[Cite as *State v. Slates*, 2011-Ohio-295.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. CHRISTOPHER MICHAEL SLATES Appellant	C.A. No. 25019 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 08 12 4045

DECISION AND JOURNAL ENTRY

Dated: January 26, 2011

CARR, Judge.

{¶1} Appellant, Christopher Slates, appeals the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} On December 19, 2008, Slates was indicted on one count of operating under the influence of alcohol or drugs in violation of R.C. 4511.19(A)(1)(a), a felony of the fourth degree; one count of operating under the influence of alcohol or drugs in violation of R.C. 4511.19(A)(2), a felony of the fourth degree; one count of obstructing official business in violation of R.C. 2921.31(A), a misdemeanor of the second degree; one lanes of travel/weaving violation pursuant to R.C. 4511.25, a misdemeanor of the third degree; and one headlights violation pursuant to R.C. 4513.03, a minor misdemeanor. Slates pleaded not guilty to the charges.

{¶3} On February 18, 2009, Slates filed a motion to suppress and/or dismiss. The State responded in opposition. The trial court held a hearing on the motion and subsequently denied the motion to suppress, further finding R.C 4511.191(A)(5)(b) constitutional. The statute authorizes the police to "employ whatever reasonable means are necessary" to ensure that a person suspected of operating under the influence, and who would be required to be sentenced as a repeat offender, submits to a blood alcohol test.

{¶4} Subsequently, pursuant to a plea agreement, Slates withdrew his prior plea of not guilty and entered a plea of no contest to the two counts of operating under the influence of alcohol or drugs. The State dismissed the remaining charges. The trial court sentenced him to 18 months of incarceration on each count, but suspended the sentence upon the condition that Slates complete two years of community control. Slates filed a timely appeal, raising five assignments of error for review. We rearrange some assignments of error to facilitate review.

II.

ASSIGNMENT OF ERROR I

> "APPELLANT'S MOTION TO SUPPRESS THE RESULTS OF A BLOOD/ALCOHOL TEST SHOULD HAVE BEEN SUSTAINED BECAUSE THE STATE FAILED TO PROVE THAT APPELLANT'S BLOOD WAS TESTED IN ACCORDANCE WITH THE REQUIREMENTS OF OHIO ADM. CODE 3701-53-05(C)."

{¶5} Slates argues that the trial court erred by denying his motion to suppress the results of his blood alcohol test because the State failed to substantially comply with the requirements of OAC 3701-53-05 in several respects. This Court disagrees.

{¶6} A motion to suppress presents a mixed question of law and fact:

> "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." (Internal citations omitted.) *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶8.

{¶7} OAC 3710-53-05 sets forth the requirements relevant to the collection and handling of blood specimens and provides:

> "(A) All samples shall be collected in accordance with section 4511.19, or section 1547.11 of the Revised Code, as applicable.
>
> "(B) When collecting a blood sample, an aqueous solution of a non-volatile antiseptic shall be used on the skin. No alcohols shall be used as a skin antiseptic.
>
> "(C) Blood shall be drawn with a sterile dry needle into a vacuum container with a solid anticoagulant, or according to the laboratory protocol as written in the laboratory procedure manual based on the type of specimen being tested.
>
> "* * *
>
> "(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 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."

{¶8} The Ohio Supreme Court has held that the State must demonstrate that it substantially complied with the Department of Health regulations codified in the Ohio Administrative Code when a criminal defendant has challenged the admissibility of alcohol-testing results. *Burnside* at ¶27. Recognizing that strict compliance is not always realistically or humanly possible, the high court rejected the requirement for strict compliance, although limiting

the substantial compliance standard "to excusing only errors that are clearly de minimis." Id. at ¶34.

{¶9} Slates first argues that the State failed to demonstrate substantial compliance with OAC 3701-53-05(B) because there was no evidence that the site of the blood draw was prepared by an application of "an aqueous solution of a non-volatile antiseptic."

{¶10} "The defendant must first challenge the validity of the alcohol test by way of a pretrial motion to suppress; failure to file such a motion 'waives the requirement on the state to lay a foundation for the admissibility of the test results.'" *Burnside* at ¶24, quoting *State v. French* (1995), 72 Ohio St.3d 446, 451. The motion to suppress must notify the State and the trial court of the issues to be determined by setting forth with sufficient particularity both the legal and factual bases for inadmissibility. *State v. Shindler* (1994), 70 Ohio St.3d 54; see, also, *State v. Price*, 11th Dist. No. 2007-G-2785, 2008-Ohio-1134, at ¶22; *State v. Nicholson*, 12th Dist. No. CA2003-10-106, 2004-Ohio-6666, at ¶9. The Twelfth District Court of Appeals has clarified:

> "in order to require the state to respond specifically and particularly to issues raised in a motion, an accused must raise issues that can be supported by facts, either known or discovered, that are specific to the issues raised. Unless an accused, either through discovery or cross-examination at the hearing, points to facts to support the allegations that specific health regulations have been violated in some specific way, the burden on the state to show substantial compliance with those regulations remains general and slight." *State v. Embry*, 12th Dist. No. CA2003-11-110, 2004-Ohio-6324, at ¶29.

Specific evidence is only required where the defendant has raised the issue with specificity. *State v. Johnson* (2000), 137 Ohio App.3d 847, 851. This Court has recognized this body of law. See *State v. Perez*, 9th Dist. No. 23419, 2007-Ohio-2897, at ¶24-5 (Carr, P.J., dissenting). The majority declined to apply an analysis under this line of case law, however, because the record indicated that the State was fully aware of the specific bases on which the defendant sought to

suppress the results of the blood alcohol test, as evidenced by the State's own explanation of those bases. Id. at ¶17.

{¶11} In the motion to suppress, Slates challenged the admissibility of the blood alcohol test, in part, by questioning "[w]hether or not the appropriate procedures were followed in connection with the collection and handling of Defendant's blood/urine sample in accordance with OAC [] 3701-53-05(A), (B), (C), (E), and (F)[.]" He failed to set forth any factual basis to support this issue. Challenging the admissibility of his urine sample, where there is nothing in the record to demonstrate that he provided a urine sample, indicates that Slates' bare bones recitation of the issue was nothing more than a boilerplate challenge which did not notify the State with sufficient particularity of the specific evidence it was obligated to present. The State, therefore, needed only to demonstrate, in general terms, that it substantially complied with the regulations. *Columbus v. Aleshire*, 10th Dist. No. 09AP-104, 2010-Ohio-2773, at ¶32.

