



FILED
LORAIN COUNTY

2024 JAN 18 P 3:24

COURT OF COMMON PLEAS
TOMORLANDO

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JOURNAL ENTRY
Hon. D. Chris Cook, Judge

Date Jan. 18, 2024

Case No. 23CR109420

STATE OF OHIO

Plaintiff

Paul Griffin

Plaintiff's Attorney

VS

RAYSHAWN BURGESS

Defendant

Philip Korey

Defendant's Attorney

This matter is before the Court on the Defendant's Motion to Suppress, filed October 23, 2023; the State's Objection, filed November 8, 2023; and, the Defendant's Reply [Brief], filed November 10, 2023.

Evidentiary hearing had on January 3, 2024.

The Motion is **DENIED *in part*** and **GRANTED *in part***.

The motion is denied relative to the Defendant's arrest for Improper Handling of Firearms in a Motor Vehicle. The Motion is granted relative to the Defendant's arrest for OVI and all evidence related to flowing from his arrest for OVI is suppressed.

IT IS SO ORDERED. See Judgment Entry.



Judge D. Chris Cook

cc: Griffin, Asst. Pros. Atty.
Korey, Esq.



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I. INTRODUCTION

This matter is before the Court on the Defendant's Motion to Suppress, filed October 23, 2023; the State's Objection, filed November 8, 2023; and, the Defendant's Reply [Brief], filed November 10, 2023.

Evidentiary hearing had on January 3, 2024.

II. STATEMENT OF PERTINENT FACTS

With a few important exceptions, the facts in this matter are not in material dispute.

UNCONTESTED FACTS

On January 14, 2023, Lorain County Sheriff's Deputy Brandon Strinka ("Deputy Strinka"), was on patrol in the City of Lorain in a marked patrol vehicle. At approximately 5:08 a.m., while near the intersection of Cooper Foster Park Road and Middle Ridge Road¹, he observed a vehicle stopped in a northbound lane of Middle Ridge Road, despite the fact that the traffic light was green.

Deputy Strinka remained in the area and observed the traffic light cycle two or three times but the vehicle remained stationary in the roadway. He also observed a couple of vehicles honk their horns at the stationary vehicle and traverse around it. Deputy Strinka then initiated a traffic stop by activating his overhead lights and pulled behind

¹ Middle Ridge Road becomes Broadway Avenue north of the Cooper Foster Park Road intersection.



the stationary vehicle.² He exited his cruiser and approached the vehicle on the passenger side. At this point, Deputy Strinka's Police Body Camera ("The Body Cam Video") activated³ and he observed the Defendant asleep in the driver's seat.⁴ The vehicle was on and running.⁵ Deputy Strinka knocked on the window and awoke the Defendant, who was alone in the vehicle.⁶

The Defendant rolled down the passenger window and Deputy Strinka immediately noticed "a strong odor of alcohol" and the Defendant appeared "extremely confused and disoriented."⁷ He also observed the Defendant's eyes to be red, bloodshot, and glassy.⁸

At this point, the following interaction occurred between Deputy Strinka and the Defendant,

Q. Okay. And so you see all these things, what happens next? He's rolled down his window, you've made contact with him, what happens after that?

A. I asked for the driver's license, and he hands me a -- multiple things. One is a driver's license, and the other is a police ID, which -- to which I asked if he had any firearms in the vehicle.

Q. Okay. And what was his response?

A. Initially he said, "No. Oh, I got one back here on my duty belt," and then he turned his body back and reached for the firearm.

Q. Okay. And was that a concern for you?

A. Yes.⁹

² TR. Pages, 14-15, Lines 24-25, 1-12.

³ TR. Page, 18, Lines 10-12.

⁴ TR. Page, 19, Lines 11-13.

⁵ TR. Page, 19, Line 19.

⁶ TR. Page, 20, Lines 1-5.

⁷ TR. Page, 21, Lines 21-25.

⁸ TR. Page, 22, Lines 2-3.

⁹ TR. Page, 22, Lines 8-20.



The two documents that the Defendant handed to Deputy Strinka were an Ohio Driver's License and a City of Bellevue Police Department ID card. These documents identified the Defendant as Rayshawn DJ Burgess ("Officer Burgess").

At this point in the interaction, Deputy Strinka ordered Officer Burgess out of the vehicle in a normal voice, without much inflection or concern. However, seconds after Officer Burgess stepped out of his vehicle, Deputy Strinka became highly agitated and animated and ordered Officer Burgess to the ground at gunpoint and instructed him to lie down in the roadway. Officer Burgess complied, and this is where things get dicey, and contested.

DEPUTY STRINKA'S VERSION OF THESE EVENTS

According to Deputy Strinka, once he realized that the Defendant was (ostensibly)¹⁰ a police officer, Deputy Strinka asked him if he had any firearms in the vehicle, to which Officer Burgess replied, ". . . I got one back here on my duty belt." ("Firearm #1"). Deputy Strinka then testified that Officer Burgess ". . . turned his body back and reached for that firearm." This prompted Deputy Strinka to remove Officer Burgess from the vehicle at gunpoint.

Deputy Strinka then testified that as Officer Burgess was exiting the vehicle, Deputy Strinka observed a *second firearm* ("Firearm #2") in Officer Burgess' waistband.

A. So as I shined my light and watched him get out of the vehicle, I
**observed, as he bent over to get up a -- a black pistol grip kind of
hanging out of his waistband.** Again, seemed very odd, it wasn't in a
secure type of holster just a little belt clip.

Q. Okay.

A. Which is, again, kind of odd for a police officer. At which time I drew my
firearm and ordered him to the ground.

Q. Ordered him to the ground?

A. Correct.

¹⁰ I say "ostensibly" because Deputy Strinka testified to having some initial doubt about the authenticity of Officer Burgess' Police ID.



- Q. And so, in other words, there was a gun in his waist band?
- A. Correct.
- Q. And then there was another gun in his duty holster in the back seat?
- A. Correct.
- Q. But he only told you about one gun, and he was pointing to the gun in the back seat?
- A. Correct.
- Q. **He didn't tell you about the gun that was in duty -- or in his waistband?**
- A. **Correct.**¹¹

According to Deputy Strinka, it was Officer Burgess' failure to disclose the presence of Firearm #2 after being requested to do so that prompted Officer Burgess' arrest.

OFFICER BURGESS' VERSION OF THESE EVENTS

Officer Burgess testified very differently about this specific interaction.

According to Officer Burgess, when Deputy Strinka asked him if he had any firearms in the vehicle, he said yes, pointed to his waistband (Firearm #2), and pointed to the firearm in the back seat (Firearm #1).

- A. He asked me if I had any firearms.
- Q. And your answer was?
- A. **I told him -- I told him yes, and I pointed to my waistband, and then I pointed to my other firearm in the back seat.** And when I pointed to the one in the back seat, he told me don't reach for it. What am I doing. And I

¹¹ TR. Pages, 23-24, Lines 24-24, 1-18; Page 105, Lines 8-11, emphasis added.



just stopped and froze. And then he asked me to get out of the car, and I proceeded to get out of the vehicle.¹²

Officer Burgess testified on cross that he did not initially *verbally* inform Deputy Strinka that he had firearms in the vehicle.¹³ Upon inquiry from the Court, Officer Burgess testified that he did verbally advise Deputy Strinka that he was in possession of firearms when asked by Deputy Strinka and that he simultaneously pointed to both guns.¹⁴

BACK TO UNCONTESTED FACTS

At this point, there is no dispute that Officer Burgess is outside of his vehicle, eventually cuffed, then placed under arrest for Improper Handling of Firearms in a Motor Vehicle for failing to disclose to Deputy Strinka the presence of Firearm #2.¹⁵ He is patted down and placed in Deputy Strinka's patrol vehicle, during which Officer Burgess' vehicle is searched.

