[Cite as *State v. Akers*, 2016-Ohio-7216.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	CASE NO. 15 BE 0056
V.	)	
	)	OPINION
SCOTT C. AKERS,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Belmont County Court, Northern Division of Belmont County, Ohio Case No. 15TRC0508-01
JUDGMENT:	Reversed in part and Remanded Conviction and Sentence Vacated
APPEARANCES: For Plaintiff-Appellee	Helen Yonak Assistant Prosecutor 147-A West Main Street St. Clairsville, Ohio 43950
For Defendant-Appellant	Attorney Adam Myser 320 Howard St. Bridgeport, Ohio 43912

JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: September 27, 2016

[Cite as *State v. Akers*, 2016-Ohio-7216.]
DONOFRIO, P.J.

{¶1} Defendant-appellant, Scott C. Akers, appeals the judgment of the Belmont County Court – Northern Division finding him guilty of violating R.C. 4511.19(A)(1)(a), operating a vehicle under the influence of alcohol or drugs, a misdemeanor of the first degree.

{¶2} On April 2, 2015, Trooper Rocky Hise of the State Highway Patrol was exiting Interstate 470 to State Route 7 in Belmont County, Ohio. As he approached the intersection of Route 7 and Interstate Route 470, he observed Appellant's vehicle approach the intersection from northbound Route 7. Trooper Hise testified that Appellant failed to stop at the stop sign. Tr. 5-6. Instead, Appellant stopped abruptly in the intersection. Tr. 5-6; 27; 28; 33. The Trooper turned on his overhead lights, turned around, and stopped Appellant as he merged his vehicle onto Interstate 470.

{¶3} Trooper Hise approached Appellant's vehicle and asked for Appellant's license, registration, and insurance. Tr. 6. The first thing Trooper Hise noticed was an odor of an alcoholic beverage on Appellant's person. *Id*. Appellant's eyes, according to the Trooper, were noticeably bloodshot and glassy. *Id*. Appellant was having trouble pronouncing his words, his speech sounded slurred and slightly garbled. Tr. 6-7. Appellant's actions were slowed and delayed. Tr. 7.

{¶4} Trooper Hise asked Appellant how much he had to drink. Appellant denied that he had anything to drink. When Trooper Hise pressed him, indicating that he could smell the alcohol, Appellant admitted to drinking one beer earlier in the day. *Id*.

{¶5} Trooper Hise then asked Appellant to exit his vehicle for purposes of performing standardized field sobriety tests. Tr. 7-8. According to Trooper Hise, those tests included the Horizontal Gaze Nystagmus Test; the One Leg Stand Test; and the Walk and Turn Test. Tr. 8. Trooper Hise testified that he observed six clues, three in each eye, on the Horizontal Gaze Nystagmus Test. *Id*. On the One Leg Stand Test, he observed three clues, i.e., Appellant swayed while balancing; used his arms more than six inches for balancing; and put his foot down during the test. Tr. 8-9. On the Walk and Turn Test, Appellant moved his feet to keep his balance during the

instructional phase; did not touch heel to toe on step number three; and stepped off the line on step number three. Tr. 9-10.

{¶6} In order to rule out the possibility of other controlled substances or other drug categories, Appellant was then administered a portable breath tester which indicated he had consumed alcohol. Tr. 10. The test results initially indicated .179 and continued to rise. Tr. 10-11. Based on the field sobriety tests and his observations, Trooper Hise testified there "wasn't any doubt he was impaired." Tr. 16-17. At that time the Trooper placed Appellant under arrest. Tr. 11. Appellant was charged with operating a vehicle while under the influence of alcohol or drugs, a misdemeanor of the first degree, and failure to obey a traffic control device, a minor misdemeanor.

{¶7} Appellant filed a motion to dismiss, motion to suppress, and motion in limine arguing that there was no probable cause to stop Appellant, that the field sobriety test results and the portable breath test results should be suppressed, and that there was no probable cause to arrest Appellant. After a hearing, the trial court denied Appellant's motions. Subsequently, Appellant pled no contest to, and was found guilty of, operating a vehicle while under the influence of alcohol or drugs in violation of R.C. 4511.19(A)(1)(a). Appellant reserved his right to appeal on questions of law. The charge of failure to obey a traffic control device in violation of R.C. 4511.12 was dismissed.

