[Cite as *State v. Dye*, 2021-Ohio-3513.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio/City of Bowling Green

Appellee

v.

Joel S. Dye

Appellant

Court of Appeals No. WD-20-041

Trial Court No. 19-TRC-07717

DECISION AND JUDGMENT

Decided: September 30, 2021

* * * * *

Hunter Brown, Bowling Green City Prosecutor, for appellee.

Joseph C. Patituce, Megan M. Patituce, and C. Adam Carro, for appellant.

* * * * *

MAYLE, J.

{¶ 1} Appellant, Joel Dye, appeals the February 18, 2021 judgment of the Bowling Green Municipal Court sentencing him for a misdemeanor conviction of operating a vehicle under the influence of alcohol ("OVI"). For the following reasons, we reverse.

I. Background and Facts

{¶ 2} Early in the morning of October 6, 2019, Dye was parked on the side of Interstate 75 when trooper Christopher Kiefer of the Ohio State Highway Patrol ("OSHP") stopped to investigate. As a result of their interaction, Dye was arrested and charged with operating a vehicle while under the influence of alcohol in violation of R.C. 4511.19(A)(1)(a), a first-degree misdemeanor, and driving with a prohibited breath-alcohol concentration ("BAC") in violation of R.C. 4511.19(A)(1)(d), a first-degree misdemeanor.

{¶ 3} Dye moved to suppress the evidence against him because (1) Kiefer did not have the reasonable suspicion necessary to remove Dye from his vehicle and conduct field sobriety tests; (2) Kiefer did not substantially comply with National Highway Traffic Safety Administration ("NHTSA") standards in conducting the field sobriety tests; (3) Kiefer did not observe any "additional markers of impairment," so he did not have probable cause to arrest Dye; and (4) the Intoxilyzer 8000 breath-testing machine used to test Dye's BAC was not operated in compliance with Ohio Adm.Code 3701-53-04(C) because the dry gas used in the Intoxilyzer was not traceable to National Institute of Standards and Technology ("NIST") standards.

{¶ 4} On March 9, 2020, the trial court held a hearing on Dye's motion to suppress. The city called Kiefer and Frank Nedveski, an Ohio Department of Health ("ODH") inspector for alcohol and drug testing. Dye called paramedic Matthew Bechstein. The following facts were adduced at the hearing.

A. Kiefer's testimony

{¶ 5} Around 4:30 a.m. on October 6, 2019, Kiefer saw a Dodge pickup truck parked on the side of Interstate 75. He pulled in behind the vehicle to investigate, as he is required to do with any disabled vehicle. It was raining at the time, but the rain stopped while Kiefer was interacting with Dye. Kiefer approached the driver—Dye—to offer assistance. He said that he noticed that Dye had "bloodshot and glassy" eyes, but did not notice anything else unusual about him. Kiefer testified that Dye asked if Kiefer could take him to get gas. Kiefer agreed, and had Dye step out of his truck. Kiefer "conducted a consensual pat-down for weapons * * *." While conducting the pat-down and speaking to Dye, Kiefer testified that he "detect[ed] a strong odor of an alcoholic beverage coming from [Dye]." Later, the prosecutor asked, "Would it surprise you if I told you that you noted in the report that you smelled the odor of alcohol when you immediately walked up to the car?" Kiefer responded, "It wouldn't surprise me, but if that's what I wrote down, that's what I wrote down." The city did not use Kiefer's report to refresh his recollection or attempt to admit the report into evidence.

{¶ 6} On cross, Dye played the video recorded by the cameras in Kiefer's cruiser. The video showed that, although Kiefer's microphone was not activated for the first several minutes, when the sound came on, the first question Kiefer asked Dye was something like "How many did you have to drink tonight?"[1] Dye denied drinking.

[1] From the video, it is difficult to determine the exact words Kiefer used when asking Dye if he had been drinking that night. It is clear, however, that Kiefer was inquiring about Dye's alcohol consumption.

According to the video, Dye did not ask Kiefer for a ride to the gas station—rather, Kiefer asked Dye how he wanted to get home and immediately offered to take Dye to a gas station. Dye accepted the offer, and got out of his truck. The video shows Kiefer conducting a pat-down and then escorting Dye to the cruiser. Once Dye was seated in the backseat of the cruiser, Kiefer asked Dye if he had come from somewhere that people were drinking because Kiefer could "smell it coming from the car * * *." Dye said that he was coming from a "college campus," but again denied drinking. Immediately after Dye made this denial, Kiefer asked Dye, "You mind if I check your eyes real quick?" Dye responded "Yeah."

{¶ 7} Kiefer proceeded to conduct three field sobriety tests: the horizontal gaze nystagmus test ("HGN"), the walk-and-turn test, and the one-leg stand test. Kiefer said that he is required to ask about a suspect's general health before conducting field sobriety tests. According to Kiefer, "[a]t some point in the night * * *," Dye told him that he was a diabetic and had insulin in his truck. Kiefer was aware that diabetes can cause physical issues that "emulate the signs of impairment."

{¶ 8} During each test, Kiefer observed multiple signs of impairment, including "distinct and sustained nystagmus at maximum deviation" during the HGN test. Kiefer said that when this indicator is present "the probability of the blood alcohol level being above an 08 is 88% [sic]."

{¶ 9} On cross-examination, Dye's attorney asked Kiefer about his compliance with NHTSA standards while administrating the field sobriety tests, including his

positioning of Dye during the HGN test, the instructions he gave Dye for the HGN test, and Kiefer's decision to conduct the one-leg stand test and walk-and-turn test on a surface that was not dry and non-slippery. Although Kiefer admitted that Dye's field sobriety tests deviated in some respects from the way Kiefer was trained to administer these tests, Kiefer believed that the clues of impairment he saw during Dye's tests were accurate and that Dye "was under the influence of an alcoholic beverage."

{¶ 10} Following the field sobriety tests, Kiefer asked Dye to submit to a portable breathalyzer test, which Dye refused. Kiefer then arrested Dye for OVI and placed him in the back of the cruiser. Kiefer explained that he believed he had probable cause to arrest Dye because Dye was the only person in the truck and had told Kiefer that he was driving, Dye had "bloodshot and glassy eyes," Kiefer noticed "the strong odor of an alcoholic beverage," and because of "all the field sobriety testing[.]" Dye told Kiefer at the time of the arrest that his blood-sugar level might be high, and Kiefer conceded that Dye's behavior could have been affected by "that hyperglycemic state * * *."

{¶ 11} On cross-examination, Kiefer admitted that he "never saw the vehicle in motion[,]" so he did not witness Dye driving erratically. Nor did he see any signs of an accident or damage to Dye's truck. When Kiefer approached Dye's truck and spoke to him, Dye was alert and responsive to Kiefer's questions. He told Kiefer that he had not consumed any alcoholic beverages. Kiefer said that he did not notice the odor of alcohol while Dye was in the truck, nor did he smell any cover-up odors like cigarettes or perfume. Kiefer asked Dye to get out of the truck so that Kiefer could take him to get

some gas. It was not until Dye got out of his truck and Kiefer "got close to him" that Kiefer noticed the smell of alcohol. Kiefer did not recall Dye having any difficulty exiting the truck or seeing Dye lean on the truck or fall when he got out. There were no open containers of alcohol in the truck.

{¶ 12} In addition to noticing the smell of alcohol once Dye was out of the truck, Kiefer said on cross that he first noticed that Dye's eyes were glassy and bloodshot after Dye was out of the truck. He also said that he knew that "NHTSA specifically removed bloodshot glassy eyes from its list of clues of impairment[.]"

