COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff	:	**CASE NO. 2016 CR 000716**
vs.	:	**Judge McBride**
TERRY ANDREW SMITH	:	**DECISION/ENTRY**
Defendant	:	

Darren D. Miller, assistant prosecuting attorney for the state of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103

Mark J. Tekulve, assistant public defender and attorney for the defendant Terry Andrew Smith, 302 East Main Street, Batavia, Ohio 45103

This cause is before the court for consideration of the motion to suppress filed by the defendant Terry Andrew Smith on October 24, 2017. The court held an evidentiary hearing on the motion on November 14, 2017. Counsel submitted written arguments with respect to the motion, and the court took the motion under advisement on December 23, 2017.

Upon consideration of the motion, the record of the proceedings, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FINDINGS OF FACT

On December 13, 2016, the defendant Terry Andrew Smith was indicted on one count of operating a vehicle while under the influence of alcohol and/or a drug of abuse ("OVI"), in violation of R.C. 4511.19(A)(1)(a), a felony of the third degree.

The above charge arises from an automobile accident that occurred on September 22, 2016. On the evening of September 22nd, Trooper T.A. Jasper from the Ohio State Patrol was on duty. Trooper Jasper has been a state trooper for two years, which began upon his graduation from the Ohio State Patrol Academy in March 2016. At the Academy, Trooper Jasper had a 40-hour course on OVI enforcement, which included instruction as to the National Highway Traffic Safety Administration ("NHTSA") manual.[1]

At 6:28 p.m. on September 22nd, Trooper Jasper was dispatched to respond to a single vehicle accident on Belfast Road in Clermont County, Ohio. The accident occurred along a bend in the road, at which point the defendant's vehicle went left of center and then off the opposite side of the road, where it flipped three to four times before landing in a field. The roads were clear, and the weather was good that day.

EMS and fire department workers were already on the scene when Trooper Jasper arrived at 6:50 p.m., and the defendant was in the back of an ambulance. At the scene, Trooper Jasper spoke to two witnesses who were driving in the opposite

[1] Trial court may, "* * * sua sponte, take[] judicial notice of the NHTSA manual and its standards governing the admission of field sobriety tests, including the HGN test." *State v. Frazee*, 12th Dist. Warren No. CA2004-07-085, 2005-Ohio-3513, ¶ 19, citing *State v. Stritch*, 2d Dist. Montgomery No. 20759, 2005-Ohio-1376, ¶ 16.

direction of the defendant and saw the accident. Both witnesses observed that the defendant rounded the curve at a very fast speed, although Trooper Jasper did not know how fast that was.[2] Neither witness had personal contact with the defendant after the accident, but one witness noted that the defendant looked dazed and confused following the accident.[3]

Trooper Jasper also spoke to two paramedics at the scene. Paramedic Christian Miller indicated that the defendant appeared alert and oriented, but refused his help.[4] Miller heard the defendant's son who arrived on the scene, Andrew Smith, yell: "We told not [*sic*] to leave the house! We told you not to drive."[5] Miller also detected the odor of an alcoholic beverage emanating from the defendant, and asked the defendant if he had been drinking.[6] The defendant responded that he had been drinking.[7] At the hospital, Miller heard the defendant say that he only had one drink.[8]

The second paramedic, Jeremy Walton, told Trooper Jasper that the defendant appeared dazed, but he did not smell alcohol on him.[9] He also heard Andrew Smith yell "I told you not to drive," to the defendant.[10] Walton then asked the defendant if he had been drinking, and the defendant responded affirmatively.[11]

Trooper Jasper did not speak with the defendant before he was transported to the hospital. Before Trooper Jasper left the scene of the accident, he took an inventory

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[2] State's Exs. 1 and 2.
[3] State's Ex. 1.
[4] State's Ex. 3.
[5] State's Ex. 3.
[6] State's Ex. 3.
[7] State's Ex. 3.
[8] State's Ex. 3.
[9] State's Ex. 4.
[10] State's Ex. 4.
[11] State's Ex. 4.

of the crashed vehicle's contents. He found a nearly empty Summer Shandy beer bottle on the passenger floor of the vehicle.