Now, things get even more interesting – and challenging.

THE OVI INVESTIGATION

Once Officer Burgess was secured and under arrest for (allegedly) violating R.C. 2923.16, Deputy Strinka decided to continue Officer Burgess' detention in order to investigate the possibility of his operating a vehicle while under the influence ("OVI").

A. I patted him down for any more weapons, then did a search incident to arrest. Located no other weapons or narcotics or anything like that. And during that discussion, I continued to detect a strong odor of an alcoholic beverage emitting from his breath as he was talking to me away from the vehicle.

Q. Okay.

¹² TR. Page, 113, Lines 4-12, emphasis added.

¹³ TR. Page 142, Lines 18-20.

¹⁴ TR. Pages 152-153, Lines 22-25, 1-13.

¹⁵ R.C. 2923.16(E)(1), is a second-degree misdemeanor that is an arrestable offense. R.C. 2935.03(A)(1).



A. **To which point I determined we were going to have to investigate the possible OVI further.**¹⁶

After Mirandizing Officer Burgess, Deputy Strinka testified that, “. . . I asked him if he wanted to take any field sobriety tests, and he advised he would.”¹⁷

Deputy Strinka testified that he then administered three standardized field sobriety tests (“FST”); the HGN, the Walk and Turn, and the One-Leg Stand. Deputy Strinka did not testify on direct about the results of the HGN test, but testified that Officer Burgess showed one clue on the Walk and Turn test and no clues on the One-Leg Stand.

Deputy Strinka also testified that an empty container was found in Officer Burgess’ vehicle that “smelled like wine”¹⁸ and that Officer Burgess admitted to drinking “one beer.”¹⁹

Based upon these observations, Deputy Strinka placed Officer Burgess under arrest for OVI for being under the influence of narcotics and alcohol.²⁰

On cross examination, however, a rather different picture was painted.

First, Deputy Strinka conceded that he did not initially request that Officer Burgess take FST’s, but that Officer Burgess *offered* to take the tests.²¹

Second, Deputy Strinka stated that per his report, Officer Burgess had two clues on the HGN test,²² that he had one clue on the Walk and Turn test, and no clues on the One-Leg Stand test.²³

It then came out on cross that Deputy Strinka actually administered a fourth test, a non-standard, divided attention test, the “Romberg” test. There was testimony that in this test, the subject counts to 30 silently while timed by the officer and that Officer Burgess stopped at either 36 or 38, but there was no testimony about what the results of that test meant.²⁴

¹⁶ TR. Page 26, Lines 10-18, emphasis added.

¹⁷ TR. Page 27, Lines 7-8.

¹⁸ TR. Pages 33-35.

¹⁹ TR. Page 33, Lines 21-25, Page 75, Lines 15-16.

²⁰ TR. Page 35, Lines 1-3.

²¹ TR. Page 76, Lines 2-5.

²² TR. Page 78, Lines 8-10.

²³ TR. Page 82, Lines 10-12.

²⁴ TR. Page 82, Lines 18-25, Pages 121-122, Lines 19-25, 1.



Next, during the ride to the station while already under arrest for OVI, Deputy Strinka requested that Officer Burgess take a Portable Breath Test ("PBT"), which he agreed to do – a test the Deputy Strinka then decided not to administer.²⁵

And finally, while on-station after being arrested for Improper Handling and OVI, Officer Burgess agreed to take a Breathalyzer Test or Blood Test, but these tests were not offered. Instead, Deputy Strinka insisted that Officer Burgess provide a urine sample.²⁶ When Officer Burgess was unable to produce urine, Deputy Strinka concluded that Officer Burgess had refused the chemical test²⁷ despite Officer Burgess' repeated entreaties to take a breath or blood test.

The booking process was completed, Officer Burgess was released, and this motion followed.

III. ANALYSIS

STANDARD OF REVIEW

Very recently, the Ninth District Court of Appeals reiterated the standard of review for appellate review of a trial court's ruling on a motion to suppress. The standard has not changed in years. Deference must be given to the trial court's findings of fact which the reviewing court then uses *de novo* to determine whether the facts found by the trial court satisfy the applicable legal standard.

A motion to suppress evidence presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. "When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses." *Id.*, citing *State v. Mills*, 62 Ohio St.3d 357, 366 (1992). Thus, a reviewing court "must accept the trial court's findings of fact if they are supported by competent, credible evidence." *Burnside* at ¶ 8. "Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *Id.*, citing *State v. McNamara*, 124 Ohio App.3d 706 (4th Dist.1997).

State v. Anderson, 9th Dist. Medina No. 22CA0031-M, 2024-Ohio-37, at ¶ 7. See also: *State v. Harrison*, 166 Ohio St. 3d 479, 2021-Ohio-4465, ¶ 11.

²⁵ TR. Page 91-92, Lines 20-25, 1-5.

²⁶ TR. Page 96, Lines 6-7.

²⁷ TR. Page 38, Lines 11-15.



This Court's role, *ab initio*, is to determine the propriety of the warrantless traffic stop initiated by Deputy Strinka. The Ninth District also gives guidance in this regard.

"The Fourth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, and Article I, Section 14 of the Ohio Constitution protect individuals from unreasonable searches and seizures." *State v. Bearer*, 9th Dist. Wayne No. 21AP0035, 2022-Ohio-4554, ¶ 13. "To justify an investigative stop, an officer must point to 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" (Internal quotations and citations omitted.) *Id.*, quoting *State v. Kordich*, 9th Dist. Medina No. 15CA0058-M, 2017-Ohio-234, ¶ 7. "[W]here an officer has an articulable reasonable suspicion or probable cause to stop a motorist for any criminal violation, including a minor traffic violation, the stop is constitutionally valid * * *." *Bearer* at ¶ 13, quoting *Dayton v. Erickson*, 76 Ohio St.3d 3, 11-12 (1996).

Id., ¶ 14.

THE INITIAL TRAFFIC STOP OF OFFICER BURGESS' VEHICLE WAS CONSTITUTIONALLY SOUND

There is no question that Deputy Strinka had not only specific and articulatable facts to justify his stop of Officer Burgess' vehicle, he had probable cause and maybe even an *obligation* to investigate.²⁸ After all, Officer Burgess' vehicle was stopped in the roadway as the traffic light cycled and following traffic had to circumvent it.

That Officer Burgess would challenge the stop of his vehicle or Deputy Strinka's decision to investigate a stationary car parked in the middle of the road, while a traffic light cycles and other motorists must navigate around it, is preposterous.

Even more absurd, he argues in his brief that he was "semi-asleep" while "waiting for the light to change."²⁹

No, he was out cold, and the traffic light had cycled at least two or three times as motorists, honking their horns, went around him.

Worse yet, he argues that, "At the time of the seizure, all Deputy Strinka knew was that Officer Burgess was asleep in a parked vehicle in a parking lot early in the morning."³⁰

²⁸ The Court notes that Deputy Strinka did not initiate a traffic "stop" in the traditional sense. Nevertheless, the Deputy's action of activating his overhead lights and pulling behind Officer Burgess' stationary vehicle constitutes a traffic stop for Fourth Amendment purposes.

²⁹ Defendant's Motion to Suppress, Pg. 3, Para. 2.



