IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO,	:	Case No. 2015-CR-307 (Judge Dennis J. Langer)
Plaintiff,	:	
v.	:	
LOREN BROWN,	:	**DECISION AND ENTRY OVERRULING IN PART AND SUSTAINING IN PART "MOTION**
Defendant.	:	**TO SUPPRESS"**

On May 6, 2015, the Defendant, Loren Brown, filed a *Motion to Suppress*. An evidentiary hearing was conducted on June 12.

On July 17, Brown filed a *Memorandum in Support of Motion to Suppress*.

On August 11, the *State's Response to Defendant's Memorandum in Support of Motion to Suppress* was filed.

FINDINGS OF FACT

By a preponderance of the evidence, the Court makes the following factual findings:

Steven Scott Davis has been a Miamisburg police officer for approximately fifteen years. Previously, he was a West Carrollton police officer for over nine years. On January 17, 2015 at 8:00 a.m., Officer Davis was dispatched to the Red Roof Inn, 222 Byers Road in Miamisburg.

Julie Kirk's Statement

Upon Officer Davis' arrival at the Red Roof Inn, he met with Julie Kirk. Ms. Kirk reported she had observed a male driver [later identified as the Defendant Brown] back up his car "and struck a semi truck and that he went forward accelerating, hit a parking block and then

drove into a room and the room was 134." *Suppression Transcript.* (In her written statement, *State's Exh. 2*, Kirk wrote the man first drove into the room and then backed up and hit the semi.) Kirk reported the man "drove off and she said he drove around the building. She assumed that he was leaving but, in fact, he returned a few minutes later, parked in front of 132, got out and then entered room 132 next to the room that was crashed." *Suppression Transcript*. Kirk pointed out the car and described the driver and the clothing he was wearing

Officer Davis testified that the fact the car drove over the parking block indicated a slow response time that is consistent with intoxication.

Officer Davis' Initial Encounter with Brown

Officer Davis knocked on the door of room 132. The Defendant, Loren Brown, opened the door. His appearance and clothing matched the description provided by Julie Kirk.

Officer Davis asked Brown "if I could step in and talk to him about the crash. He said, yes." Id. Two other individuals - younger than Brown – also were inside the room. Davis detected the odor of alcohol in the room. He also "noticed there were beer bottles scattered throughout the room" and that it "appeared they'd had a party there, also broken beer bottle out in front of the room." Id. Davis observed four or five bottles in plain view, but didn't touch them to determine if they were still cold.

As Davis began talking to Brown, he "noticed his eyes were glassy, they were watery, red, bloodshot; however, his speech was good [not slurred] but he had, like, a southern accent." Id. While he has observed persons with glassy eyes in the early morning hours whom he did not suspect of impaired driving, nonetheless Davis testified that glassy eyes is a "clue" that a person might be impaired.

Officer Davis asked Brown if he had driven the car. Brown responded, "Yes." Id. Davis asked him "if he had had anything to drink and he said no, not this morning; that it had been about eight hours since last he had any alcohol." Id.

Officer Davis has been trained that it is important to determine the following: The number of drinks the suspect consumed; what the beverage was he was drinking, and when he had been drinking. Davis did not attempt to elicit any of this information from Brown.

The "legal limit" in Ohio is .08 grams of alcohol for every 200 liters of breath. On cross-examination Officer Davis testified that for persons to awaken over the "legal limit" after a night's sleep, normally "they [would] have needed to be significantly more intoxicated when they went to bed than when they woke up to still be over the limit when they woke up." Id.

As Officer Davis recorded in the narrative portion of his report, *Def's Exh. C,* when Brown was exiting the motel room, it appeared he "was somewhat uncoordinated by the way he was walking. However, he said he had a lot -- a lot of it because he had arthritis, two bad knees and two bad feet." Id. Brown reported he "was also just in a car accident." Id.

Davis testified on direct examination that Brown walked with a "kind of a stagger almost." Id. In neither the narrative portion of his report, *Def's Exh. C,* nor in his impaired driver's report form, *Def's Exh. B,* did Officer Davis use the word "stagger." Thus, this Court is not convinced Brown had a "kind of a stagger."

Officer Davis asked Brown "what had occurred. He admitted he was driving that morning. He got up. He wanted to go to breakfast, that he wanted to go to the Waffle House and that he met . . . his great nephew, a Devon Cane who was actually staying in the room next to him. They were going to go out. He said that he backed up. He didn't realize that he had hit

the semi truck. And that when he started forward, the pedal got stuck halfway and caused his car to accelerate forward striking the parking block and into the room." *Suppression Transcript.* This explanation seemed suspicious to Davis, because in his twenty-four years as a patrol officer he had never investigated a vehicular incident in which "a pedal has been stuck mechanically." Id.

Neither Brown nor anyone else reported to Officer Davis that Brown had sustained a blow to the head or had been otherwise injured in the accident. Davis particularly noted that "no air bag or anything like that" was deployed in Brown's car as a result of the accident. Id.

Brown, who was 62 years old, appeared to Davis to be more than fifty pounds overweight.

Brown agreed to step out of the motel room. Because it was cold outside, Officer Davis asked Brown "if he wanted to put on clothes or a jacket, pants. He said no, that he would go out the way he was." Id.

They looked at Brown's car.

Because he "was going to have to take an accident report and probably issue a citation," Officer Davis told Brown that he "just wanted to go over some information with him, check his driver's license because he had handed me a driver's license." Id.

Brown was placed in the backseat of the cruiser. Officer Davis testified he detected on Brown's person "a moderate odor of the alcoholic beverage." However, Davis wrote in the "CAOS form," *Def's Exh. A*, that he had detected a "faint odor of alcohol." Also, in the Miamisburg Police Department impaired driver's report form, *Def's Exh. B*, Davis recorded the intensity of the strength of the alcohol odor was "light." In the narrative portion of his report,

Def's Exh. C, Davis recorded he had "detected a faint moderate odor of an alcoholic beverage on or about the person." Id. Thus, this Court is persuaded that Officer Davis detected a faint or light – not moderate - odor of alcohol on Brown's person.

Officer Davis also testified he smelled alcohol on Brown's breath. This Court finds that had Davis detected odor on Brown's breath – a highly relevant and significant fact – he would have recorded that observation in at least of one of his aforementioned reports. Thus, this Court is not persuaded that Officer Davis detected odor on Brown's breath.

Peter Mense's Statement

Leaving Brown in the cruiser, Officer Davis went to room 134 – the room that had been struck by Brown's car. He knocked on the door, which was opened by Peter Mense, who was alone in the room. Mense reported "that initially his girlfriend was with him and that she had already left and went to work." *Suppression Transcript.* He said that in the adjacent room 132 "they had had a party over there last night." Id. He stated that approximately one half hour prior to the accident, Brown "came and started banging on his door." When Mense opened the door, Brown said, "Oh, I'm sorry. I'm at the wrong room." Id. Mense told Officer Davis that as he was talking to him, Brown "was off kilter, disheveled and actually leaning against the door frame." Id.

Brown then went to his room 132. Mense reported that approximately one half hour later, "he and his girlfriend were in the room and that a vehicle crashed into his room, startled him and his girlfriend. He jumped up, looked out, saw the car, saw the defendant." Id. Mense stated that a passenger [Devon Cane] exited Brown's car and "he came up, checked on him, said

that, yeah, he had been drinking last night. They had a party and he was probably still drunk from the night before." Id.

Devon Cane's Statement

Officer Davis then went to room 130 where he met Devon Cane, who is either Brown's great nephew or grand niece. (Davis testified he couldn't definitely identify Cane's gender.)

Cane told Davis "that it was his 21st birthday last night and they wanted to celebrate his 21st birthday. He told me they started off at Cheeks Gentleman's Club. And then once he left Cheeks, that they came back to the room and then they continued to have a party there." *Suppression Transcript*. The next morning, Cane said, he and Brown had decided to go to breakfast. As Brown was backing his car up, Cane told Brown "to stop, stop, stop." Id. When asked if Brown had actually hit the semi truck, Cane said "he didn't think so." Id.

Miranda Rights

At Officer Davis' request, a sergeant arrived on the scene with a portable breath tester. However, Brown refused to submit to the test.

Officer Davis entered the cruiser and, as recorded in the cruiser cam video*, State's Exh. 5*, Davis advised Brown of the Miranda rights. During the ensuing interview, Brown "identified himself as Terry Lee Johnson, age 26," provided a driver's license and explained how the accident occurred.

Field Sobriety Tests Administered By Officer Davis

Since Officer Davis intended to ask Brown to perform field sobriety tests in the cold weather - and given that Brown was only wearing shorts and a T-shirt - Davis had a supervisor escort Brown back to his room so he could put on a pair of pants and obtain a jacket. In the

meantime, Davis repositioned his cruiser in front of Brown's room on a spot of ground that was dry and flat and not icy.

When Brown returned, Officer Davis discussed his performing the following field sobriety tests: Horizontal Gase Nystagmus (HGN), walk and turn, one-legged stance, hand dexterity, alphabet, and finger-to-nose.

Brown stated that due to his medical condition, he wouldn't be able to perform the walk and turn and one-legged stance tests. However, as Officer Davis testified, Davis' age, weight and reported medical problems did not affect his ability to perform the HGN, hand dexterity, alphabet, and finger-to-nose tests.

