.S. 690 116 S.Ct. 1657, "... as a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal."

I., II. & III.

{¶12} Appellant's first, second and third assignments of error raise common and interrelated issues; therefore, we will address the arguments together.

{¶13} Appellant argues that Deputy Hartman did not administer the Field Sobriety Tests in substantial compliance with the NHTSA standards. He maintains that the Deputy committed numerous errors when administering the field sobriety tests.

{¶14} In order for the results of the field sobriety tests to be admissible, the State must show by clear and convincing evidence that the officer performing the testing substantially complied with accepted testing standards. *State v. Jimenez,* Warren App. No. CA2006-01-005, 2007-Ohio-1658 citing *State v. Schmitt,* 101 Ohio St.3d 79, 2004-Ohio-37, 801 N.E.2d 446; R.C. 4511.19(D) (4) (b). Typically, the standards used are those from the NHTSA. Id. at paragraph 12. Part of the state's burden "includes demonstrating what the NHTSA requirements are, through competent testimony and/or by introducing the applicable portions of the NHTSA manual." *State v. Djisheff,* Trumbull App. No.2005-T-0001, 2006-Ohio-6201 citing *State v. Brown,* 166 Ohio App.3d 638, 2006-Ohio-1172, 852 N.E.2d 1228; *State v. Ryan,* Licking App. No. 02-CA00095, 2003-Ohio-2803.

{¶15} First, appellant argues that the State failed to show that the HGN test was conducted in substantial compliance with the NHTSA standards because the officer failed to give appellant the NHTSA instructions verbatim and failed to use the correct procedure when administering the HGN test. We disagree.

{¶16} According to the NHTSA manual, a police officer should instruct the suspect that they are going to check the suspect's eyes, that the suspect should keep their head still and follow the stimulus with their eyes, and that the suspect should do so until told to stop. After these initial instructions are provided, the officer is instructed to position the stimulus approximately 12 to 15 inches from the suspect's nose and slightly above eye level. The officer is then told to check the suspect's pupils to determine if they are of equal size, the suspect's ability to track the stimulus, and whether the

suspect's tracking is smooth. The officer then checks the suspect for nystagmus at maximum deviation and for onset of nystagmus prior to 45 degrees.

{¶17} The officer need not read the instructions verbatim from the manual to substantially comply. *State v. Cox*, Coshocton App. No. 08 CA 0008, 2009-Ohio-1625 at ¶35; *State v. Wood,* Clermont App. No. CA2007-12-115, 2008-Ohio-5422, ¶ 20.

{¶18} Deputy Hartman described his training pertinent to the HGN. He testified that he was trained to tell the driver he wanted to check their eyes; he was to use the tip of an ink pen and ask the driver to hold their head still and follow the tip of the pen with their eyes only. He testified to the possibility of three clues for each eye, for a total of six possible clues. Deputy Hartman testified he was trained to check for distinct nystagmus before 45 degrees, maximum deviation, and the lack of smooth pursuit. Deputy Hartman testified that he was to determine whether the driver was wearing contacts; although he noted the NHTSA manual instructs contacts do not affect the test.

{¶19} Deputy Hartman testified as follows regarding the training regarding specific procedures for administering the HGN test: "the instrument that you use is placed approximately 12 to 15 inches in front of the suspect's face right above eye level just to make sure that the eyes are open and you can actually see what's going on. We're required to take a pen and start to the right to check for smooth pursuit, bring the pen back and check back across to the left. I believe it's two seconds for the checking of the smooth pursuit." (T. at 24). Upon further questioning, Deputy Hartman clarified that checking for smooth pursuit should take approximately two seconds in each eye. (Id. at 25).