{¶8} Appellant was sentenced to 180 days in jail, all but 40 of those days were suspended; a fine of $250.00; $115.00 in court costs; suspension of his operator's license for two years; and two years' probation with conditions. Appellant filed a motion for a stay of execution pending appeal, which was granted. Appellant filed a timely appeal.

{¶9} Appellant's first assignment of error states:

> THE TRIAL COURT ERRED BY FINDING A TRAFFIC VIOLATION HAD OCCURRED AND THEREFORE, ERRED IN FINDING THE TROOPER HAD PROBABLE CAUSE TO INSTITUTE A TRAFFIC

STOP OF APPELLANT.

{¶10} Appellant claims that where a police officer stops a motorist for a violation of a provision of the traffic code, "the heightened standard of probable cause must underline [sic] the stop." Brief of Defendant-Appellant, p. 5. In support of his argument, Appellant cites *Bowling Green v. Godwin,* 110 Ohio St.3d 58, 2006-Ohio-3563, 850 N.E.2d 698. Appellee does not challenge this assertion by Appellant but instead argues that Trooper Hise did have probable cause to make the stop at issue.

{¶11} In *Dayton v. Erickson,* 76 Ohio St.3d 3, 1996-Ohio-431, 665 N.E.2d 1091, the Ohio Supreme Court considered a case where a traffic code violation (a turn signal violation) was allegedly used as a pretext to stop a vehicle to determine if the driver had a valid driver's license. The Court considered if the test should be whether a reasonable police officer, under the circumstances, "would" stop the driver or whether the fact that the officer "could" stop the vehicle was enough to make the stop proper. Although the Court did not specifically address, or rule upon, the issue of whether probable cause was needed to make a traffic stop, it did observe, with regard to the "could" test, that federal courts adopting the "could" test, "have concluded that where an officer has either a reasonable suspicion or probable cause to stop a motorist for a traffic violation, the stop is constitutionally valid regardless of the officer's underlying intent or motivation * * *." *Id.* at 7. In adopting the "could" test, the Ohio Supreme Court stated:

> We conclude that where an officer has an articulable reasonable suspicion or probable cause to stop a motorist for any criminal violation, including a minor traffic violation, the stop is constitutionally valid regardless of the officer's underlying subjective intent or motivation * * *

Id. at 11-12.

{¶12} In *Godwin,* which Appellant asserts stands for the proposition that a police officer must have probable cause to make a traffic stop, the Ohio Supreme

Court considered the following certified question: "Whether disregard of a traffic control device that lacks the statutorily required authorization can serve as the basis for a traffic stop." *Godwin,* ¶ 1. The Court answered the question in the affirmative. In reaching its conclusion, the court discussed whether probable cause was necessary to make a traffic stop or if a reasonable articulable suspicion satisfied the constitutional mandates with regard to unreasonable searches and seizures. In *Godwin,* the trial court used the reasonable articulable suspicion standard while the appellate court used the probable cause standard. The Ohio Supreme Court observed that there is a split of authority on this issue, quoting *Gaddis ex rel. Gaddis v. Redford Twp.,* 188 F.Supp.2d 762, 767, (E.D.Mich.2002), where the federal district court observed that authorities "seem to be split as to whether a traffic stop is reasonable when supported merely by reasonable suspicion, or whether the heightened standard of probable cause must underlie the stop." *Godwin* at ¶ 13. The Court then noted that in *Erickson,* discussed above, it determined that "the officer had probable cause to believe that a traffic offense had been committed and therefore found it unnecessary to consider separately the lesser standard of reasonable suspicion." *Godwin* at ¶ 13. The Court concluded that the same was true in *Godwin*:

> We therefore need not decide whether a mere reasonable suspicion of the commission of a minor traffic offense, as opposed to probable cause, justifies an officer in stopping a driver. *Id.*