{¶12} At the hearing, Todd Doolittle, RN, testified that he conducted the draw of Slates' blood at Akron General Medical Center. He testified that, prior to withdrawing Slates' blood, he prepared the site with povidone iodine, which he described as a non-alcohol cleanser, the same type of preparation used prior to surgeries. Nurse Doolittle further testified that he understands the importance of preparing the site for a forensic blood draw to avoid contamination. On cross-examination, Slates failed to "point[] to facts to support the allegations that specific health regulations have been violated in some specific way," thereby retaining to the State a "general and slight" burden to establish substantial compliance. See *Embry* at ¶29. Because Nurse Doolittle testified that he used a non-alcohol cleanser to swab the site, the trial court did not err in concluding that the State substantially complied with the requirements of OAC 3701-53-

05(B). See *State v. Hutson*, 1st Dist. Nos. C-060274, C-060275, C-060276, 2007-Ohio-1178, at ¶13.

{¶13} Second, Slates argues that the State failed to demonstrate substantial compliance with OAC 3701-53-05(C) because there was no evidence that his blood was drawn with a "dry" needle into a vacuum container with a "solid anticoagulant."

{¶14} Nurse Doolittle testified that he used a brand new, sterile butterfly needle that he removed from its package. In regard to the vial, he testified that all vials are vacuum tubes, although the medium may differ. Officer Dan Gump of the Akron Police Department ("APD") testified that he provided Nurse Doolittle with the blood vials and test kit for the blood draw. Steven Perch, a toxicologist with the Summit County Medical Examiners Office, testified that he performs the analysis on blood alcohol samples for the APD and that he did so in regard to Slates' blood sample. Mr. Perch testified that he has two director's permits through the Ohio Department of Health to operate a forensic laboratory. He testified that he provides the blood draw test kits to the APD and that he puts the kits together to ensure compliance with state requirements. Although there was no specific testimony regarding an anticoagulant, a vial in a kit which comports to the OAC requirements would necessarily contain an anticoagulant. Based on the above testimony, the trial court did not err in concluding that the State substantially complied with the requirements of OAC 3701-53-05(C).

{¶15} Slates next argues that the State failed to demonstrate substantial compliance with OAC 3701-53-05(E) because the vials were not properly labeled or sealed.

{¶16} Slates concedes that one of the two vials' labels contains the data required. The State presented photographs of the two vials of Slates' blood. On one vial, the label is unrolled from the vial, exposing in one view all the required information. The label remains wrapped

around the other vial, limiting the view of the information in any given photograph. The series of photographs, however, shows the label from multiple perspectives and demonstrates that it contains the same information as the vial which Slates concedes complies with code requirements. In addition, Officer Gump testified that he labeled both vials with the date and time of collection, the defendant's name, and the name of the nurse who collected the sample.

{¶17} Mr. Perch testified that the vials of Slates' blood appeared to be from a kit that he provided to the APD for this purpose and that the vials complied with code requirements. He testified that the samples did not appear to have been tampered with in any way. Slates argues that it is immaterial whether or not the analyst detected tampering. Rather, he asserts that the issue is whether the vials were sealed in a manner that tampering can be detected. In a case where the analyst testified that he provided the kit and vials, and that they complied with the OAC, Slates raises a distinction without a difference. Being aware of the OAC requirements, and having provided all the items necessary to comply with the collection and handling of blood specimens, Mr. Perch's testimony that he did not detect any tampering demonstrates that the State substantially complied with the sealing requirement. In addition, the photograph of the vials indicates that the vials were sealed with evidence tape that covered the stoppers and most of the vial. The information labels were then wrapped around the evidence tape. Based on this evidence, the trial court did not err by concluding that the State substantially complied with the requirements of OAC 3701-53-05(E). Slates' first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> "THE STATE FAILED TO PROVE THAT THE NURSE WHO WITHDREW APPELLANT'S BLOOD SAMPLE, NOR AKRON GENERAL HOSPITAL, WERE POSSESSED OF A PERMIT FROM THE OHIO DIRECTOR OF HEALTH AS REQUIRED BY OHIO ADM. CODE 3701-53-09." (sic)

{¶18} Slates argues that the State failed to prove that Nurse Doolittle and Akron General Medical Center had permits required for laboratory directors and technicians pursuant to OAC 3701-53-09. This Court disagrees.

{¶19} Although he does not fully develop his argument, this Court assumes that Slates challenges the trial court's denial of his motion to suppress on the basis of a lack of substantial compliance with OAC 3701-53-09. We have previously set forth the standard of review applicable to such a challenge.

{¶20} Slates misconstrues the scope of the applicability of OAC 3701-53-09. Neither Nurse Doolittle nor Akron General Medical Center had a role in analyzing Slates' blood specimen. Accordingly, there was no requirement that the State prove that either individual was possessed of the type of permit addressed in the code provision. The individual in this case who was mandated to possess such a permit was the toxicologist who testified that he has two Ohio Department of Health permits to operate a forensic laboratory. Slates' second assignment of error is overruled.

ASSIGNMENT OF ERROR V

> "THE OFFICER DID NOT HAVE PROBABLE CAUSE TO ARREST THE APPELLANT FOR OVI AND ALL STATEMENTS AND PHYSICAL EVIDENCE SEIZED THEREAFTER ARE INADMISSIBLE."

{¶21} Slates argues that the trial court erred in denying his motion to suppress because the officer did not have probable cause to arrest him for operating while under the influence. Specifically, Slates argues that the sole field sobriety test was not conducted in substantial compliance with the National Highway Traffic Safety Administration instructions and that the officer's remaining observations were insufficient to constitute probable cause to arrest. This Court disagrees.

{¶22} We have previously set out the standard of review relevant to the trial court's ruling on a motion to suppress. Moreover, "this Court reviews a probable cause determination de novo." *State v. Sunday*, 9th Dist. No. 22917, 2006-Ohio-2984, at ¶28, citing *State v. Salas*, 9th Dist. No. 21891, 2004-Ohio-6274, at ¶17.

{¶23} As a preliminary matter, we note that Slates does not challenge the propriety of the initial traffic stop. This Court has repeatedly recognized that "[a]n officer may stop a vehicle to investigate a suspected violation of a traffic law." *Sunday* at ¶29, quoting *Akron v. Tomko* (Nov. 3, 1999), 9th Dist. No. 19253. Slates does not dispute that Officer Gump stopped him for driving without headlights. Accordingly, the initial traffic stop was not improper.

{¶24} Moreover, a police officer does not need probable cause to conduct a field sobriety test; rather, he must simply have a reasonable suspicion of criminal activity. *Sunday* at ¶30, citing *Tomko*, supra. "[R]easonable suspicion exists if an officer can point to specific and articulable facts indicating that a driver may be committing a criminal act." *State v. Osburn*, 9th Dist. No. 07CA0054, 2008-Ohio-3051, at ¶9, quoting *Wadsworth v. Engler* (Dec. 15, 1999), 9th Dist. No. 2844-M.