What? If Officer Burgess' vehicle had been parked in a "parking lot" he would never have been arrested and I would not have had to write a 32-page decision.

But alas, I digress.³¹

DEPUTY STRINKA HAD PROBABLE CAUSE TO DETAIN OFFICER BURGESS AND ULTIMATELY ARREST HIM FOR VIOLATING R.C. 2923.16(E)(1), IMPROPER HANDLING FIREARMS IN A MOTOR VEHICLE

Make no mistake, upon initial evaluation, this is a close decision.

The Court is called upon to weigh the credibility of two highly credible witnesses, both with some built-in bias, both law enforcement officers, both who testified very differently about their interaction.

Now at this point in the analysis of events, one might reasonably inquire, "why not just review The Body Cam Video" to determine whose version of events is accurate? Well, we did that, and the results are wholly inclusive as to what occurred in the vehicle.

Unfortunately, at this most pivotal part of Deputy Strinka's and Officer Burgess' interaction, the Video is very dark and you cannot ascertain any of Officer Burgess' movements.

Worse yet, the audio is atrocious. The wind is howling about and what is said by Officer Burgess during these crucial few seconds, is completely inaudible.

In other words, you can't see a thing that Officer Burgess does or hear a thing that he says – and this is unfortunate.

Obviously, if the Video was clearer, we could see if in fact Officer Burgess pointed to Firearm #2, which would bolster his version of events. Better yet, if the audio was discernable, we would hear if Officer Burgess *verbally* responded that there were two guns in the car. But, as noted, the Video helps with neither.

³⁰ *Id.* at Page 11, Para. 3, emphasis added.

³¹ Though I cannot help but also note, parenthetically, that on Page 15, Para. 2, Officer Burgess writes, "Mr. Myrick-Bey was arrested when Deputy Strinka took his car keys . . ." Who in tarnation is Mr. Myrick-Bey? And finally, in his Summary he writes, "He was waiting for the light to change and closed his eyes." Please . . . Counsel would do better to argue why the real facts do not demonstrate probable cause than to make up facts out of whole cloth. See: Page 18, Para. 1.



Instead, the Court is left to determine this issue based solely upon the credibility of the witnesses, the facts established by the greater weight of the testimony and evidence, and any inferences the Court may reasonably make.

So, with equal weight attributed to the testimony of Deputy Strinka and Officer Burgess and no help provided by the Video, the Court relies instead upon the circumstances surrounding their encounter relative to the discovery (or disclosure) of Firearm #2 and whether Officer Burgess *pointed to* or *reached for* Firearm #1 .

So, what actually happened? The Body Cam Video does help answer the first question relative to the disclosure, or lack thereof, of Firearm #2. Conversely, the Court is unable to determine either way if Officer Burgess pointed to or reached for Firearm #1, and candidly, it is really of no accord.

As for the disclosure or non-disclosure of Firearm #2, recall that Deputy Strinka testified upon seeing Officer Burgess' police ID, he asks Officer Burgess, "You got your gun on you?"³² Officer Burgess' response on The Body Cam Video is inaudible, but Deputy Strinka immediately replies, in an excited voice and elevated tone, "**Don't reach for it, the fuck you doin'?**"³³

Deputy Strinka, back to a normal voice and tone, states, "Alright, step out of the vehicle for me."³⁴ As Officer Burgess steps out of his vehicle, Deputy Strinka, standing behind the rear passenger side of the vehicle near the trunk states *once again* in a loud, excited voice and elevated tone, "**Show me your fuckin' hands, show me your fuckin' hands, get on the ground, get on the ground.**"³⁵ Officer Burgess raises his arms, then lowers himself to the ground.

Seconds after laying on the ground, Deputy Strinka appears to kick an object on the ground near where Officer Burgess is laying and states, with a normal voice inflection, "You got another gun on you?"³⁶

And this is where it gets telling.

³² The Body Cam Video, 5:10:50 a.m.

³³ The Body Cam Video, 5:10:56 a.m.

³⁴ The Body Cam Video, 5:11:02 a.m.

³⁵ The Body Cam Video, 5:11:10 a.m.

³⁶ The Body Cam Video, 5:11:42 a.m.



The following exchange occurs between Deputy Strinka and Officer Burgess,

Deputy Strinka – **“You got another gun on you?”**

Officer Burgess – **“No, I said it was in the back.”**

Deputy Strinka – **“YOU GOT A FUCKIN’ GUN ON YOU!”**

Officer Burgess – **“NO, and I told you in the duty belt.”**³⁷

Relative to Firearm #2 during this exchange, Deputy Strinka testified as follows,

A. I removed the firearm from his waistband, and I tossed it under his car . . . and I said, “You’ve got a gun on you, dude.” **And he’s like, “No, it’s in the car.” He’s like, “I told you, it’s in the car.”** And it just seems like that entire time he still didn’t know that he had just had a gun on his person.³⁸

A second deputy arrives, Officer Burgess is handcuffed, lifted up, searched, and placed in the back of Deputy Strinka’s patrol cruiser.

So, what can we glean from this exchange?

The most reasonable inferences, if not outright obvious facts are, 1) Deputy Strinka’s surprise and shock at seeing Firearm #2 in Officer Burgess’ waistband demonstrates that Deputy Strinka was not advised by Officer Burgess of the presence of Firearm #2; 2) Officer Burgess *twice* answering “no” when asked if he had a second gun indicates that he was either unaware, or forgot, that he had a second firearm on his person; and 3) Officer Burgess stating that he told Deputy Strinka that his gun was “in his duty belt in the car” (Firearm #1) with no mention of Firearm #2 that was in his waistband, further confirms the lack of disclosure of Firearm #2.

And importantly, note that while on scene, as this situation is unfolding, Deputy Strinka reasonably concludes that Officer Burgess was unaware of the presence of Firearm #2, “And it just seems like that entire time he still didn’t know that he had a gun on his person.”

³⁷ The Body Cam Video, 5:11: 42 a.m., emphasis added.

³⁸ TR, Pages 25-26, Lines, 25-26, 1-6, emphasis added.



Finally, recall Deputy Strinka's testimony about when he first learned of Firearm #2,

So as I shined my light and watched him get out of the vehicle, I **observed, as he bent over to get up a -- a black pistol grip kind of hanging out of his waistband.** Again, seemed very odd, it wasn't in a secure type of holster just a little belt clip. *** He didn't tell you about the gun that was in . . . his waistband. *** Correct.³⁹

At least initially, the facts at hand present a close call as to whether or not Deputy Strinka had probable cause to arrest Officer Burgess for Improper Handling. As noted, both Deputy Strinka and Officer Burgess testified very credibly, each has some bias, and both are law enforcement officers.

If the Body Cam Video was more clear, audible, or both, relative to the initial interaction regarding the presence of firearms, it would be much easier to determine whose version of events is accurate. After all, if Officer Burgess did in fact advise Deputy Strinka of the presence of both guns, there is no Improper Handling violation.

In reaching the conclusion that Deputy Strinka had probable cause to arrest Officer Burgess for the charge of Improper Handling, this Court considers the totality of the facts in evidence, including direct and circumstantial evidence, that was available to Deputy Strinka at the time he made the decision to arrest.

This Court is guided by the Ohio Supreme Court that recently reiterated the standard of review for evaluation of the propriety of a warrantless arrest.