At 9:03 p.m. Trooper Jasper arrived at Bethesda North Hospital, where the defendant was being treated. When speaking with the nurses, they indicated that they had detected the odor of an alcoholic beverage on the defendant. They did not indicate what injuries the defendant may have suffered.

Upon seeing the defendant, Trooper Jasper noticed that the defendant's eyes were red and watery and that he exhibited a moderate odor of an alcoholic beverage. Trooper Jasper went over the statements and inventory sheets with the defendant, and discussed the partially empty beer bottle. The defendant claimed to not know anything of the Summer Shandy beer bottle. He admitted to drinking alcohol, less than a 12 oz. can of a very strong beer.[12] The defendant averred that the accident occurred because he observed a raccoon in the road and tried to avoid it.[13] Neither of the two witnesses who observed the vehicle accident crash mentioned a raccoon in their statements.

Trooper Jasper asked the defendant what his injuries were, and he replied that he had broken ribs, stitches in his right hand, and a possible head trauma.[14] Trooper Jasper asked the defendant if he could conduct one of the field sobriety tests in the NHTSA manual, the horizontal gaze nystagmus ("HGN") test, to which the defendant consented. Trooper Jasper did not conduct the other two tests, the walk and turn test and the one leg stand test, because they would have required the defendant to stand.[15]

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[12] Defs. Ex. 5.
[13] Defs. Ex. 5.
[14] State's Ex. 5.
[15] State's Ex. 6.

At the time of the test, the defendant was reclining in his hospital bed at a 45 degree angle.

Trooper Jasper testified about the procedure for the HGN test, which he described as follows: Before conducting the test, the subject should be instructed that the officer is going to hold a stimulus 12-15 inches from the subject's eyes, the subject should keep his head still, and the subject should follow the stimulus with his eyes. The subject is told to keep his feet together and his hands up at his cheeks. If the subject is wearing eyeglasses, those eyeglasses must be removed. Next, there is a pre-test, checking for pupil size, resting nystagmus, and equal tracking of the eyes. To conduct the pre-test, a stimulus is positioned approximately 12 to 15 inches from the subject's nose and slightly above eye level. If the subject passes the pre-test, then the HGN test can begin.

During the HGN test the officer checks for lack of smooth pursuit, distinct and sustained nystagmus at maximum deviation, and onset of nystagmus before 45 degrees. There are two passes per eye. To check for each of these, the stimulus is moved at different speeds. When checking for smooth pursuit, the time to move the stimulus from the center point out towards the side should take approximately two seconds. When checking for distinct and sustained nystagmus at maximum deviation, the stimulus is moved from the center to beyond the outer limit of the eye in two seconds, and then is held there for at least four seconds. When checking for the onset of nystagmus prior to 45 degrees, the stimulus is moved from the subject's eye to his shoulder over approximately four seconds.

The stimulus used in the present case was Trooper Jasper's finger. Trooper Jasper testified that he followed the above procedure when testing the defendant. However, Trooper Jasper did not instruct the defendant to stand with his feet together and to place his hands on his cheeks because the defendant was lying in his hospital bed at about a 45 degree angle. Although the NHTSA manual does not provide instructions on how to conduct an HGN test from a reclining position, it is not prohibited.

Even though the defendant said he had a "possible head trauma," which could affect the outcome of an HGN test, Trooper Jasper proceeded with the HGN test. He proceeded because he had checked the defendant's pupil size, resting nystagmus, and eye tracking during the pre-test, which was meant to discern whether there was a possible head injury. If the subject fails one of the pretests, that indicates a head trauma. Since the defendant passed the pre-test, Trooper Jasper proceeded with the HGN test.

For each of the three HGN tests, Trooper Jasper conducted two passes per eye. The defendant exhibited six of six possible clues of intoxication (one clue per eye, per test).[16] Following the HGN test, Trooper Jasper offered the defendant the opportunity to take a portable breathalyzer test, a urine test, and a blood test, but the defendant refused those tests.

Trooper Jasper opined that, based on his experience and training, the defendant was under the influence of alcohol and/or drugs of abuse and was appreciably impaired at the time of his accident. Trooper Jasper formed this opinion based on the defendant's single vehicle accident, the witness statements about the defendant's high speed, the paramedics' statements about the defendant's odor of alcohol, the

[16] State's Ex. 6.

paramedics' statements that Andrew Smith yelled to the defendant that he should not have been driving, the defendant's red and watery eyes, the open container found in the vehicle, the odor of an alcoholic beverage on the defendant at the hospital, and the results of the HGN test. The defendant was not immediately arrested because he was at the hospital, but was cited instead.

