

**COURT OF COMMON PLEAS  
CLERMONT COUNTY, OHIO**

**FILED**

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BARBARA A. WIEDENBEIN  
CLERK OF COMMON PLEAS  
CLERMONT COUNTY, OH

**STATE OF OHIO** :  
Plaintiff : **CASE NO. 2017 CR 000394**  
vs. : **Judge McBride**  
**BRIAN KENT WAYMAN** : **DECISION/ENTRY**  
Defendant :

Zachary A. Zipperer, assistant prosecuting attorney for the state of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103

Joshua R. Crousey, counsel for the defendant Brian Kent Wayman, 1 East Main Street, Amelia, Ohio 45102

This cause is before the court for consideration of a motion to suppress filed by the defendant Brian Kent Wayman on July 12, 2017. An evidentiary hearing was held on the motion on August 18th. At the end of the hearing, and after hearing the oral arguments of counsel, the court took the motion under advisement.

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 June 27, 2017, the defendant Brian Kent Wayman was indicted on two counts: 1) Operating a vehicle while under the influence of alcohol, a drug of abuse, or a combination of alcohol and a drug of abuse in violation of R.C. 4511.19(A)(1)(a), a felony of the third degree, and 2) Operating a vehicle while under the influence of alcohol, a drug of abuse, or a combination of alcohol and a drug of abuse in violation of R.C. 4511.19(A)(2), a felony of the third degree.

The above charges arise from an incident that occurred on June 3, 2017.<sup>1</sup> That evening, Officer Jeffrey Wolf from the Goshen Police Department was on duty.<sup>2</sup> On or about 9:26 p.m., Officer Wolf responded to 85 Crosstown Street, located in Goshen Township, Clermont County, in response to a 9-1-1 call.<sup>3</sup> Crosstown Street is a street within a mobile home park named Fay Garden.<sup>4</sup> The call informed Officer Wolf of an unresponsive subject in a gold Toyota Camry automobile on Crosstown Street. Officer Wolf arrived at 85 Crosstown Street at approximately 9:45 p.m.

Upon arrival, Officer Wolf observed a gold Toyota Camry automobile parked halfway on the grass and halfway on the road, facing against traffic. The brake lights of the vehicle were on. Officer Wolf parked behind the vehicle and walked to the driver's side of the vehicle.

Based on the information provided by the dispatcher, Officer Wolf was concerned that the person in the vehicle might be having a medical emergency. He observed the

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<sup>1</sup> Stipulations.

<sup>2</sup> Stipulations.

<sup>3</sup> Stipulations.

<sup>4</sup> State's Ex. 1.

defendant slumped over in the driver's seat such that his face was almost in his lap. The defendant had an unlit cigarette hanging from his mouth. The vehicle transmission was still in drive and the defendant's foot was on the brake.

Upon reaching the driver's side door, Officer Wolf reached into the vehicle and put the vehicle into park and turned it off to prevent the vehicle from accidentally moving when the defendant woke up. Officer Wolf awoke the defendant by asking him if he was okay, and the defendant slowly lifted his head and looked upwards.

Officer Wolf noticed that the defendant's pupils were constricted, which he stated is inconsistent with the fact that it was dark outside at the time. According to Officer Wolf, constricted pupils in darkness indicate that the defendant is likely impaired on some kind of drug. Officer Wolf also detected a moderate odor of alcohol emanating from the defendant, and he observed an open can of beer situated in the center console cup holder.

Officer Wolf asked for the defendant's license, to which the defendant responded that it was at his house. The defendant said he lived at 210 Gateway Street in the same mobile home park. Officer Wolf noted that the defendant's speech was slurred and that his eyes were blood shot and glassy. The defendant began to move around and shift his hands around in his pockets. The defendant told Officer Wolf that he was looking for his lighter. Officer Wolf asked the defendant to step out of his vehicle out of concern that the defendant was concealing or destroying evidence.