{¶13} In *State v. Mays,* 119 Ohio St.3d 406, 2008-Ohio-4539, 894 N.E.2d 1204, the Ohio Supreme Court considered a traffic stop where a motorist drifted over lane markings in violation of R.C. 4511.33. There was no other evidence of erratic or unsafe driving. *Id.* at Syllabus. In *Mays,* the Court decided that a conflict existed among appellate courts and thus agreed to answer the following issue: "May a police officer who witnesses a motorist cross a white edge line and without any further evidence of erratic driving or that the crossing was done in an unsafe manner make a constitutional stop of the motorist?" *Id.* at ¶ 1. In again answering in the affirmative,

the Ohio Supreme Court reported that both the trial and appellate court used the reasonable articulable suspicion standard. *Id.* at ¶ 4-5. (Using the same standard, the trial court sustained the motion to suppress and the appellate court reversed). *Id.* On appeal to the Supreme Court, the defendant, citing *Erickson,* argued that a police officer is only warranted in stopping a vehicle if the officer had probable cause. The Ohio Supreme Court rejected the defendant's argument:

> Appellant's reliance on *Erickson,* and on *Whren v. United States* (1996), 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89, is misplaced. Probable cause is certainly a complete justification for a traffic stop, but we have not held that probable cause is required. Probable cause is a stricter standard than reasonable articulable suspicion. *State v. Evans* (1993), 67 Ohio St.3d 405, 411, 618 N.E.2d 162. The former subsumes the latter. Just as a fact proven beyond a reasonable doubt has by necessity been proven by a preponderance, an officer who has probable cause necessarily has a reasonable and articulable suspicion, which is all the officer needs to justify a stop. *Erickson* and *Whren* do not hold otherwise.

Id. at ¶ 23. The *Mays* court then concluded that the officer there had not only a reasonable and articulable suspicion, but also probable cause. *Id.* at 24. We note that *Mays* followed *Godwin,* the case relied upon by Appellant to assert that probable cause is the standard that must be used in the case at bar.

After *Godwin,* in *State v. Cunningham,* 7th Dist. No. 08 MO 0008, 2009-Ohio-4394, ¶ 14, involving a stop for a loud muffler, we applied the reasonable and articulable suspicion test explaining:

> Where a police office has an articulable reasonable suspicion that any offense, including a minor traffic offense, is occurring, the officer is permitted to stop the vehicle, even if the stop is allegedly pretextual.

> *Dayton v. Erickson,* (1996), 76 Ohio St.3d 3, 11-12, 665 N.E.2d 1091. The reasonable suspicion test is met when the officer had before him specific and articulable facts which, taken together with rational inferences from those facts, reasonably warranted the stop and detention. *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S.Ct. 1868, 20 L.Ed.2d 889.

{¶14} Recently, we reiterated the test to be applied in cases of this nature. In *State v. Campenelli,* 7th Dist. No. 14 CO 0023, 2015-Ohio-2332, also decided post-*Godwin,* we explained:

> "The Fourth Amendment to the Constitution and Section 14, Article I of the Ohio Constitution prohibit unreasonable searches and seizures, including unreasonable automobile stops." *Bowing Green v. Godwin,* 110 Ohio St.3d 58, 850 N.E.2d 698, 2006-Ohio-3563, ¶ 11. In order to make an investigative traffic stop, an officer must have a reasonable suspicion, based on specific and articulable facts, that the motorist was engaged in criminal activity or that the vehicle was in violation of the law. *State v. Snyder,* 7th Dist. No. 01 BE 0015, 2004-Ohio-3200, ¶ 5, citing *Dayton v. Erickson,* 76 Ohio St.3d 3, 12, 665 N.E.2d 1091 (1996); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Campenelli at ¶ 19.

{¶15} Probable cause is determined by the events leading up to the stop when viewed from the standpoint of an objectively reasonable police officer. *Godwin* at ¶ 14, citing *Ornelas v. United States,* 517 U.S. 690, 696, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). Probable cause determinations are fact-dependent and turn on what the officer knew at the time he made the stop. *Godwin* at ¶ 14 citing *Erickson* at 10. The test is not whether Appellant "substantially complied" with the posted stop sign, but whether probable cause (or a reasonable and articulable suspicion) existed from the perspective of the police officer. The reasonable suspicion test is met when

the officer had before him specific and articulable facts which, taken together with rational inferences from those facts, reasonably warranted the stop and detention. *Cunningham* at ¶ 14. As explained above, if probable cause exists for a traffic stop then, by definition, the reasonable and articulable standard has been met. Since we conclude that the Trooper here had probable cause to make the stop in question, it is unnecessary to separately discuss whether the Trooper also had a reasonable and articulable suspicion to stop Appellant. *Mays* at ¶ 23; *Godwin* at ¶ 13.