The constitutionality of an arrest depends on whether, at the moment the arrest was made, the officers had probable cause to make it. *Beck v. Ohio*, 379 U.S. 89, 91, (1964). Probable cause is "defined in terms of facts and circumstances 'sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.'" (Brackets added in *Gerstein*.) *Gerstein v. Pugh*, 420 U.S. 103, 111-112, (1975), quoting *Beck* at 91, 85 S.Ct. 223. When a warrantless arrest is challenged on constitutional grounds, the court must determine whether the facts known to the officers at the time of the arrest would "warrant a man of reasonable caution in the belief that an offense has been committed." *Beck* at 96, 85 S.Ct. 223, quoting *Carroll v. United States*, 267 U.S. 132, 162, (1925). An arrest that is based on probable cause is a reasonable intrusion under the Fourth Amendment, *United States v. Robinson*, 414 U.S. 218, 235, (1973), whereas an arrest that is not supported by probable cause constitutes an unreasonable

³⁹ TR. Pages, 23-24, Lines 24-24, 1-18; Page 105, Lines 8-11, emphasis added.



seizure, *Donovan v. Thames*, 105 F.3d 291, 297-298 (6th Cir.1997), citing *Beck* at 90-91, 85 S.Ct. 223.

State v. Jordan, 166 Ohio St. 3d 339, 2021-Ohio-3922, ¶ 19.

And very recently, Judge Stevenson of the Ninth District Court of Appeals counsels,

Probable cause consists of “a reasonable ground for belief of guilt.” *State v. Moore*, 90 Ohio St.3d 47, 49 (2000), quoting *Carroll v. United States*, 267 U.S. 132, 161 (1925). While “[t]he amount of evidence necessary for probable cause * * * is less evidence than would be necessary to support a conviction * * *[,]” *State v. McGinty*, 9th Dist. Medina No. 08CA0039-M, 2009-Ohio-994, ¶ 11, probable cause is “a stricter standard than reasonable and articulable suspicion[,]” *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, ¶ 23. See also *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (probable cause means “more than bare suspicion”). **The question of whether an officer had probable cause to arrest a defendant “is a fact-intensive inquiry * * *.”** *State v. Davis*, 9th Dist. Summit No. 29273, 2020-Ohio-473, ¶ 19. **“The determination ‘is made from the totality of the circumstances.’”** *State v. R.L.*, 9th Dist. Summit No. 29573, 2020-Ohio-2811, ¶ 9, quoting *State v. White*, 9th Dist. Wayne No. 05CA0060, 2006-Ohio-2966, ¶ 24. “Factors to be considered include an officer’s observation of some criminal behavior by the defendant, furtive or suspicious behavior, flight, events escalating reasonable suspicion into probable cause, [and] association with criminals and locations.” *White* at ¶ 24, quoting *State v. Shull*, 5th Dist. Nos. 05-CA-30, 2005- Ohio-5953, ¶ 20. *State v. Dudsak*, 9th Dist. Medina No. 21CA0033-M, 2021-Ohio-3632, ¶ 16.

State v. Rinella, 9th Dist. Summit No. 30629, 2024-Ohio-152, ¶ 13, emphasis added.

And finally, Judge Sutton instructs,

[A] probable cause determination is a fact-intensive inquiry that ‘requires consideration of the totality of the circumstances known to the officer at the time of the arrest.’ *State v. Davis*, 9th Dist. Summit No. 29273, 2020-Ohio-473, ¶ 19, quoting *State v. Ray Rogers*, 9th Dist. Wayne No. 16AP0014, 2017-Ohio-357, ¶ 9. “The amount of evidence necessary for probable cause to suspect a crime is being committed is less evidence than would be necessary to support a conviction of that crime at trial.” *State v. McGinty*, 9th Dist. Medina No. 08CA0039-M, 2009-Ohio-994, ¶ 11. **There need only be “a probability of criminal activity * * *.”** *Id*

State v. Kline, 9th Dist. Summit No. 30801, 2024-Ohio-150, ¶ 28, emphasis added.



After a "fact intensive inquiry" that considers the "totality of the circumstances," this Court is convinced that Deputy Strinka had probable cause to arrest Officer Burgess for Improper Handling as it is more probable than not that he failed to advise Deputy Strinka of Firearm #2.

While this Court has considered the totality of the facts, circumstances, and evidence attendant to this matter, its decision is grounded primarily upon Deputy Strinka's reaction when he first observed Firearm #2, coupled with the fact that Officer Burgess clearly stated *twice* while on the ground that he did not have a second firearm and that the one he had was in his duty belt. As such, it becomes quite clear that Officer Burgess failed to advise Deputy Strinka of the presence of Firearm #2.

Accordingly, Deputy Strinka had probable cause to arrest Officer Burgess for the Improper Handling charge because Deputy Strinka reasonably concluded, based upon all of the facts and circumstances surrounding their interaction, that Officer Burgess had committed an Improper Handling violation.

The motion to suppress relative to the Improper Handling charge is not well-taken and hereby DENIED.

But that does not end the inquiry.

DEPUTY STRINKA DID NOT HAVE PROBABLE CAUSE TO ARREST OFFICER BURGESS FOR VIOLATING R.C. 4511.19, OVI, AND ALL EVIDENCE RELATED TO OR FLOWING FROM HIS ARREST FOR THAT CHARGE IS SUPPRESSED

In addition to moving to suppress evidence related to his arrest for Improper Handling, Officer Burgess moves the Court to suppress evidence related to his second arrest for OVI.

In reaching the merits on this issue, the Court is guided by the same standard of review and legal calculus as it applied above. That is to say, based upon the facts and circumstances available to Deputy Strinka at the time he decided to arrest Officer Burgess, would a reasonably prudent law enforcement officer believe that Officer Burgess was impaired?

I say no.

So how do we get here?



First, let us consider the factors that affirmatively demonstrate impairment.

FACTORS IN FAVOR OF IMPAIRMENT

- 1) Officer Burgess' vehicle is stopped in a lane of traffic for no apparent reason at 5:08 a.m.
- 2) Officer Burgess is sound asleep in the driver's seat, with the car running, in park.⁴⁰
- 3) As soon as Officer Burgess lowered the passenger window, Deputy Strinka detected a "strong" odor of alcohol.
- 4) During their initial discussions, Officer Burgess appeared "extremely confused and disoriented."
- 5) Deputy Strinka observed Officer Burgess' eyes to be "red, bloodshot, and glassy."
- 6) An empty container is found that smells like wine.
- 7) Deputy Strinka continues to detect an odor of alcohol emanating from Officer Burgess during his arrest for Improper Handling.
- 8) Officer Burgess admits to consuming one alcoholic drink.

We know what happens next in their interaction regarding the firearms and Officer Burgess' arrest for Improper Handling, and we know that once Officer Burgess is under arrest, Deputy Strinka decides to continue the detention of Officer Burgess in order to investigate the possible OVI.

There is no doubt that given these facts, Deputy Strinka had every right to continue the detention of Officer Burgess for the purpose of investigating a possible OVI violation. In fact, had Deputy Strinka arrested Officer Burgess *at this point* for OVI, there would be little dispute that probable cause existed.

On this point, the Ninth District is clear.