{¶20} Deputy Hartman testified that checking for onset of nystagmus before 45 degrees required him to "bring the pen back and check the right for the onset of nystagmus at 45-before 45 degrees. And again, you come back to the center of the nose to check the left eye, and then back over to the center, and then start the maximum deviation..." (T. at 24). Deputy Hartman further explained the onset before 45 degrees, which he then referred to as the onset of nystagmus before maximum deviation. (T. at 25). He testified as follows: "The onset of nystagmus before maximum deviation is the jerking of the eyes. You can see the onset before maximum deviation. The maximum deviation gives you the indicators from where the eyes are jerking back and forth at a constant rate. Not all impaired drivers will show that-the onset of it; however, in some-in most drivers who are-at least according to NHTSA studies, is .10 or higher will have onset of nystagmus before maximum deviation." (T. at 25-26). He testified that the purpose of this test is to look for clues to interpret what the alcohol level might be and that the NHTSA manual still references .10 for a standard level. (T. at 26). Upon further questioning, Deputy Hartman indicated that this process involved a four second back and forth on both eyes, and that it was to be repeated. (T. at 25.)

{¶21} Deputy Hartman's testimony regarding this maximum deviation portion of the test is as follows: "The maximum deviation is where there's no whites in the corner of the eye to where you can see no white at all, and that's held up for four seconds and back across to the center of the nose and back across to the opposite eye to do the same thing for another four seconds, and then that's complete." (T. pgs. 24-25)

{¶22} Deputy Hartman's testimony concerning the procedure he performed on appellant further clarifies his knowledge of the NHTSA standards. "I...had Mr. Secoy

stand perfectly still and had his arms to his side. It should be also noted that I didn't, that I did turn my overhead lights off to perform this. I used just the light from the parking lot to perform the test. I did instruct Mr. Secoy to follow the tip of the pen, because I was going to check his eyes from the center of his nose after placing the instrument, which was my ink pen, 12 to 15 inches approximately from his face and was slightly above his eye level, where his eyes were open. At that point I started with the right side, which would have been his left, and held the pen for two seconds checking the smooth pursuit, come back to the center of Mr. Secoy's nose, and then went back to my left, his right, to check his right eye. And at that point, I come back to the center and checked for the onset of nystagmus before maximum deviation for the-and then come back to the center and checked the right eye. At that point I then checked the maximum deviation for the nystagmus, come back and checked his right eye as well." (T. at 26-27).

{¶23} Deputy Hartman testified that he followed his training on this date when administering this test to appellant, that he noted his observations on the Impaired Driver's Report (See State's Exhibit "B"), and that appellant exhibited all six clues, although NHTSA only requires four of the six. (T. at 29).

{¶24} We find, despite the omission of checking appellant's pupil sizes, that there is clear and convincing evidence in the record that Deputy Hartman substantially complied with the NHTSA standards when administering the HGN test.

{¶25} Appellant also argues against the admissibility of the results from her one-leg stand [“OLS”] because Deputy Hartman did not give him proper instructions. Further, appellant contends that Deputy Hartman did not instruct appellant not put his

foot down, not to hop, not to raise his arms from his side for balance, thus rendering the test inadmissible.

{¶26} Even though Deputy Hartman did not recite the instructions for the OLS test verbatim, we find that his instructions and administration of the test substantially complied with the NHTSA guidelines.

{¶27} With respect to the OLS test, an officer is required to "inform suspect that [he] must begin the test with [his] feet together and that [he] must keep [his] arms at [his] side for the entire test. The officer also [must tell] the suspect that he must raise one leg, either leg, six inches from the ground and maintain that position while counting out loud for thirty seconds. * * * NHTSA standards provide that the counting should be done in the following manner: 'one thousand and one, one thousand and two, until told to stop.' Further the officer must "Tell suspect “[k]eep your arms at your sides at all time and keep watching the raised foot.” Next, ask the suspect whether they understand. Finally, tell the suspect to begin.

{¶28} According to Deputy Hartman’s testimony at the hearing, he instructed appellant to hold his foot off the ground until he reached the count of 30 or was told to stop. Deputy Harman testified that the operators are instructed to stand straight up with their hands down to their side and to hold either foot, whichever one they choose to stand on, approximately six inches from the ground and to remain standing on one foot and counting 1-1,000 to 30 until we instruct them to stop." (T. at 14). He testified that he gave these instructions to appellant. (T. at 14). He further testified that he demonstrated the OLS for appellant. Finally, he asked appellant if he understood the instructions before having appellant attempt the test. (T. at 16).