The defendant was slow, unsteady, and had difficulty maintaining his balance. Officer Wolf asked the defendant to hand him the beer from the vehicle, which the defendant did, but he almost spilled it on Officer Wolf in the process. The beer was

approximately three quarters full and still cold to the touch. Officer Wolf asked the defendant if he had been drinking alcohol. The defendant responded that he had consumed three alcoholic beverages earlier in the day, but that he had not consumed any alcoholic beverages recently.

Officer Wolf asked the defendant what he had been doing in the vehicle. The defendant replied that he was waiting for his girlfriend to arrive with fishing poles so that they could go fishing in a pond in the mobile home park. The defendant's vehicle was parked in a corner of the mobile home park that was opposite to the corner of the park where the pond was located.<sup>5</sup> The defendant's mobile home was located in between those two locations.<sup>6</sup> The defendant's girlfriend never arrived during the time that Officer Wolf interacted with the defendant.

Concerned that the defendant was impaired, Officer Wolf conducted several field sobriety tests on the defendant. Officer Wolf is NHTSA certified for OVI stops, arrests, and field sobriety tests.<sup>7</sup> Officer Wolf conducted the horizontal gaze nystagmus test, which indicated two of six possible clues for intoxication, the walk-and-turn test, which indicated five of eight possible clues for impairment of drugs or alcohol, the one-leg stand test, which indicated three of four clues, and the modified Romberg and lack of convergence tests, which indicated impairment. After the tests were administered, Officer Wolf asked the defendant which drugs he would test positive for, and the defendant replied that he would test positive for marijuana.

Based on his training and experience, and the observations that he made, Officer Wolf believed that the defendant was impaired by drugs and/or alcohol. Officer Wolf

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<sup>5</sup> State's Ex. 1.

<sup>6</sup> State's Ex. 1.

<sup>7</sup> Stipulations.

believed that the drugs the defendant consumed were marijuana and/or heroin. Officer Wolf also believed that the defendant had operated the vehicle because he was in physical control of the vehicle while he was impaired, he was sitting in the driver's seat, the vehicle was in gear, the brake lights were illuminated, and the defendant's foot was on the brake. After conducting the field sobriety tests, Officer Wolf arrested the defendant for OVI and read him his *Miranda* rights. Officer Wolf asked if he could search his vehicle, to which the defendant consented.

Another officer who arrived on scene searched the vehicle. Inside the vehicle were three cut-straws, used for drugs, small Ziploc bags with a white powder residue, and a small off-white substance wrapped in paper that was believed to be heroin. Officer Wolf took a witness statement from the 9-1-1 caller, who lived across the street from where the defendant's vehicle was located. The caller stated that he saw the defendant drive to that location.

Officer Wolf confronted the defendant with the witness statement and asked about the contraband. The defendant stated he did not use drugs and continued to deny driving the vehicle. The defendant claimed that someone must have put the drug items in his vehicle while he was passed out.

As mentioned previously, on June 27, 2017, the defendant was indicted on two counts: (1) Operating a vehicle while under the influence of alcohol, a drug of abuse, or a combination of alcohol and a drug of abuse in violation of R.C. 4511.19(A)(1)(a), a felony of the third degree, and (2) Operating a vehicle while under the influence of alcohol, a drug of abuse, or a combination of alcohol and a drug of abuse in violation of R.C. 4511.19(A)(2), a felony of the third degree.

On July 12, 2017, the defendant filed a motion to suppress. The motion to suppress broadly sought to suppress all of the defendant's statements and the observations, conclusions, and opinions of any police officer who interviewed or investigated the defendant regarding his sobriety. The motion claimed that there was no reasonable cause to stop and detain the defendant, nor any probable cause for his arrest. It posited that the defendant's statements were obtained in violation of the Fifth and Sixth Amendments to the United States Constitution. The motion also argued that the field sobriety tests were not performed in substantial compliance with proper standards. The state did not file a response.