The legal standard for probable cause to arrest for OVI is whether at the moment of the arrest, the police had sufficient information, derived from a reasonably trustworthy source of facts and circumstances, sufficient to cause a prudent

⁴⁰ TR. Page 136, Lines 13-16.



person to believe that the suspect was driving under the influence. *State v. Krzemieniewski*, 9th Dist. Medina No. 15CA0015-M, 2016-Ohio-4991, ¶ 11, quoting *State v. Homan*, 89 Ohio St.3d 421, 427 (2000), *superseded by statute on other grounds*. “[E]ven without positive results on field sobriety testing, the totality of the facts and circumstances may support probable cause to arrest for a violation of [R.C.] 4511.19(A) * * *.” *State v. Cooper*, 9th Dist. Medina No. 12CA0067-M, 2013-Ohio-5489, ¶ 14 quoting *State v. Thayer*, 9th Dist. Medina No. 11CA0045-M, 2012-Ohio-3301, ¶ 33.

State v. Kordich, 9th Dist. Medina No. 15CA0058-M, 2017-Ohio-234, at ¶ 14.

And,

To prove impaired driving ability, the [S]tate can rely on physiological factors (e.g., odor of alcohol, glossy or bloodshot eyes, slurred speech, confused appearance) to demonstrate that a person’s physical and mental ability to drive was impaired. *State v. Peters*, 9th Dist. Wayne No. 08CA0009, 2008-Ohio-6940, ¶ 5, quoting *State v. Slone*, 9th Dist. Medina No. 04CA0103-M, 2005-Ohio-3325, ¶ 9.

Id. at ¶ 17. See Also: *State v. Gibson*, 9th Dist. Lorain No. 21CR104074, 2022-Ohio-3862, ¶ 21, (erratic or reckless driving, when coupled with other factors such as bloodshot eyes, the smell of alcohol, and an admission to drinking, amounts to probable cause for an OVI arrest even where no field sobriety tests have been administered.)

But once again, it is here that things get interesting.

Instead of arresting Officer Burgess based upon these clearly identified impairment factors, Deputy Strinka continues the detention in order to administer four roadside sobriety tests, three NHSTA certified standardized FST’s and one, non-standard divided attention test.

So, what are the results of these tests, why, if at all, are the results relevant, and why were they administered to begin with?

It is axiomatic that a law enforcement officer conducting an OVI investigation is not required to administer FST’s.

[A] police officer does not need probable cause to conduct a field sobriety test; rather, he must simply have a reasonable suspicion of criminal activity.” * * * “‘Reasonable suspicion’ is more than an ill-defined hunch * * *.” “[R]easonable suspicion exists if an officer can point to specific and articulable facts indicating



that [an individual] may be committing a criminal act.” *** “Reasonable suspicion is based on the totality of the circumstances.” ***

State v. High, 9th Dist. Medina No. 17CA0019-M, 2017-Ohio-8264, at ¶ 8.

This Court has held that even a mild odor of alcohol can provide reasonable suspicion for field sobriety testing when paired with other factors such as a traffic infraction, bloodshot eyes, and an admission to having consumed two beers. *** Yet, this Court cannot conclude that the result is the same when an unspecified odor of alcohol is paired strictly with an admission to having had a few beers. “For better or worse, the law prohibits drunken driving, not driving after a drink.”

Id. at ¶ 14. See also: *State v. Mackim*, 9th Dist. Summit No. 28741, 2018-Ohio-3033, at ¶ 9, (On the other hand, in order to administer field sobriety tests, a police officer must have a reasonable suspicion of criminal activity *** ‘Reasonable suspicion’ is more than an ill-defined hunch.)

The Body Cam Video at this point is instructive.

Deputy Strinka returns to the cruiser where Officer Burgess is seated and they have a short discussion, about two minutes.⁴¹ During this discussion, Officer Burgess is Mirandized, admits to consuming one beer, and gives Deputy Strinka consent to search his vehicle. Noteworthy, the audio portion of this exchange is very clear and Officer Burgess’ speech shows no sign of impairment. In addition, he shows complete comprehension of the questions put to him. It’s also at this point that Officer Burgess states, “You can give me the standardized field sobriety tests.”

About ten minutes later, Deputy Strinka removes Officer Burgess from the cruiser, removes the handcuffs, and begins to administer FST’s.

THE HGN TEST

The first FST Deputy Strinka administers is the Horizontal Gaze Nystagmus test, the HGN. This is a standardized field sobriety test as determined by the National Highway Safety Transportation Administration (“NHSTA”), a division of the United States Department of Transportation.

The “NHSTA Manual” is considered the Holy Grail of OVI detection, and its procedures and protocols for the administration and interpretation of impairment is universally

⁴¹ Body Cam Video, 5:17:22-5:19:06.



accepted by courts and law enforcement throughout the nation. While the manual was not introduced into evidence, this Court takes judicial notice of its contents. Evid. R 201; *State v. Filip*, 9th Dist. Medina No. 16CA0049-M, 2017-Ohio-5622, at ¶ 13.⁴²

Administration and interpretation of the HGN test is technical. There are a multitude of complex maneuvers using a stylus in which the administering officer attempts to identify distinct indicators of impairment by the involuntary jerking of the eyes ("Nystagmus"), usually caused by alcohol consumption.

Specifically, the officer is looking for 1) lack of smooth pursuit; 2) distinct and sustained nystagmus at maximum deviation; and 3) onset of nystagmus prior to 45 degrees.

According to the NHSTA Manual, there are six possible clues on this test. If four clues are present, the subject is assumed to have a blood alcohol content ("BAC") of .08 or greater.⁴³

In the case at bar, Deputy Strinka testified that in his report that he noted two clues present on the HGN test.⁴⁴

THE WALK AND TURN TEST

The next test Deputy Strinka administered to Officer Burgess was the walk and turn test. In this test, the participant is requested to take nine, heel-to-toe steps on a straight line, make a small turn to the left, then take nine, heel-to-toe steps back to the starting point.

Here, the officer is looking for the following nine clues from the participant: 1) cannot keep balance during the instruction phase; 2) does not maintain heel-to-toe during the instruction phase; 3) starts the test too soon; 4) stops while walking; 5) does not touch heel-to-toe; 6) steps off of the line; 7) uses arms to balance; 8) makes an improper turn; and 9) takes the incorrect number of steps.

According to the NHSTA Manual, the detection of two clues out of the nine indicates a BAC of .08 or higher.

As for this test, Officer Burgess showed one clue.

⁴² Specifically, this Court takes judicial notice of the 2/2023 DWI Detection and Standardized Field Sobriety Test (SFST) Instructor Guide.

⁴³ R.C. 4511.19(A)(1)(d).

⁴⁴ There was some "controversy" about the administration of this test, but it is irrelevant as Deputy Strinka clearly noted in his report, without any qualification, that he detected only two clues on this test.



THE ONE-LEG STAND TEST

The final standardized test that Deputy Strinka administered to Officer Burgess was the one-leg stand test.

In this test, the officer instructs the participant to stand in a stationary position, arms at the sides, then to lift one foot about six inches off of the ground and count to 30 seconds.

The officer is looking for four clues here: 1) the participant sways during the instruction phase; 2) uses the arms for balance; 3) hops; and 4) puts the foot down during the test.

According to the NHSTA Manual, the detection of two clues out of the four indicates a BAC of .08 or higher.

On this test, Officer Burgess showed no clues.

THE MODIFIED ROMBERG BALANCE TEST

The final FST Deputy Strinka administered to Officer Burgess is the Modified Romberg Balance Test ("MRB"). This test is not a "standardized" FST recognized by the NHSTA Manual. This significance of this fact is twofold: First, it means that the MRB test lacks the indicia of reliability that the three standardized tests have; and, Second, the results of this test, if given during an OVI investigation, are usually not admissible into evidence at trial, though they may be considered for purposes of a suppression hearing.