{¶25} Officer Gump stopped Slates' vehicle at 2:52 a.m. after observing his vehicle traveling without headlights on, straddling the lane divider between Interstates 76 East and 77 South, and traversing the gore section of the highway at the last second to enter 77 South. The officer testified that Slates finally stopped on the ramp after an excessively long time and turned on his hazard lights. He testified that, based on his training and experience, such a manner of driving and pulling over was consistent with the actions of someone driving while under the influence. Officer Gump testified that he smelled alcohol emanating from Slates' vehicle and that Slates admitted to having "a few" drinks that evening. The officer testified that Slates'

speech was slurred and he repeatedly asked the same questions. He testified that, based on these factors, he decided to administer a field sobriety test, and Slates agreed to participate. Officer Gump testified that he administered only the HGN test because the terrain conditions made the administration of the walk-and-turn and one-leg stand tests both unsafe and unfair to the suspect. As in *Sunday*, this Court concludes that this combination of factors, including the late hour, Slates' indecisive driving, the odor of alcohol, Slates' slurred speech, repetitive questions, and his admission that he had had multiple alcoholic beverages that night, was "sufficient to establish a reasonable suspicion in the mind of an experienced police officer to detain an individual pending further investigation into the possibility the individual was driving while under the influence." *Sunday* at ¶31.

{¶26} Before an officer may effectuate a warrantless arrest, however, he must have probable cause that the suspect is engaging in criminal activity. *State v. McGinty*, 9th Dist. No. 08CA0039-M, 2009-Ohio-994, at ¶11. An officer has probable cause to arrest a person for driving under the influence of alcohol "if, at the moment of the arrest, the totality of the facts and circumstances within the officer's knowledge and of which he had reasonably trustworthy information were sufficient to warrant a prudent person in believing that the suspect had violated R.C. 4511.19." *State v. Kurjian*, 9th Dist. No. 06CA0010-M, 2006-Ohio-6669, at ¶17, quoting *In re V.S.*, 9th Dist. No. 22632, 2005-Ohio-6324, at ¶13.

{¶27} Slates' argument on appeal is that, if this Court concludes that the field sobriety test was not admissible for purposes of establishing probable cause, then the State has failed to meet its burden of proving that, under a totality of the facts and circumstances as they existed at the time of the arrest, Officer Gump had probable cause to arrest him without a warrant. In effect, Slates asserts that only the results of a field sobriety test, administered in substantial

compliance with standardized procedures, can support probable cause to arrest a suspect for driving under the influence of alcohol. He cites *State v. Derov*, 176 Ohio App.3d 43, 2008-Ohio-1672, out of the Seventh District, in support. The *Derov* court, however, concluded that the officer's failure to administer the field sobriety tests in substantial compliance with the NHTSA instructions, coupled with the lack of any evidence that the suspect was impaired, negated probable cause for arrest. Id. at ¶25-27. In *Derov*, while the suspect had red, glossy eyes and admitted to drinking one beer, he had not been driving erratically, did not have slurred speech, and had no trouble walking. Accordingly, Slates' reliance on *Derov* is misplaced.

{¶28} In this case, Officer Gump testified regarding his administration of the HGN test, which mirrored the requirements as set forth in the NHTSA manual. Slates asserts that there is no evidence that the entire test took 64 seconds. The NHTSA manual does not set forth a minimum time for completion of the HGN test. Rather, it sets forth minimum times for execution of the various components of the three phases of the test. Officer Gump's testimony demonstrates that he complied with those time requirements. He testified that he did not, however, know how long it took him to administer the test in its entirety. However, it is axiomatic that, if he spent the minimum requisite amount of time to administer each portion of the test, and administered each portion the required number of times, that he spent the required total minimum amount of time administering the test. Accordingly, the State established that the officer conducted the HGN test in substantial compliance with the prescribed instructions. However, assuming the State failed to establish substantial compliance, the officer still had probable cause to arrest Slates.

{¶29} This Court has stated that the totality of the facts and circumstances can support probable cause for arrest even in the absence of the administration of field sobriety tests.

McGinty at ¶20; see, also, *Kurjian* at ¶18, citing *State v. Homan* (2000), 89 Ohio St.3d 421, 427. In fact, we have held that "the totality of the facts and circumstances can support a finding of probable cause to arrest even when the results of the field sobriety tests must be excluded for lack of compliance to standardized procedures." *Sunday* at ¶32, citing *Akron v. Buchwald*, 9th Dist. No. 21433, 2003-Ohio-5044, at ¶14. Furthermore, "[r]egardless of a challenge to field sobriety tests, an officer may testify regarding his observations made during administration of the tests." *State v. Griffin*, 12th Dist. No. CA2005-05-118, 2006-Ohio-2399, at ¶11, citing *State v. Schmitt*, 101 Ohio St.3d 79, 2004-Ohio-37, at ¶14-15.

{¶30} As in *Sunday*, the totality of the facts and circumstances available to Officer Gump - the late hour, Slates' failure to use headlights in the dark and his failure to concede that his lights were not on, Slates' indecisive driving, the immediate smell of alcohol upon approach, Slates' admission to having had a few alcoholic beverages, his loss of focus and need to ask repetitive questions, and his slurred speech – "were sufficient to warrant a prudent person in believing that the suspect had violated R.C. 4511.19." *Sunday* at ¶33; see, also *In re V.S.* at ¶13. Accordingly, even if Officer Gump did not administer the field sobriety test in substantial compliance with the recognized standards, the totality of the facts and circumstances supports a finding of probable cause to arrest Slates for driving under the influence of alcohol. Slates' fifth assignment of error is overruled.

ASSIGNMENT OF ERROR IV

"THE BLOOD TEST RESULTS ARE INADMISSIBLE BECAUSE IT WAS NOT WITHDRAWN WITHIN THREE HOURS OF THE VIOLATION."

{¶31} Slates argues that the trial court erred in denying his motion to suppress the results of his blood test because the blood was not drawn within three hours of the violation as required by R.C. 4511.19(D)(1)(b). This Court disagrees.

{¶32} This Court applies the standard of review regarding a ruling on a motion to suppress as enunciated above. Slates cites no authority in support of his argument.

{¶33} OAC 3701-53-05(A) states that "[a]ll [blood] samples shall be collected in accordance with section 4511.19, or section 1547.11 of the Revised Code, as applicable." R.C. 4511.19(D)(1)(b) provides, in pertinent part: "In any criminal prosecution *** for a violation of division (A) or (B) or this section ***, the court may admit evidence on the concentration of alcohol *** in the defendant's *** blood, *** as shown by chemical analysis of the substance withdrawn within three hours of the time of the alleged violation."