{¶ 13} Further, although Kiefer initially said that Dye's "speech was slurred" when Dye's attorney asked if Dye was "speaking incoherently or anything" when Kiefer first spoke to Dye while he was inside the truck, after reviewing the video from his cruiser that showed Dye speaking clearly, Kiefer said that Dye's speech was slurred "[a]t some point of the night, * * *" although Kiefer did not "remember exactly when * * *."

{¶ 14} After arresting Dye, Kiefer took him to the OSHP post near Bowling Green, where Dye took a breath-alcohol test on an Intoxilyzer 8000 breath-testing machine. The test showed that Dye's BAC was .141. As far as Kiefer knew, the Intoxilyzer was working properly that day.

{¶ 15} While at the OSHP post, Dye told Kiefer that he was having some diabetic issues. Kiefer called EMS to check Dye. It is unclear whether Kiefer called EMS before or after Dye took the breath test. He said that the paramedics who responded "checked [Dye's] blood sugar and it was abnormally high," although Kiefer could not remember

the exact reading. He was unsure if blood sugar levels could affect the results of a breath-alcohol test.

B. Nedveski's testimony

{¶ 16} The city's other witness was Frank Nedveski, an ODH inspector. Part of his job included training officers to use the Intoxilyzer 8000, conducting annual certifications of Intoxilyzers, and checking the machines if the dry gas pressure is low or the dry gas canister needs to be replaced.

{¶ 17} On May 22, 2019, Nedveski conducted the annual certification of the Intoxilyzer involved in Dye's case. He said that certification involves seven tests, five with a solution and two with dry gas. The results of each certification test "fell within the tolerance of plus or minus 005[,]" which meant that "the instrument is working perfectly to continue to be used for evidential testing." He also checked to make sure that he could blow into the Intoxilyzer "with no restrictions" and that the instrument would abort a test if there was radio frequency interference. The Intoxilyzer passed both of those checks. There was nothing in the reports from the May 22 certification that indicated to Nedveski that the Intoxilyzer was not working properly.

{¶ 18} Nedveski said that he was familiar with dry gas "[o]nly to install the gas cylinder into the [Intoxilyzer] 8000." Regardless, he explained that dry gas "has ethanol and nitrogen in it and it's made for a value to be tested on an instrument, that it's reading properly[,]" and that the gas "mirrors alcohol." The dry gas is used by the Intoxilyzer for "self checks" before a test subject's first breath sample and after the subject's second

breath sample, to ensure that the instrument is "reading properly." The canister Nedveski used for the May 22 certification was DRYGAZ brand dry gas, which came with a certificate of analysis—city's exhibit D—that shows the composition of the dry gas and describes the gas's metrological traceability.

{¶ 19} Some definitions are necessary for a complete understanding of certain legal issues related to Nedveski's testimony—which involve "metrology," i.e., "the science of weights and measures or of measurement." *Merriam Webster's Collegiate Dictionary* 732 (10th Ed.1996). According to a publication by NIST that was admitted as defendant's exhibit No. 2 at the suppression hearing—"Supplementary Materials related to NIST Policy on Metrological Traceability" ("NIST supplement")—"NMI" means national metrology institute, which is a governmental organization responsible for maintaining a country's standard measurements. *See* National Institute of Standards and Technology, *Supplementary Materials related to NIST Policy on Metrological Traceability* (Sept. 10, 2019), I.C.1. NIST is the NMI for the United States. *Id.* The "Mutual Recognition Arrangement" ("MRA"; referred to in the DRYGAZ certificate of analysis, which was admitted as city's exhibit D at the suppression hearing, as a "mutual recognition agreement") is an agreement among the NMIs of different countries to help establish the degree of equivalence of national measurement standards, provide for mutual recognition of calibration and measurement certificates issued by NMIs, and provide a secure technical foundation for international trade, commerce, and regulation. *Id.* at I.E.1

{¶ 20} The certificate at issue here shows that the "BrAC" value for the ethanol in the DRYGAZ is "0.100" and the "AVERAGE ANALYTICAL VALUE" of the "BrAC" of the ethanol in the DRYGAZ is "0.101." The certificate includes several statements about traceability. First, it states that its "REFERENCE STANDARD" is "N.M.I. TRACEABLE STANDARDS," which it defines as "CERTIFICATION TRACEABLE TO National Metrology Institute Traceable Standards." Under the heading "TRACEABILITY," the certificate has two different statements, one for "Preparation" and one for "Analytical." The "[p]reparation" statement reads "Gas mixtures manufactured with balances calibrated by an ISO 17025 accredited company using NIST traceable weights and meets or exceed the requirements of NIST handbook 44." In contrast, the "[a]nalytical" statement says only that "Analytical Instruments Calibrated Using NMI Traceable Standards." The certificate also notes that "NMI is recognized by NIST through the Mutual Recognition Agreement (CIPM MRA)," but it does not identify the NMI with any more specificity.

{¶ 21} When the prosecutor asked Nedveski how he knew that the dry gas was traceable to NIST, Nedveski replied, "It says it on the report here that it's traceable to the National Metrology Institute tracing standards and that's the standards it uses." Nedveski said that the Intoxilyzer would not have been certified if the dry gas in the machine was not up to ODH standards.

{¶ 22} On cross, Nedveski said that Ohio Adm.Code 3701-53-04 "oversee[s] our instruments[,]" and acknowledged that the code section specifically requires dry gas

traceable to NIST. However, Nedveski said that he does not "question[] the method of the testing that NIST has" when he certifies an Intoxilyzer; he simply checks to ensure that the instrument "reads [the dry gas] within" a tolerance of "plus or minus 005." That is, his certification only checks to make sure that "the tank [was] read by the instrument."

{¶ 23} Throughout cross-examination, Nedveski made it clear that he did not know specifics about the traceability of the dry gas canister that he installed in the Intoxilyzer 8000 at the Bowling Green OSHP post. For example, following a line of questions about traceability, Nedveski said that "as far as going into [NIST traceability] * * * I'm not qualified to go into that." He also said that his job, as it relates to the certificate of analysis that comes with a canister of dry gas, is "to review the value of it and enter that into the [Intoxilyzer] 8000 * * *." Importantly, he said that another ODH employee was a more appropriate witness to testify regarding traceability. According to Nedveski, "this would be more of Gina's expertise to question any of the methods used for traceability. I just accept the tank for the value performance and install into the instrument. * * * [A]s far as the person to question the validity of accurate testing on the dry gas or analytical, you would have to have Gina come in and testify."

{¶ 24} Regardless, Nedveski attempted to answer some of Dye's questions specific to traceability. He first acknowledged that "NMI Traceable Standards" is "what's on the cert form" for the canister of dry gas that he used to certify the Intoxilyzer in May 2019 and that the certificate "has a specification to NMI and other standards, analytical testing." While NMI is not the same entity as NIST, Nedveski believed that

NMI is "one standard that's used to where they're both recognized." He thought that the statement on the certificate of analysis that "NMI is recognized by NIST * * *" indicated "an additional test that's done * * *." When counsel specifically asked if the dry gas used in the May 2019 certification was NIST traceable, Nedveski responded that "two different types of standards that are done on this dry gas that was used in [May 2019], we're in compliance of printing it on this sheet." When counsel pressed Nedveski to answer whether the DRYGAZ certificate of analysis specifically said that it was traceable to NIST, Nedveski said "[w]ell, I read the language here, but looking at what is printed here and for me to challenge that, I don't have an answer."