On August 18, 2017, the court held an evidentiary hearing on the motion, at the end of which it heard oral argument from both sides. At the hearing, the arresting officer, Jeffrey Wolf, testified. Prior to the hearing, the defendant narrowed the issues in the motion to suppress to two: (1) whether Officer Wolf had reasonable, articulable suspicion to have the defendant perform field sobriety tests and (2) whether Officer Wolf had probable cause to arrest the defendant for an OVI offense. At the conclusion of the hearing, 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.”<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup>

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.”<sup>11</sup> 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.”<sup>12</sup> 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.”<sup>13</sup>

A motion to suppress typically “presents mixed questions of law and fact.”<sup>14</sup> In reviewing such a motion, “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.”<sup>15</sup>

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<sup>8</sup> *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).

<sup>9</sup> *State v. Haines*, 12th Dist. Clermont No. CA2003-02-015, 2003-Ohio-6103, ¶ 8.

<sup>10</sup> Crim.R. 12(C).

<sup>11</sup> *State v. Way*, 12th Dist. Butler No. CA2008-04-098, 2009-Ohio-96, ¶ 7, quoting Crim.R. 47.

<sup>12</sup> *Way*, 2009-Ohio-96 at ¶ 7, quoting *State v. Wood*, 12th Dist. Clermont No. CA2007-12-115, 2008-Ohio-5422, ¶ 10.

<sup>13</sup> *Way*, 2009-Ohio-96 at ¶ 7, citing *State v. Plunkett*, 12th Dist. Warren No. CA2007-02-012, 2008-Ohio-1014, ¶ 11.

<sup>14</sup> *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.

<sup>15</sup> *Codeluppi*, 2014-Ohio-1574 at ¶ 7, citing *Burnside*, 2003-Ohio-5373 at ¶ 8.

## LEGAL ANALYSIS

In the present case the defendant has been indicted on two charges for operating a vehicle while under the influence of alcohol and/or drugs of abuse ("OVI charges"), under R.C. 4511.19(A)(1)(a) and (A)(2). 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."<sup>16</sup> R.C. 4511.19(A)(2) provides:

"No person who, within twenty years of the conduct described in division (A)(2)(a) of this section, previously has been convicted of or pleaded guilty to a violation of this division, a violation of division (A)(1) or (B) of this section, or any other equivalent offense shall do both of the following:

- (a) Operate any vehicle, streetcar, or trackless trolley within this state while under the influence of alcohol, a drug of abuse, or a combination of them.
- (b) Subsequent to being arrested for operating the vehicle, streetcar, or trackless trolley as described in division (A)(2)(a) of this section, being asked by a law enforcement officer to submit to a chemical test or tests under section 4511.191 of the Revised Code, and being advised by the officer in accordance with section 4511.192 of the Revised Code of the consequences of the person's refusal or submission to the test or tests, refuse to submit to the test or tests."<sup>17</sup>

The Fourth Amendment to the United States Constitution protects people against "unreasonable searches and seizures."<sup>18</sup> Similarly, the Ohio Constitution provides: "The right of the people to be secure in their persons, houses, papers, and possessions,

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<sup>16</sup> R.C. 4511.19(A)(1)(a).

<sup>17</sup> R.C. 4511.19(A)(2)(a).

<sup>18</sup> Fourth Amendment to the United States Constitution.

against unreasonable searches and seizures shall not be violated.”<sup>19</sup> The United States Supreme Court has long observed that “[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”<sup>20</sup>

Regarding seizures of an individual, there are three types of police encounters that individuals have with law enforcement. In the Fourth Amendment context there are: “(1) consensual encounters; (2) investigatory stops; and (3) seizures that equate to an arrest.”<sup>21</sup> The Fourth Amendment does not prohibit “all contact between the police and citizens, but is designed ‘to prevent arbitrary and oppressive interference with enforcement officials with the privacy and personal security of individuals.”<sup>22</sup>

Hence, a consensual encounter between police officers and individuals “does not trigger Fourth Amendment scrutiny.”<sup>23</sup> A Fourth Amendment violation does not occur “simply because a police officer approaches an individual and asks a few questions.”<sup>24</sup> The encounter is consensual so long as the police officers do not “by means of physical force or show of authority” restrain the liberty of an individual.<sup>25</sup>

In the case at bar, the defendant argues that the warrantless stop and detention contravenes his Fourth Amendment rights. At the evidentiary hearing, the defendant

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<sup>19</sup> Ohio Constitution, Article I, Section 14.