{¶29} We find, despite the omission of instructing the appellant to "keep watching the raised foot", that there is clear and convincing evidence in the record that Deputy Hartman substantially complied with the NHTSA standards when administering the OLS test.

{¶30} Appellant next argues that Deputy Hartman did not perform the walk-and-turn ["WAT"] in substantial compliance with the NHTSA standards.

{¶31} With respect to the WAT test, an officer is required to, "first instruct the suspect of the initial positioning, which requires the suspect to stand with [his] arms down at [his] side, and to place one foot directly in front of the other in a line. The suspect is then told to remain in that position while further instructions are given. These further instructions include, the method by which the suspect walks while touching his heel to his toe for every step, counting the nine steps aloud while walking down the line, and making a turn with small steps with one foot while keeping the other foot on the line. The officer is also told to demonstrate the instructions to ensure that the suspect fully understands.

{¶32} According to Deputy Hartman's testimony at the hearing his instructions to appellant "included the left foot and then the right foot, heel to toe, staying relatively on the line. They're to take nine heel-to-toe steps. On the last step, normally we have them turn to the left just because it's easier coming back. What we're looking for is-the heel-to-toe steps, we're looking for balance and the swaying, the raising of the arms. They're instructed to keep their arms down to the side while they're performing this skill." (T. at 17-18). Deputy Hartman demonstrated by taking three or four steps and then turning. (Id. at 18).

{¶33} Deputy Hartman did not testify that he instructed appellant to count his steps aloud, nor did he testify that he instructed the appellant that once he started walking, not to stop until he completed the test. Nor is it clear whether Deputy Hartman instructed appellant that when he turned, he was to keep the front foot on the line, and turn by taking a series of small steps with the other foot.

{¶34} Assuming *arguendo* that the officer did not substantially comply with the manual concerning the WAT appellant has not demonstrated prejudice from the court's alleged improper admission of the WAT results.

{¶35} Appellant entered a plea of no contest to a violation of R.C. 4511.19(A) (1) (a):

{¶36} "(A) (1) No person shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, any of the following apply:

{¶37} "(a) The person is under the influence of alcohol, a drug of abuse, or a combination of them."

{¶38} In *State v. Dalrymple,* Fairfield App. No. 07CA33, 2008-Ohio-2827, this Court held that the appellant did not demonstrate prejudice as a result of the trial court's alleged improper admission of breath test results because the appellant pleaded no contest to a violation of R.C. 4511.19(A)(1)(a), and because there was competent, credible evidence apart from the breath test that the appellant was under the influence of alcohol, the trial court did not necessarily rely on the breath test results in convicting the appellant. Id. at ¶ 15.

{¶39} The instant case is similar to *Dalrymple*. Appellant pleaded no contest to a violation of R.C. 4511.19(A) (1) (a). Nothing in the record demonstrates that the court

relied on the WAT results in finding appellant guilty. There was sufficient competent, credible evidence apart from the WAT test that appellant was under the influence of alcohol to support the court's finding of guilt upon the plea. He demonstrated clues of being under the influence of alcohol on the one-leg stand test and the HGN. The deputy observed appellant travel across the centerline and fail to stop for a red light. Appellant smelled like alcohol, and his eyes were bloodshot. Appellant has not demonstrated prejudice from the court's failure to suppress the results of the WAT test.

{¶40} While field sobriety tests must be administered in substantial compliance with standardized procedures, probable cause to arrest does not necessarily have to be based, in whole or in part, upon a suspect's poor performance on one or more of these tests. The totality of the facts and circumstances can support a finding of probable cause to arrest even where no field sobriety tests were administered. *State v. Homan* (2000), 89 Ohio St.3d 421, 732 N.E.2d 952. Further, the Ohio Supreme Court has made clear that the officer may testify regarding observations made during a defendant's performance of standardized field sobriety tests even absent proof of “strict compliance.” *State v. Schmitt* (2004), 101 Ohio St.3d 79, 84, 2004-Ohio-37 at ¶15, 801 N.E.2d 446, 450.