{¶ 25} Counsel showed Nedveski an Intoxilyzer certification from December 2019—after Dye's breath test—that included a certificate of analysis for ILMO brand dry gas. According to Nedveski, there was "[n]o specific reason to change dry gas vendors. [ODH] just bought this dry gas." He acknowledged that the ILMO certificate of analysis said that "[t]he calibration results within this certificate were obtained using equipment and standards capable of producing analytical results traceable to NIST * * *[,]" and that the DRYGAZ certificate did not contain the phrase "traceable to NIST." Regardless, Nedveski responded "Yes" when counsel asked if he "still fe[lt] that this machine was properly calibrated under NIST[.]"

{¶ 26} On redirect, Nedveski agreed with the prosecutor's clarification that "the traceability as is noted on the [DRYGAZ certificate] is compliant with the Ohio

Administrative Code for [Nedveski's] purposes for certifying a machine and being traceable to NIST standards[.]"

C. Bechstein's testimony

{¶ 27} Following the city's case, Dye called Bechstein, who was one of the paramedics who responded to the OSHP to examine Dye. He testified that the normal blood sugar range for a healthy adult is between 60 and 110. Dye's blood sugar at the time Bechstein examined him was 329. The paramedics allowed Dye to take his own insulin, after which his blood sugar level began to decrease.

{¶ 28} Bechstein said that people with hyperglycemia—or high blood sugar—exhibit different symptoms depending on how high their blood sugar is, but that it can affect a person's mental state and coordination. Additionally, a person with hyperglycemia who has entered ketoacidosis—a state in which the body attempts to mitigate high blood sugar by releasing ketones—will sometimes have a "sweet" or "fruity" odor on their breath. Although Dye's blood sugar was high, Bechstein said that "somebody might not have diabetic ketoacidosis at that level." Bechstein had not personally seen any cases where a person's ketoacidosis affected the results of a breath-alcohol test.

{¶ 29} On cross, Bechstein said that he did not remember Dye telling him that he had been drinking that day and did not notice an odor of alcohol while caring for Dye. However, the EMS report from that run, which was written by Bechstein's partner, said that "patient admits to alcohol use." He also said that someone who is having a diabetic

incident "could be misconstrued" as someone who is under the influence of alcohol, which is why paramedics always check a patient's blood sugar first.

D. The trial court's decision

{¶ 30} Following the hearing, the trial court denied Dye's motion to suppress. In its findings of fact, the trial court determined that "Kiefer could smell a strong odor of alcohol coming from [Dye] and [Dye's] truck while his speech was slurred." The odor of alcohol and slurred speech, combined with Kiefer's observation that Dye's eyes were "glassy and bloodshot" provided Kiefer with reasonable suspicion to conduct field sobriety tests. The court also determined that Kiefer administered the field sobriety tests "in substantial compliance with the NHTSA requirements if not literal compliance * * *." Finally, the court found that Kiefer had probable cause to arrest Dye for OVI "[b]ased upon the results of the [field sobriety tests], [Dye] being found out of gas and stranded by the roadside at 4:24 am, [Dye's] bloodshot, glassy eyes, slurred speech and strong odor of alcohol * * *."

{¶ 31} Regarding the traceability of the dry gas used in the Intoxilyzer, the trial court found that Nedveski "testified that he had no knowledge of the traceability of dry gas to NIST used with [the Intoxilyzer] other than that printed on State's Exhibit D [the DRYGAZ certificate of analysis] which showed the gas was approved by ODH." However, the court went on to hold that the "use of the dry gas similar to that in [Dye's] test and previously approved by the Ohio Department of Health substantially complied with the ODH regulations for Intoxilyzer 8000 instruments." The court also determined

that Dye had presented "no expert testimony that the language on the dry gas certificate in Plaintiff's [sic] Exhibit D meant that the gas in question was not traceable to NIST standards." The court concluded that the city had shown substantial compliance with Ohio Adm.Code 3701-53-04(B), (C), and (D) because "[a]pparently the manufacturer of the dry gas sufficiently proved the gas's traceability to NIST to the ODH which approved the gas." The court also found that Dye had not shown that he was prejudiced by a lack of strict compliance with the regulations. Accordingly, the court denied Dye's motion to suppress.

E. Dye's plea and sentence

{¶ 32} Following the denial of his motion to suppress, Dye pleaded no contest to OVI in violation of R.C. 4511.19(A)(1)(a), and the city dismissed the charge of driving with a prohibited BAC. The trial court found him guilty and sentenced him to community control, a partially-suspended jail term, a five-year driver's license suspension, vehicle immobilization, a partially-suspended fine, and costs.

{¶ 33} Dye appeals his conviction, raising four assignments of error:

> ASSIGNMENT OF ERROR 1: THE TRIAL COURT ERRED IN FINDING THAT TROOPER KIEFER HAD REASONABLE AND ARTICULABLE SUSPICION TO JUSTIFY THE CONTINUED DETENTION FOR FIELD SOBRIETY TESTING.

ASSIGNMENT OF ERROR 2: THE TRIAL COURT ERRED IN FINDING THAT THE FIELD SOBRIETY TESTS WERE CONDUCTED IN SUBSTANTIAL COMPLIANCE WITH NHTSA STANDARDS.

ASSIGNMENT OF ERROR 3: THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS, BECAUSE TROOPER KIEFER LACKED PROBABLE CAUSE TO ARREST APPELLANT DUE TO THE LACK OF MARKERS OF IMPAIRMENT.

ASSIGNMENT OF ERROR 4: THE TRIAL COURT ERRED IN FINDING THAT THE INTOXILYZER 8000 WAS IN COMPLIANCE WITH OHIO ADMINISTRATIVE CODE 3701-53-04.

II. Law and Analysis

{¶ 34} In his assignments of error, Dye argues that (1) the trial court's determination that Kiefer had reasonable suspicion to conduct field sobriety tests was not supported by competent, credible evidence; (2) the trial court erred in finding that Kiefer conducted the field sobriety tests in substantial compliance with NHTSA standards; (3) the trial court's determination that Kiefer had probable cause to arrest him based, he claims, on "the alleged odor of alcohol alone * * *" was insufficient evidence of probable cause; and (4) the Intoxilyzer used to test his BAC was not certified in compliance with Ohio Adm.Code 3701-53-04 because the dry gas used in the machine is not traceable to NIST.

{¶ 35} Regarding Dye's first three assignments of error, the city responds that (1) Dye exhibited "nearly all" of the common indicia of impaired driving, and the totality of the circumstances supported Kiefer's decision to conduct field sobriety tests; (2) Kiefer's cruiser video refutes Dye's arguments about the HGN test not being in substantial compliance with NHTSA standards, and the "requirement" that the walk-and-turn test and the one-leg-stand test be conducted on dry, non-slippery surfaces is a "NHTSA recommendation," rather than a standard applicable to these field sobriety tests; and (3) the totality of the circumstances supported Kiefer's probable cause determination. As to Dye's fourth assignment of error, the city argues that it met its burden of showing substantial compliance with Ohio Adm.Code 3701-53-04 through Nedveski's testimony because he testified that the cylinder of dry gas that he installed in the Intoxilyzer 8000—which was in use at the time of Dye's breathalyzer test—was provided to him by ODH, and as far as he was aware, the dry gas met the requirements for certification. The city also claims that we are required to defer to ODH on scientific matters and the case law supports a finding of traceability.