<sup>20</sup> *Terry v. Ohio*, 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), citing *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251, 11 S.Ct. 1000, 35 L.Ed. 734 (1891).

<sup>21</sup> *State v. McLemore*, 10 N.E.3d 1186, 2014-Ohio-2116, ¶ 9 (9th Dist.), citing *State v. Patterson*, 9th Dist. Summit No. 23136, 2006-Ohio-5424, ¶ 11.

<sup>22</sup> *I.N.S. v. Delgado*, 466 U.S. 210, 215, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984), quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 554, 96 S.Ct. 3074, 3074, 49 L.Ed.2d 1116 (1976).

<sup>23</sup> *Florida v. Bostick*, 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d, 59 USLW 4708 (1991), at paragraph one of the syllabus, citing *Terry*, 392 U.S. at 19, fn. 16.

<sup>24</sup> *Bostick*, 501 U.S. at 433.

<sup>25</sup> *Id.*

revised this argument and agreed that it was permissible for Officer Wolf to conduct a welfare check on the defendant by approaching his vehicle to check his safety. The court agrees. Officer Wolf testified that he had received a call from the police dispatcher that there was a man unconscious or passed out in the driver's seat of a vehicle. He testified that he was concerned that the individual may have suffered a drug overdose. Officer Wolf did not contravene the Fourth Amendment in approaching the defendant's vehicle and asking him questions.

Following the wellness check as to the defendant, when Officer Wolf suspected the defendant of driving while under the influence of alcohol and drugs, the encounter transitioned to the second type of police encounter, an investigatory stop. Detainment is constitutional as an investigatory stop when a police officer "reasonably suspected" the defendant of "wrongdoing."<sup>26</sup> The officer must have had "'specific and articulable facts' that the detention was reasonable."<sup>27</sup> To determine whether the officer had a "reasonable and articulable suspicion" to detain a motorist is "determined by evaluating the totality of the circumstances 'through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold.'"<sup>28</sup>

A police officer is permitted to detain the motorist for the amount of time "reasonably necessary to confirm or dispel his suspicions of criminal activity."<sup>29</sup> The officer must release the motorist when the officer becomes satisfied that no criminal

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<sup>26</sup> *U.S. v. Mendenhall*, 446 U.S. 544, 552, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). See *Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed. 332 (1993), at paragraph one of the syllabus ("*Terry* permits a brief stop of a person whose suspicious conduct leads an officer to conclude in light of his experience that criminal activity may be afoot \* \* \*").

<sup>27</sup> *State v. Chatton*, 11 Ohio St.3d 59, 60-61, 463 N.E.2d 1237 (1984).

<sup>28</sup> *Stephenson*, 2015-Ohio-233 at ¶ 20, quoting *State v. Popp*, 12th Dist. Butler No. CA2010-05-128, 2011-Ohio-791, ¶ 13.

<sup>29</sup> *Stephenson*, 2015-Ohio-233 at ¶ 19, citing *Williams*, 2010-Ohio-1523 at ¶ 18.

activity occurred.<sup>30</sup> However, if an officer has a reasonable, articulable suspicion of further criminal activity, the officer may order the motorist to exit the car.<sup>31</sup> Most relevant to this case, “\* \* \* after a valid stop a police officer must have a reasonable suspicion of criminal activity before administering field sobriety tests.”<sup>32</sup> “Only when there are no articulable facts which give rise to a suspicion of illegal activity does continued detention to conduct field sobriety tests constitute an illegal seizure.”<sup>33</sup> However, probable cause is unnecessary to conduct field sobriety tests.<sup>34</sup>

All that is necessary to have reasonable suspicion to conduct field sobriety tests is “reasonable, articulable suspicion of intoxication.”<sup>35</sup> Physical characteristics that can give rise to reasonable suspicion sufficient to conduct field sobriety tests include “odor of alcohol, bloodshot eyes, flushed face, and slurred speech \* \* \*.”<sup>36</sup> Additional factors include “\* \* \* time and location of the stop, erratic driving, diminished coordination, demeanor of the driver, and admission of alcohol consumption \* \* \*.”<sup>37</sup> Not all of the above factors are necessary for a police officer to have reasonable articulable suspicion sufficient to conduct a field sobriety test.<sup>38</sup>

The observations that Officer Wolf testified to establish that he had a reasonable, articulable suspicion that the defendant operated his vehicle while intoxicated by

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<sup>30</sup> *Stephenson*, 2015-Ohio-233 at ¶ 19, citing *Williams*, 2010-Ohio-1523 at ¶ 18.