PROCEDURAL BACKGROUND

The defendant filed a motion to suppress and to dismiss on October 24, 2017. On November 14, 2017, the court held an evidentiary hearing on the motion, and the only witness called at the hearing was Trooper Jasper. At the hearing, defense counsel narrowed the issues in his motion to suppress to whether Trooper Jasper had probable cause to arrest the defendant for an OVI offense and whether the HGN test could be relied on in determining probable cause.

The defendant filed a memorandum in support of his motion to suppress on November 29, 2017. The state filed a memorandum in opposition to the defendant's motion to suppress on December 15, 2017. The defendant did not file a reply. On December 23rd, the court took the motion under advisement.

STANDARD OF REVIEW

A motion to suppress is defined as "a device used to eliminate from a criminal trial evidence that has been secured illegally, generally in violation of the Fourth

Amendment (search and seizure), the Fifth Amendment (privilege against self incrimination), or the Sixth Amendment (right to assistance of counsel, right of confrontation, etc.) of the United States Constitution."[17] When a defendant's motion to suppress is successful, the principal remedy for a constitutional violation is to exclude the evidence from the criminal trial.[18]

Pursuant to Crim.R. 12(C), before trial "any party may raise by motion any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue." A motion to suppress evidence "on the ground that it was illegally obtained" must be made prior to trial.[19]

In filing a motion to suppress, the defendant "shall state with particularity the grounds upon which it is made and shall set forth the relief or order sought."[20] The defendant must "state the motion's legal and factual bases with sufficient particularity to place the prosecutor and the court on notice of the issues to be decided."[21] Once the defendant has satisfied his or her burden of "placing the prosecutor and the court on sufficient notice of the issues to be determined, the burden then shifts to the state to show substantial compliance with the applicable standards."[22]

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[17] *State v. Scruggs*, 12th Dist. Clinton No. CA2005-11-042, 2007-Ohio-6416, ¶ 4, citing *State v. French*, 72 Ohio St.3d 446, 449-50 (1995).
[18] *State v. Haines*, 12th Dist. Clermont No. CA2003-02-015, 2003-Ohio-6103, ¶ 8.
[19] Crim.R. 12(C).
[20] *State v. Way*, 12th Dist. Butler No. CA2008-04-098, 2009-Ohio-96, ¶ 7, quoting Crim.R. 47.
[21] *Way*, 2009-Ohio-96 at ¶ 7, quoting *State v. Wood*, 12th Dist. Clermont No. CA2007-12-115, 2008-Ohio-5422, ¶ 10.
[22] *Way*, 2009-Ohio-96 at ¶ 7, citing *State v. Plunkett*, 12th Dist. Warren No. CA2007-02-012, 2008-Ohio-1014, ¶ 11.

A motion to suppress typically "presents mixed questions of law and fact."[23] In reviewing such a motion, "the trial court, as the trier of fact, is in the best position to weigh the evidence in order to resolve factual questions and evaluate witness credibility."[24]

LEGAL ANALYSIS

In the present case the defendant has been indicted on one charge of operating a vehicle while under the influence of alcohol or drugs ("OVI"), under R.C. 4511.19(A)(1)(a). R.C. 4511.19(A)(1) provides: "No person shall operate any vehicle * * * within this state, if, at the time of the operation, any of the following apply: (a) The person is under the influence of alcohol, a drug of abuse, or a combination of them."[25]

The defendant argues that there was not probable cause to arrest him. In so arguing, he maintains that the HGN testing cannot be considered evidence of probable cause because it was not undertaken in substantial compliance with the NHTSA manual. The defendant posits that the HGN test was not in substantial compliance because the test was conducted while the defendant was lying down and after he had a head injury.