As Officer Davis conceded, while the HGN, one-legged stance and walk and turn tests are sanctioned by NHTSA, the other tests are not.

With regard to the hand dexterity, alphabet, and finger-to-nose tests, Officer Davis testified he does not know the reason why the Miamisburg Police Department authorizes those tests. With regard to the accuracy of these three tests, Davis provided contradictory testimony. On cross-examination he testified:

> Q. Well, if they're not sanctioned by the NHTSA manual, and they weren't created by NHTSA; fair to say? Do you have any idea where they came from? A. I do not.
> Q. Do you have any idea of how accurate or reliable they are?
> A. I do not.
> Q. Does anybody keep any information in your department as to the accuracy of your three field sobriety tests that are not sanctioned by NHTSA?
> A. Not that I'm aware.

Suppression Transcript. On re-direct, Davis testified:

> Q. So, based on your training that you received and your extensive experience as an officer, have the field sobriety tests that you were talking about before proven to be reliable and accurate?
> A. Yes.
> Q. And did you perform those tests in accordance with your training and experience?
> A. Yes.

Id.

In 1989 Officer Davis received special training in the police academy on the subject of impaired individuals. In 1992, in an "ADAP" (Alcohol and Drug Awareness Program) class, he received advanced training in the detection and apprehension of DUI drivers and he received a NHTSA (National Highway Traffic Safety Administration) field sobriety certification. In the subsequent twenty-three years, he has not received a NHTSA training update. Nor has he been trained on the NHTSA 2006 or 2013 manuals.

In the course his career in law enforcement, Officer Davis has "arrested hundreds and hundreds and hundreds of OVI drivers." *Suppression Transcript.* He testified, "In 24 years of experience, numerous letters for evaluations, the number of OVIs and convictions. I received an award from the Ohio Department of Highway Traffic Safety from the director for the number of OVIs and convictions for it." Id.

"Hand Dexterity Test": Officer Davis described the "hand dexterity test": "They can choose whichever hand they wish, right hand or left hand. Basically, it's a thumb to each finger test touching the very tip of the finger, counting forward and then counting backwards. And each time they are to touch the very tip of their thumb to the very tip of each finger. You start at the index finger, the middle finger, the ring finger, and then the small finger. And then you touch the small finger to the ring finger to the middle finger, the index finger and you do it as

fast as you can three times." *Suppression Transcript.* The signs indicative of impairment, Davis testified, include the following behavior by the suspect: "Doesn't follow instructions, doesn't touch the tip of each finger, counts out of sequence, counts wrong." Id.

Brown's performance of the "hand dexterity test" was recorded on the cruiser cam video, *State's Exhibit 5*, at 43 minutes to 45 minutes, 41 seconds. On cross-examination, Officer Davis detailed the manner in which Brown performed this test incorrectly:

> Q. Okay. And what were the errors or the faults that Mr. Brown had in conducting the test?
> A. The instructions come at the beginning. He also kind of swayed while standing there. He did not touch each finger.
> Q. I want to stop you. When he swayed when he was standing there, was he swaying in the same manner that he was walking to the car earlier after his injuries?
> A. No. It's not the same.
> Q. He was swaying in a different way?
> A. Yes.
> Q. Side to side or front to back?
> A. Little bit off balance in a circular motion.
> Q. Please continue with what you were saying about the problems with his finger dexterity.
> A. He did not touch each finger with the tip of his thumb with each finger. And then when he counted forward, that was correct; however, when he counted backwards, he was incorrect coming to the number one.
> Q. With the numbers or with the fingers that he was touching?
> A. The numbers.
> Q. The numbers?
> A. He stopped at two.
> Q. Did he touch his fingers correctly?
> A. No.
> Q. What did he do wrong?
> A. He didn't touch the very tip of his finger.
> Q. So it was just kind of floating his thumb in front of his fingers?
> A. No. He would just not touch the tip of his finger.

Q. How much space would he leave between his thumb and his finger?
A. Maybe the front portion of his finger a little bit, not the tip.
Q. If you had to estimate a distance, what would you call it?
A. I would say to your fingernail tip.
Q. So we're talking about, like, an inch, maybe half an inch then?
A. Yes. You just watch the coordination and so forth. It's common sense.
Q. But he did not touch his fingers?
A. Not the very tip of his fingers. He did not.
Q. Did he touch some other part of his finger?
A. Yes.
Q. Which part did he touch?
A. Towards, I guess, the front.
Q. Is the tip not the front?
A. The tip would be the tip. This would be the front.
Q. So he touched the underside of the tip?
A. Yes.
Q. Instead of the tip of the finger?
A. Yes.
Q. So, for the record, then, squeezing like you'd pinch something instead of thumb to tip?
A. Just not the very tip.
Q. And in your instructions that you got in '92 from this mystery person, did they tell you whether or not this is accurate to pinch or do you have to touch the tip?
A. You have to touch the tip.
Q. According to?
A. The training.

Id.

"Alphabet Test": Officer Davis asked Brown if he knew the alphabet. Brown, who has had twelve years of education, replied "Yes." *Suppression Transcript.* As recorded on the cruiser cam video*, State's Exhibit 5*, at 45 minutes, 41 seconds to 46 minutes, 24 seconds, Brown performed the "alphabet test." In so doing, Officer Davis testified, Brown exhibited

indications of intoxication: "He couldn't recite his alphabet in chronological order. Both times he was not able to do it correctly. He was given two opportunities." *Suppression Transcript.*

"Finger-To-Nose Test": Officer Davis described the "finger-to-nose test": "I have them face towards me. I have them extend both their arms out to their side with their palms up. Extend their index finger out, their pointer finger out and then I explain it to them. And then I have them close their eyes and then I'll tell them either their right finger or their left finger and I will show them and make sure they understand it before they perform it. And I have them bring the finger that I ask around to the front of them and then directly touch the very tip of the finger to the very tip of the nose and I actually show them where I want them to touch their nose, not the bridge of their nose, not the side of their nose or so forth. And then to return their arm out to the front and then out to the side. " Id.

In performing this test Officer Davis testified he looks for the following: "Once, again, following instructions. I use the right finger that I directed them to, maintaining balance, if they actually can close their eyes and keep their balance, bring their finger around to the front and actually touch the tip of their finger to the very tip of their nose." Id.

As recorded on the cruiser cam video*, State's Exh. 5* - at 46 minutes, 24 seconds to 47 minutes, 30 seconds - Brown performed the "finger-to-nose test." Davis testified, "I was watching his balance. He kind of swayed in a circular motion. When he was to touch the very tip of his finger to the very tip of his nose, he missed one time out of two and he also didn't keep his eyes closed as I asked him to." *Suppression Transcript*. These are signs of alcohol based on Officer Davis' experience and training.

HGN Test Administered by Sgt. Kelly

At Officer Davis' request, Sgt. William Kelly then performed the Horizontal Gaze Nystagmus (HGN) test. Davis observed Kelly perform this test at the conclusion of which Kelly stated that "he had witnessed four out of the six clues" of intoxication. *Suppression Transcript*

Sgt. Kelly has been an officer with the Miamisburg Police Department since 2001 and an administrative sergeant for the last eighteen months. In 2001, Kelly received training conducted by the University of Dayton Police Department in "ADAP." The forty hour class included training in the HGN test. "That is the test," Sgt. Kelly testified, "where you hold a stimulus 12 to 14 inches from a suspect impaired driver's face, move the stimulus back and forth in front of their face observing what their eyes do following that stimulus." Id. "Nystagmus" is the involuntary twitching of the eye.

With regard to the HGN training, Sgt. Kelly testified, "The entire class consists of classroom and lecture and practical exercise where they have volunteers come in, consume varying levels of alcohol and then you are able to perform not only the HGN but other tests on those people." Id. Kelly passed the practical test for this course.

In the last fourteen years, Sgt. Kelly performed the HGN test several hundred times.

In accordance with his training, Sgt. Kelly performed the HGN test on Brown's eyes. He made sure there were no lights that would influence the test and he confirmed that Brown had no "eye problems" - such as contacts or lazy eye.

"Equal Tracking": Kelly testified he starts the HGN test by holding up a stimulus – typically a pen. As he puts his finger at the top of the pen, he asks the suspect, "Can you see the tip of my pen?" When the suspect responds, "Yes," Kelly then confirms the suspect is "equal

tracking" – i.e. that is, "That the subject is following the stimulus with both eyes; they're not having difficulty seeing it; one eye isn't moving and the other one isn't, things like that." Id.

Sgt. Kelly looks for "equal tracking" of the pupils by holding the pen twelve to fourteen inches from the suspect's face "and make a pass past each eye at about a speed of one to two seconds per side . . . So from the nose to this side and back would be one to two seconds. And then this side and back, one to two seconds." Id. Thus, the entire sequence for both eyes takes two to four seconds. Sgt. Kelly did two passes for each of Brown's eyes – for a total of four passes. Brown demonstrated that he was "equal tracking."