<sup>31</sup> *Stephenson*, 2015-Ohio-233 at ¶ 27, citing *Pennsylvania v. Mimms*, 434 U.S. 106, 111, 98 S.Ct. 330 (1977).

<sup>32</sup> *State v. Koogler*, 12th Dist. Preble No. CA2010-04-006, 2010-Ohio-5531, ¶ 7, citing *State v. Robbins*, 12th Dist. Clermont No. CA2002-10-082, 2003-Ohio-4457, ¶ 8.

<sup>33</sup> *Koogler*, 2010-Ohio-5531 at ¶ 7, citing *Robbins*, 2003-Ohio-4457 at ¶ 8.

<sup>34</sup> *State of Ohio/City of Fairfield v. Lucking*, 12th Dist. Butler No. CA2002-12-303, 2004-Ohio-90, ¶ 8, citing *Columbus v. Anderson*, 74 Ohio App.3d 768, 600 N.E.2d 712 (10th Dist. 1991).

<sup>35</sup> *Lucking*, 2004-Ohio-90 at ¶ 8, citing *Anderson*, 74 Ohio App.3d 768.

<sup>36</sup> *Koogler*, 2010-Ohio-5531 at ¶ 8, citing *Lucking*, 2004-Ohio-90 at ¶ 9.

<sup>37</sup> *Koogler*, 2010-Ohio-5531 at ¶ 8, citing *Lucking*, 2004-Ohio-90 at ¶ 9.

<sup>38</sup> *Koogler*, 2010-Ohio-5531 at ¶ 15, citing *Lucking*, 2004-Ohio-90 at ¶¶ 10, 12.

alcohol, drugs, or a combination of both. Officer Wolf noted that the defendant's vehicle was stopped in the wrong direction, and the defendant was slumped over in the driver's seat with an unlit cigarette dangling from his mouth. When speaking with the defendant, Officer Wolf detected a moderate odor of an alcoholic beverage emanating from him. The defendant's pupils were constricted, despite the darkness, and his eyes were bloodshot and glassy. Moreover, when answering Officer Wolf's questions, the defendant's speech was slurred. Finally, Officer Wolf spotted an open beer can in the vehicle. These multiple factors provided sufficient reasonable, articulable suspicion for Officer Wolf to have the defendant exit his vehicle.

Once out of the vehicle, those same factors were adequate to provide Officer Wolf a reasonable, articulable suspicion to conduct field sobriety tests.<sup>39</sup> The defendant exhibited additional factors that buttressed Officer Wolf's reasonable, articulable suspicion to conduct the tests. The defendant was slow and unsteady and had difficulty maintaining his balance. When he handed Officer Wolf the open can of beer, he nearly spilled it. Finally, the defendant admitted to drinking earlier in the day.<sup>40</sup> Given all of these factors, Officer Wolf certainly had a reasonable, articulable suspicion to have the defendant exit his vehicle and to conduct field sobriety tests.

However, the defendant argues that the officer had insufficient observations of the defendant driving the vehicle to have a reasonable, articulable suspicion that the defendant *operated* the vehicle while under the influence of drugs or alcohol. As discussed, R.C. 4511.19(A) criminalizes individuals who "operate" vehicles when, "at the time of operation" the individual was "under the influence of alcohol, a drug of

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<sup>39</sup> *Koogler*, 2010-Ohio-5531 at ¶ 8, citing *Lucking*, 2004-Ohio-90 at ¶ 9.