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[23] *State v. Codeluppi*, 139 Ohio St.3d 165, 2014-Ohio-1574, 10 N.E.3d 691, ¶ 7, citing *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5373, 797 N.E.2d 71, ¶ 8.
[24] *State v. Deluca*, 12th Dist. Butler No. CA2016-03-055, 2017-Ohio-1235, ¶ 9, citing *State v. Vaughn*, 12th Dist. Fayette No. CA2014-05-012, 2015-Ohio-828, ¶ 9. *See Codeluppi*, 2014-Ohio-1574 at ¶ 7, citing *Burnside*, 2003-Ohio-5373 at ¶ 8 (explaining that when the trial court reviews a motion to suppress "the 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.").
[25] R.C. 4511.19(A)(1)(a).

As stated in the preceding section, when a defendant files a motion to suppress, the defendant must "state with particularity the grounds upon which it is made and shall set forth the relief or order sought."[26] In doing so, the defendant must "state the motion's legal and factual basis with sufficient particularity to place the prosecutor and court on notice of the issues to be decided."[27] Once the defendant satisfies his burden concerning notice, the burden shifts to the states to demonstrate substantial compliance.[28] "However, a defendant may not unjustly cite the state's inability to respond to specific claims for which the state did not have sufficient notice as the basis for granting a motion to suppress."[29]

The state must show the "requisite level of compliance with accepted testing standards" in response to a motion to suppress regarding field sobriety tests.[30] The state's burden of proof concerning substantial compliance "only extends to the level with which the defendant takes issue with the legality of the test."[31] For instance, "if the defendant's motion to suppress raises issues in general terms, then the state is only required to show substantial compliance in general terms."[32] In such a case where the defendant has made a general allegation, the state's burden is "slight, and only requires

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[26] *Henry*, 2009-Ohio-10 at ¶ 10, citing Crim.R. 47. *See State v. Wyatt*, 12th Dist. Clermont No. CA2008-01-013, 2008-Ohio-5667, ¶ 8 citing Crim.R. 47 (holding same).
[27] *Henry*, 2009-Ohio-10 at ¶ 10, quoting *State v. Schindler*, 70 Ohio St.3d 54 (1994), paragraph one of the syllabus. *See Wyatt*, 2008-Ohio-5667 at ¶ 8, quoting *Wood*, 2008-Ohio-5422 at ¶ 10 (holding same).
[28] *Henry*, 2009-Ohio-10 at ¶ 11, citing *Plunkett*, 2008-Ohio-1014 at ¶ 11. *See Wyatt*, 2008-Ohio-5667 at ¶ 8, citing *Plunkett*, 2008-Ohio-1014 at ¶ 11 (holding same).
[29] *Henry*, 2009-Ohio-10 at ¶ 21, citing *Plunkett*, 2008-Ohio-1014 at ¶ 21.
[30] *Henry*, 2009-Ohio-10 at ¶ 10, citing *State v. Schmitt*, 101 Ohio St.3d 79, 2004-Ohio-37, ¶ 9.
[31] *Deluca*, 2017-Ohio-1235 at ¶ 11, quoting *State v. Nicholson*, 12th Dist. Warren No. CA2003-10-106, 2004-Ohio-6666, ¶ 10. *See Wyatt*, 2008-Ohio-5667 at ¶ 10, quoting *Nicholson*, 2004-Ohio-6666 at ¶ 10 (holding same).
[32] *Henry*, 2009-Ohio-10 at ¶ 12, citing *State v. Nicholson*, 12th Dist. Warren No. CA2003-10-106, 2004-Ohio-6666, ¶ 10.

the amount of specificity as stated in the motion."[33] Significantly, even when the defendant's motion is general, "* * * the defendant may still provide some factual basis, either during cross-examination or by conducting formal discovery, to support a claim that the standards were not followed in an effort to raise the slight burden placed on the state."[34]

In the present case, the defendant filed a general, boilerplate motion to suppress. In the two-page document, the only statement that could arguably have placed the state on any notice is that the defendant moved to suppress "[o]pinion and/or observation of the arresting officers regarding Defendant's sobriety and/or alcohol content."[35] However, that statement is very broad and makes no mention of field sobriety tests. Further, none of the four reasons listed in the motion as supporting suppression in any way relate to field sobriety tests. The lack of specificity in the defendant's motion was insufficient to raise the state's burden of proof.