In making its determination it is not bound by the rules of evidence except those with respect to privileges. Therefore, the Rules of Evidence do not apply to suppression hearings. *State v. Boczar*, 113 Ohio St. 3d 148, 2007-Ohio-1251, at ¶ 17. See also: *State v. Walker*, 11th Dist. Ashtabula No. 2001-A-0086, 2002-Ohio-4362, (Officer considered two non-standard FST's for probable cause to arrest); *State v. Rau*, 3rd Dist. Paulding No. 11-13-06, 2013-Ohio-5664, ¶ 33, (In addition to standardized tests, nonstandardized tests "are useful sources of information regarding the suspect's sobriety. If circumstances dictate that methods other than strictly standardized tests must be used in determining whether a driver is under the influence * * * then an officer should be able to use nonstandardized tests that, based upon his experience, can indicate impairment * * *." *State v. Menking*, 4th Dist. No. 02CA66, 2003-Ohio-3515, ¶ 14, quoting *State v. Walker*, 11th Dist. No. 2001-A-0086, 2002-Ohio-4362, at ¶ 14.

The MRB test is designed to evaluate three clues: 1) the participant's time estimation; 2) balance; and 3) presence of eyelid and body tremors. The test requires the participant



to stand erect with arms at the side, tilt the head back and close the eyes, then count silently (to him/herself) for 30 seconds. Once the participant gets to 30, he/she is to stop counting and say out loud, "stop." The participant should stop the count no later than 35 seconds.

In this case, there is no evidence that Officer Burgess exhibited any body or muscle tremors or sway and the best testimony is that he stopped counting at 36. As such, by all accounts, he passed this non-standard divided attention FST as well.

At this point in their interaction, Officer Burgess is re-cuffed and placed back into Deputy Strinka's patrol cruiser where another short discussion occurs. Deputy Strinka next transports Officer Burgess, now under arrest for OVI, to the Lorain County Correctional Facility ("LCCF") to be booked.

On the way to the jail, Deputy Strinka inquires if Officer Burgess would submit to a portable breath test ("PBT"), which he confirms he will take. Deputy Strinka then calls the station to prepare the PBT, but as they get closer to LCCF, he changes his mind and rather inexplicably, cancels the PBT.

On station, Officer Burgess is processed without incident and importantly, uses the bathroom to urinate. Deputy Strinka then reads Officer Burgess the Ohio BMV Form 2255, and requests that Officer Burgess take a urine test. Deputy Strinka testified that he wanted Officer Burgess to take a urine test because he suspected Officer Burgess was under the influence of both alcohol and narcotics.

Officer Burgess was unable to produce urine, however, as he had just used the restroom and at this point, asked Deputy Strinka to administer a breath or blood test instead of a urine test.

Deputy Strinka denied this request, insisted that Officer Burgess take only a urine test, and when he was unable to do so, treated Officer Burgess' inability to produce urine as a refusal.

DEPUTY STRINKA: I am offering you a urine test. That's the only test I am offering you.⁴⁵

* * *

When Officer Burgess continued to ask to take a breath or blood test, Deputy Strinka again replied,

⁴⁵ Booking Video, 6:38:34.



DEPUTY STRINKA: This is the only test that is going to be offered to you . . .

You don't get to decide . . . I want to do the breathalyzer, I want to do blood . . . I am able to offer you different tests, and its optional.⁴⁶

Thereafter, Officer Burgess agreed to take the urine test, went to the bathroom area, but was unable to produce. At this point, he was marked as a refusal.

So how do we assimilate this conflicting information relative to the determination of impairment, and, by extension, probable cause?

Let us begin by examining the factors in favor of sobriety.

FACTORS IN FAVOR OF SOBRIETY

- 1) After he awoke, Officer Burgess shows no signs of confusion or disorientation.
- 2) At all times during their interaction, Officer Burgess' speech is clear and cogent.
- 3) At no time during their interaction was Officer Burgess rude, loud, obnoxious, boisterous, or argumentative.
- 4) At no time during their interaction did Officer Burgess sway, stumble, or show any signs of lack of balance.
- 5) Officer Burgess produced uncontroverted evidence that he consumed just one alcoholic beverage, six or seven hours before his arrest.
- 6) At no time on the Body Cam Video does it confirm that Officer Burgess had red, bloodshot, or glassy eyes. If anything, his eyes appear to be perfectly normal.
- 7) Officer Burgess *actually offered* to take FST's.
- 8) Officer Burgess gave consent for the search of his vehicle.

⁴⁶ Booking Video, 6:38:58.



- 9) No evidence of drugs or contraband were found in the vehicle, except a container that may have smelled like wine.
- 10) Officer Burgess passed all four FST's that were administered to him.
- 11) Officer Burgess agreed to take a PBT, which was never administered.
- 12) Officer Burgess requested to take either a breath or blood test on station, but was refused an alternate test by Deputy Strinka.
- 13) Officer Burgess agreed to take a urine test, but was unable to produce.
- 14) The only time that the Body Cam Video shows any signs of impairment is when Officer Burgess is first awoken by Deputy Strinka.

The Court will address the interplay of these factor below, including the factors that cannot reasonably be ascertained, such as the strong odor of alcohol and the odor of wine in a container found in the car.

But most importantly, how should passing four FST's impact the probable cause analysis?

WHEN A MOTORIST SHOWS SIGNS OF IMPAIRMENT DURING THE INITIAL STAGES OF AN OVI INVESTIGATION, BUT SUBSEQUENTLY PASSES MULTIPLE FIELD SOBRIETY TESTS, WHAT IS THE IMPACT ON THE PROBABLE CAUSE ANALYSIS

The Ninth District Court of Appeals gives us some guidance on this issue.

Although no one ever viewed the video in this case, there is no dispute that the dash-cam video captured the traffic stop at issue **and subsequent field sobriety tests. “[S]uch direct evidence is by its very nature either inculpatory or exculpatory, or some combination of the two,** and there is likely no ‘test’ of that footage that would be necessary to yield a result that would exonerate the accused.” *State v. Durham*, 8th Dist. Cuyahoga No. 92681, 2010-Ohio-1416, 2010 WL 1254355, ¶ 16. Generally, the defendant bears the burden of proving that evidence was materially exculpatory.

State v. Nastick, 9th Dist. Summit No. 28243, 2017-Ohio-5626, at ¶ 11, emphasis added.



As noted above, during the course of an OVI investigation, the investigating officer has no obligation to administer FST's. Nevertheless, it is this Court's anecdotal observation that in the vast majority of OVI cases, FST's are in fact administered, and most motorists who take them – fail.

As such, FST's are a powerful tool in law enforcement's arsenal for the detection of impairment and likelihood that a motorist is over the .08 statutory *per se* limit. But what about the (rare) case where the motorist *passes* the FST's? And more pointedly, what if the motorist passes all of the FST's *and* shows other indicia of sobriety?

This factual scenario appears to be a matter of first impression, as this Court cannot find a single case on point, that is, a case where a motorist showed some initial signs of impairment, but then passed the FST's with flying colors.

So how does the Court resolve this conundrum?

First, the Court notes the frequency in which failed FST's are used, properly, against OVI defendants and the substantial probative value they have in both establishing probable cause to arrest and evidence sufficient to convict. In essence, they are a very dependable indicator of impairment.

It is quite clear that standardized FST's, developed over decades of testing and implementation by the Department of Transportation's NHSTA for the detection of impaired drivers, are almost sacrosanct when clues of impairment are detected.

But that begs the question, does it not?

It must follow then, *a priori*, that the opposite should be true. That is to say, when a motorist *passes* these highly dependable tests, *sobriety should be inferred*.