{¶34} The Ohio Supreme Court has held that the State need only demonstrate substantial, rather than strict, compliance with the Department of Health regulations as promulgated in the OAC. *State v. Plummer* (1986), 22 Ohio St.3d 292, 294; *Burnside* at ¶27. The high court tempered this standard as follows:

> "To avoid usurping a function that the General Assembly has assigned to the Director of Health, however, we must limit the substantial-compliance standard set forth in *Plummer* to excusing only errors that are clearly de minimis. Consistent with this limitation, we have characterized those errors that are excusable under the substantial-compliance standard as 'minor procedural deviations.'" *Burnside* at ¶34, quoting *State v. Homan* (2000), 89 Ohio St.3d 421, 426.

{¶35} In this case, Slates' blood was drawn three hours and one minute after the time of the alleged violation. Officer Gump testified that Slates initially agreed to submit to a breath test and he was transported to the police station where that test could be performed. Only after Sgt. Swartz calibrated the machine did Slates change his mind and refuse to submit to the breath analysis, thereby implicating the compelled blood draw provisions of R.C. 4511.191(A)(5)(b). Officer Gump testified that Slates refused to submit to the breath analysis at 4:09 a.m., at which time the officer advised him that he could be charged with obstructing official business and Sgt.

Swartz explained that he was subject to a mandatory blood draw. After refusing to submit to a blood test, Slates had to be transported to the hospital emergency room. Officer Gump testified that they arrived at the hospital by 4:20 a.m. At that time, one hour and twenty-eight minutes had elapsed since the time of the alleged violation, leaving one hour and thirty-two minutes in which a medical professional had to complete the blood draw.

{¶36} Nurse Doolittle attempted to draw Slates' blood well within the three-hour time limitation. He testified that Slates, however, was resistant. The nurse testified: "He clearly didn't want it done. It wasn't an extreme amount of resistance, but he wouldn't have let me do it without the officer holding his arm." Officer Gump testified that Slates was moving around, standing up, and walking around to prevent the nurse from being able to safely draw his blood. The officer testified that Slates informed them that he did not want to give a sample of his blood. Sgt. Swartz testified that the nurse suggested moving to another room where Slates could recline and relax. Both officers testified that even in the second room Slates continued to move his hands around, preventing the nurse from drawing his blood. Officer Gump testified that he informed the nurse that the police would not fight anyone to obtain a blood sample. The officer testified that, after Slates' continued lack of cooperation, he placed his hands over both of Slates' wrists and held his hands down, thereby allowing the nurse to finally draw the suspect's blood at 5:53 a.m.

{¶37} This Court concludes that a mere one minute deviation from the three-hour time limit is inherently de minimis. A slight deviation between an officer's watch at the scene of the alleged incident and a hospital clock where the blood is drawn could reasonably skew the documentation of the passage of time one way or the other. A deviation from the standard of what may be mere seconds cannot logically negate substantial compliance with the code

provision. The reasonable purpose of the provision is to ensure that evidence of a suspect's blood alcohol content accurately reflects his condition at the time of the alleged violation, e.g., at a time not too far removed so as to allow either a significant diminishing of the blood alcohol content or the opportunity to ingest other substances which might otherwise affect the accuracy of results during the time relevant to the violation.

{¶38} This Court declines to enunciate an express deviation from the three-hour time limitation which would nevertheless constitute substantial compliance with the code and statute. However, especially in a situation like this one, where the suspect demonstrated a pattern of consenting to procedures then withdrawing his consent, as well as physically struggling to prevent the medical professional from drawing his blood, we conclude that the State should not suffer the consequences of a minute deviation from the standard.

{¶39} Faced with a suspect's resistance, the police are limited to the use of "reasonable means" to ensure the suspect's submission. R.C. 4511.191(A)(5)(b). With little guidance as to what constitutes "reasonable means," it is understandable that the police are loath to use physical force to compel a suspect into submission. It is not unreasonable for the police to decline to leap to the use of physical force to compel a suspect's submission to a blood draw in the hope that such force will not be necessary. Here, the police reasonably attempted to ensure the draw by first agreeing to move Slates to another hospital room where he could recline and become more comfortable. When those less restrictive measures did not work, the police used limited physical force to try to ensure Slates' submission. Had such limited physical force not been sufficient, the police might have applied more restrictive restraint. This Court cannot say that the police were unreasonable in their graduated approach. Nor can we say that a blood draw completed several

minutes later after the application of greater force, if necessary, would have defeated the State's demonstration of substantial compliance.

{¶40} Based on the reasonable purpose of the three-hour time limit to complete a blood draw, a deviation of one minute must be considered per se de minimis. Furthermore, considering the specific facts of this case, Slates' repeated withdrawal of consent and on-going resistance which caused the deviation from the time limitation does not serve to defeat the State's demonstration of substantial compliance. Slates' fourth assignment of error is overruled.

ASSIGNMENT OF ERROR III

> "R.C. []4511.191(A)(5)(B), INSOFAR AS IT AUTHORIZES A NONCONSENSUAL, WARRANTLESS SEARCH, TO EXTRACT A BLOOD DRAW FROM CERTAIN OVI SUSPECTS, IS UNCONSTITUTIONAL."

{¶41} In a case of first impression, Slates argues that the statute authorizing the police to compel a suspect to submit to a blood draw is unconstitutional on its face. This Court disagrees.

{¶42} The Ohio Supreme Court has held:

> "[S]tatutes enjoy a strong presumption of constitutionality. 'An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.' *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, paragraph one of the syllabus. 'A regularly enacted statute of Ohio is presumed to be constitutional and is therefore entitled to the benefit of every presumption in favor of its constitutionality.' Id. at 147. 'That presumption of validity of such legislative enactment cannot be overcome unless it appear[s] that there is a clear conflict between the legislation in question and some particular provision or provisions of the Constitution.' *Xenia v. Schmidt* (1920), 101 Ohio St. 437, paragraph two of the syllabus; *State ex rel. Durbin v. Smith* (1921), 102 Ohio St. 591, 600; *Dickman*, 164 Ohio St. at 147." *State v. Cook* (1998), 83 Ohio St.3d 404, 409.

{¶43} "A party seeking constitutional review of a statute may [either] present a facial challenge to the statute as a whole or challenge the statute as applied to a specific set of facts." *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, at ¶26, citing *Harrold v.*

Collier, 107 Ohio St.3d 44, 2005-Ohio-5334, at ¶37. In this case, Slates argues that R.C. 4511.191(A)(5)(b) violates the Fourth Amendment prohibition against unreasonable searches and seizures by authorizing the non-consensual taking of a suspect's blood without a warrant "irrespective of personal and factual circumstances." Therefore, Slates raises a facial challenge to the statute's constitutionality.