{¶16} Here, Appellant was stopped, according to Trooper Hise, for failing to stop at a stop sign in violation of R.C. 4511.12(A) which obligates drivers of vehicles to obey traffic control devices. R.C. 4511.43(A) provides:

> Except when directed to proceed by a law enforcement officer, every driver of a vehicle or trackless trolley approaching a stop sign shall stop at a clearly marked stop line, but if none, before entering the crosswalk on the near side of the intersection, or, if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering it. After having stopped, the driver shall yield the right-of-way to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard during the time the driver is moving across or within the intersection or junction of roadways.

{¶17} Appellant complains that the Trooper did not have probable cause to stop Appellant because the Trooper testified that he was unsure if a stop line existed at the stop sign, Tr. 25-26; that Appellant came to a complete stop eight to ten feet past the stop sign, Tr. 29; and that there is no language in the Revised Code that requires a driver to stop at the stop sign, Tr. 31. Citing *Grossman v. Andros,* 135 Ohio App.3d 712, 716, 735 N.E.2d 499 (8th Dist.1999), Appellant argues that the statute requires substantial rather than strict or literal compliance. The purpose of the statute, Appellant argues, is to allow a driver to stop and observe an intersection to

allow the driver to yield to any vehicle having the right of way. *Grossman,* however, is a civil negligence action and does not discuss probable cause. The standard urged by Appellant addresses proof of a violation, not probable cause. Appellant asserts that the DVD demonstrates that Appellant posed no risk to any other driver at the intersection and that, after stopping, he safely proceeded through the intersection. Appellant notes that he did come to a complete stop prior to making a left hand turn. A review of the DVD suggests it is not clear enough to contradict the uncontradicted testimony of Trooper Hise.

{¶18} Whether or not a defendant could be convicted of a failure to obey a traffic control device is not determinative of whether a law enforcement officer acted reasonably in stopping the defendant. *Godwin* at ¶ 15. The existence of probable cause depends on whether an objectively reasonable police officer would believe that Appellant's conduct constituted a traffic violation based on the totality of the circumstances known to the officer at the time of the stop. *Godwin* at ¶ 16. Here, Trooper Hise testified consistently that Appellant did not come to a complete stop until he had entered the intersection. Tr. 5-6, 27, 28, 33. Trooper Hise testified that if he were a commercial truck turning north on to Route 7, he would have hit Appellant's car. Tr. 28. Trooper Hise testified that "if I was a commercial truck making that turn * * * I would not have made that turn with that car in the way". Tr. 33. This constitutes probable cause. A reasonable police officer could conclude that Appellant's vehicle had at least partially entered the intersection. This is sufficient evidence for Trooper Hise to believe Appellant had violated R.C. 4511.12(A). Thus, the Trooper here, based on his observations, had probable cause (and, therefore, a reasonable and articulable suspicion) to stop Appellant.

{¶19} Appellant's first assignment of error is without merit and is overruled.

{¶20} Appellant's second assignment of error states:

> THE TRIAL COURT ERRED IN NOT SUPPRESSING THE RESULTS OF THE FIELD SOBRIETY TESTS.

{¶21} Appellant, relying upon this court's decision in *State v. Bish,* 191 Ohio App.3d 661, 2010-Ohio-6604, 947 N.E.2d 257, argues that the trial court erred when it denied his motion to suppress the results of the field sobriety tests administered by Trooper Hise, i.e., the horizontal gaze nystagmus test, the one leg stand test, and the walk and turn test. Appellant complains that the State failed to present any evidence as to the National Highway Traffic Safety Manual ("NHTSA") standards or any other accepted testing standards, contrary to *Bish* and the dictates of R.C. 4511.19(D)(4)(b). Appellant notes that the State had the opportunity to present this evidence during the presentation of its case at the suppression hearing, after the cross examination of Trooper Hise at the suppression hearing, and in response to Appellant's Written Summation Regarding Suppression Hearing filed after the suppression hearing. The State, according to Appellant, failed to present evidence of any such standards on all three occasions. Thus, Appellant asserts, the results of these three tests should have been suppressed.