"Resting Nystagmus": Before moving his pen across Brown's eyes, Sgt. Kelly did not hold the pen still and look for "resting Nystagmus" in each eye. He wasn't trained to do so in his 2001 ADAP course. On cross-examination, Sgt. Kelly testified:

> Q. . . . . Did they tell you in your 2001 training that if someone exhibits resting Nystagmus then it would be absolutely pointless to look for Nystagmus while it's moving because if they move at a standstill, they're going to move while they're in motion, right?
> A. Are you telling me that or are you asking me that?
> Q. I'm asking you that. I'm asking you if someone's eyes are exhibiting Nystagmus at a standstill, are they necessarily going to exhibit Nystagmus as they move back and forth?
> A. That makes sense so, yes.
> Q. If you properly are looking for resting Nystagmus and you observe resting Nystagmus, would there be any point in continuing?
> A. No, sir.
> Q. Since you didn't look for resting Nystagmus, you don't have that frame of reference for Mr. Brown; is that right?
> A. I guess not.

Id.

‘Equal Pupil Size”: Prior to moving his pen across Brown’s eyes, Sgt. Kelly did not determine whether Brown’s eyes were of equal pupil size.

“Lack of Smooth Pursuit”Clue: As Sgt. Kelly conducted the HGN test, he looked for three “clues.” First, the “lack of smooth pursuit” clue, which Kelly described as follows: “If you picture your eyes rolling across a smooth surface, that's what you and I are doing right now. When you're impaired or under the influence of alcohol, that stops. It's as if your eyes are marble or kind of going across sand paper. It's that kind of bumpy way of doing it.” Id. As a preliminary matter, Sgt. Kelly moved the stimulus back in front of Brown to make sure his eyes were able to track the stimulus. Kelly testified that in looking for “lack of smooth pursuit,” he passes the stimulus for two to four seconds per eye. When asked on cross examination, “Have you ever been updated that the new manuals require that you take a minimum of four seconds per pass?” Sgt. Kelly responded, “Yes, I am, sir.” Id.

Kelly observed lack of smooth pursuit in both of Brown’s eyes.

“Distinct Nystagmus at Maximum Deviation” Clue: The second clue is “distinct Nystagmus at maximum deviation.” “That is,” Sgt. Kelly testified, “when you take the stimulus all the way out to the subject's peripheral vision, you will see their eyes distinctly bouncing for lack of a better way to put it into the corner of their eyes.” Id. Sgt. Kelly testified, he “take[s] the stimulus out to the subject's peripheral vision and hold it there for two to three seconds and observe their eye.” Id. He then looks for “an involuntary bouncing or jerking of the eyes.” Id.

Kelly observed this involuntary bouncing or jerking movement in both of Brown’s eyes for two to three seconds.

The Clue of "Onset of Nystagmus Prior to 45 Degrees": The third clue is the "onset of Nystagmus prior to 45 degrees," which Kelly described as follows: "If you start in the middle and you start going out, before you would get to approximately 45 degrees, that bouncing will start." Id.

Kelly did not observe involuntary jerking in either of Brown's eyes.

Vertical Gaze Nystagmus: While Sgt. Kelly tested for lack of smooth pursuit, distinct Nystagmus at maximum deviation and onset of Nystagmus prior to 45 degrees, he did not test for vertical gaze Nystagmus, because he was never trained to do so.

In sum, out of a total of six HGN clues (two for each eye), Sgt. Kelly testified he observed four clues.

Brown Arrested

Upon Sgt. Kelly's completion of the HGN test, Officer Davis placed Brown "into custody for the suspicion of operating a motor vehicle, suspicion of alcohol and/or drug of abuse." *Suppression Transcript.*

Sgt. Muncy's Interview of Brown

Jeff Muncy is a Sergeant with the Miamisburg Police Department. On January 21, 2015, Sgt. Muncy - along with Gratis Police Officer Eric Stevens - went to 105 West North Street, Gratis, Ohio – Brown's residence. Muncy testified as to his reason for doing so:

> Q. Kind of describe some more of the background information.
> A. OVI crash. Someone had run into the building at the Red Roof Inn causing significant damage to the building. He was arrested for OVI, at the time gave a driver license for Terry Johnson with his picture on it. He was booked into the county jail as Terry Johnson.

> At some point, he got out of jail and before they realized -- before they passed it on to the Miamisburg Police Department, Officer Davis, the arresting officer, they were getting hits back on his prints that he could potentially be a guy by the name of Loren Brown, as well; so I was investigating that. That's why I went out to his house.

Suppression Transcript.

Sgt. Muncy was knocking on the door of the residence when he heard Brown, who was approximately a block away, yelling. Muncy and Stevens walked onto the street, where Brown walked up and met them. Brown stated "Hey, that's my house. What do you guys need?" Id. Sgt. Muncy introduced himself and Brown "told me who he was." Id. Muncy told Brown he needed to talk to him about possibly giving a false name when he was arrested for the OVI.

Sgt. Muncy asked Brown what his real name was. Brown "just looked down at the ground" and was "stammering." Id. In an effort to put Brown at ease, Sgt. Muncy told Brown that he didn't have any intention of arresting him that day. He said to Brown, "I just wanted to talk to you today. I'm not here to arrest you. I need to get all this paperwork straightened out. You gave a bogus name. I believe you gave a bogus name." Id. Brown then stated, "My real name is Loren Brown." Id. Muncy "asked him to talk to me about it and he agreed to talk to me about it." Id.

Because Brown admitted he had used a false name, Muncy "asked him if he had any other false identifiers. He said he didn't think he did." Id. Muncy asked to look in Brown's wallet. Brown handed his wallet to Muncy, who found inside it a social security card that belonged to "Terry Johnson."

Brown explained how he had acquired the name "Terry Johnson" and had obtained Terry Johnson's birth certificate. Brown explained he "had walked through the graveyard [in Dayton] several years ago in the 1980's and obtained a guy's name and date of birth and he went down and got a birth certificate, got a social security card, a birth certificate, got a driver's license and he talked about why he did that." Id.

Brown said Johnson's birth certificate might possibly be in his house. Sgt. Muncy "asked him if he would mind going to his house looking for it and he said sure." Id. Brown went in his house without the officer, returned a few minutes later and delivered Johnson's birth certificate to Muncy.

At the end of our conversation, Sgt. Muncy "asked him about the OVI."

The entire conversation lasted twenty to twenty-five minutes. Sgt. Muncy and Officer Stevens did not arrest Brown; rather, they left him at his residence.

The tone of the entire conversation was casual. At no point did anyone yell or engage in an argument. While Sgt. Muncy had his gun on his person, he never took it out.

On direct examination, Sgt. Muncy testified that at no point was Brown threatened or promised anything. On cross-examination, Muncy elaborated:

> Q. Did you tell him that if he cooperated the system would go easier on him; that it would be easier for him?
> A. I don't recall telling him that.
> Q. Did you tell him something to that effect?
> A. I told him that if he cooperated, generally the courts look at you in a better light, yes.
> Q. Did you tell him that he was eligible for probation on these crimes?
> A. No.
> Q. Did you tell him he would receive probation?
> A. No.

Q. Did you have any conversation with him about sentencing at all?
A. I think during our conversation, I said he could receive anywhere from probation to prison time.
Q. Did you tell him you'd make a recommendation for him?
A. No.
Q. Any conversation about what you thought was likely?
A. No. I never do that.

Id.

FINDINGS OF LAW

A. As a result of his investigation leading up to the field sobriety tests, Officer Davis developed only an inchoate hunch – not reasonable articulable suspicion – that Brown had been driving under the influence. Thus, Davis lacked the authority to detain Brown to subject him to the field sobriety tests.

In *State v. Santiago* (Oct. 14, 2011), Miami App. No 2010 CA 33, the Second District Court of Appeals held:

> An arrest is a substantial intrusion upon the arrestee's protected liberty interests, and therefore requires the full measure of probable cause to satisfy the Fourth Amendment to the United States Constitution. A brief, investigative stop is far less intrusive, and requires a correspondingly smaller quantum of probable cause for its justification, described as reasonable and articulable suspicion. The administration of field sobriety tests is intermediate between these two in terms of the intrusion it represents upon the subject's protected liberty interest. See *State v. Smethurst* (February 13, 1995), Clark App. No. 94-CA-24, 1995 Ohio App. LEXIS 900, and [*Spillers*, supra]. The imposition upon the subject's time is apt to be not much greater than the imposition represented by the typical investigative stop, but the indignity inflicted upon the subject's person, while far less than the indignity

> represented by an arrest, is greater than any indignity inflicted by the typical investigative stop." *State v. Kissinger*, Montgomery App. No. 23636, 2010 Ohio 2840, ¶240. ***Nonetheless, an officer's decision to conduct field sobriety tests need only be justified by a reasonable articulable suspicion.*** Id. at ¶26. See, also, *Columbus v. Shepherd*, Franklin App. No. 10AP-483, 2011 Ohio 3302, ¶23; *State v. Trevarthen*, Lake App. No. 2010-L-046, 2011 Ohio 1013, ¶15.

Id. at ¶22 (emphasis added).

> Whether an officer had reasonable articulable suspicion to administer field sobriety tests is a "very fact-intensive" determination. *State v. Wells*, Montgomery App. No. 20798, 2005 Ohio 5008, ¶9. We determine the existence of reasonable suspicion of criminal activity by evaluating the totality of the circumstances, considering those circumstances "through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold." *State v. Heard*, Montgomery App. No. 19323, 2003 Ohio 1047, ¶14, quoting State v. Andrews (1991), 57 Ohio St.3d 86, 87-88, 565 N.E.2d 1271.

Id. at ¶15.