{¶44} It is well established that "a party raising a facial challenge must demonstrate that there is no set of circumstances in which the statute would be valid." *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, at ¶26, citing *Arbino* at ¶26, citing *Harrold* at ¶37, and *United States v. Salerno* (1987), 481 U.S. 739, 745. To succeed on his claim, Slates must demonstrate that the statute would not be valid under any set of circumstances. *Groch* at ¶26, citing *Harrold* at ¶37, and *Salerno*, 481 U.S. at 745. "The fact that a statute might operate unconstitutionally under some plausible set of circumstances is insufficient to render it wholly invalid." *Harrold* at ¶37, and *Salerno*, 481 U.S. at 745.

{¶45} R.C. 4511.191(A)(5)(b) authorizes the police to "employ whatever reasonable means are necessary" to ensure that a person suspected of operating under the influence, and who would be required to be sentenced as repeat offender, submit to a blood alcohol test.

{¶46} Slates cites only one case in support of his argument that statutes which "purport[] to waive a citizen's 4th Amendment rights" against warrantless searches and seizures are unconstitutional. He cites an Eighth District decision, *Cleveland v. Berger* (1993), 91 Ohio App.3d 102, which he asserts holds a city ordinance authorizing the imposition of criminal penalties against property owners who refuse to allow a warrantless search by a housing inspector to be unconstitutional as violative of the Fourth Amendment. Slates, however, misreads the majority holding of that case which concludes that Mr. Berger lacked standing to

challenge the constitutionality of the ordinance. Id. at 107. Slates' argument arises out of a discussion solely by the dissent, which does not constitute viable legal authority.

{¶47} The trial court in this case found the provisions of R.C. 4511.191(A)(5) to be constitutional in reliance on the analyses in *Schmerber v. California* (1966), 384 U.S. 757, and this Court's decision in *State v. Troyer*, 9th Dist. No. 02-CA-0022, 2003-Ohio-536. This Court agrees.

{¶48} In *Schmerber*, the defendant moved to suppress the results of a chemical analysis of his blood which had been drawn at the direction of a police officer after Schmerber's arrest at a hospital following an automobile accident. Schmerber argued that the circumstances of the blood draw violated his constitutional privilege against self-incrimination and rights to due process, counsel, and to be free from unreasonable searches and seizures.

{¶49} The Fourth Amendment to the United States Constitution provides in part that "[t]he right of the people to be secure in their persons *** against unreasonable searches and seizures, shall not be violated[.]" The United States Supreme Court has held:

> "[t]he essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of reasonableness upon the exercise of discretion by government officials, including law enforcement agents, in order to safeguard the privacy and security of individuals against arbitrary invasions[.] Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against the promotion of legitimate governmental interests." (Internal quotations and citations omitted.) *Delaware v. Prouse* (1979), 440 U.S. 648, 653-54.

{¶50} The *Schmerber* court recognized the "overriding function of the Fourth Amendment [] to protect personal privacy and dignity against unwarranted intrusion by the State." Id. at 767. It further recognized that blood testing procedures implicate Fourth Amendment protections. Id. Even within this context, the high court emphasized that the Fourth Amendment does not constrain against all intrusions, however, but rather only those intrusions

which are not justified by the circumstances or which are executed in an improper manner. Id. at 768. As this Court recognized, the *Schmerber* court set forth three criteria to determine the reasonableness of an intrusive search:

> "(1) the government must have a clear indication, rather than a mere chance, that incriminating evidence will be found; (2) there must be a search warrant or exigent circumstances, such as the imminent destruction of evidence; and (3) the method used to extract the evidence must be reasonable and must be performed in a reasonable manner." *Troyer* at ¶13, citing *Schmerber*, 384 U.S. at 770-72.

{¶51} The first prong may be satisfied where the State has established probable cause for the arrest. See *Schmerber*, 384 U.S. at 768-70. As we have already determined, the police officer had probable cause to arrest Slates based on Officer Gump's observations that Slates was driving in the middle of the night without headlights, that he acted indecisively while driving, and that he was overly slow to stop, that his speech was slurred, that an odor of alcohol emanated from the vehicle as the officer approached, as well as Slates' own admission that he had had "a few" drinks that evening. Moreover, Slates does not challenge the first prong of the reasonableness test.

{¶52} Neither does Slates challenge the third prong of the reasonableness test concerning the method used to extract the evidence. Given the commonplace nature of blood draws which "involves virtually no risk, trauma, or pain" for most people, the *Schmerber* court concluded that such a means of extracting evidence is not unreasonable. Id. at 771-72. Moreover, the applicable version of R.C. 4511.19(D)(1)(b) provides additional safeguards to ensure the reasonableness of the method and manner of the intrusion by mandating that the blood sample be drawn only by a "physician, a registered nurse, or a qualified technician, chemist, or phlebotomist."

{¶53} Slates merely challenges the second prong of the test which requires that the intrusion be as a result of a warrant or exigent circumstances. Specifically, he asserts that the statute is unconstitutional because it allows warrantless searches and seizures in the absence of exigent circumstances. He asserts that the three-hour time limit in which blood must be drawn provides a reasonable opportunity in which the police could obtain a warrant. This argument fails in light of Slates' burden to demonstrate that the statute would not be valid under any set of circumstances. See *Groch* at ¶26.

{¶54} R.C. 4511.191(A)(5)(b) permits a compelled blood draw only after a suspect refuses to submit to a chemical test of his blood after both an officer's request that he submit and advice that the officer may use whatever reasonable means necessary to ensure the suspect's submission. After the suspect's refusal to submit to the chemical test, the suspect must necessarily be transported to a location where a physician, registered nurse, or other enumerated qualified professional is available to draw the blood. Accordingly, the police will never have the entire three-hour period in which to obtain a warrant.

{¶55} Moreover, depending on the time of the alleged violation, there most likely would not be enough time to secure a warrant to allow for the blood draw within three hours. Allowing for time to properly prepare the affidavit in support of the warrant, as well as the time necessary to deliver the affidavit to the magistrate, allow for its review, and time to return the warrant to the site where the blood draw will occur, Slates' argument that a warrant could be obtained in any case to allow for the completion of the draw within three hours must fail. In this case, the alleged violation occurred at 2:52 a.m., outside of regular court business hours and at a time when an impartial magistrate would likely be sleeping. In addition, Slates was initially transported to the police station for a breathalyzer test based on his assertion that he would

consent to such a test. Only after the machine was calibrated did he refuse to submit to a breath test, and only then could the police request that he submit to a blood test. This case is a prime example of how a suspect can further reduce the time in which the police might otherwise try to secure a search warrant.

{¶56} On the other hand, the United States Supreme Court has recognized the exigent circumstances underlying the drawing of blood for purposes of chemical analysis in OVI cases. The *Schmerber* court recognized that "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." Id. at 770. Accordingly, time is of the essence where evidence of the charged offense may diminish or be lost completely.