{¶22} However, the State claims that Appellant's cross examination of Trooper Hise cured this problem. The State argues that Appellant "went on to elicit details on the HGN [horizontal gaze nystagmus] that the court considered along with the totality of the circumstances in finding the Trooper had probable cause to arrest Appellant for OVI." (Reply Brief of Plaintiff-Appellee, p. 10). However, the State represents that Appellant "only mentioned that the HGN test was not done correctly and the PBT [portable breath test] should not be allowed as evidence of probable cause." (Reply Brief of Plaintiff-Appellee, p. 9). This is inaccurate. Appellant challenged all three field sobriety tests in his motion collectively, but then also addressed the HGN and portable breath tests individually. (Motion to Dismiss, Motion to Suppress, and Motion in *Limine*, Sections "C", "D", and "E", pp. 4-5). Appellant again challenges all three tests here. The State, while admitting that it did not present evidence of any standards, nevertheless argues that at the motion hearing "the trial court heard, the standards at the motion hearing and also testimony that the Trooper performed them correctly." (Reply Brief of Plaintiff-Appellee, p. 10). Although

Appellant also challenged the PBT in his motion before the trial court, he does not raise that issue on appeal.

{¶23} The standard of review in an appeal regarding the suppression of evidence is two-fold. *State v. Phillips,* 7th Dist. No. 08 MO 0006, 2010-Ohio-1547, ¶ 7, citing *State v. Dabney*, 7th Dist. No. 02 BE 0031, 2003-Ohio-5141, at ¶ 9. The trial court is in the best position to evaluate witness credibility. Therefore, if the trial court's findings of fact are supported by competent, credible evidence, this court must uphold the trial court's findings of fact. *Phillips* at ¶ 7; *State v. Bish* at ¶ 10; *State v. Burnside,* 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8, citing *State v. Mills,* 62 Ohio St.3d 357, 366, 582 N.E.2d 972 (1992). Accepting these facts as true, this court must determine as a matter of law if the trial court met the applicable legal standard. *Id.*

{¶24} R.C. 4511.19(D)(4)(b) provides that the results of a field sobriety test are admissible:

> * * *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* * *.

{¶25} Before the State is required to make such a showing, a defendant's suppression motion must state the grounds for suppression with specificity and particularity. *Bish* at ¶ 16, citing *Phillips* and *State v. Kale,* 7th Dist. No. 08 CO 0047, 2009-Ohio-6530. Here, the State is apparently satisfied that Appellant's motion met this requirement. The State did not complain at the hearing on Appellant's motion that Appellant had failed to meet this standard and, as Appellant notes, the State, upon questioning by the trial court at the beginning of the hearing on the motion, affirmatively stated that it had sufficient notice of the basis for Appellant's allegations

in his motion and was ready to proceed. Tr. 3. Thus, it was incumbent upon the State to produce some evidence of the NHTSA or other acceptable testing standards. R.C. 4511.19(D)(4)(b); *Bish* at ¶ 27. This could be done through testimony or the introduction of the NHTSA or other similar manual. *Id.*

{¶26} The State admits it did not meet this burden in the presentation of its case at the hearing on Appellant's motion. (Reply Brief of Plaintiff-Appellee, p. 10). Instead, the State argues, this was effectively done by Appellant through his cross examination of Trooper Hise.

{¶27} This argument, however, is inaccurate. At no time during the hearing on Appellant's motion is there any mention of the NHTSA manual or the requirements contained in that manual. Neither is there the identification or mention of any other standards by which the tests performed by Trooper Hise might be evaluated. Although the State is correct that cross examination was conducted as to the performance of the tests, and what Trooper Hise believed the results had to be in order for one to conclude that there was some level of impairment, at no time was there testimony about what criteria, standards, or tests were being used.