But there are even more facts and circumstances at hand that favor sobriety over impairment and undermine probable cause than the FST results. Recall the fourteen factors noted above in favor of sobriety. Those factors are significant and weigh heavily of finding that Officer Burgess was not impaired whilst operating his vehicle.

Regardless, the last step in the analysis is to consider the controverted factors, or those factors that cut both ways.



CONTESTED FACTORS

- 1) The strong odor of alcohol.
- 2) Confusion and disorientation.
- 3) Red, bloodshot, glassy eyes.
- 4) The container that smells like wine.
- 5) The continued detection of the odor of alcohol.
- 6) The admission of consuming one drink.

THE STRONG ODOR OF ALCOHOL, THE CONTINUED DETECTION OF THE ODOR OF ALCOHOL, AND THE ADMISSION OF ONE ALCOHOLIC DRINK

Deputy Strinka testified that immediately upon interacting with Officer Burgess, he smelled a strong odor of alcohol and that as their interaction commenced, he continued to smell the odor of alcohol on or about Officer Burgess. Officer Burgess admitted to consuming one alcoholic beverage and produced the receipt from the establishment he was at earlier in the night confirming the purchase of one alcoholic drink.

Once awake, however, Officer Burgess showed absolutely no signs of impairment, and there was no collaborating testimony as to the odor of alcohol on or about his person. Moreover, the identification of the odor of alcohol is a highly subjective matter and, candidly, one to which there is no defense. After all, if a law enforcement officer testifies that he smelled a strong odor of alcohol on or about a motorist, that is pretty much it. But what if the motorist is also a law enforcement officer and produces a receipt confirming that he had only one drink?

One must also bear in mind that even if Officer Burgess smelled of alcohol, it is not against the law in the State of Ohio to consume alcohol prior to operating a motor vehicle – it is against the law to be impaired by alcohol or over the *per se* limit.

The law in Ohio remains it is not illegal to consume alcohol and then operate a motor vehicle. Only if the driver's ability to operate the vehicle is appreciably impaired or the driver tests above a *per se* level for alcohol in his or her system does a person violate the law.

State v. Keserich, 5th Dist. Ashland No. 14-COA-011, 2014-Ohio-5120, ¶ 13. See also: *State v. Hopp*, 9th Dist. Summit No. 28095, 2016-Ohio-8027, ¶ 8, emphasis added, (**The**



law does not prohibit driving after drinking alcohol; instead, it prohibits driving when impaired by alcohol. *State v. Taylor*, 3 Ohio App.3d 197, 198 (1st Dist.1981) ("For better or worse, **the law prohibits *drunken* driving, not driving after a drink.**") (Emphasis sic.); R.C. 4511.19.)

In deference to Deputy Strinka, let us treat the odor of alcohol as a sign of impairment. But what about the container found in Officer Burgess' vehicle that allegedly smelled like wine?

Again, hard to refute, highly subjective, and contested as Officer Burgess testified that it did not contain alcohol. Fair enough, but why wasn't the container produced in evidence? After all, it surely was confiscated. And again, why no collaborating testimony?

Now to be sure, this Court is not interested in sniffing evidence as a matter of course, nor is there any assurance that such a "sniff" would be conclusory anyway. Regardless, the Court gives this testimony of the "wine container" little probative value.

CONFUSION & DISORIENTATION

Normally, these factors would weigh heavily in favor of impairment as they are common signs of intoxication. But here, there is an equally plausible explanation: Officer Burgess was confused and disoriented because he was awoken from a deep slumber.

It is a common experience of human beings who are jolted out of a profound snooze to *initially* appear confused and disoriented. But as noted above, and confirmed by the video, Officer Burgess' confusion and disorientation quickly dissipates as he regains consciousness. In fact, within minutes of their interaction, to the very end, almost two-hours later, Officer Burgess exhibits clarity, understanding, smooth, intelligent speech, and displays absolutely no signs of confusion or disorientation.

RED, BLOODSHOT, GLASS EYES

As with confusion and disorientation, red, bloodshot, and/or glassy eyes are often signs of alcohol impairment. But not always.

Again, as Officer Burgess just woke up, any redness, bloodshot, or glassy eyes observed by Deputy Strinka are easily explainable due to just being awoken.

And more importantly, as noted, the Body Cam Video simply does not confirm these observations. Frankly, the best evidence of the condition of Officer Burgess' eyes is shown while on station at LCCF. While he is in the booking room, the video is very



clear and well-lit, and at no time do Officer Burgess' eyes appear to be red, bloodshot, or glassy.

One final observation regarding the chemical test offered in this case.

DEPUTY STRINKA REQUIRED THAT OFFICER BURGESS TAKE A URINE TEST ONLY, DESPITE HIS REQUEST TO TAKE A BREATH OR BLOOD TEST

Recall the paradox attendant to the facts in this case regarding the administration of a chemical test. While enroute to LCCF, Deputy Strinka inquired if Officer Burgess would submit to a PBT. He agreed. Deputy Strinka then radioed dispatch and requested the PBT unit be acquired. A short time later, as they neared the station, Deputy Strinka abandoned this plan, radioed dispatch again, and cancelled the PBT.

Why?

To be sure, Deputy Strinka had no obligation to offer the PBT in the first place. Nevertheless, once he learned that Officer Burgess was willing to take it, Deputy Strinka changed his mind and cancelled the test. Is this because it was too inconvenient to acquire the PBT unit, because Deputy Strinka was running out of time to get Officer Burgess officially tested at the station, or perhaps because Deputy Strinka did not really want to know the results?

Regardless, we will never know why the test was cancelled. What we do know is that if it had been administered, we would have had some additional evidence as to what amount of alcohol, if any, was present in Officer Burgess' system.

And what can we make of Deputy Strinka's refusal to offer Officer Burgess either a breath or blood test, or both?

Without a doubt, Deputy Strinka had the discretion to decide which chemical test to administer. R.C. 4511.191(A)(3). He could select one, two, or all three, and an affirmative refusal by Officer Burgess to take the requested test, even if he offered to take an alternate test, could constitute a refusal.

But here, can we definitively conclude that Officer Burgess "refused" the urine test?

I don't think so.



After all, there is a significant difference between being *unable* to take a test and *refusing* to take a test.

Again, caselaw is instructive.

An Eighth District Court of Appeals decision posits the standard of review to determine whether an OVI defendant refused a chemical test.

Further, as to what constitutes a refusal, this court in *State v. Schultz*, 8th Dist. Cuyahoga No. 90412, 2008–Ohio–4448, stated as follows: The case law addressing “refusal” has been well-settled for decades. *State v. Owen* (Oct. 19, 1998) Butler App. No. CA97–12–229, 1998 Ohio App. LEXIS 4900, 1998 WL 729204. Specifically, in *Hoban v. Rice* (1971), 25 Ohio St.2d 111, 267 N.E.2d 311, paragraph three of the syllabus, the supreme court stated as follows:

“[A] refusal to submit to a chemical test of the blood, breath or urine will occur where a person, by his acts, words or general conduct, manifests an unwillingness to submit to the test. Such refusal need not have been knowingly and intentionally made.”