{¶57} In addition, the reasonableness of the intrusion is supported by the legitimate government interest in public safety. The legislature recognizes the inherent danger posed by repeat offenders as evidenced by the elevated offense levels and the allowance for the imposition of harsher penalties for repeated violations of R.C. 4511.19. Accordingly, this Court agrees with the State's argument that the legitimate interest in protecting the public from harm bolsters the reasonable nature of a warrantless blood draw.

{¶58} Slates has failed to meet his burden to establish that there is no set of circumstances in which the statute would be valid. The nature of the search is minimally invasive. The means by which the blood is drawn are safe and virtually painless, particularly in light of the limitations on the types of individuals who may conduct the draw. The statute serves to protect the government's legitimate interest in protecting the public from harm occasioned by individuals with a known propensity for operating a vehicle while under the influence. Accordingly, this Court concludes that R.C. 4511.191(A)(5)(b), which permits compelled blood

draws under limited circumstances, is constitutional. Slates' third assignment of error is overruled.

III.

{¶59} Slates' assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
CONCURS, BUT WRITES SEPARATELY, SAYING:

{¶60} I concur in the majority's judgment. I write separately for two reasons.

{¶61} First, I would elaborate on the distinction between the instant case and the situation in *State v. Perez*, 9th Dist. No. 23419, 2007-Ohio-2897, wherein we declined to hold the State to merely a slight and general burden. In *Perez*, although the defendant's motion did not assert violations of the statute and regulations with specificity, the State informed the court on the record that the defense had notified it as to the specific challenges. Id. at ¶17.

{¶62} In the instant case, however, the assistant prosecutor recited the issues for the trial court's consideration as follows:

> "It's my understanding in going through the defendant's motion, on the original motion, there's three issues. There's reasonable suspicion to stop defendant's vehicle, there was no probable cause to place him under arrest and that there was not substantial compliance with the standardized testing procedures and that there's a blood collection from Akron General Hospital that was not accomplished pursuant to the Ohio Health Regulations or Administrative Code that it was not obtained within three hours of the alleged violation. Those are the issues that are listed in the motion to suppress."

Defense counsel agreed with the State's recitation of the issues and asserted that the memorandum raised two additional issues. The first involved statements made by Slates and the second involved the constitutionality of R.C. 4511.191(A)(5)(b). However, other than the reference to the three-hour requirement which the State addressed at the hearing, Slates did not elaborate on his challenges to the lack of substantial compliance with the statutory and regulatory procedures. Unlike the situation in *Perez*, there is nothing in the record to demonstrate that the State was aware of anything more than Slates' very broad allegation of a lack of substantial compliance with the legal requirements for testing blood or urine samples. Accordingly, I agree with the majority that the State's burden in this case remained general and slight. See *State v.*

Embry, 12th Dist. No. CA2003-11-110, 2004-Ohio-6324, at ¶29. Moreover, I agree that based on the evidence the trial court did not err when it found that the State substantially complied with the requirements of OAC 3701-53-05(E).

{¶63} Second, I am concerned by the method frequently used by the State to prove substantial compliance with the code. As in other cases, the instant case was rife with instances of leading testimony by the State to elicit the bare bones of substantial compliance. Slates, however, has not challenged the State's method of presenting witnesses' testimony on appeal. More troubling was the fractured way in which the State presented the necessary testimony. The organization of the code lends itself nicely to the creation of a checklist of questions which the State could ask the relevant witnesses, thereby ensuring the presentation of the necessary testimony in a coherent and cohesive way. Of concern in this case was the State's hurried approach, for example, accepting a witness' "Uhm-hum" mid-way through a critical question regarding the solution used to prepare Slates' skin prior to the blood draw. However, Slates failed to cross-examine the witness on the issue of the alcohol content, if any, of povidone iodine or to present the testimony of any other witness who could dispute the testimony by the nurse that povidone iodine constitutes a non-alcohol cleanser. Although the better practice would be for the State to develop a protocol by which it ensures the presentation of evidence on every requirement under the code, in this case, the totality of the evidence established substantial compliance with the code. Accordingly, I concur in the judgment of the majority.

BELFANCE, P. J.
DISSENTS, SAYING:

{¶64} I respectfully dissent from the majority's resolution of the first assignment of error. The majority's announcement of a "general and slight" burden to govern the admissibility

of alcohol test results departs from established Supreme Court of Ohio precedent as well as the precedent of this Court.

{¶65} "When a defendant challenges the results of a blood-alcohol test, 'the state must show substantial compliance with R.C. 4511.19(D)(1)[.]'" *State v. Cutlip*, 9th Dist. No. 08CA009353, 2008-Ohio-4999, at ¶8, quoting *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, at paragraph one of the syllabus. This Court has also acknowledged that "[t]he Ohio Supreme Court has adopted 'a burden-shifting procedure to govern the admissibility of alcohol-test results.'" *Cutlip* at ¶10, quoting *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶24. "'The defendant must first challenge the validity of the alcohol test by way of a pretrial motion to suppress[.]'" Id. "'After a defendant challenges the validity of test results in a pretrial motion, the state has the burden to show that the test was administered in substantial compliance with the regulations prescribed by the Director of Health.'" Id. "'Once the state has satisfied this burden and created a presumption of admissibility, the burden then shifts to the defendant to rebut that presumption by demonstrating that he was prejudiced by anything less than strict compliance.'" Id.

{¶66} In *State v. Burnside*, the Supreme Court of Ohio considered the issue of "whether the state substantially complie[d] with the alcohol-testing regulations set forth in the Ohio Administrative Code when it faile[d] to use a solid anticoagulant in a blood test." *Burnside* at ¶1. The state conceded that it had failed to present evidence at the suppression hearing that a solid anticoagulant had been used, but it nonetheless contended that the evidence demonstrated that it had substantially complied with the regulations in the Ohio Administrative Code ("OAC"). Id. at ¶26. In order to resolve that question, the *Burnside* Court examined the parameters of the "substantial compliance" standard.

{¶67} At the outset, the *Burnside* Court recognized a fundamental problem with permitting any judicial determination of admissibility when an alcohol test is not administered in strict compliance with alcohol testing regulations. Id. at ¶¶29-32. Because "the General Assembly instructed the Director of Health--and *not* the judiciary--to ensure the reliability of alcohol-test results[,] a judicial determination of reliability in the face of noncompliance with the regulations is "inconsistent with R.C. 4511.19, which provides that *compliance with the regulations*, rather than a judicial determination as to reliability, is the criterion for admissibility." (Emphasis in original.) Id. at ¶32. Thus, the *Burnside* Court recognized that:

> "[a] court infringes upon the authority of the Director of Health when it holds that the state need not do that which the director has required. Such an infringement places the court in the position of the Director of Health for the precise purpose of second-guessing whether the regulation with which the state has not complied is necessary to ensure the reliability of the alcohol-test results." Id. at ¶33.