{¶28} Trooper Hise testified that he had received "Advanced Roadside Impaired Driver Enforcement", was certified as a "Drug Recognition Expert", had made hundreds of OVI stops, and was trained to perform field sobriety tests. Tr. 7-8, 16. There was cross examination with regard to the HGN. Tr. 34-49. With regard to the HGN, Trooper Hise testified that his test resulted in six clues, three for each eye, Tr. 8; that he performed a series of three tests, Tr. 34; that he first checked for equal tracking and pupil size, Tr. 34-35; then for lack of a smooth pursuit, Tr. 36-39; the maximum deviation, Tr. 39-42; and the onset of nystagmus prior to 45 degrees, Tr. 42-47. The six clues he found, according to Trooper Hise, indicated an impairment. Similarly, Appellant cross examined Trooper Hise about the one leg stand test. Tr. 49-56. Trooper Hise indicated he used his watch to time this test, Tr. 50-51; that Appellant had trouble following instructions, Tr. 52-54; that Appellant swayed, his left hand came out more than six inches from his side, and that he put his foot down, Tr.

54-55; and, although viewing Appellant's feet was important, he failed to record this test on video, Tr. 50, 55. Trooper Hise indicated he was looking for a minimum of two clues from this test and found three. Tr. 8-9, 67. Appellant also conducted cross examination regarding the administration of the walk and turn test. Tr. 56-66. This test was recorded on video. Tr. 56. Trooper Hise testified that Appellant stumbled, Tr. 59; that Appellant, on step three, did not touch his heel to toe and did not stand on the imaginary line, Tr. 60; and that he found four clues from the walk and turn test which was an indication that Appellant may have been under the influence, Tr. 66. Despite this cross examination, Trooper Hise, the only witness, never mentioned the NHTSA or its manual. The State never indicated that it was using the NHTSA standards. The State never mentioned or identified any other standards. After the hearing, Appellant filed a summation, again arguing that no standards had been identified or explained. Appellant attached to its summation a copy of this court's decision in *Bish.* The trial court was never asked to, nor did it indicate that it was, taking judicial notice of the NHTSA standards or manual, or any other standards. Nonetheless, the trial court denied Appellant's motion to suppress, stating:

> Testimony and evidence provided a traffic violation had occurred and that there was substantial compliance with NHTSA Rules regarding filed [sic] sobriety tests.

{¶29} In *Bish,* this court held that having a trooper testify about how the trooper administered various tests is not sufficient. *Bish* at ¶ 28. Based on such evidence alone, it would be impossible to determine if the tests were performed in substantial compliance with the NHTSA or any other set of standards. *Id.* The State must produce some evidence by way of testimony or exhibits as to what the standards are. *Id.* at ¶ 31; see also, e.g., *State v. Smith,* 7th Dist. No. 13 CO 0010, 2014-Ohio-2933; *State v. Holzapfel,* 2nd Dist. No. 2013-CA-17, 2014-Ohio-4251; *State v. Kitzler,* 3rd Dist. No. 16-11-03, 2011-Ohio-5444; and *Cleveland v. Krivich,* 8th Dist. No. 103810, 2016-Ohio-3072.

{¶30} Here, despite the State's argument, the trial court's judgment referring to the NHTSA standards, and the testimony of Trooper Hise relative to what clues he was looking for and what clues he found, there was no evidence that the NHTSA standards or any other standards were the standards that were being used.

{¶31} Appellant's second assignment of error has merit and is sustained.

{¶32} Appellant's third assignment of error states:

> THE TRIAL COURT ERRED IN FINDING THAT THE ARRESTING OFFICER HAD PROBABLE CAUSE TO PLACE THE DEFENDANT-APPELLANT UNDER ARREST FOR A VIOLATION OF R.C. 4511.19, OVI.

{¶33} The standard for determining if there was probable cause to justify an arrest for OVI is whether, at the time of arrest, the trooper had sufficient information derived from a reasonably trustworthy source of facts to cause a prudent person to believe the suspect was driving under the influence. *State v. Homan,* 89 Ohio St.3d 421,427, 2000-Ohio-212, 732 N.E.2d 952 (superseded by statute on other grounds as stated in R.C. 4511.19(D)(4)(b).) The determination is based on the totality of the facts and circumstances surrounding the arrest. *Id.*

{¶34} Appellant argues that there were insufficient facts upon which a prudent person could believe Appellant was driving under the influence. Appellant complains that if the field sobriety test results are suppressed, all that is left to consider is a questionable traffic violation and the appearance of someone who has been allegedly ingesting alcohol. Citing *State v. Taylor,* 3 Ohio App.3d 197, 444 N.E.2d 481 (1st Dist. 1981), Appellant asserts that having the appearance of being intoxicated is not enough to support a finding of probable cause. Appellant claims that Trooper Hise admitted that he was not of the opinion that he had probable cause to arrest Appellant until he considered the results of the field sobriety tests. Appellant notes that Trooper Hise could not state whether the odor of alcohol was strong, moderate, or just an odor and that his testimony that Appellant's speech was slurred is not

supported by the video.