"Reasonable suspicion" entails a minimal level of objective justification that is less than the level of suspicion required for probable cause, but is more than an "inchoate hunch." *State v. Grefer* (Jan. 10, 2014), Montgomery App. No. 25501.

In engaging in this "very fact-intensive" determination as to whether Officer Davis had reasonable articulable suspicion to administer the field sobriety tests, this Court is guided by the following decisions of the Second Appellate District:

In *State v. Spillers* (March 24, 2000), Darke App. No. 1504, the Second District held a "nominal traffic violation" – in that case, a few marked lane violations - combined with a slight odor of alcohol on the defendant's person and the fact he had consumed "a couple" of beers

were insufficient facts to create a reasonable articulable suspicion of DUI. Thus, the detention of the defendant for the purpose of administering a field sobriety test was unlawful. "Because, in our experience, virtually the entire motoring public commits nominal traffic violations regularly, we conclude that even the conjunction of these facts is insufficient to create a reasonable articulable suspicion of Driving under the Influence. A slight odor of an alcoholic beverage is insufficient, by itself, to trigger a reasonable suspicion of DUI, and nominal traffic violations, being common to virtually every driver, add nothing of significance." Id. at 9

Similarly, in *State v. Hall* (August 26, 2005), Greene App. No. 04CA86, the Second District held that driving fourteen miles per hour over the posted speed limit "is not a nominal or de minimus violation. While speeding is not necessarily an indicia of intoxication, it can be." Id. at P15. However, the Court noted that the defendant had a "moderate, not slight, odor of alcohol on his breath, " had glassy eyes and admitted he had consumed "a few" alcoholic drinks. The Second District held: "While none of the factors and circumstances known to Sergeant Landacre, if considered alone, may be sufficient to give rise to a reasonable suspicion that Defendant was driving under the influence and therefore justify field sobriety tests, the totality of these facts and circumstances is sufficient to create a reasonable suspicion of a possible OMVI violation that justified further investigation, including field sobriety tests." Id. at P16.

In *State v. Dixon* (Dec. 1, 2000), Greene App. No. 2000-CA-30, the Second District held there was not reasonable articulable suspicion to subject the defendant to field sobriety tests based upon the following facts: The defendant - stopped for a window tint violation at 2:20 a.m. - "had glassy, bloodshot eyes, . . . he had an odor of alcohol about his person, and . . . he admitted that he had consumed one or two beers" Id. at 5. "The mere detection of an odor of

alcohol," the Court held, "unaccompanied by any basis, drawn from the officer's experience or expertise, for correlating that odor with a level of intoxication that would likely impair the subject's driving ability, is not enough to establish that the subject was driving under the influence. Nor is the subject's admission that he had had one or two beers." Id. at 5-6.

In *State v. Hido* (May 27, 2011), Clark App. No. 10CA0046, the defendant was stopped for going 85 M.P.H. in a 65 M.P.H. zone. "This," the Second District held, "is not a situation involving 'nominal' speeding, but rather one involving excessive speeding, which we have held is some evidence of impairment." Id. at P11. This major traffic violation, the Court held, combined with the defendant having a strong odor of alcohol on her breath, having glassy and bloodshot eyes and being very nervous were sufficient facts to create a reasonable suspicion of impairment justifying her detention to conduct field sobriety tests. Id. at P11.

In *State v. Morris* (July 16, 2010), Greene App. No. 09CA84, the Second District held the following facts, considered together, "are clearly sufficient to give rise to a reasonable suspicion of criminal behavior, OMVI, and justify conducting field sobriety tests," id. at P11: "Defendant was stopped at 1:40 a.m., following two turn signal violations and after she nearly hit a concrete divider while making a left turn from North Fairfield Road onto Crossing Boulevard. When Trooper Stanfield made contact with Defendant he noticed that her eyes were glassy and that a strong odor of alcohol emanated from Defendant's vehicle. Defendant admitted that she had consumed two vodka drinks an hour or so earlier." Id.

Finally, it should be noted the Second District has repeatedly held that a *strong* odor of alcohol alone is enough to provide an officer reasonable suspicion to warrant administering field sobriety tests. *State v. Tackett*, (Dec. 23, 2011), Greene App. No. 2011-CA-15; *State v.*

Marshall (Dec. 28, 2001), Clark App. No. 2001CA35*; State v. Haucke*, (Mar. 17, 2000) Clark App. No. 99 CA 77.

In the case at bar, the following facts and circumstances led up to Officer Davis' decision to detain Brown in order to administer the field sobriety tests:

- Brown drove his car over a parking block into room 134. This was a major - not minor - vehicular violation. As Officer Davis testified, the fact that the car was driven over the parking block indicated a slow response time that is consistent with intoxication.
- Brown subsequently explained "that when he started forward, the pedal got stuck halfway and caused his car to accelerate forward striking the parking block and into the room." This explanation seemed suspicious to Davis, because in his twenty-four years as a patrol officer he had never investigated a vehicular incident in which "a pedal has been stuck mechanically."
- Officer Davis noticed four or five bottles scattered throughout Brown's motel room. However, he didn't touch them to determine if they were still cold.
- Officer Davis detected the odor of alcohol in Brown's motel room.
- Brown's speech was not slurred.
- Brown did not walk with a "kind of a stagger."
- Officer Davis detected a faint or light – not strong or moderate - odor of alcohol on Brown's person.
- Officer Davis did not detect the odor of alcohol on Brown's breath.

- Brown's eyes were "glassy, watery, red, bloodshot." While he has observed persons with glassy eyes in the early morning whom he did not suspect of impaired driving, Officer Davis testified that glassy eyes is a "clue" that a person might be impaired.
- Brown told Officer Davis that he hadn't anything to drink "this morning; that it had been about eight hours since last he had any alcohol."
- Davis has been trained that is important to determine the following: the number of drinks the suspect consumed; what beverage he was drinking, and when he had those drinks. Davis did not attempt to elicit any of this information from Brown.
- Peter Mense, who was the occupant of the room in which Brown crashed his car, told Officer Davis that in the adjacent room 132 – Brown's room - "they had had a party over there last night."
- Mense stated that approximately one half hour prior to the accident, Brown "came and started banging on his door." When Mense opened the door, Brown said, "Oh, I'm sorry. I'm at the wrong room." Mense told Officer Davis that as he was talking to him, Brown "was off kilter, disheveled and actually leaning against the door frame."
- Mense stated that when the accident occurred, the passenger - Devon Cane – exited Brown's car and "he came up, checked on him, said that, yeah, he had been drinking last night. They had a party and he was probably still drunk from the night before." (It should be noted this was a subjective personal opinion of Cane.)
- Devon Cane told Officer Davis that it was his 21st birthday the previous night and that they wanted to celebrate. Cane said they went to Cheeks Gentleman's Club and then returned to the motel room and "continued to have a party there." The next morning,

Cane said, he and Brown decided to go to breakfast. As Brown was backing his car up, Cane told Brown "to stop, stop, stop." He didn't think that Brown had struck the semi truck.

- Brown told Officer Davis that due to his medical condition, he would be unable to perform the walk and turn and one-legged stance tests. "He said he had arthritis, had two bad knees, two bad feet."

Unquestionably, because of the very nature of the accident - Brown driving his car over the parking block and into the motel room - Officer Davis properly initiated an investigation as to the cause of the accident and to determine if it was alcohol-related. However, as that investigation proceeded – and prior to the administration of the field sobriety tests – Officer Davis developed significant facts and information that militated against reasonable suspicion that Brown had been driving under the influence.

Brown's speech wasn't slurred; he didn't walk with a stagger; he had only faint or light odor of alcohol on his person, and he didn't have an odor of alcohol on his breath.

Brown told Davis it had been eight hours since he had consumed any alcohol. This was corroborated by Devon Cane, who told Peter Mense that "he [Brown] had been drinking last night." Mense himself reported to Officer Davis that "they had had a party over there last night" in Brown's room.

Cane did make the statement to Peter Mense that Brown was "was probably still drunk from the night before." However this was Cane's subjective personal opinion.

And while Brown's eyes were "glassy, watery, red, bloodshot" – a "clue" that a person might impaired – Officer Davis conceded that he has observed persons with glassy eyes in the early morning whom he did not suspect of impaired driving.

Finally, while he had been trained to do so, Officer Davis failed to ask Brown how many drinks he had consumed.

Evaluating the totality of the circumstances through the eyes of a reasonable and prudent police officer on the scene who must react to events as they unfold – and applying the aforementioned case law of the Second District Court of Appeals - this Court makes the following finding: At the point he decided to administer the field sobriety tests Officer Davis had an inchoate hunch - not reasonable articulable suspicion - that Brown had been driving under the influence. Thus, Officer Davis lacked the authority to continue to detain Brown in order to subject him to field sobriety tests. As a result, this Court must sustain Brown's *Motion to Suppress* is sustained as it relates to the field sobriety tests administered by Officer Davis and Sgt. Kelly. No evidence or testimony will be admitted at trial relating to those tests. Furthermore, those field sobriety tests cannot be considered by this Court in determining whether there was probable cause to arrest Brown for driving under the influence.

Nonetheless, for purposes of the record, this Court will address and rule upon two issues:

- Does the fact that the hand dexterity, alphabet and finger-to-nose tests administered by Officer Davis are not sanctioned by NHTSA preclude the consideration of the results of those tests in determining whether there was probable cause to arrest Brown?
- Was Sgt. Kelly's HGN test administered in substantial compliance with NHTSA standards?