{¶68} Notwithstanding the inherent problem with justifying any judicial determination of substantial compliance, the *Burnside* Court also recognized that strict compliance is not always humanly possible. Id at ¶34. However, "[t]o avoid usurping a function that the General Assembly has assigned to the Director of Health" the Court determined that the "substantial-compliance" standard must be limited to excusing errors that are "clearly de minimis[,]" or "minor procedural deviations." (Internal quotations and citations omitted.) Id. With respect to the facts before it, the Court determined that the state's failure to establish the use of a solid anticoagulant was not a de minimis error given that the language of the regulation did not simply advise but rather *demanded* the use of a solid anticoagulant. Id. at ¶36. Hence, the Court concluded that the state had not substantially complied with the alcohol testing regulations. Id.

{¶69} In *State v. Mayl*, the Supreme Court again reaffirmed its view that "substantial compliance" entails the excuse of only minor procedural deviations and it reiterated that "the

Director of Health, and not the judiciary, has been entrusted with ensuring the reliability of blood-alcohol test results through regulations—precisely because the former possesses the scientific expertise that judges do not have." *Mayl* at ¶¶49, 58.

{¶70} This Court followed the analysis of *Burnside* and *Mayl* in *Cutlip*. In *Cutlip*, we acknowledged the burden-shifting procedure described above, as well as the *Burnside* Court's limited parameters of substantial compliance so as not to usurp the statutory directives of the General Assembly. *Cutlip* at ¶¶10-11. Thus, our precedent establishes that if a criminal defendant challenges the admissibility of a blood alcohol test by way of a motion to suppress, the s*tate* has the burden to establish substantial compliance with the administrative rules. Id.; see, also, *State v. Perez*, 9th Dist. No. 23419, 2007-Ohio-2897, at ¶12.

{¶71} Notwithstanding the clear precedent of the Supreme Court of Ohio and this Court, the majority departs from that precedent to hold that where a defendant files what it considers to be a "boilerplate" motion to suppress, the state's burden to establish substantial compliance is transformed to one that is only "general and slight." It is unclear just exactly how the state's burden to establish substantial compliance can be "general and slight." For example, one court reasons "the burden to establish substantial compliance only extends to the level with which the defendant takes issue with the legality of the test. Therefore, when a defendant's motion only raises issues in general terms, the state is only required to demonstrate compliance in general terms." (Internal citation omitted.) *State v. Nicholson*, 12th Dist. No. CA2003-10-106, 2004-Ohio-6666, at ¶10. It is unclear how the state establishes compliance in "general terms," without compromising the requirement that it demonstrate substantial compliance. This is especially so, given that the administrative rules have very specific requirements. Notwithstanding, it is apparent that whatever this standard may be, it represents a departure from the limited

parameters of substantial compliance as described in *Burnside*. As noted above, the central concern of the *Burnside* Court was its recognition that that "the General Assembly instructed the Director of Health-and *not* the judiciary -- to ensure the reliability of alcohol-test results by promulgating regulations precisely because the former possesses the scientific expertise and the latter does not." (Emphasis in original.) *Burnside* at ¶32. Thus, "[a] court infringes upon the authority of the Director of Health when it holds that the state need not do that which the director has required." Id. at ¶33. In my view, the adoption of a "general and slight" burden of proof eviscerates the principals outlined in *Burnside* and sets the stage for excusing errors that are more than de minimis or minor procedural deviations. Instead, this standard invites judges to usurp the function that the General Assembly has assigned to the Director of Health and precipitates inconsistent and conflicting decisions—the very results that the *Burnside* Court sought to avoid.

{¶72} The majority's adoption of a "general and slight" burden is premised upon the notion that if a defendant's motion to suppress is not sufficiently detailed then the state should not be required to demonstrate substantial compliance because it does not have sufficient notice of the specific factual basis for the motion. There is nothing in *Burnside* or subsequent decisions of the Supreme Court of Ohio to suggest that the state's burden to establish substantial compliance should be diluted simply because a criminal defendant files a motion to suppress that sets forth in general terms the basis for the motion. Indeed, the Supreme Court of Ohio has determined that a generalized motion *does* appropriately notify the state of the basis for a motion to suppress. See *State v. Shindler* (1994), 70 Ohio St.3d 54, 56-58.

{¶73} In *State v. Shindler*, the Supreme Court of Ohio considered whether a suppression motion met the requirements of Crim.R. 47 so as to require a hearing on the motion. In *Shindler*,

the defendant filed a suppression motion which contained nine grounds for suppression, including among others, a challenge to the admission of breathalyzer test results because it was not conducted in accordance with the OAC. Id. at 56-57. The motion contained specific allegations relative to the failure to conduct testing in accordance with the OAC and essentially tracked the language of the administrative code.[1] Id. at 56-58. The trial court overruled the motion to suppress without conducting a hearing, concluding that the "shotgun, boilerplate" motion failed to set forth a factual basis to justify an evidentiary hearing. Id. at 55. The court of appeals reversed the trial court, finding that because the motion specifically cited to the statute, regulations and constitutional amendments allegedly violated, the motion gave the prosecutor sufficient notice of the basis of the defendant's challenge. Id. at 55-56.

{¶74} On appeal, the *Shindler* Court agreed with the reasoning of the court of appeals. Id. at 58. The Court acknowledged that the defendant's motion was "a virtual copy" of the sample motion to suppress found in a driving under the influence handbook. Id. at 57. Notwithstanding, the Court unanimously concluded that the defendant's motion specifically cited to "the statutes, regulations and constitutional amendments she alleged were violated, set forth some underlying factual basis to warrant a hearing, and gave the prosecutor and the court sufficient notice of the basis of her challenge.'" Id. at 58. The holding in *Shindler* is consistent with the generalized pleading requirements that are basic to our jurisprudence. It is troubling that in some instances, courts concede that a motion passes muster under *Shindler*, however, they

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[1] For example, the defendant alleged that "[t]he breath testing instrument was not properly surveyed to determine radio frequency interference by two qualified police officers utilizing two radios and surveying from all positions the hand held, mobile, and base radios required by O.A.C. 3701-53-02(C) and Appendix G." *Shindler*, 70 Ohio St.3d at 55.

have paradoxically held that the state's burden is nonetheless "general and slight." See, e.g., *State v. Johnson* (2000), 137 Ohio App.3d 847, 851; *State v. Embry*, 12th Dist. No. CA2003-11-110, 2004-Ohio-6324, at ¶¶14, 26. Relying upon the *Shindler* Court's statement that "'[a] motion to suppress must state its legal and factual bases with sufficient particularity to place the prosecutor and the court on notice of the issues to be decided,'" courts blur the distinction between sufficiency of a motion for purposes of Crim. R. 47 and the burden of proof once the suppression hearing is underway. See, e.g., *State v. Price*, 11th Dist. No. 2007-G-2785, 2008-Ohio-1134, at ¶22, quoting *Nicholson* at ¶9, citing *Shindler*, 70 Ohio St.3d at 58. However, reliance upon *Shindler* for the proposition that the state's *burden of proof* is diminished if a suppression motion is deemed too general is misplaced. *Shindler* merely addresses the degree of specificity required in a suppression motion under Crim.R. 47. *Shindler*, 70 Ohio St.3d at 57-58. The *Shindler* court did not remotely suggest that a state's *burden of proof* to demonstrate substantial compliance is altered if a motion is deemed insufficient under Crim. R. 47.