A. Standard of review

{¶ 36} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. The trial court acts as the trier of fact at a suppression hearing by weighing the evidence and determining the credibility of the witnesses. Although we must accept any findings of fact that are supported by competent, credible evidence, we conduct a de novo review

to determine whether the facts satisfy the applicable legal standard, and this independent review is done without deference to the trial court. *State v. Codeluppi*, 139 Ohio St.3d 165, 2014-Ohio-1574, 10 N.E.3d 691, ¶ 7, citing *Burnside* at ¶ 8; *State v. Jones-Bateman*, 6th Dist. Wood Nos. WD-11-074 and WD-11-075, 2013-Ohio-4739, ¶ 9.

B. The city failed to meet its burden of showing substantial compliance with Ohio Adm.Code 3701-53-04.

{¶ 37} We first address Dye's fourth assignment of error. In it, he contends that the trial court erred in finding that the Intoxilyzer used to test his BAC complied with the requirements of Ohio Adm.Code 3701-53-04 because the dry gas that Nedveski installed in May 2019 is not traceable to NIST. We agree.

{¶ 38} In R.C. 4511.19(D)(1)(b), the legislature made the results of a breath-alcohol test presumptively admissible, provided that the sample is "analyzed in accordance with methods approved by the director of health * * *" and the analysis is conducted by a person with the appropriate permit issued by the director of ODH. The legislature also gave the director of ODH the authority to determine and approve "satisfactory techniques or methods" for analyzing the amount of alcohol in a person's breath, set the qualifications for those who may conduct breath-alcohol analyses, and issue permits to those who qualify to conduct breath-alcohol analyses. R.C. 3701.143.

{¶ 39} To trigger the presumption of admissibility in R.C. 4511.19(D)(1)(b), the state must establish that it substantially complied with the alcohol-testing regulations promulgated by ODH. *Burnside* at ¶ 27. The requirement that the state show substantial (rather than strict) compliance with the regulations "does not relieve the state of its

burden to prove compliance with the alcohol-testing regulations, but rather defines *what compliance is*." (Emphasis sic.) *Id.* In other words, "*compliance with the regulations* * * * is the criterion for admissibility." (Emphasis sic.) *Id.* at ¶ 32. If the state shows that it substantially complied with the applicable regulations, the results of the alcohol test are presumptively admissible, and the burden shifts to the defendant to rebut the presumption by demonstrating that he was prejudiced by the state's failure to strictly comply with the regulations. *Id.* at ¶ 24.

{¶ 40} Although the Ohio Supreme Court has determined that "rigid compliance with the Department of Health regulations is not necessary for test results to be admissible[,]" it has also "limit[ed] the substantial-compliance standard * * * to excusing only errors that are clearly de minimis" or that can be characterized as "'minor procedural deviations.'" *Id.* at ¶ 34, citing *State v. Steele*, 52 Ohio St.2d 187, 370 N.E.2d 740 (1977); and quoting *State v. Homan*, 89 Ohio St.3d 421, 426, 732 N.E.2d 952 (2000).

{¶ 41} By adopting this standard, the Supreme Court sought to prevent lower courts from making judicial determinations of whether the state's compliance with alcohol-testing regulations affected the reliability of alcohol-test results. It did this to prevent the courts from "second-guessing whether the regulation with which the state has not complied is necessary to ensure the reliability of the alcohol-test results" and "usurping a function that the General Assembly has assigned to the Director of Health * * *"—i.e., "ensur[ing] the reliability of alcohol-test results * * *"—which the court deemed

prudent because the director of ODH "possesses the scientific expertise that [a court] does not." *Id.* at ¶ 32, 34.

{¶ 42} The regulations that the director of ODH promulgated related to alcohol testing are in Ohio Adm.Code Chapter 3701-53. Pertinent to Dye's case, ODH has approved the Intoxilyzer 8000 as a breath-alcohol testing instrument. Ohio Adm.Code 3701-53-02(A)(3). The specific performance standards for the Intoxilyzer 8000 are found in Ohio Adm.Code 3701-53-04(B),[2] which states, as relevant here:

> Instruments listed under paragraph (A)(3) of rule 3701-53-02 of the Administrative Code [i.e., the Intoxilyzer 8000] shall automatically perform a dry gas control using a dry gas standard *traceable to the national institute of standards and technology (NIST)* before and after every subject test. For purposes of [the Intoxilyzer 8000], a subject test shall include the collection of two breath samples. A dry gas control is not required between the two breath samples. (Emphasis added.)

The regulation also requires the use of dry gas traceable to NIST any time "[r]epresentatives of the director" of ODH "perform an instrument certification on * * *"

[2] Although Dye focuses his arguments on the Intoxilyzer not being properly certified under Ohio Adm.Code 3701-53-04(C) and only mentions in passing Ohio Adm.Code 3701-53-04(B)—the regulation requiring NIST-traceable dry gas to be used at the beginning and end of every breath-alcohol test done on an Intoxilyzer—it is undisputed that the canister of dry gas that Nedveski installed when he certified the Intoxilyzer in May 2019 is the same canister that was in the machine and used at the beginning and end of Dye's breath test in October 2019. Accordingly, we will address both regulations in our analysis.

the Intoxilyzer 8000, which must be done "no less frequently than once every calendar year or when the dry gas standard on the instrument is replaced, whichever comes first." Ohio Adm.Code 3701-53-04(C). When an Intoxilyzer 8000 is first placed into service or is returned to service following repairs, an ODH representative must perform the same type of certification required by Ohio Adm.Code 3701-53-04(C)—i.e., one that includes a "dry gas control using a dry gas standard traceable to the national institute of standards and technology * * *"—before the machine can be used for breath-alcohol tests. Ohio Adm.Code 3701-53-04(D).

{¶ 43} We recently decided a case addressing the issue of the traceability of the same brand of dry gas used for Dye's breath test. In *Bowling Green v. Farrell*, 2021-Ohio-1554, 172 N.E.3d 488 (6th Dist.), based on similar testimony from Nedveski, the same certificate of analysis, an earlier version of the NIST supplement,[3] and an additional NIST publication (the "NIST policy"), we found that the city failed to show substantial compliance with Ohio Adm.Code 3701-53-04 because (1) the regulation unambiguously required dry gas for an Intoxilyzer to be traceable to NIST standards; (2) the certificate of analysis stated that the dry gas was traceable to standards of an unspecified NMI; (3) the NIST supplement made clear that NIST's participation in the MRA did not automatically mean that traceability to another signatory NMI's standards was the equivalent of traceability to NIST standards; (4) the NIST publications clearly placed the burden of

[3] The earlier version of the NIST supplement before the trial court in *Farrell* and the version before the trial court in this case are identical in all respects relevant to our analysis.

establishing traceability on the proponent of a measurement; (5) Nedveski's testimony was insufficient to show that traceability to the unnamed NMI was the equivalent of traceability to NIST; and (6) the lack of evidence of traceability was more than a de minimis error or minor procedural deviation. *Id.* at ¶ 26-33. Our review of the evidence in Dye's case shows that the same is true here.

{¶ 44} First, the DRYGAZ certificate of analysis presented to the trial court plainly states that the "CERTIFICATION [is] TRACEABLE TO *National Metrology Institute Traceable Standards*." (Emphasis added.) Equally plain is Ohio Adm.Code 3701-53-04(B) and (C)'s requirements that the Intoxilyzer 8000 use "a dry gas standard *traceable to the national institute of standards and technology (NIST)* * * *" for breath tests and certification tests, respectively. (Emphasis added.) The question, then, is whether traceability to "National Metrology Institute Traceable Standards" is substantially the same as traceability to NIST standards. Or, in other words, is traceability to "National Metrology Institute Traceable Standards" rather than NIST standards no more than a "clearly de minimis" error or a "'minor procedural deviation[].'" *Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, at ¶ 34.