However, during cross examination of Trooper Jasper, defense counsel obtained the necessary factual basis to place the prosecutor on notice of the issue to be decided in regards to the motion to suppress. During cross examination, defense counsel asked specific questions to support the claim that the NHTSA standards were not followed. The specific questions regarded the defendant's placement during the HGN test in a

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[33] *Henry*, 2009-Ohio-10 at ¶ 12, citing *Nicholson*, 2004-Ohio-6666 at ¶ 11.
[34] (Internal quotations omitted.) *Henry*, 2009-Ohio-10 at ¶ 12, citing *Plunkett*, 2008-Ohio-1014 at ¶¶ 25-26. *See Wyatt*, 2008-Ohio-5667 at ¶ 15, citing *Plunket*, 2008-Ohio-1014 at ¶ 26 (stating that the necessary factual basis for a motion to suppress field sobriety tests can be obtained during cross-examination at the hearing on the motion); *Wood*, 2008-Ohio-5422 at ¶ 11, quoting *Plunkett*, 2008-Ohio-1014 at ¶¶ 25-26 (Internal quotations omitted). ("However, if the defendant's motion to suppress lacks the required particularity, the defendant may still provide some factual basis, either during cross-examination or by conducting formal discovery, to support a claim that the standards were not followed in an effort to raise the slight burden placed on the state.").
[35] Defs. Mot., pg. 1.

partially reclined position, and whether the defendant may have had a head injury at the time of the HGN test. Thus, the state has a heightened burden to show that conducting the HGN test while the defendant was in bed and with a possible head injury was in substantial compliance with NHTSA standards.

In resolving the state's burden, the court now turns to the issue of whether Trooper Jasper properly considered the HGN test results in determining probable cause to arrest the defendant. The standards for field sobriety tests, including the HGN test, are set forth in the NHTSA manual.[36] Pursuant to R.C. 4511.19(D)(4)(b), "[s]trict compliance with NHTSA standards is not necessary, but instead, clear and convincing evidence of substantial compliance with NHTSA standards is sufficient."[37] "A determination of whether the facts satisfy the substantial compliance standard is made on a case-by-case basis."[38]

Thus, the court must determine whether Trooper Jasper substantially complied with the NHTSA standard for conducting the HGN test. In his memorandum in support of his motion to suppress, the defendant's main argument, and the only one supported by a legal citation, is that an HGN test "conducted while a subject was lying on their [*sic*] back is not in substantial compliance with NHTSA standards and is therefore unreliable.[39] The defendant also touches on whether conducting the HGN test was in substantial compliance after the defendant had "suffered head trauma" in the vehicle

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[36] *Deluca*, 2017-Ohio-1235 at ¶ 10, citing *State v. Jimenez*, 12th Dist. Warren No. CA2006-01-005, 2007-Ohio-1658, ¶ 12.
[37] *State v. Henry*, 12th Dist. Preble No. CA2008-05-008, 2009-Ohio-10, ¶ 10, citing R.C. 4511.19(D)(4)(b).
[38] *Deluca*, 2017-Ohio-1235 at ¶ 10, quoting *State v. Fink*, 12th Dist. Nos. CA2008-10-118 and CA2008-10-119, 2009-Ohio-3538, ¶ 26.
[39] Defs. Mem. in Supp., pg. 4.

accident.[40] To clarify, the defendant did not tell Trooper Jasper that he had a head trauma. He stated that he had suffered possible head trauma.

Recently in *State v. Fridley*, 12th Dist. Clermont No. CA2016-05-030, 2017-Ohio-4368, the Twelfth District Court of Appeals examined a factually similar case in which it was called upon to determine whether a trooper substantially complied with NHTSA standards in conducting an HGN test on a defendant while the defendant was lying in a hospital bed.[41] In *Fridley*, the defendant was driving his vehicle when he failed to negotiate a curve, hitting an oncoming vehicle.[42] When the trooper arrived at the scene, the trooper noted a strong odor of alcoholic beverage on the defendant.[43] The trooper then went to the hospital, where the defendant was taken. A nurse advised that the defendant might have a lacerated liver, but no other injuries were reported to the trooper.[44] When questioned, the defendant admitted to the trooper that he had consumed alcohol.[45] The trooper then administered the HGN test while the defendant was partially reclined in his hospital bed, during which the defendant displayed four of six clues of intoxication.[46]

On appeal, the defendant argued, *inter alia*, that the trooper improperly conducted the HGN test because the defendant was reclining in a hospital bed and he