{¶75} Even if it were appropriate to alter the state's burden of proof upon determination that a suppression motion is not detailed enough, that fact is not present in this case. The majority states that Appellant's "barebones recitation" in his suppression motion was nothing more than a boilerplate challenge and thus the State needed only to demonstrate in general terms that it substantially complied with the OAC. However, Appellant filed a detailed motion to suppress consisting of thirteen pages–a far cry from the more general motion considered and deemed appropriate in *Shindler*. Id. at 54 (quoting the motion to suppress in its entirety). In his suppression motion, the Appellant articulated numerous grounds for the motion and specifically stated that "the blood collected at Akron General Medical Center at the direction of the Akron Police Department was not accomplished pursuant to Ohio Department of Health Regulations

and/or in compliance with the Ohio Administrative Code[.]" Appended to the motion, was a memorandum of law further detailing the Appellant's legal arguments. The State responded to the Appellant's motion to suppress. The State did not question the grounds for the motion, nor request that the Appellant provide additional facts or legal grounds to support the motion. With respect to Appellant's challenge to the admissibility of the blood draw results, the State clearly understood the basis of the motion given that in its response it stated that it would show through its officers "that the blood draw was conducted in compliance with Ohio [Department] of Health Regulations[.]" It is clear that before the suppression hearing, the State understood that it would need to establish its compliance with the blood draw procedures as delineated in the OAC.[2] Thus, in keeping with *Shindler*, the Appellant's motion was more than sufficient to place the State and the trial court on notice of the issues to be decided. Hence, even if it were appropriate to do so, the majority's justification for the reduction of the State's burden of proof to one that is "general and slight" is simply not present in this case.

{¶76} It is evident that appellate courts that have adopted the "general and slight" burden standard for evaluating the state's substantial compliance with the OAC regulations are concerned that criminal defendants are able to employ a "shotgun" approach when filing suppression motions by broadly challenging compliance with each procedure that is conceivably relevant to the matter at hand. However, the solution does not lie in diluting the contours of

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[2] There is a suggestion in the concurring opinion that because prior to the hearing, the parties outlined the issues for the trial court, the State did not have the burden to demonstrate substantial compliance with the blood draw regulations. However, there was no stipulation that the State was relieved of having to demonstrate substantial compliance with respect to all of the blood draw requirements. Indeed, the State's conduct at the hearing evidences its understanding that it was required to demonstrate substantial compliance with the blood draw regulations as it proceeded to present evidence with respect to all of the required regulations.

substantial compliance; rather, it lies in simple pre-hearing discovery procedures that will enable the litigants to sort out disputed facts and legal issues. For example, there is nothing that prevents the state from filing a request seeking more particularized information from the defendant or simply meeting with counsel to exchange information. Furthermore, there is nothing that prevents the trial court from establishing pre-suppression hearing discovery procedures designed to exchange information so that the parties can determine what compliance disputes or questions of law exist. Such a process would mostly likely reduce the hours courts typically expend during suppression hearings.

{¶77} The majority's view also invites inconsistent and conflicting decisions. Trial and appellate courts will be placed in the position of initially evaluating the "sufficiency" of the contents of suppression motions so as to determine whether the motion is deemed too general or boilerplate thereby reducing the state's burden to one that is "general and slight." Of course, the sufficiency of a motion will vary in the eyes of the beholder. In my view, the process of weighing the sufficiency of a suppression motion is not only procedurally problematic but it is contrary to the law.[3]

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[3] In many cases, and as implicitly recognized in *Shindler*, the simple identification of a code section is clearly sufficient to place the state on notice of what is being challenged. For example, Ohio Adm.Code 3701-53-04(D) plainly states that a check must be made when the instrument is either placed into service or returned after repairs. If a criminal defendant challenges compliance in his motion to suppress by detailing the code section, there is no guess-work on behalf of the state as to what facts would be necessary to demonstrate substantial compliance as the grounds for challenge are sufficiently apparent by virtue of the language of the provision itself. It is unclear why the state's burden to demonstrate substantial compliance should be only "general and slight" when the state knows precisely what is being challenged, and there is really nothing more for the movants to add by way of explanation or narrative. One can foresee this issue and others when courts begin to weigh the sufficiency of a suppression motion.

{¶78} With respect to the merits of the Appellant's first assignment of error, I would reverse the decision of the trial court. It is clear that the State failed to present evidence that a solid anticoagulant was used—precisely the same problem the *Burnside* court confronted. *Burnside* at ¶16. The majority reasons that because there was testimony that a toxicologist prepared vial kits that comport with OAC requirements, the vial kit used in the case *must* have contained an anticoagulant. However, speculation that the kit *would have contained* a solid anticoagulant is not evidence that, in this case, a solid anticoagulant *was actually used* and is contrary to the evidentiary standard expressly articulated in *Burnside*. See id. at ¶24 (describing the burden-shifting procedure and substantial compliance). Furthermore, it is apparent that the State, although clearly cognizant of its burden, simply failed to present the evidence it needed to satisfy its burden with respect to the use of a solid anticoagulant. As pointed out in the concurring opinion, the organization of the administrative code itself lends itself nicely to a checklist of questions from which the state could point to its compliance with each required item. In other words, when faced with a suppression motion that challenges compliance with the administrative code, the state knows precisely what it must prove and can plan ahead to ensure that it has all of the required evidence at the hearing. In this case, it is likely that the State's failure to present evidence as to the use of a solid anticoagulant was inadvertent. Whatever the reason for the State's omission, it is clear that it did not demonstrate substantial compliance with the blood draw regulations. Accordingly, as in *Burnside* and *Cutlip*, I would find that the State failed to establish that it complied with the alcohol-testing regulations when it failed to present evidence that a solid anticoagulant was used. See id. at ¶36; *Cutlip* at ¶20.

APPEARANCES:

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