{¶41} Accordingly, the totality of the evidence, even excluding the WAT test, gave rise to probable cause to arrest for OVI.

{¶42} Assuming arguendo the WAT test should not have been admitted to support the Deputy’s finding of probable cause to arrest, we find, in this case, that the admission of the WAT test at appellant’s suppression hearing was harmless beyond a reasonable doubt.

{¶43} Pursuant to Crim. R. 52(A), any error will be deemed harmless if it did not affect an accused's substantial rights. Thus, under a Crim. R. 52(A) analysis, the conviction will be reversed unless the State can demonstrate the defendant has suffered no prejudice as a result of the error. *State v. Perry*, 101 Ohio St.3d 118, 121, 2004-Ohio-297, 802 N.E.2d 643 (citing *United States v. Olano* (1993), 507 U.S. 725, 741, 113 S.Ct. 1770, 123 L.Ed 508 and *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061). “When a claim of harmless error is raised, the appellate court must read the record and decide the probable impact of the error on the minds of the average juror.” *State v. Young* (1983), 5 Ohio St.3d 221, 226, 450 N.E.2d 1143 (citing *Harrington v. Califor*nia (1969), 395 U.S. 250, 254, 89 S.Ct. 1726, 23 L.Ed.2d 284). An appellate court must reverse if the government does not meet its burden. *Perry*, 101 Ohio St.3d at ¶15.

{¶44} As previously stated, the trial court had competent, credible evidence apart from the WAT test that appellant was under the influence of alcohol to support the court's finding of guilt upon the plea.

{¶45} Accordingly, appellant’s first, second and third assignments of error are overruled.

IV.

{¶46} Appellant initially complains that (1) no evidence was presented that the field sobriety tests utilized were reliable, credible, and generally accepted, and (2) that there was no evidence that the standards utilized were in effect at the time of the stop.

{¶47} The field sobriety tests described in the National Highway Traffic and Safety Administration ["NHTSA'] Manual are "reliable, credible, and generally accepted"

as memorialized in R.C. 4511.19(D)(4)(b), stating the results of the field sobriety tests may be admitted "if a law enforcement officer has administered a field sobriety test to the operator of the vehicle involved in the violation and if it is shown by clear and convincing evidence that the officer administered the test in substantial compliance with the testing standards for any reliable, credible, and generally accepted field sobriety tests that were in effect at the time the tests were administered, including, but not limited to, any testing standards then in effect that were set by the National Highway Traffic Safety Administration." The Ohio Supreme Court has interpreted this statute: "[t]he General Assembly has determined that the tests are sufficiently reliable to be admissible by meeting a clear-and-convincing standard. The potential compromise of reliability caused by the lack of strict compliance can be shown by the defense on cross-examination." *State v. Boczar,* 113 Ohio St .3d 148, 2007-Ohio-1251 at ¶ 23; *State v. Raleigh*, Licking App. No. 2007-CA-31, 2007-Ohio-5515.

{¶48} R.C. 4511.19(D) (4)(b) deals with the issues of reliability, credibility, and general acceptance in its text by explicitly including field sobriety tests administered pursuant to NHTSA standards as meeting those qualifications. *State v. Boczar,* supra; *State v. Raleigh*, supra.

{¶49} Appellant complains that the Deputy did not utilize the most current version of the NHTSA manual when administering the tests to appellant.

{¶50} In the case at bar, appellant did not object to the admission of the NHTSA manual into evidence. Further, appellant did not raise the State's burden of proof during cross-examination. Here, appellant failed to ask specific questions during his cross-examination to support the claim that the NHTSA standards had substantially changed

in a significant way from when the deputy received his training. Instead, appellant's cross-examination merely consisted of general questions regarding the deputy's procedures used during the tests.