B. The fact that the hand dexterity, alphabet and finger-to-nose tests are not sanctioned by NHTSA does not preclude the consideration of the results of those tests in determining whether there was probable cause to arrest.

Brown argues that because the hand dexterity, alphabet and finger-to-nose tests performed by Officer Davis are not sanctioned by NHTSA, the results of those tests should be suppressed and not considered in the determination of whether Davis had probable cause to arrest Brown for DUI.

Early this year, in *State v. Wood* (May 29, 2015), Montgomery App. No. 26341, the Second Appellate District rejected this argument as it applies to the alphabet test and the finger-to-nose test:

> Upon review, we find Wood's arguments about the alphabet test and the finger-to-nose test to be unpersuasive. As a preliminary matter, we agree with Wood that the only three validated and standardized field-sobriety tests discussed in the NHTSA manual are the HGN test, walk-and-turn test, and one-leg stand test. This does not mean, however, that Stewart could not perform any other tests. In fact, the 2013 NHTSA "participant" manual identifies the alphabet test and other tests and techniques as things officers can use to help determine whether a driver is impaired. The manual notes that such tests and techniques are not as reliable as the more accepted, standardized field-sobriety tests (i.e., the HGN test, walk-and-turn test, and one-leg stand test). Nevertheless, the manual recognizes them as being "useful for obtaining evidence of impairment" along with typical on-the-scene observations such as a suspect's slurred speech, bloodshot eyes, or an odor of alcohol. (2013 NHTSA participant manual, Session 6, pg. 4-7, 9-11).
>
> Although the NHTSA manual suggests use of the alphabet test and other tests and techniques to help determine whether the HGN test, walk-and-turn test, and one-leg stand test should be administered, we see no reason why

Stewart could not perform the alphabet test and the finger-to-nose test after those other tests. The fact that the alphabet test and the finger-to-nose test may not be recognized as reliable or accepted as the HGN test, walk-and-turn test, and one-leg stand test does not preclude their consideration.

In *State v. Schmitt*, 101 Ohio St.3d 79, 2004-Ohio-37, 801 N.E.2d 446, the Ohio Supreme Court addressed whether an officer may testify about his observation of a suspect's performance on standardized field-sobriety tests, such as the walk-and-turn test and the one-leg stand test, even when those tests were not administered in compliance with applicable NHTSA standards. Although non-compliance with NHTSA testing procedures effectively renders such standardized tests non-standardized, the Ohio Supreme court reasoned:

> The nonscientific field sobriety tests involve simple exercises, such as walking heel-to-toe in a straight line (walk-and-turn test). The manner in which defendant performs these tests may easily reveal to the average layperson whether the individual is intoxicated. We see no reason to treat an officer's testimony regarding the defendant's performance on a nonscientific field sobriety test any differently from his testimony addressing other indicia of intoxication, such as slurred speech, bloodshot eyes, and odor of alcohol. In all of these cases, the officer is testifying about his perceptions of the witness, and such testimony helps resolve the issue of whether the defendant was driving while intoxicated.
>
> Unlike the actual test results, which may be tainted, the officer's testimony is based upon his or her firsthand observation of the defendant's conduct and appearance. Such testimony is being offered to assist the jury in determining a fact in issue, i.e., whether a defendant was driving while intoxicated. Moreover, defense counsel will have the

> opportunity to cross-examine the officer to point out any inaccuracies and weaknesses. We conclude that an officer's observations in these circumstances are permissible lay testimony under Evid.R. 701. Therefore, we answer the certified question in the negative and hold that a law enforcement officer may testify at trial regarding observations made during a defendant's performance of nonscientific standardized field sobriety tests.
> Id. at ¶ 14-15.

Much like Schmitt, we see no reason why Stewart could not testify regarding his observation of Wood's performance on the alphabet test and the finger-to-nose test. A suspect's inability to recite the alphabet or to touch his nose may be considered, under the totality of the circumstances, along with observations of his slurred speech, bloodshot eyes, or an odor of alcohol to determine whether he was driving under the influence of alcohol. Here Wood's performance of the alphabet test and the finger-to-nose test simply constituted additional information that, along with other indicia of intoxication, helped Stewart make the decision to arrest.

As noted above, the NHTSA manual recognizes that the alphabet test and other techniques are relevant and useful in determining whether a driver is impaired. Stewart himself testified that the alphabet test and the finger-to-nose test were part of a "standard battery" of tests used by and taught to him by the Kettering Police Department. (Hearing Tr. at 31, 34). In his experience, he has found a correlation between a defendant's performance on the alphabet test and the finger-to-nose test and being under the influence of alcohol. (Id. at 36-37). Finally, we note that, following Schmitt, this court and others have found admissible an officer's testimony about his observations of a suspect's performance on the alphabet test and the finger-to-nose test. See, e.g., *State v. Wells*, 2d Dist. Montgomery No. 20798, 2005-Ohio-5008 (finding that officer had probable cause to arrest defendant based partially on her performance on tests including the alphabet test and the finger-to-nose test);

> *State v. Washington*, 9th Dist. Lorain No. 11CA0100042, 2012-Ohio-1391 (finding that an officer could testify about his observations while administering the alphabet test and the finger-to-nose test); *Brooklyn Heights v. Yee*, 8th Dist. Cuyahoga No. 92038, 2009-Ohio-4552 (rejecting argument that officer could not testify regarding his observations of the alphabet test and the finger-to-nose test and instead was limited to the HGN test, the walk-and-turn test and the one-leg stand test); *State v. Winland*, 5th Dist. Licking No. 07-CA-12, 2007-Ohio-7109, ¶ 42 (finding that officer could testify about observations made during suspect's performance of alphabet test and finger-to-nose test). Accordingly, we see no error in the trial court's denial of Wood's motion insofar as it pertained to the alphabet test and the finger-to-nose test.

Id. at P7- P11.

Based upon *State v. Wood*, this Court rejects Brown's arguments that the results of the hand dexterity, alphabet and finger-to-nose tests conducted by Officer Davis should be suppressed because they are not sanctioned by NHTSA.

C. The State established by clear and convincing evidence the HGN test was administered in substantial compliance with NHTSA standards.

R.C. 4511.19(D)(4)(b) provides that evidence and testimony regarding the results of a field sobriety test may be presented "if it is shown by clear and convincing evidence that the officer administered the test in substantial compliance with the testing standards for any reliable, credible, and generally accepted field sobriety tests that were in effect at the time the tests were administered, including, but not limited to, any testing standards then in effect that were set by the national highway traffic safety administration [.]" In *State v. Boczar*, 113 Ohio St.3d 148, 2007-Ohio-1251, the Ohio Supreme Court ruled that HGN test results are admissible in evidence "so long as the proper foundation has been shown both as to the administering officer's

training and ability to administer the test and as to the actual technique used by the officer in administering the test." Id. at ¶28.

In accordance with the *Notice of Intent* filed August 18, 2015, thus Court takes judicial notice of the NHTSA standards set forth in the NHTSA March 2013 manual titled: *DWI Detection and Standardized Field Sobriety Testing* (hereinafter referred to as the "*NHTSA Manual*").

As a preliminary matter, this Court addresses the failure of Sgt. Kelly to test Brown for vertical gaze Nystagmus (VGN), which is an "an involuntary jerking of the eyes (up-and-down) which occurs as the eyes are held at maximum elevation." *NHTSA Manual,* Session 1, pg. 22.

In *State v. Delarosa*, 2005-Ohio-3399 (Portage County June 30, 2005), the Eleventh Appellate District held the NHSTA standards do not require an officer test for vertical gaze nystagmus. "Although the standards describe the proper procedures to perform a vertical gaze nystagmus, such standards also confirm that only the horizontal gaze nystagmus is used to assess whether an individual is intoxicated. Moreover, trial courts have excluded the results of the vertical gaze nystagmus test because the Ohio Supreme Court has not approved this test as a method to gauge alcohol consumption. See e.g., *State v. Anez* (2000), 108 Ohio Misc. 2d 18, 28, 738 N.E.2d 491, citing *State v. Bresson* (1990), 51 Ohio St.3d 123, 554 N.E.2d 1330. See, also, *State v. Holt* (2002), 119 Ohio Misc. 2d 1, 17, 772 N.E.2d 203." Id. at P45

In *State v. Frakes*, 2008-Ohio-4204 (Coshocton County Aug. 15, 2008), the trial court – in its decision overruling the defendant's motion to suppress - addressed the defendant's complaint that the officer failed to check for vertical nystagmus: "While this is included in the H.G.N. test outline, it is odd because no 'clues' are obtained from this portion of the test. All six

(6) clues are indicated on the horizontal portion of the test. Since the horizontal portion of the test was completed and since all six (6) clues were observed, the failure to complete a vertical test was a minor deviation and this is also inconsequential. According to the N.H.T.S.A. manual, if a suspect displays four (4) or more clues it is likely that the suspect's B.A.C. is above .10." Id. at P31. The Fifth Appellate District ruled the trial court did not err in denying the motion to suppress on this issue. Id. at P38.

The 2013 *NHTSA Manual* does not mandate that an officer perform the VGN test, Rather, it provides that VGN is one of tests than an officer "*can* conduct to assess possible drug or medical impairment." Id. at Session 0, pg. 6 (emphasis added). Therefore, this Court finds the *NHTSA Manual* did not require Sgt. Kelly to test for VGN.