{¶35} The State responds arguing that the one leg test results and the walk and turn test results were never challenged and thus should be considered as a part of the totality of the circumstances. This, as discussed under Appellant's second assignment of error, is inaccurate. These tests were challenged in the trial court and are challenged here. In addition, the State argues that Trooper Hise's observations about Appellant's demeanor, bloodshot and glassy eyes, odor of alcohol, slurred speech, slow and delayed reactions, traffic violation, lack of coordination, and inability to follow instructions, all support the conclusion that a reasonably prudent person would believe that Appellant was under the influence.

{¶36} Even if the field sobriety tests are suppressed, an officer's observations of a suspect while performing those tests can be considered when evaluating whether there is probable cause to arrest the suspect for OVI. *Bish* at ¶ 47; *Krivich* at ¶ 27. In *Homan,* the Ohio Supreme Court concluded that the defendant's erratic driving, her red and glassy eyes, the smell of alcohol on her breath, and her admission to consuming alcoholic beverages, amply supported the trooper's decision to place her under arrest, even where no field sobriety tests were performed or where the results were suppressed. *Homan* at 427. Contrary to Appellant's assertion, Trooper Hise did not testify that he was "not of the opinion" that he had probable cause until he considered the field sobriety tests. (Brief of Defendant-appellant, p. 12). Rather, Trooper Hise testified that his opinion was based on the totality of the circumstances, i.e., Appellant's physical condition, the field sobriety tests, "everything." Tr. 17. Among the factors that have been held to be indications that established probable cause for arrest are: erratic driving, driving left of center at least three times, stopping at an intersection for a prolonged period of time, smell of an alcoholic beverage on the person or breath, failure to notice police car flashers, slurred speech, bloodshot eyes, and impairment of physical abilities. *Phillips* at ¶ 28.

{¶37} Here, Trooper Hise testified that Appellant had an odor of an alcoholic beverage, he admitted drinking one beer earlier after denying that he had consumed

any alcohol, his eyes were noticeably bloodshot and glassy, he had difficulty pronouncing words, his speech was slurred and garbled, his actions were slow and delayed, and Trooper Hise had to point out to him where his registration was. Tr. 6-7. Trooper Hise's observations of Appellant as he performed the field sobriety tests are admissible to show probable cause even if the results of the tests are suppressed. *Bish* at ¶ 52; *Krivich* at ¶ 29. As noted above, the trial court's order refusing to suppress the PBT, argued in Appellant's motion before the trial court, is not challenged here. Trooper Hise had been a highway patrolman for 12 years. Tr. 5. He had received training in advanced roadside impaired driver enforcement, was certified as a "Drug Recognition Expert", and had made hundreds of OVI arrests. Tr. 7-8, 16. Again, Appellant argues that the video does not support the uncontradicted testimony of Trooper Hise. The copy of the video reviewed is not of sufficient quality to conclude that Trooper Hise's testimony is incorrect. It should be noted that the trial court also viewed the video during the suppression hearing and parts of it are discussed during Trooper Hise's testimony. The video does not establish that the trial court abused its discretion in this regard.

{¶38} Appellant's third assignment of error is without merit and is overruled.

{¶39} Appellant's first and third assignments of error are without merit and are overruled. Appellant's second assignment of error is with merit and is sustained. The judgment of the trial court is reversed as to the results of the field sobriety tests and the motion to suppress is hereby granted only as to the results of these tests. Appellant's conviction and sentence are vacated. This case is remanded to the trial court for further proceedings according to law and consistent with this Court's opinion.

Waite, J., concurs.

DeGenaro, J., concurs.