{¶ 45} In *Farrell*, at ¶ 27, we noted that

> [a]ccording to the NIST policy, "[m]etrological traceability requires the establishment of an unbroken chain of calibrations * * * to specified references." Although NIST "assures the traceability of measurement results that NIST itself provides, * * * [o]ther organizations are responsible

> for establishing the traceability of their own results to those of NIST or other specified references." It is official NIST policy that "providing support for a claim of metrological traceability of the result of a measurement is the responsibility of the provider of that result * * *." The NIST policy also "[c]ommunicates, especially where claims expressing or implying the contrary are made, that NIST does not * * * certify metrological traceability * * * of the results of measurements except those that NIST itself provides, either directly or through an official NIST program or collaboration." (Brackets and ellipses sic.)

{¶ 46} Although the NIST policy that was before the court in *Farrell* was not admitted into evidence in this case, the trial court record does contain the NIST supplement—which goes into even greater detail about metrological traceability and how to determine whether a measurement is, or is not, traceable to NIST standards. Of importance here is the NIST supplement's discussion of the MRA (i.e., the Mutual Recognition Arrangement). The NIST supplement explains that the MRA is an agreement among the NMIs that are members of the International Committee on Weights and Measures. In short, the arrangement allows member NMIs to recognize and accept as equivalent the measurements established by the NMIs of all other member countries. Section I.E.2. of the NIST supplement directly addresses whether measurements that are traceable to standards maintained by one signatory NMI are also traceable to standards maintained by another signatory NMI:

> While signatory NMIs (including NIST) recognize the validity of other signatories' measurement and calibration certificates under the MRA, *such recognition does not mean that measurement results obtained by one signatory NMI are automatically traceable to stated references developed and maintained by any other signatory NMI*. However, users of measurement results * * * may well decide that sufficient evidence exists under the MRA to provide mutually acceptable traceability of these results to the standards and measurements of two or more participating NMIs. (Emphasis added.)

{¶ 47} The information in section I.E.2. of the NIST supplement tells us two things: (1) metrological traceability of measurement results to standards maintained by some unspecified NMI—even one that is a signatory to the MRA—does not automatically result in traceability to NIST standards and (2) the proponent of the measurement is free to decide that the MRA provides sufficient evidence of "mutually acceptable traceability" between the other NMI's standards and NIST's standards. Essentially, traceability to another NMI that is an MRA signatory is not definitively synonymous with traceability to NIST. Rather, NIST allows the proponent of the measurement to articulate *why* its reference to standards maintained by another signatory NMI is sufficient to support its claim of traceability to NIST standards. Importantly, the NIST supplement clearly states that the proponent of the measurement has the burden of showing that its measurement is traceable to NIST standards.

{¶ 48} So, to summarize, the trial court had before it evidence that the dry gas used in Dye's breath test was traceable to some unnamed NMI that was a signatory to the MRA, as well as material from NIST that explained (1) the proponent of the measurement is responsible for showing its traceability to NIST and (2) traceability to an NMI that NIST recognizes through the MRA does not necessarily equate to traceability to NIST. Missing from the evidence before the trial court, however, is any testimony or documentary evidence establishing that the NMI standard at issue here—i.e., the "National Metrology Institute Traceable Standards" in the DRYGAZ certificate of analysis—is the equivalent of NIST traceable standards. There is no evidence that DRYGAZ or ODH accepted the unnamed NMI's standards as sufficient to show traceability to NIST, as permitted by section I.E.2. of the NIST supplement. The city's only witness to testify about the dry gas, Nedveski, was not able to testify about traceability; he testified only that (1) he put the canister of DRYGAZ associated with the certificate of analysis in the Intoxilyzer 8000 used for Dye's breath test; (2) he got the canister of DRYGAZ from ODH, and, to the best of his knowledge, the dry gas was approved by ODH; and (3) the Intoxilyzer 8000 passed certification with the DRYGAZ canister installed.

{¶ 49} Based on this evidence, we cannot say that the city demonstrated in this case that it used "a dry gas standard traceable to the national institute of standards and technology (NIST) * * *," as required by Ohio Adm.Code 3701-53-04.

{¶ 50} The next question we must address is whether the city's use of dry gas traceable to "National Metrology Institute Traceable Standards" rather than NIST standards substantially complies with Ohio Adm.Code 3701-53-04. Although "strict" or "rigid" compliance with the regulation is not required, the Supreme Court has limited the substantial-compliance standard to "excusing only errors that are clearly de minimis" or that can be characterized as "'minor procedural deviations.'" *Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, at ¶ 34.

{¶ 51} Even a cursory reading of the NIST supplement shows that the field of metrology, generally, and metrological traceability, specifically, are highly precise, technical, and exacting in nature. In the breath-alcohol-testing regulations, the director of ODH unambiguously *required* the Intoxilyzer 8000 to use a dry gas that was traceable to *NIST standards*. The evidence in this case shows that the dry gas was traceable to unspecified *NMI standards*, but does *not* show that those NMI standards and NIST standards are equivalent or interchangeable. Without that critical link, we cannot find that the city met its burden of demonstrating that Dye's breath test was administered in substantial compliance with Ohio Adm.Code 3701-53-04.

{¶ 52} On that basis—and given that the record lacks any testimony regarding the traceability of the dry gas at issue—we cannot say that the use of dry gas that is traceable to different metrological standards than those required by Ohio Adm.Code 3701-53-04 was a de minimis error or a minor procedural deviation. *Farrell*, 2021-Ohio-1554, 172 N.E.3d 488, at ¶ 32-33.

{¶ 53} Regarding the city's argument that we are required to defer to ODH's choice of dry gas and cannot "question[] the legitimacy of preapproved ODH Solutions and Methods[,]" in *Farrell*, we said that

> [a]lthough the Ohio Supreme Court has recognized that the director of ODH has scientific expertise superior to that of the judiciary, *Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, at ¶ 32, and we agree that courts "cannot undercut [ODH's] rulemaking authority * * *" by ignoring or adding to the requirements of validly-adopted regulations, *State v. Yoder*, 66 Ohio St.3d 515, 518, 613 N.E.2d 626 (1993), courts are not required to blindly accept the truth of the information that the state presents simply because it involves science. * * *
>
> Contrary to the city's argument, this is not a case where we, as a court, are looking at compliance with Ohio Adm.Code 3701-53-04 to make a determination about the reliability of the test result, thereby second-guessing a scientific decision made by the director of ODH in implementing a regulation regarding alcohol testing. Rather, as instructed in *Burnside*, we are looking at the contents of the regulation to see if the city has demonstrated that it substantially complied with the requirements of the regulation when it administered Farrell's breathalyzer test. *Burnside* at ¶ 32 ("[C]ompliance with the regulations * * * is the criterion for admissibility." (Emphasis omitted.)). Indeed, in this particular case,

> because the city did not present the testimony of any witnesses to elucidate whether the dry gas used in Farrell's breath test was traceable to NIST, the question of substantial compliance comes down to interpretation of the regulation and the documentary evidence submitted at the suppression hearing—a task to which the courts are particularly well-suited.

Id. at ¶ 24-25. The same is true here. We are not second-guessing ODH's scientific decision to purchase DRYGAZ brand dry gas for use in Intoxilyzers; we are scrutinizing whether the testimony and evidence support a finding that the Intoxilyzer in question substantially complied with Ohio Adm.Code 3701-53-04 at the time of Dye's breath test. They do not.