However, Sgt. Kelly did test for horizontal gaze Nystagmus (HGN), which is the "involuntary jerking of the eyes occurring as the eyes gaze to the side." Id. at Session 10, pg. 14.

When the HGN test is "administered in a standardized manner, " laboratory research has indicated that it is "highly accurate and reliable" test for "distinguishing BACs at or above 0.10." Id. at Session 8, pg. 5.

The 2013 *NHTSA Manual* states: "Prior to administration of HGN, the eyes are checked for equal pupil size, resting nystagmus, and equal tracking (can they follow an object together). If the eyes do not track together, or if the pupils are noticeably unequal in size, the chance of medical disorders or injuries causing the nystagmus may be present." Id. at Session 8, pg. 18.

The *NHTSA Manual* sets forth the "Administrative Procedures for Horizontal Gaze Nystagmus" and cautions: "It is important to administer the Horizontal Gaze Nystagmus test systematically using the following steps, to ensure that nothing is overlooked. There are 10

steps in the systematic administration of the Horizontal Gaze Nystagmus test" Id. at Session 8, pg. 21.

Among the ten steps is: "Step 4: Equal Pupil Size and Resting Nystagmus. Check for equal pupil size and resting nystagmus." Id. at Session 8, pg. 23. Prior to moving his pen across Brown's eyes to test for HGN, Sgt. Kelly did not determine whether Brown's eyes were of equal pupil size.

Sgt. Kelly did not test for resting Nystagmus. The *NHTSA Manual* states: *"*Resting Nystagmus is referred to as jerking as the eyes look straight ahead. This condition is not frequently seen. Its presence usually indicates a pathological disorder or high doses of a Dissociative Anesthetic drug such as PCP." Id. at Session 0, page 6. In *State v. Burris*, 2008-Ohio-2168(Licking County Apr. 28, 2008), the deputy did not check for resting nystagmus. However, the Fifth Appellate District held this was not required in the case of suspected alcohol consumption, because "this test is generally relevant to testing for the influence of drugs such as PCP. See 2006 NHTSA Manual at VIII-4" Id. at P13. In the case at bar, since there was no suggestion of PCP usage – only alcohol consumption – testing for resting nystagmus was unnecessary.

Another step in the HGN test: "Step 5: Equal Tracking. Check for equal tracking. Move the stimulus rapidly from center to far right, to far left and back to center." *NHTSA Manual* at Session 8, pg. 23. This Court finds Sgt. Kelly properly performed this step. Kelly testified he looked for "equal tracking" of the pupils by holding his pen twelve to fourteen inches from the suspect's face "and make a pass past each eye at about a speed of one to two seconds per side . . . So from the nose to this side and back would be one to two seconds. And then this side and

back, one to two seconds." *Suppression Transcript.* Thus, the entire sequence for both eyes takes two to four seconds. Sgt. Kelly did two passes for each of Brown's eyes. Contrary to the suggestion of the Defense Counsel, this Court could not find within the *NHTSA Manual* a requirement of a minimum of four seconds for each eye.

With regard to checking for the HGN clue of "lack of smooth pursuit," the *NHTSA Manual* provides:

> The Mechanics of Clue Number 1
>
> It is necessary to move the object smoothly in order to check the eye's ability to pursue smoothly.
>
> The stimulus should be moved from center position, all the way out to the right side (checking subject's left eye) where the eye can go no further, and then all the way back across subject's face all the way out to the left side where the eye can go no further (checking subject's right eye) and then back to the center.
>
> The object must be moved steadily, at a speed that takes approximately 2 seconds to bring the eye from center to side.
>
> In checking for this clue, make at least two complete passes in front of the eyes.
>
> If you are still not able to determine whether or not the eye is jerking as it moves, additional passes may be made in front of the eyes.

Id. at Session 8, pg. 28. Sgt. Kelly testified to the manner in which he checked for the "lack of smooth pursuit" clue: "If you picture your eyes rolling across a smooth surface, that's what you and I are doing right now. When you're impaired or under the influence of alcohol, that stops. It's as if your eyes are marble or kind of going across sand paper. It's that kind of bumpy way of

doing it." *Suppression Transcript*. Preliminarily, Sgt. Kelly moved the stimulus back in front of Brown to make sure his eyes were able to track the stimulus. Kelly testified that in looking for "lack of smooth pursuit," he passes the stimulus for two to four seconds per eye. When asked on cross examination, "Have you ever been updated that the new manuals require that you take a minimum of four seconds per pass?" Sgt. Kelly responded, "Yes, I am, sir." Id. However, it is not a requirement that it take a "take a minimum of four seconds per pass." Rather, the *NHTSA Manual* states: "The object must be moved . . . at a speed that takes *approximately* 2 seconds to bring the eye from center to side." This would equate to an "approximate" – not a mandated minimum – speed of four seconds per pass.

With regard to checking for the HGN clue of **"**distinct nystagmus at maximum deviation" clue, the *NHTSA Manual* provides:

> Clue No. 2: Distinct and Sustained Nystagmus at Maximum Deviation
>
> Once you have completed the check for lack of smooth pursuit, you will check the eyes for distinct and sustained nystagmus when the eye is held at maximum deviation, beginning with the subject's left eye.
>
> The Mechanics of Clue Number 2
>
> Once again, position the stimulus approximately 12 - 15 inches (30 - 38 cm) in front of subject's nose and slightly above eye level.
>
> Move the stimulus off to the right side (checking subject's left eye) until the eye has gone as far as possible.
>
> Hold the stimulus steady at that position for a minimum of four (4) seconds, and carefully watch the eye.

> Then, move the stimulus back across the subject's face all the way out to the left side (subject's right eye).
>
> Four seconds will not cause fatigue nystagmus. This type of nystagmus may begin if a subject's eye is held at maximum deviation for more than 30 seconds.
>
> Hold the stimulus steady and carefully watch the eye.
>
> If the person is impaired, the eye is likely to exhibit definite, distinct and sustained jerking when held at maximum deviation for a minimum of 4 seconds.
>
> In order to "count" this clue as evidence of impairment, the nystagmus must be distinct and sustained for a minimum of 4 seconds.
>
> If you think you see only slight nystagmus at this stage of the test, or if you have to convince yourself that nystagmus is present, then it isn't really there.

Id. at Session 8, pg. 30. In looking for distinct Nystagmus at maximum deviation, Sgt. Kelly testified he held the stimulus out to Brown's peripheral vision "for two to three seconds" for each eye and that he observed involuntary bouncing or jerking movement in both of Brown's eyes for two to three seconds.

The Twelfth Appellate District has determined that substantial compliance with NHTSA regulations was shown where, in testing for the onset of nystagmus prior to 45 degrees, an officer took two seconds to move the stimulus out, rather than the four seconds outlined in the manual. *State v. Lange*, Butler App. No. CA2007-09-232, 2008 Ohio 3595, P10-11, citing *Cleveland Heights v. Schwabauer*, Cuyahoga App. No. 84249, 2005 Ohio 24, P24-25. In *Lange,* the Twelfth District held that no prejudice was shown to the defendant, because "presumably moving the stimulus in strict compliance with the manual would have rendered the

same, if not worse results." Id. at P11, citing *Schwabauer* at P25. Likewise, in the case at bar, in testing for distinct Nystagmus at maximum deviation, presumably holding the stimulus out to Brown's peripheral vision for a full four seconds in strict compliance with the manual would have rendered the same results that Kelly observed "for two to three seconds" - involuntary bouncing or jerking movement in both of Brown's eyes. Thus, Brown suffers no prejudice from Sgt. Kelly's failure to hold the stimulus out to Brown's peripheral vision for a full four seconds.

Under the totality of the circumstances, this Court finds by clear and convincing evidence that in conducting the HGN test, while Sgt. Kelly did not strictly comply with the 2013 NHTSA testing standards, he did substantially comply with those standards.

D. Brown's arrest for DUI was not based on probable cause.

This Court has ruled that Officer Davis lacked the authority to detain Brown to subject him to the field sobriety tests. Therefore, in determining whether there was probable cause to arrest Brown for driving under the influence, this Court cannot consider the results of the hand dexterity, alphabet and finger-to-nose tests administered by Officer Davis conducted and the HGN test administered by Sgt. Kelly.

"Probable cause, specifically in terms of arrests for driving under the influence, is determined by whether, at the time of arrest, the officer had sufficient information, from a reasonably trustworthy source, of facts and circumstances, that are sufficient to make a prudent person believe the suspect was driving under the influence. [*State v.*] *Brown* [2d Dist. Greene No. 2011 CA 52, 2012 Ohio 3099]. This standard requires examining the totality of facts and circumstances surrounding the arrest. " *State v. Sheppeard*, 2d Dist. Clark No. 2012 CA 27 (Mar. 8, 2013) at P41.

Earlier in the *Decision*, this Court considered totality of the facts and circumstances leading up to Officer Davis' decision to subject Brown to the field sobriety tests. This Court concluded these facts and circumstances caused Officer Davis to have an inchoate hunch - not reasonable articulable suspicion - that Brown had been driving under the influence. It must follow that these same facts and circumstances did not provide probable cause to arrest Brown for driving under the influence

E. Brown was not "in custody" during his conversation with Sgt. Muncy and Officer Stevens. Thus, he was not entitled to the Miranda warnings during that conversation.