{¶51} Under the doctrine of "invited error," it is well-settled that "a party will not be permitted to take advantage of an error which he himself invited or induced the trial court to make." *State ex rel. Smith v. O'Connor* (1995), 71 Ohio St.3d 660, 663, citing *State ex rel. Fowler v. Smith* (1994), 68 Ohio St.3d 357, 359. See, also, *Lester v. Leuck* (1943), 142 Ohio St. 91, paragraph one of the syllabus. As the Ohio Supreme Court has stated:

{¶52} "The law imposes upon every litigant the duty of vigilance in the trial of a case, and even where the trial court commits an error to his prejudice, he is required then and there to challenge the attention of the court to that error, by excepting thereto, and upon failure of the court to correct the same to cause his exceptions to be noted. It follows, therefore, that, for much graver reasons, a litigant cannot be permitted, either intentionally or unintentionally, to induce or mislead a court into the commission of an error and then procure a reversal of the judgment for an error for which he was actively responsible." *Lester* at 92-93, quoting *State v. Kollar* (1915), 142 Ohio St. 89, 91; *Walker v. State,* Stark App. No.2007CA00037, 2007-Ohio-5262 at ¶ 48-52.

{¶53} Unfortunately, appellant did not include a copy of the 2008 manual in evidence at the trial court level. Further, appellant has utterly failed to explain how the procedures have changed and, more importantly, how any alleged changes in the administration of the procedures have prejudiced the appellant. *State v. Raleigh*, supra at ¶ 32; *Brookpark v. Key,* 8th Dist. No. 89612, 2008-Ohio-1811, at ¶ 54 (where the

defendant failed to introduce the "most current manual into evidence," the court was unable to compare "the most current standards" to those submitted by the prosecution); *State v. Morgan*, 11th Dist. No. 2008-P-0098, 2009-Ohio-2795 at ¶34.

{¶54} Muskingum County Sheriff Deputy Hartman testified he received his training through the police academy at Zane State, graduating in 2004. (T. at 12-13). He testified that the manual he brought to court set forth the NHTSA standards and was a copy of the manual used for his training. (T. at 13). “There was no evidence that the standards for any specific portions of the field sobriety tests administered had changed at all between the time of the [deputy’s] training and the time of the encounter in this case. This Court will not presume prejudice.” *State v. Raleigh*, supra at ¶ 33; *Brookpark v. Key,* supra at ¶ 80; *State v. Morgan*, supra at ¶ 34. The State further submitted into evidence, without objection, the NHTSA manual used for his training. Therefore, the trial court could ascertain whether the tests were conducted within substantial compliance of the standards.

{¶55} Accordingly, appellant's fourth assignment of error is overruled.

{¶56} The decision of the Muskingum County Court is affirmed.

By Gwin, P.J., and

Delaney, J., concur

Edwards, J., dissents

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

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HON. PATRICIA A. DELANEY

WSG:clw 0826

EDWARDS, J., DISSENTING OPINION

{¶57} I respectfully dissent from the majority's disposition of the fourth assignment of error.

{¶58} R.C. 4511.19(D)(4)(b) provides in pertinent part:

{¶59} "In any criminal prosecution or juvenile court proceeding for a violation of division (A) or (B) of this section, of a municipal ordinance relating to operating a vehicle while under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, or of a municipal ordinance relating to operating a vehicle with a prohibited concentration of alcohol, a controlled substance, or a metabolite of a controlled substance in the whole blood, blood serum or plasma, breath, or urine, if a law enforcement officer has administered a field sobriety test to the operator of the vehicle involved in the violation *and if it is shown by clear and convincing evidence that the officer administered the test in substantial compliance with the testing standards for any reliable, credible, and generally accepted field sobriety tests that were in effect at the time the tests were administered,* including, but not limited to, any testing standards then in effect that were set by the national highway traffic safety administration, all of the following apply:

{¶60} "(i) The officer may testify concerning the results of the field sobriety test so administered.

{¶61} "(ii) The prosecution may introduce the results of the field sobriety test so administered as evidence in any proceedings in the criminal prosecution or juvenile court proceeding.

{¶62} "(iii) If testimony is presented or evidence is introduced under division (D)(4)(b)(i) or (ii) of this section and if the testimony or evidence is admissible under the

Rules of Evidence, the court shall admit the testimony or evidence and the trier of fact shall give it whatever weight the trier of fact considers to be appropriate." (Emphasis added).