{¶ 54} The city also argues that the "Governing Case Law on this Issue * * *" shows that the DRYGAZ complies with Ohio Adm.Code 3701-53-04, and points to the three municipal court cases that the trial court relied on in its suppression decision: *State v. Johnson*, Lima M.C. No. 19 TRC 07793 (Jan. 24, 2020); *State v. Lee*, Wadsworth M.C. No. 18 TRC 04104 (Dec. 4, 2019); and *State v. Bennett*, Marietta M.C. No. 18 TRC 8484(A-C) (Sept. 5, 2019). Each court found that the state substantially complied with Ohio Adm.Code 3701-53-04 when using DRYGAZ in an Intoxilyzer 8000. *See id.* We discussed these cases in *Farrell*, at ¶ 34-39, and, after noting that "these are municipal court cases and, therefore, they not 'governing case law' for purposes of our analysis[,]" found that they are distinguishable.

{¶ 55} In *Lee*, for example, the state presented the testimony of Jeanna Walock, a forensic toxicology expert and the administrator of the alcohol and drug testing program at ODH—who is presumably the same "Gina" that Nedveski referred to at the suppression hearing as the person with the "expertise to question any of the methods used for traceability." As we summarized in *Farrell*, "[e]ssentially, Walock—an ODH administrator who was also an expert in forensic toxicology—testified that the information on the DRYGAZ certificate of analysis demonstrated traceability to NIST." *Id.* at ¶ 37; *see also State v. Engler*, 11th Dist. Lake No. 2020-L-055, 2021-Ohio-902, ¶ 50 (Walock testified that the certificate of analysis of the dry gas at issue "'provides an unbroken chain of traceability back to NIST standards[,]'" and an ODH inspector testified that the dry gas sample that he used to certify the breathalyzer "was prepared using NIST standards and that it was also traceable to NMI standards."). We do not have the same testimony about traceability in this case.

{¶ 56} At the suppression hearing, Nedveski stated numerous times that he did not have the knowledge and expertise to opine on the traceability of the dry gas used in Dye's breath test. He was clear that his knowledge of the suitability of a canister of dry gas for use in an Intoxilyzer was limited to "review[ing] the value of it and enter[ing] that into the [Intoxilyzer] 8000 * * *[,]" and "accept[ing] the tank for the value performance and install[ing] into the instrument." So, although Nedveski's testimony showed that the dry gas met the potency standard that he was looking for, his testimony is insufficient to

support the trial court's finding that the dry gas used for Dye's breath test is traceable to NIST.

{¶ 57} Moreover, in *Farrell* we distinguished the municipal court cases on the basis that the trial court had documentary evidence before it that was not presented to the other municipal courts (i.e., in *Farrell*, the NIST policy and supplement; in this case, the NIST supplement). The NIST publications, standing alone, demonstrated that the certificate of analysis was insufficient to show traceability to NIST without some additional testimony or explanation. *Id.* at ¶ 39.

{¶ 58} Accordingly, we find that Dye's fourth assignment of error is well-taken because the trial court erred in denying his motion to suppress the results of his breathalyzer test.

{¶ 59} Unlike in *Farrell*, however, our analysis does not end here because Dye was convicted of OVI under R.C. 4511.19(A)(1)(a) (driving "under the influence of alcohol, a drug of abuse, or a combination of them") rather than under R.C. 4511.19(A)(1)(d) (driving with a prohibited BAC). Under R.C. 4511.19(A)(1)(a), impairment can be proven without the use of BAC test results. *State v. North*, 2020-Ohio-6846, 164 N.E.3d 1121, ¶ 27 (7th Dist.) (R.C. 4511.19(A)(1)(a) "does not require evidence of a specific BAC in order to show impairment." Indeed, "the defendant's behavior is the primary consideration" under R.C. 4511.19(A)(1)(a). (Internal quotation omitted.)).

C. Kiefer lacked reasonable suspicion sufficient to conduct field sobriety tests.

{¶ 60} We now turn to Dye's first assignment of error, in which he argues that Kiefer lacked the requisite reasonable suspicion, based on specific, articulable facts, to conduct field sobriety tests. We agree.

{¶ 61} The Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution protect citizens from unreasonable searches and seizures. "'The U.S. Supreme Court has created three categories of police-citizen contact to identify the separate situations where constitutional guarantees are implicated: (1) consensual encounters, (2) investigative or "*Terry* [*v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)]" stops, and (3) arrests.'" (Brackets sic.) *State v. Williams*, 6th Dist. Lucas No. L-17-1148, 2018-Ohio-5202, ¶ 20, quoting *State v. Staten*, 4th Dist. Athens No. 03CA1, 2003-Ohio-4592, ¶ 16.

{¶ 62} Two of the three types of encounters—arrests and investigatory stops—require the officer to have some justification for his contact with the citizen. For an arrest, the officer must have probable cause. *State v. Barner*, 6th Dist. Wood No. WD-01-034, 2002 WL 737065 (Apr. 26, 2002). For an investigatory stop, the officer must have a reasonable, articulable suspicion that criminal activity is occurring. *State v. Mesley*, 134 Ohio App.3d 833, 840, 732 N.E.2d 477 (6th Dist.1999), citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). However, the requirement for reasonable, articulable suspicion or probable cause is excused when police exercise their "community caretaking" function to approach a person who appears

to be in distress or in need of assistance. "[T]he community-caretaking/emergency-aid exception to the Fourth Amendment warrant requirement allows police officers to stop a person to render aid if they reasonably believe that there is an immediate need for their assistance to protect life or prevent serious injury." *State v. Dunn*, 131 Ohio St.3d 325, 2012-Ohio-1008, 964 N.E.2d 1037, ¶ 22. This exception has been recognized when, for example, a vehicle is parked where it should not be "thereby causing concern as to the vehicle's or the driver's impairment." *Williams* at ¶ 24, fn. 1, citing *State v. Clapper*, 9th Dist. Medina No. 11CA0031-M, 2012-Ohio-1382, ¶ 13.

{¶ 63} Here, Kiefer testified that he is required to stop and investigate any disabled vehicle, and Dye said on the video from Kiefer's cruiser that he was surprised at how quickly a trooper arrived after he called for assistance. We conclude that Kiefer's initial contact with Dye—i.e., his initial approach of Dye's vehicle, which was stopped on the side of I-75 late at night—falls under the umbrella of community caretaking, and we find no fault with this interaction.

{¶ 64} Although Kiefer's initial encounter with Dye did not require justification, his administration of field sobriety tests did. An officer's request that a driver participate in field sobriety testing qualifies as a seizure subject to Fourth Amendment protection and must be "'separately justified by specific, articulable facts showing a reasonable basis for the request.'" *Bowling Green v. Murray*, 6th Dist. Wood No. WD-18-045, 2019-Ohio-4285, ¶ 19, quoting *State v. Trevarthen*, 11th Dist. Lake No. 2010-L-046, 2011-Ohio-1013, ¶ 15; and citing *State v. Bright*, 5th Dist. Guernsey No. 2009-CA-28,

2010-Ohio-1111, ¶ 17. Kiefer, therefore, was required to provide specific, articulable facts supporting a reasonable suspicion that Dye operated his vehicle while under the influence of alcohol. *State v. Graff*, 6th Dist. Lucas No. L-11-1307, 2013-Ohio-2242, ¶ 15.