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[40] Defs. Mem. in Supp., pg. 3.
[41] *Fridley*, 2017-Ohio-4368 at ¶ 5. *Fridley* dealt with whether the HGN test was admissible in trial, not whether it should be suppressed. However, *Fridley*, like the present case, had to apply the same standard, which asks whether the trooper substantially complied with the NHTSA testing standards. As such, the Twelfth District Court of Appeal's analysis as to whether HGN testing complied with NHSTA standards is instructive here.
[42] Id. at ¶ 2.
[43] Id. at ¶ 3.
[44] Id. at ¶ 6.
[45] Id.
[46] Id. at ¶ 7.

was suffering a head injury.[47] The appellate court highlighted that the "NHTSA standards do not prohibit the administration of the HGN test while the subject is reclined, or even if the subject was lying down."[48] The court therefore concluded "the fact that [the defendant] was in a reclined position does not violate the NHTSA or otherwise indicate that the HGN test was not conducted in substantial compliance."[49]

As to the issue of head trauma, the court likewise found that there "was no reason to suppress the HGN test based on [the defendant's] assertion that he suffered a head injury."[50] This was so because the trooper did not observe injuries to the defendant's head, he was not notified of evidence to the contrary, and the trooper did not notice any other symptoms of a head injury while conducting the HGN pre-test, such as the presence of differently sized pupils.[51] As such, the court found that the trooper substantially complied with the NHTSA standards in administering the HGN test.[52]

In examining the case at bar, the defendant has not taken issue with most of the procedures involved in the HGN test Trooper Jasper conducted. Trooper Jasper gave a detailed overview of the procedures for HGN testing, as well as how he tested the defendant. The defendant mostly takes issue with the fact that the defendant was reclining while tested. As the court explains in *Fridley*, conducting an HGN test while the subject is reclined is not prohibited in the NHTSA manual, and as such it does not indicate that the test was not conducted in substantial compliance with the NHTSA manual.

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[47] Id. at ¶ 14.
[48] Id. at ¶ 18.
[49] Id.
[50] Id. at ¶ 20.
[51] Id.
[52] Id. at ¶ 21.

The defendant has also argued that Trooper Jasper improperly conducted the HGN test after the defendant informed him that he had suffered a head trauma. However, this argument is predicated upon an incorrect fact. The defendant actually told Trooper Jasper that he had a possible head trauma, and none of the medical staff told Trooper Jasper that the defendant had suffered a head trauma. Moreover, Trooper Jasper properly conducted the pre-test in compliance with the NHTSA manual to determine if the defendant had suffered a head injury. Because the results did not indicate a head injury, Trooper Jasper correctly proceeded to administer the HGN test. Lastly, although the defendant stated he had a possible head injury, he did not indicate to Trooper Jasper that he could not perform the test, nor did he present any evidence during the hearing that he had actually suffered a head trauma.[53] For these reasons, the court finds that Trooper Jasper did not fail to substantially comply with the NHTSA manual by conducting an HGN test on the defendant.

Having resolved whether Trooper Jasper could consider the HGN results, the next issue is whether his consideration of the HGN results, in tandem with other facts known to him, was sufficient to establish probable cause to arrest the defendant. Generally, to arrest a person, a police officer must have a warrant, unless the police officer has probable cause at the time of arrest.[54] "The test for establishing probable

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[53] *See State v. Terry*, 2d Dist. Montgomery No. 27102, 2017-Ohio-2686, ¶¶ 30-31 (finding that field sobriety tests were done in accordance with the appropriate regulations, even though the defendant told the testing officer that she had suffered a head trauma, because she did not say she could not perform the field sobriety tests and she presented no evidence at the hearing on the motion to suppress to corroborate her claim that she had a head trauma).