Whether a driver refused a test is a factual determination that is to be made by the trial court based upon all of the evidence before it. *Owen, supra; see, also, State v. Basye* (Feb. 4, 1997), Ross App. No. 96CA2211, 1997 Ohio App. LEXIS 421, 1997 WL 66196 . “Such a refusal may be established when the evidence shows that the person who was given the request and advice * * * had thereafter conducted himself in such a way as to justify a reasonable person in the position of the requesting officer to believe that such requested person was capable of refusal and manifested unwillingness to take the test.” *Andrews v. Turner* (1977), 52 Ohio St.2d 31, 368 N.E.2d 1253, paragraph one of the syllabus. *Id.* at ¶ 37–38.

City of Cleveland v. McCane, 8th Dist. No. 103457, 2016-Ohio-3459, ¶ 24, emphasis added.

That court continued.

The finding of a “refusal” has been upheld where, as here, the defendant refuses to take the requested test, such as a breath test, and instead offers to take a different test. *State v. Daniels*, 10th Dist. Franklin No. 13AP–969, 2014–Ohio–3697. The *Daniels* court stated:



Appellant did not have the right to choose which test to take. *State v. Caldwell*, 10th Dist. [Franklin] No. 02AP-576, 2003-Ohio-271, ¶ 8-12 (provision of *Maumee v. Anistik*, 69 Ohio St.3d 339, 344, 1994 Ohio 157, 632 N.E.2d 497 (1994) refusal instruction not plain error where defendant refused to take urine test despite his repeated requests to take different test). *Mt. Vernon v. Seng*, 5th Dist. [Knox] No. 04CA000012, 2005-Ohio-2915, ¶ 46 (refusal where defendant offered to take blood test but officer only offered breath test and defendant refused that test).

Id. ¶ 25.

Deputy Strinka had every right to select the chemical test offered to Officer Burgess. And, despite a lack of evidence as to drug impairment, Deputy Strinka's explanation for requesting a urine test instead of a breath test makes sense as the breath test would not disclose the presence of any narcotics in Officer Burgess' system – but a blood test would have.

Recall that once Officer Burgess was on-station at LCCF, he urinated. Within minutes of using the restroom, after being read the BMV 2255, Deputy Strinka requests that Officer Burgess take a urine test. Officer Burgess hesitates and asks to take either a breath test or blood test. Deputy Strinka refuses to offer either of these alternate tests.

Why? Simply because he can?

Just because a person *can* do a thing does not mean that a person *should* do that thing.⁴⁷

After all, it would be one thing if Officer Burgess flat-out refused to attempt the urine test and insisted on a breath or blood test only. But that is not what happened. Officer Burgess had just urinated, and for obvious, physiological reasons, could not produce urine "on demand." So instead he offered to take either of the other two available tests. And to reiterate, the blood test would have satisfied Deputy Strinka's concern (justified or not) that Officer Burgess was also under the influence of narcotics.

Regardless, when Deputy Strinka rejected Officer Burgess' overtures to take a breath test or blood test, he attempted to urinate, as the video shows him standing in the restroom stall for almost six minutes, until Deputy Strinka determines that Officer Burgess had refused.

⁴⁷ Colleen Patrick-Goudreau.



And one final observation: there was still about eighteen minutes left to complete the urine test. Once Deputy Strinka determined that he would not offer Officer Burgess a breath or blood test, why not wait a bit longer before marking the test as a refusal?

After all, Officer Burgess even drank some water in an effort to produce urine. Though again, to be fair to Deputy Strinka, he had no legal obligation to wait until the two hours⁴⁸ had almost elapsed before determining that Officer Burgess refused.

The upshot of this analysis is not to be critical of Deputy Strinka's decision to offer Officer Burgess a urine test only. Such was, unconditionally, Deputy Strinka's prerogative.

Instead, the Court makes these observations to demonstrate that based upon all of the evidence before it, Officer Burgess' inability to produce urine for that test, when he offered to take either of the other two tests, does not constitute a "refusal."

And more than that, Officer Burgess' offer to take either a breath test or blood test is yet another factor indicative of sobriety as it implies, and this Court reasonably infers, that he had nothing to hide.

IV. CONCLUSION

The case at bar presents a virtual cornucopia of legal issues combined with a thorny thicket of factual uncertainty. For sure, many of the facts are not in dispute as they are captured by Deputy Strinka's Body Cam Video or the Booking Video recorded at LCCF.

But, many other facts, including some very important ones, are controverted.

And, there is a legal issue of first impression to boot.

What is not in dispute is that on January 14, 2023, at about 5:08 a.m., Deputy Strinka of the Lorain County Sheriff's Office, observed the Defendant's vehicle parked in the roadway, stationary as a traffic light cycled and other motorists honked and evaded the parked vehicle.

In short order, Deputy Strinka learned that Rayshawn Burgess was the operator of the stationary vehicle, that he was sound asleep at the wheel, and that he was a fellow police officer.

Upon waking Officer Burgess up, Deputy Strinka and Officer Burgess' two-hour odyssey began, and went south quickly, when Officer Burgess failed to inform Deputy Strinka

⁴⁸ See: R.C. 4511.192(A).



that he was in possession of two firearms, one on the back seat in his duty belt, and one in his waistband.

Because he failed to advise Deputy Strinka of the firearm in his waistband, Officer Burgess was placed under arrest for Improper Handling, a misdemeanor of the second degree.

But then things got dicier, and much more serious.

At this point, based upon a series of dependable indicators of alcohol impairment, Deputy Strinka continued the detention of Officer Burgess in order to further investigate the possibility that Officer Burgess was operating his vehicle while under the influence.

The upshot of the OVI investigation is that the longer it lasted, the more apparent it becomes that Officer Burgess was not impaired or under the influence of alcohol, let alone drugs.

This should have been obvious, and the OVI investigation should have terminated once Officer Burgess passed all four field sobriety tests administered to him by Deputy Strinka, including all three of the NHSTA standardized tests and one, non-standardized, divided attention test.

To make matters more complicated, once on-station at LCCF during the booking process, Deputy Strinka insisted, as is his right, that Officer Burgess take a urine test, and only a urine test. Having just urinated moments earlier, Officer Burgess was unable to produce urine and instead, offered to take either of the other two chemical tests, a breath test or a blood test. Deputy Strinka refused this offer and treated Officer Burgess' inability to produce urine as a refusal.

Thus, two things are clear to this Court. First, that Officer Burgess, for whatever reason, failed to inform Deputy Strinka of the presence of a second firearm on his person after being asked if he was in possession of any weapons. This failure to affirmatively respond to Deputy Strinka's inquiry justifies Officer Burgess' arrest for Improper Handling, probable cause is clearly present, and Officer Burgess' motion to suppress on this point is DENIED.

Conversely, based upon the totality of facts, circumstances, and evidence before this Court, no reasonable law enforcement officer would have arrested Officer Burgess for OVI after he passed all four field sobriety tests, offered to take three chemical tests (PBT, Breath, Blood) and attempted to produce urine for the urine test.




In addition, the testimony of Officer Burgess about the one drink he consumed, his overall sobriety, his complete cooperation, and his conduct and demeanor throughout the encounter, is telling. Other than snoozing in the middle of the roadway while sitting in a running motor vehicle and his initial grogginess upon being awoken, Officer Burgess exhibited absolutely no *objective* signs of impairment.

In fact, quite the opposite.

This Court carefully scrutinized the testimony of both Deputy Strinka and Officer Burgess, watched the entire two-hours of Body Cam and Booking Video, and applied the facts, uncontested, contested, and inferred, to the law requisite for a Fourth Amendment Constitutional analysis.

The arrest of Officer Burgess for OVI by Deputy Strinka was not supported by probable cause, and all evidence related to or flowing from that charge, is suppressed.



JUDGE D. CHRIS COOK