{¶ 65} Ohio courts recognize that a number of factors may supply an officer with reasonable suspicion to conduct field sobriety tests, including, but not limited to (1) the time of day that the stop occurred; (2) the area where the stop occurred; (3) whether there was erratic driving that might point to a lack of coordination; (4) the existence of a "cognizable report" that the driver might be intoxicated; (5) the appearance of the suspect's eyes;[4] (6) impairments related to the individual's speech; (7) an odor of alcohol in the car or on the person; (8) the strength of that odor; (9) lack of coordination after the stop; (10) "the suspect's demeanor"; and (11) the suspect's admission of alcohol consumption. *State v. Evans*, 127 Ohio App.3d 56, 63, 711 N.E.2d 761 (11th Dist.1998), fn. 2. In determining whether the officer had reasonable suspicion we look at the totality of the circumstances, not any one factor. *State v. Andrews*, 57 Ohio St.3d 86, 87, 565 N.E.2d 1271 (1991).

{¶ 66} Whether the facts of a case provide an officer with reasonable suspicion for conducting field sobriety tests is often a close issue. *Murray* at ¶ 21, citing *State v.*

[4] We note that Kiefer, defense counsel, and the prosecutor all acknowledged at the suppression hearing that NHTSA—which trains officers on the detection of impaired driving and the administration of field sobriety tests—removed bloodshot, glassy eyes as an indicator of alcohol impairment approximately a decade ago, but, as defense counsel stated, "it is still a clue that the officer can use in his determination during the stop."

Beeley, 6th Dist. Lucas No. L-05-1386, 2006-Ohio-4799, ¶ 16. These decisions are "'very fact-intensive,'" leading courts to reach different decisions in seemingly similar circumstances; "[t]he slightest difference between officers' descriptions of an encounter can form the basis for opposite outcomes." *Id.*, quoting *State v. Burkhart*, 2016-Ohio-7534, 64 N.E.3d 1004, ¶ 15 (4th Dist.).

{¶ 67} Here, the trial court determined that Kiefer had the reasonable suspicion necessary to conduct field sobriety tests because Kiefer "could smell a strong odor of alcohol coming from [Dye] and [Dye's] truck while his speech was slurred[,]" and Kiefer noticed that Dye's eyes were "glassy and bloodshot." We find that, under the facts of this case, the trial court erred in determining that Kiefer had reasonable, articulable suspicion to conduct the field sobriety tests because some of these factual findings lacked competent, credible evidence.

{¶ 68} We have repeatedly held that "[w]here a non-investigatory stop is initiated and the odor of alcohol is combined with glassy or bloodshot eyes *and further indicia of intoxication* * * * reasonable suspicion exists." (Emphasis added.) *Beeley* at ¶ 16. "[F]urther indicia of intoxication" that we have found sufficient to provide an officer with reasonable suspicion include admission to consuming alcohol, slurred speech, and fumbling or searching for a driver's license or registration paperwork. *E.g., Beeley* at ¶ 17 ("strong" and "unmistakable" odor of alcohol as soon as driver rolled down his car window, bloodshot eyes, admission to drinking "about an hour" before the stop); *State v. Mapes,* 6th Dist. Fulton No. F-04-031, 2005-Ohio-3359, ¶ 42 (odor of alcohol in driver's

vehicle, glassy and bloodshot eyes, "somewhat slurred" speech); *State v. Maddux*, 6th Dist. Wood No. WD-08-065, 2010-Ohio-941, ¶ 13 (odor of alcohol of unspecified strength about driver's person, glassy eyes, and driver "fumbling through her purse for her operator's license, when it was actually in her pocket * * *").

{¶ 69} However, *without* additional indicia of intoxication, we tend to find that the odor of alcohol and bloodshot, glassy eyes—standing alone—are insufficient to provide reasonable suspicion for field sobriety tests.

{¶ 70} In *Whitehouse v. Stricklin*, 6th Dist. Lucas L-10-1277, 2012-Ohio-1877, for example, the officer stopped Stricklin's vehicle at 1:26 a.m. after observing that one of his headlights was inoperable. *Id.* at ¶ 3. Stricklin exited his car, struck the headlight with his hand, rendering it operable, and then returned to the car. *Id.* The officer continued to speak to Stricklin after he was back in his car, and during the course of their interaction, she noticed that Stricklin had a slight odor of alcohol on his breath, bloodshot, glassy eyes, and an "anxious" demeanor. *Id.* at ¶ 3-4. Stricklin denied that he had been drinking. *Id.* at ¶ 4. The officer ran Stricklin's license information and learned that he had a prior OVI. *Id.* She then asked Stricklin to take a portable breath test and, when he refused, asked him to exit the vehicle so that she could administer field sobriety tests. *Id.* After determining that Stricklin failed those tests, the officer arrested him for OVI. *Id.*

{¶ 71} On appeal from the trial court's decision denying Stricklin's motion to suppress the results of the field sobriety tests, we explained that "[t]raffic violations of a

de minimus [sic] nature, combined with a slight odor of an alcoholic beverage, and an admission of having consumed a 'couple' beers, are not sufficient to support a reasonable and articulable suspicion of DUI." *Id.* at ¶ 12. We held, therefore, that the officer's observations did not provide reasonable, articulable suspicion to warrant the administration of field sobriety tests, and we reversed the trial court's decision.

{¶ 72} Similarly, in *State v. Kennard*, 6th Dist. Huron No. H-01-006, 2001 WL 605106, (June 1, 2001), an officer pulled Kennard over because her license plate light was not functioning and she weaved within her lane of travel. *Id.* at *1. The officer testified that Kennard's speech was slurred and she had "a moderate or strong odor of alcohol about her person." *Id.* There was also a video of the stop in which Kennard admitted to drinking "one beer." *Id.* at *2. The trial court found that, contrary to the officer's testimony, the video did not show Kennard slurring her speech—which undermined the officer's credibility—and suppressed the evidence from the stop. *Id.*

{¶ 73} We affirmed because the time of the stop, the moderate to strong odor of alcohol about Kennard's person, and her admission to drinking one beer were insufficient to give rise to a reasonable, articulable suspicion that she was intoxicated. *Id.*; *see also State v. Watkins*, 2021-Ohio-1443, 170 N.E.3d 549, ¶ 37 (6th Dist.) (finding that the officer lacked reasonable, articulable suspicion to conduct field sobriety tests when he "observed only that [Watkins's] eyes were bloodshot and glassy (at approximately 3:00 a.m.), she smelled of alcohol (of an unspecified strength), and she admitted to having had

one glass of wine (approximately seven hours earlier)[,]" but did not stumble, slur her words, or show other signs of impairment).

{¶ 74} In this case, the trial court determined that Kiefer identified three indicators of impairment before he conducted the field sobriety tests: (1) a strong odor of alcohol, (2) bloodshot, glassy eyes, and (3) slurred speech while Dye was in his truck. We will address slurred speech first because we find that the record lacks competent, credible evidence to support this finding.

{¶ 75} Kiefer first testified on cross-examination that Dye's "speech was slurred" when Dye's attorney asked if Dye was "speaking incoherently or anything" when Kiefer first approached Dye in his truck. However, after Dye's attorney played the video from the cruiser—which shows Dye speaking clearly—Kiefer changed his testimony. Instead of alleging that Dye's speech was slurred at the time of initial contact, Kiefer clarified that Dye's speech was slurred "[a]t some point of the night, * * *" but he did not "remember exactly when * * *." Critically, Kiefer did not testify that he noticed that Dye's speech was slurred *before* he decided to administer the HGN test.