"Miranda warnings apply only when a person is subjected to custodial interrogation." *State v. Severt* (Nov. 5, 2010), Montgomery App. No. 24074. In *Severt*, the Second District Court of Appeals reiterated the controlling standard for deciding whether an individual is in custody:

> In *State v. Estepp*, Montgomery App. No. 16279, 1997 Ohio App. LEXIS 5279, we reiterated the controlling standard for deciding whether an individual is in custody:
>
> "The determination whether a custodial interrogation has occurred requires an inquiry into 'how a reasonable man in the suspect's position would have understood his situation.' *** [T]he ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." Citing *State v. Biros* (1997), 78 Ohio St.3d 426, 1997 Ohio 204, 678 N.E.2d 891. Neither an officer's subjective intent nor the defendant's subjective belief is relevant to this analysis. *State v. Hopfer* (1996), 112 Ohio App.3d 521, 546, 679 N.E.2d 321. Thus, whether Wilson felt free to leave and whether the police officers considered the interaction an interview rather than an interrogation are irrelevant

considerations. In *Estepp*, supra, we noted that HN4 the following factors have been used to assess how a reasonable person in the defendant's situation would have reacted to the questioning:

1) Where did the questioning take place, i.e. was the defendant comfortable and in a place one would normally feel free to leave?

2) Was the defendant a suspect at the time the questioning began (bearing in mind that Miranda warnings are not required simply because the investigation had focused);

3) Was the defendant's freedom to leave restricted in any way;

4) Was the defendant handcuffed or told he was under arrest;

5) Were threats made during the interrogation;

6) Was the defendant physically intimidated during the questioning;

7) Did the police verbally dominate the interrogation;

8) What was the defendant's purpose for being at the place where the questioning took place;

9) Were neutral parties present at any point during the questioning;

10) Did the police take any action to overpower, trick, or coerce the defendant into providing any statement?" See, *State v. Smith*, Franklin App. No. 96APA10-1281, 1997 Ohio App. LEXIS 2426, *State v. Evins*, Montgomery App. No. 15827, 1997 Ohio App. LEXIS 662, and *State v. Brown* (1993) 91 Ohio App.3d 427, 632 N.E.2d 970.

Id at P14- P25.

In the case at bar, Sgt. Muncy and Officer Stevens went Brown's residence.

Sgt. Muncy was knocking on the door of the residence when he heard Brown, who was approximately a block away walking down the street, yelling. Muncy and Stevens walked onto the street, where Brown walked up and met them. Brown asked, "Hey, that's my house. What do you guys need?" *Suppression Transcript.* Sgt. Muncy introduced himself and Brown "told me who he was." Id. Muncy told Brown that he needed to talk to him about possibly giving a false name when he got arrested for the OVI.

Sgt. Muncy asked him what his real name was. Brown "just looked down at the ground" and was "stammering." Id. In an effort to put Brown at ease, Sgt. Muncy said that he didn't have any intention of arresting him that day. He told Brown, "I just wanted to talk to you today. I'm not here to arrest you. I need to get all this paperwork straightened out. You gave a bogus name. I believe you gave a bogus name." Id. Brown then stated, "My real name is Loren Brown." Id. Muncy "asked him to talk to me about it and he agreed to talk to me about it." Id.

Because Brown admitted he had used a false name, Muncy "asked him if he had any other false identifiers. He said he didn't think he did." Id. Muncy asked to look in Brown's wallet. Brown handed his wallet to Muncy, who found inside it a social security card that belonged to "Terry Johnson." Brown explained how he had acquired the name "Terry Johnson" and had obtained a birth certificate for "Terry Johnson." Brown said he "had walked through the graveyard [in Dayton] several years ago in the 1980's and obtained a guy's name and date of birth and he went down and got a birth certificate, got a social security card, a birth certificate, got a driver's license and he talked about why he did that." Id.

Brown said Johnson's birth certificate might possibly be in his house. Sgt. Muncy "asked him if he would mind going to his house looking for it and he said sure." Id. Brown

went in his house without the officer, returned a few minutes later and delivered Johnson's birth certificate to Muncy.

At the end of our conversation, Sgt. Muncy "asked him about the OVI."

The entire conversation lasted twenty to twenty-five minutes. Sgt. Muncy and Officer Stevens did not arrest Brown, Rather, they left him at his residence.

The tone of the entire conversation was casual. At no point did anyone yell or engage in an argument. While Sgt. Muncy had his gun on his person, he never took it out.

At no point was Brown threatened or promised anything. Sgt. Muncy did tell Brown that "if he cooperated, generally the courts look at you in a better light." Id. However, Muncy did not tell Brown that he would make a sentencing recommendation, nor did he indicate to Brown what he thought would be a likely sentence.

In applying the *Estepp* factors, this Court notes the following:

- Brown was not at the police station. Initially he was on a public street - a place one would normally feel free to leave. And when Brown was on the porch of his residence, a person in that situation would normally feel free to leave the officers on the porch and enter the residence.
- Brown was a suspect for the crimes of Driving Under the Influence and Identity Fraud.
- Brown's freedom to leave was not restricted in any way. Notably, Brown was not stopped by the police. Rather, he walked up to and met Sgt. Muncy and Officer Stevens on the street. And it was Brown who initiated the conversation by asking, "Hey, that's my house. What do you guys need?"
- Brown was never handcuffed.

- Sgt. Muncy told Brown that "I'm not here to arrest you." In fact, Brown was not arrested. Rather, at the conclusion of the interview, the officers left Brown at his residence.
- While Sgt. Muncy had his gun on his person, he never took it out.
- At no point was Brown verbally threatened during the interrogation.
- At no point was Brown promised anything. Sgt. Muncy did tell Brown that "if he cooperated, generally the courts look at you in a better light." However, Muncy did not tell Brown that he would make a sentencing recommendation, nor did he indicate to Brown what he thought would be a likely sentence.
- Brown was never physically intimidated during the questioning.
- The police did not verbally dominate the interrogation. The tone of the entire conversation was casual. At no point did anyone yell or engage in an argument.
- While Sgt. Muncy used the phrase "I need to talk to you," this was in response to Brown's question, "Hey, that's my house. What do you guys need?" It was Brown who first used the word "need."
- Brown's purpose for being at the place where the questioning took place was obvious: he was returning to his residence.
- Neutral parties were not present at any point during the questioning.
- Sgt Muncy told Brown he needed to get the "paperwork straightened out." This Court is not convinced that this rather innocuous statement had the effect of overpowering, tricking, or coercing Brown into providing a statement to the officers.

Considering the totality of these factors, this Court finds that a reasonable person in Brown's position would have understood his freedom of movement was not being restrained to the degree the law associates with formal arrest. Brown was not "in custody "during his conversation with Sgt. Muncy and Officer Stevens Thus, he was not entitled to the Miranda warnings during that conversation .

F. Brown's statements to Sgt. Muncy were voluntarily given.

The Defense argues Brown's statements to Detective Muncy were coerced for the following reasons:

> Simply put, Loren [Brown] was tricked. The Detective told Loren that he "needed" to talk to him, and assured Loren that Muncy had no plans to arrest him and instead just wanted to get the paperwork straightened out. Muncy said this with purpose "to put [Loren] at ease" and also told Loren that, "Courts would look at him in a better light if he cooperated… and that he could receive anywhere from probation to prison", further leveraging Loren's cooperation. Loren cooperated based upon these misrepresentations and inducements. And when it was all over, Loren had admitted to a felony when he thought that he was just "straightening out the paperwork."

Memorandum in Support of Motion to Suppress at 7-8.

The test to determine the voluntariness of a confession was set forth by the Second District Court of Appeals in *State v. Knight* (Sept. 26, 2008), Clark App. No. 04-CA-35 2008 Ohio 4926:

> The State must prove by a preponderance of the evidence that a defendant's confession is voluntary. *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619, 30 L. Ed. 2d 618 (1972). In making that determination, a court should consider the totality of the circumstances. *State v. Barker* (1978), 53 Ohio St. 2d 135, 372 N.E.2d 1324. A suspect's decision to

> waive his privilege against self-incrimination is made voluntarily absent evidence that his will was overborne and his capacity for self-determination was critically impaired because of coercive police conduct. *State v. Otte*, 74 Ohio St.3d 555, 1996 Ohio 108, 660 N.E.2d 711.
>
> In *State v. Brown*, 100 Ohio St.3d 51, 55, 2003 Ohio 5059, 796 N.E.2d 506, cert. denied, 540 U.S. 1224, 124 S. Ct. 1516, 158 L. Ed. 2d 162 (2004), the Ohio Supreme Court elaborated on the test for voluntariness:
>
> "In determining whether a pretrial statement is involuntary, a court 'should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement.'"

📖 107 - 109.