[54] *State v. Timson*, 38 Ohio St.2d 122, 127, 311 N.E.2d 16 (1974). *See State v. Zehenni*, 12th Dist. Warren No. CA2016-03-020, 2016-Ohio-8233, ¶ 39, citing *State v. Aslinger*, 12th Dist. Preble No. CA2011-11-14, 2012-Ohio-5436, ¶ 13 ("An officer must have probable cause to arrest a person without a warrant."); *State v. Grisham*, 12th Dist. Warren No. CA2013-12-118,

cause to arrest without a warrant is whether the facts and circumstances within an officer's knowledge were sufficient to warrant a prudent individual in believing that the defendant had committed or was committing an offense."[55]

As to arrests for OVI in particular, "[p]robable cause to arrest for OVI exists when, at the moment of arrest, the arresting officer had sufficient information, derived from a reasonably trustworthy source of facts and circumstances, to cause a prudent person to believe the accused was driving under the influence of alcohol, a drug of abuse, or a combination of them."[56] As with all warrantless arrests, the trial court determines whether there was probable cause based upon the totality of the surrounding circumstances.[57]

The defendant argues that Trooper Jasper had insufficient information to have probable cause to arrest the defendant because he did not know what condition the defendant was in at the time of the accident, there was no reliable information regarding the speed of the defendant's vehicle, there was no reliable information that the odor of alcohol came from the defendant or that the odor was not caused by spilled alcohol, there was insufficient knowledge regarding the cause of the defendant's red and watery

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2014-Ohio-3558, ¶ 31, citing *Aslinger*, 2012-Ohio-5436 at ¶ 13 ("In order to arrest a person without a warrant, an officer must have probable cause.").

[55] *Grisham*, 2014-Ohio-3558 at ¶ 31, citing *Aslinger*, 2012-Ohio-5436 at ¶ 13. *See Timson*, 38 Ohio St.2d at 127, citing *Brinegar v. United States*, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949) (holding that an officer has probable cause to make a warrantless arrest when the officer has "sufficient information, derived from a reasonably trustworthy source, to warrant a prudent man in believing that a felony has been committed and that it has been committed by the accused.").

[56] *Way*, 2009-Ohio-96 at ¶ 30, citing *State v. Homan*, 89 Ohio St.3d 421, 427, 732 N.E.2d 952 (2000). *See Henry*, 2009-Ohio-10 at ¶ 42, citing *Homan*, 89 Ohio St.3d at 427 ("Probable cause to exist for OVI exists when, at the moment of arrest, the arresting officer had sufficient information, derived from a reasonably trustworthy source of facts and circumstances, to cause a prudent person to believe the accused was driving under the influence of alcohol.").

[57] *Henry*, 2009-Ohio-10 at ¶ 42, citing *Homan*, 89 Ohio St.3d at 427.

eyes, and the HGN was not conducted in substantial compliance with NHTSA standards.[58]

The court has already resolved that the HGN test was conducted in substantial compliance with NHTSA standards, and therefore Trooper Jasper properly considered it in making a probable cause determination. Although the defendant has offered "alternate explanation[s]" as to the smell of alcohol, his blood shot eyes, the cause of the accident, and the results of his HGN test, those alternative explanations "[do] not eliminate the existence of probable cause."[59]

Trooper Jasper considered the following circumstances before determining that there was probable cause to arrest the defendant: the defendant's single vehicle accident during the daytime and in good weather, the accident witnesses' statements about the defendant's high speed, the paramedics' statements about the defendant's odor of alcohol, the paramedics' observation that Andrew Smith yelled to the defendant that he should not have been driving, the defendant's red and watery eyes, the open alcohol found in the vehicle, the odor of alcohol on the defendant at the hospital, and the results of the HGN test results. When viewing the totality of these surrounding circumstances, the court finds that Trooper Jasper had probable cause to arrest the defendant for OVI. Accordingly, the court shall not suppress Trooper Jansen's opinions or observations of the defendant's sobriety.

As for the defendant's motion to dismiss, "the proper remedy for a Fourth Amendment violation is suppression of the evidence wrongfully obtained, not dismissal

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[58] Defs. Mem. in Supp., pgs. 4-5.
[59] *Zehenni*, 2016-Ohio-8233 at ¶ 41.

of the charges."[60] Additionally, the defendant has not offered any argument as to why this case should be dismissed. Accordingly, the court declines to dismiss the charge against the defendant

CONCLUSION

For the foregoing reasons, the defendant's motion to suppress is not well-taken and is hereby denied.

IT IS SO ORDERED.

DATED: 2-2-2018

Judge Jerry R. McBride

[60] *Blanchester v. Hester*, 81 Ohio App. 3d 815, 820, 612 N.E.2d 412 (12th Dist. 1992)