{¶ 76} Because Kiefer testified that he could not remember "exactly when" he heard slurred speech from Dye—and because the cruiser video demonstrates that Dye's speech was clear (i.e., does not sound slurred) from the time Kiefer activated his microphone to the time he asked if he could "check [Dye's] eyes real quick"—the record lacks competent, credible evidence to support the trial court's finding that Dye exhibited "slurred speech" while he was in his truck.

{¶ 77} The trial court also found that Kiefer "could smell a strong odor of alcohol coming from [Dye] and [Dye's] truck." The testimony, however, does not support this finding. Rather, Kiefer clearly testified that he "detect[ed] a strong odor of an alcoholic beverage coming from * * *" Dye while he was conducting the pat-down of Dye, but did not notice the odor of alcohol "[u]ntil [he] got close to him * * *." Although Kiefer later said that it "wouldn't surprise" him if he had written in his report that he smelled alcohol upon approaching Dye's truck, he was unable to confirm—one way or the other—what was in the report, and the prosecutor did not offer the report as an exhibit, use it to refresh Kiefer's recollection, or pursue the line of questioning any further.

{¶ 78} Finally, regarding Dye's eyes, Kiefer testified that he noticed that they were "bloodshot and glassy" while he was talking to Dye at the window of Dye's truck.

{¶ 79} Based on our case law and considering the totality of the circumstances, we cannot find that Kiefer had reasonable, articulable suspicion to administer field sobriety tests to Dye. Based on the evidence and testimony in the record, we are left with Kiefer's observations that Dye's eyes were glassy and bloodshot (at 4:30 a.m.), and his testimony that Dye had a "strong" odor of alcohol upon him, which he noticed when he "got close to [Dye]" to perform a pat-down. As discussed above, there is no competent, credible evidence to suggest that Dye's speech was slurred at any point before Kiefer began to administer the field sobriety tests. Additionally, there were no other indicia of impairment—such as erratic driving, admission to drinking alcohol, stumbling, falling, or

fumbling for paperwork—that could support Kiefer's administration of field sobriety tests.

{¶ 80} Because the record lacks evidence of impairment beyond glassy, bloodshot eyes and the odor of alcohol, we cannot find that the trial court's determination regarding Kiefer's reasonable, articulable suspicion that Dye was impaired is supported by some competent, credible evidence. Accordingly, we find that the trial court erred in failing to suppress the results of Dye's field sobriety tests. Dye's first assignment of error is well-taken.

D. Dye's second assignment of error is moot.

{¶ 81} Because we have determined that the trial court should have suppressed the results of the field sobriety tests, the issue of whether Kiefer conducted the tests in substantial compliance with NHTSA standards is moot. Dye's second assignment of error is not well-taken.

E. Kiefer lacked probable cause to arrest Dye.

{¶ 82} Finally, in Dye's third assignment of error, he argues that Kiefer lacked probable cause to arrest him for OVI because "Trooper Kiefer testified that ultimately, the alleged odor of alcohol alone was enough probable cause to arrest [him]." While we disagree with Dye's characterization of Kiefer's testimony, we agree that he lacked probable cause to make an arrest.

{¶ 83} To determine whether an officer had probable cause to arrest a driver for OVI, a reviewing court must consider whether, at the time of the arrest, "the police had

sufficient information, derived from a reasonably trustworthy source of facts and circumstances, sufficient to cause a prudent person to believe that the suspect was driving under the influence." *Homan*, 89 Ohio St.3d at 427, 732 N.E.2d 952, *superseded by statute on other grounds as stated in* R.C. 4511.19(D)(4)(b), citing *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964); and *State v. Timson*, 38 Ohio St.2d 122, 127, 311 N.E.2d 16 (1974). In making this determination, the reviewing court must consider the totality of the circumstances surrounding the arrest. *Id.* "Probable cause to arrest does not have to be based, in whole or part, on the results of field sobriety tests." *State v. Masin*, 6th Dist. Erie No. E-20-004, 2020-Ohio-6780, ¶ 34, citing *Homan* at 427. If the trial court erroneously fails to suppress the results of field sobriety tests, the error is harmless if "ample evidence exists to support the arrest and conviction * * *." *State v. Matus*, 6th Dist. Wood No. WD-06-072, 2008-Ohio-377, ¶ 27.

{¶ 84} Here, Kiefer testified that he believed he had probable cause to arrest Dye because Dye was the only person in the truck and had told Kiefer that he was driving, Dye had "bloodshot and glassy eyes," Kiefer noticed "the strong odor of an alcoholic beverage," and "all the field sobriety testing[.]" The trial court found that Kiefer had probable cause to arrest Dye for OVI "[b]ased upon the results of the [field sobriety tests], [Dye] being found out of gas and stranded by the roadside at 4:24 am, [Dye's] bloodshot, glassy eyes, slurred speech and strong odor of alcohol * * *." We have determined that the results of the field sobriety tests are inadmissible, so we cannot consider them in determining whether Kiefer had probable cause to arrest Dye.

Additionally, there was evidence before the trial court that NHTSA does not consider bloodshot, glassy eyes to be an indicator of alcohol impairment—and has not for many years—a fact that Kiefer knew, so we also decline to consider the state of Dye's eyes as support for Kiefer's probable cause determination.

{¶ 85} The remaining circumstances that play into Kiefer's probable cause to arrest Dye are (1) a "strong" odor of alcohol coming either from Dye's person or Dye's truck; (2) Dye slurring his speech "[a]t some point of the night * * *," although Kiefer could not remember when, and, importantly, it is unclear whether the slurred speech occurred before or after Dye's arrest; (3) Dye denying drinking any alcohol; (4) Dye admitting that he was coming from a "college campus"; (5) Dye running out of gas and parking on the side of an interstate with his hazard lights flashing at 4:30 in the morning; (6) Kiefer's testimony that he did not recall Dye having difficulty exiting the truck, Dye did not lean on the truck or fall when he got out, and there were no open containers of alcohol in the truck; (7) Kiefer's admission that Dye told him that his blood-sugar level might be high, which Kiefer conceded could have affected Dye's behavior; and (8) Kiefer's testimony that Dye was alert and responsive to Kiefer's questions.

{¶ 86} Taken together, these facts do not support a finding that Kiefer had, at the time he arrested Dye, "sufficient information, derived from a reasonably trustworthy source of facts and circumstances, sufficient to cause a prudent person to believe that [Dye] was driving under the influence." *Homan* at 427. Although Dye was out at 4:30 a.m., had glassy, bloodshot eyes, and smelled of alcohol, Dye's behavior did not show

indicia of impairment such as erratic driving, a report that Dye was intoxicated, a lack of coordination, a demeanor that was anything other than alert and cooperative, or admission of alcohol consumption. *See Evans*, 127 Ohio App.3d at 63, 711 N.E.2d 761, fn. 2; *see also North*, 2020-Ohio-6846, 164 N.E.3d 1121, at ¶ 27 ("[T]he defendant's behavior is the primary consideration * * *" in determining whether the defendant drove while impaired. (Internal quotation omitted)). Because these indicia were lacking at the time of the arrest, Kiefer lacked probable cause to arrest Dye for OVI. Therefore, we find that Dye's third assignment of error is well-taken.

III. Conclusion

{¶ 87} Based on the foregoing, the February 18, 2021 judgment of the Bowling Green Municipal Court is reversed, and Dye's conviction is vacated. The city is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment reversed.

Mark L. Pietrykowski, J. _____
JUDGE

Christine E. Mayle, J. _____
JUDGE

Myron C. Duhart, J.
CONCUR. _____
JUDGE