In *State v. Spah*r (Sept. 4, 2009), Miami App. Nos. 2008 CA 21, a Sherriff's Deputy advised the defendant Spahr of the factual basis of the alleged sexual offense, and "he encouraged Spahr to tell the truth. He told Spahr, 'that being truthful shows cooperation which helps…when dealing with the Prosecutor or the Courts, that it's very important to be truthful and it shows cooperation.'" Id. at ¶ 22. The Second District held that such "Admonitions to tell the truth are permissible; they are neither threats nor promises." Id. The Deputy "further explained that although any charges would ultimately be up to the prosecutor, if Spahr were cooperative, he [the Deputy] would ensure that the prosecutor was aware of that." Id. at ¶23. The Second District held that ***"To the extent that this statement could be interpreted to indicate a promise of leniency, '[p]romises that a defendant's cooperation would be considered in the disposition of the case, or that a confession would be helpful, does not invalidate an otherwise legal confession. . . .*** [Citations omitted]" Id. (Emphasis added.)

In *State v. Evins,* (Feb. 28, 1997), Montgomery App. No 15827, the defendant contended his confession was involuntary because ***Chief Frazier told him his cooperation with the officer would be relayed to the prosecution and would certainly cause the prosecutors and the court to look upon his situation in a better light.*** (Tr. 12-16). *Id.* (Emphasis added). The Second District Court of Appeals rejected the defendant's argument:

> ***Appellant contends that a confession is involuntary if induced by any direct or implied promise however slight. We disagree.*** A century ago the United States Supreme Court said that to be voluntary a confession must not have been extracted by any sort of threat or violence, nor obtained by any direct or implied promise, however slight. *Bram v. United States* (1897), 168 U.S. 532. The broad prohibition against promises, "does not state the present standard for determining the voluntariness of a confession." *Arizona v. Fulimante* (1991), 499 U.S. 279. In that case the Court held that the state supreme court properly applied the appropriate test, totality of circumstances, to determine a confession's voluntariness.
>
> Whether a confession is voluntary depends upon the totality of circumstances, including the age, mentality, and prior criminal experience of the accused, the length, intensity, and frequency of interrogation, the existence of physical deprivation or mistreatment, and the existence of threat or inducement. *State v. Edwards* (1976), 49 Ohio St.3d 31.
>
> The trial court did not address the voluntariness issue. The ultimate issue of voluntariness is, however, a legal question requiring "de novo" review in the appellate court. *Arizona v. Fulimante, supra; State v. Booker* (1988), 54 Ohio App.3d 1.
>
> Applying the "totality of circumstances" rule to the facts in this case, we find that the State has satisfied us that the appellant's confession was voluntarily made. The trial court found that the appellant was advised of his *Miranda* rights. The court also found that the appellant then requested to speak to Chief Frazier who informed him that if he

> cooperated this fact would cause the prosecutors and court to look at him in a better light.
>
> The record of the appellant's no contest plea reflects that he was on probation for the offense of drug abuse from Cuyahoga County. He indicated he completed high school. The record reflects the appellant was thirty years of age at the time of his arrest. Chief Frazier's conversation with the appellant was quite brief before he agreed to speak with Officer Suman. There was no evidence of threats or mistreatment. *State v. Edwards, supra.* We find that appellant's statements to Officer Suman were voluntary. The assignment of error must be overruled.

Id.

In *State v. Cedeno,* (Oct. 23, 1998), Hamilton App. No. C-970465, the detectives who obtained the defendant's confession told him of the seriousness of the charges and the amount of prison time he could receive if convicted, and that they promised him that they would advise the court if he cooperated. *Id.* Nonetheless, the First District Court of Appeals held that the confession was voluntary:

> Under the totality-of-the-circumstances standard, the presence of promises does not, as a matter of law, render a confession involuntary. *[State v.] Edwards* [(1976), 49 Ohio St.2d 31], supra, at 40-41 . ***Consequently, courts have held that promises that the defendant's "cooperation" would be considered in the disposition of his case, or that it would be in the defendant's "best interest" to tell the "real story," did not negate the voluntary nature of a confession.*** Id. at 41 . . . Likewise, we cannot hold that the statements about which Cedeno complains were so coercive as to render his confession involuntary as a matter of law. In sum, the record does not demonstrate that Cedeno's statements were the result of coercive police misconduct. The state proved by a preponderance of the evidence that he made a knowing, intelligent and voluntary waiver of his *Miranda* rights and that his confession was voluntary.

Id. (Emphasis added.)

In *State v. Parish* (April 22, 1997), Mahoning App. No 94 C.A. 83, the defendant claimed ✌that he was told that if he were to cooperate and provide the police with a statement, he would be charged with an offense that would make him eligible for shock probation in six months." Id. Also, the defendant asserted "the police told him about the severity of the penalties he would face if he did not cooperate.✍ *Id.* The appellate court ruled that these statements by the police did not constitute police coercion that rendered the defendant■s confession involuntary:

> The issues of whether an incriminating statement has been voluntarily made and whether an accused has voluntarily, knowingly and intelligently waived his right to counsel and his right against self-incrimination are separate issues. *State v. Clark* (1988), 38 Ohio St.3d 252, 261, U.S. certiorari denied (1989), 489 U.S. 1071. Nonetheless, the Ohio Supreme Court held in *Clark*, at 261, that: ✌ . . . While voluntary waiver and voluntary confession are separate issues, the same test is used to determine both, i.e., whether the action was voluntary under the totality of the circumstances. . . .✍ (Citations omitted.)
>
> The Supreme Court of Ohio has repeatedly held that evidence of police coercion is a necessary prerequisite to a finding that a confession was involuntary or that a waiver of rights was not made knowingly, intelligently and voluntarily. See *State v. Hill* (1992), 64 Ohio St.3d 313, 318, U.S. certiorari denied (1993), 125 L.Ed.2d 272; *State v. Combs* (1991), 62 Ohio St.3d 278, 285, U.S. certiorari denied (1992), 119 L.Ed.2d 573; *State v. Cooey* (1989), 46 Ohio St.3d 20, 28, U.S. certiorari denied (1991), 499 U.S. 954. The Supreme Court has established physical abuse, threats, or deprivation of food, medical treatment or sleep as some of the inherently coercive tactics which, if present in a case, will render a confession or a waiver involuntary. See *State v. Cooey*, supra, at 28; *State v. Clark*, supra, at 261.
>
> While it is clear that the Supreme Court did not intend this list to be all inclusive, there is no evidence in the record of the instant case establishing that the police used coercion in eliciting appellant's waiver and confession***. Appellant's only allegations of coercion, as set forth in the record before this court, are that he was promised that the police would help him if he would help them and that Detective Baldwin***

> ***told him to cooperate. Neither of these constitute police coercion within the meaning established by Clark and Cooey since there was no showing that appellant's will to resist was "overborne by threats or improper inducements."*** *State v. Burke* (1995), 73 Ohio St.3d 399, 406, U.S. certiorari denied (1996), 134 L.Ed.2d 486, quoting *State v. Melchior (1978), 56 Ohio St.2d 15, 25.*

(Emphasis added.)

In the case at bar, in determining the voluntariness of Brown's statements to Sgt. Muncy, this Court considers the following circumstances:

- Brown is an adult and demonstrated no mental deficiency.
- Brown walked up to and met Sgt. Muncy and Office Stevens and asked, "Hey, that's my house. What do you guys need?" (Note: It was Brown who first used the word "need.") It was in response that Sgt. Muncy said he "needed" to talk to Brown about possibly giving a false name when he was arrested for the OVI.
- The interview took place on a public street.
- When Sgt. Muncy asked Brown what his real name was, Brown "just looked down at the ground" and was "stammering." In an effort to put Brown at ease, Sgt. Muncy told Brown, "I just wanted to talk to you today. I'm not here to arrest you. I need to get all this paperwork straightened out. You gave a bogus name. I believe you gave a bogus name." In fact, Brown was not arrested that day.
- Assuming, arguendo, Muncy was deceitful when he told Brown he needed to get the "paperwork straightened out," it is well established that "In Ohio, as in other jurisdictions, deception in interrogation is only one factor in assessing voluntariness." *State v. Anderson* (Sept. 26, 2014), Montgomery App. No. 25689.

- The interview was not intense. The tone of the entire conversation was casual. At no point did anyone yell or engage in an argument.
- Brown was not subject to any physical deprivation or mistreatment.
- The entire conversation lasted twenty to twenty-five minutes.
- While Sgt. Muncy had his gun on his person, he never took it out.
- At no point was Brown threatened or promised anything. Sgt. Muncy did tell Brown that "if he cooperated, generally the courts look at you in a better light." However, Muncy did not tell Brown that he would make a sentencing recommendation, nor did he indicate to Brown what he thought would be a likely sentence.

Upon consideration of the totality of the circumstances, this Court finds that Brown's will was *not* overborne - and his capacity for self-determination was *not* critically impaired - by any threats or improper inducements or coercive police conduct. Therefore, this Court finds that Brown's statements to Sgt. Muncy were voluntarily given.

CONCLUSION

Brown's *Motion to Suppress* is sustained as it relates to the field sobriety tests administered by Officer Davis and Sgt. Kelly. No evidence or testimony will be admitted at trial relating to those tests.

The *Motion to Suppress* is overruled as it relates to Brown's statements to Sgt. Muncy.

This matter shall proceed to a Status Conference at 8:30 a.m. and a Scheduling Conference on Thursday, September 24, 2015.

SO ORDERED:

_____
DENNIS J. LANGER, JUDGE

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General Divison
Montgomery County Common Pleas Court
41 N. Perry Street, Dayton, Ohio 45422

Type: Decision

Case Number: 2015 CR 00307

Case Title: STATE OF OHIO vs LOREN BROWN

So Ordered