{¶63} The statute clearly places the burden on the state to show by clear and convincing evidence that the officer administered the tests in substantial compliance with the testing standards in effect at the time the tests were administered. I disagree with the majority's conclusion that if the State presents evidence that the tests were conducted in substantial compliance with the standards in place two years before the test was conducted, the defendant is then required to demonstrate that the standards have changed.

{¶64} In the instant case, there is no evidence in the record that the deputy was aware of any updates to the 1995 manual which he received at school in 2004 and which was admitted into evidence. While appellant stipulated to the admission of a photocopy of the manual into evidence, appellant did not stipulate that the manual represented the current standards for conducting field sobriety tests. The deputy did not testify that the manual, despite the 1995 date, represented the standards in effect at the time he conducted the test nor did he testify that there had been no change in the portions of the manual he relied on after his training at the academy in 2004. He did not testify that he received updated training or a copy of any new manual published. On direct examination, Deputy Hartman testified as follows regarding his training and use of the NHTSA manual:

{¶65} "Q. Let me ask you this. Where did you receive your training to perform the field sobriety testing?

{¶66} "A. Through the police academy through Zane State.

{¶67} "Q. Okay. And when did you graduate from Zane State?

{¶68} "A. In '04.

{¶69} "Q. 2004?

{¶70} "A. Yes, ma'am.

{¶71} "Q. Okay. So that's now a part of the curriculum actually at the - -

{¶72} "A. Correct.

{¶73} "Q. - - at the academy? All right. Did you bring with you today a copy of the manual that would have been used to provide that training - -

{¶74} "A. The - -

{¶75} "Q. - - at the academy?

{¶76} "A. The copy that I brought, the National Highway Traffic Safety Administration Handbook, and the ADAP section that we receive through the academy is a branch from it.

{¶77} "Q. Okay.

{¶78} "A. It's under the same curriculum. Everything is exactly the same. It's just a different - -

{¶79} "Q. It's called something different at your - -

{¶80} "A. Yes. It's not - -

{¶81} "Q. - - for your curriculum?

{¶82} "A. Right. There's nothing different about it. It's just a different book.

{¶83} "Q. Okay. So you're taught that it's the standard?

{¶84} "A. Correct." Tr. 12-13.

{¶85} On cross-examination, he testified as follows concerning updates to his training after 2004:

{¶86} "Q. You received your training in 2004. Is that correct?

{¶87} "A. Correct.

{¶88} "Q. 2004. Have you received any updates since then?

{¶89} "A. Yes.

{¶90} "Q. The last time you were trained - - the last time you've been taught any field sobriety test was in 2004. Correct?

{¶91} "A. Correct. Other than the field training.

{¶92} "Q. Tell me about the field training. That was after 2004?

{¶93} "A. Correct. Typically it's just on a job, going out, handling it, doing it.

{¶94} "Q. But no certifications or anything - -

{¶95} "A. Correct." Tr. 34-35.

{¶96} While the testimony demonstrates that the deputy received practical experience in the field in administering the tests after he finished his training at the police academy, he did not testify that the standards he used in conducting the tests were the accepted standards at the time he conducted the test. The deputy testified that he was using the methods taught to him at the police academy two years earlier, based on a manual from 1995.

{¶97} Based on the evidence submitted at the suppression hearing, I would find that the state failed to meet its burden to prove by clear and convincing evidence that the officer administered the tests in substantial compliance with the testing standards for

any reliable, credible, and generally accepted field sobriety tests that were in effect at the time the tests were administered, and I would sustain the fourth assignment of error.

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Judge Julie A. Edwards

[Cite as *State v. Secoy*, 2009-Ohio-5100.]

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
MICHAEL SECOY	:	
Defendant-Appellant	:	CASE NO. CT2008-0065

For the reasons stated in our accompanying Memorandum-Opinion, the decision of the Muskingum County Court is affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

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HON. PATRICIA A. DELANEY