<sup>40</sup> *Koogler*, 2010-Ohio-5531 at ¶ 8, citing *Lucking*, 2004-Ohio-90 at ¶ 9.

abuse, or a combination of them." Per the defendant's argument, even if he had been "under the influence of alcohol, a drug of abuse, or a combination of them," Officer Wolf did not have a reasonable, articulable suspicion to believe that the defendant had operated the vehicle.

The defendant notes that the dispatch call to Officer Wolf only indicated that a person was unconscious in a running vehicle. It did not state that the defendant had driven the vehicle to 85 Crosstown. Furthermore, before having the defendant conduct field sobriety tests, Officer Wolf did not talk to the person who had made the 911 call that led to the dispatch call. Because the officer did not personally see the vehicle move, and because no one informed him that the defendant had moved it, the defendant believes the field sobriety tests were in violation of his Fourth Amendment rights.

As noted, to be convicted of OVI under R.C. 4511.19(A), the defendant must have operated the vehicle while under the influence of alcohol, a drug of abuse, or a combination of them. The term "operate" is defined in R.C. 4511.01(HHH) to mean "to cause or have caused movement of a vehicle \* \* \*."<sup>41</sup> "Prior to the Revised Code's definition of 'operate,' the meaning of the term was 'exclusively a matter of judicial interpretation.'"<sup>42</sup> Before the legislature defined the term "operate," the Ohio Supreme Court had interpreted the word "'operate' more broadly than 'driving' and held that '[a] person who is in the driver's seat of a motor vehicle with the ignition key in the ignition

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<sup>41</sup> R.C. 4511.01(HHH).

<sup>42</sup> *State v. Anthony*, 2016-Ohio-2905, 64 N.E.3d 591 (5th Dist.), ¶ 19, quoting *State v. Wallace*, 166 Ohio App.3d 845, 2006-Ohio-2477, 853 N.E.2d 704, ¶ 8 (1st Dist.).

and who has a prohibited concentration of alcohol is operating the vehicle within the meaning of R.C. 4511.19 whether or not the engine of the vehicle is running.”<sup>43</sup>

The new definition of “operate” under R.C. 4511.01(HHH) became effective on January 1, 2004.<sup>44</sup> The term “narrows the definition of ‘operate’ which effectively eliminates ‘drunk radio listeners, or people who use their cars as a four-wheeled, heated hotel room’ from being convicted of OVI.”<sup>45</sup> Even so, the Eighth District Court of Appeals and the Fifth District Court of Appeals have observed: “\* \* \* Still, a person who is found passed out in his vehicle on the side of the highway may be convicted of an OVI because a jury could infer that the vehicle was moved to that location. \* \* \*”<sup>46</sup>

“Notably, and in relation to movement of a vehicle, R.C. 4511.01(HHH) employs both the present tense (‘to cause’) and, alternatively, the past tense (to ‘have caused’), in defining the conduct to which that section applies.”<sup>47</sup> Unlike the present tense, the “past tense indicates action already completed.”<sup>48</sup> As such, “[f]or purposes of R.C. 4511.19, to ‘have caused’ movement of a vehicle is a fact that may be proved by circumstantial evidence, which inherently possesses the same probative value as direct evidence.”<sup>49</sup>

There is no case law discussing reasonable articulable suspicion or probable cause to arrest for OVI that specifically examines whether the facts were sufficient to

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<sup>43</sup> *Cleveland v. Sheppard*, 8th Dist. Cuyahoga No. 103166, 2016-Ohio-7393, ¶ 19, quoting *State v. Gill*, 70 Ohio St.3d 150, 657 N.E.2d 897 (1994).

<sup>44</sup> *Anthony*, 2016-Ohio-2905 at ¶ 20.

<sup>45</sup> *Id.*, citing *Gill*, 70 Ohio St.3d at 157-158 (Pfeifer, J., dissenting).

<sup>46</sup> *Sheppard*, 2016-Ohio-7393 at ¶ 21, quoting *State v. Schultz*, 8th Dist. Cuyahoga No. 90412, 2008-Ohio-4448, ¶ 25. See *Anthony*, 2016-Ohio-2905 at ¶ 22, quoting *Schultz*, 2008-Ohio-4448 at ¶ 25 (quoting same).

<sup>47</sup> *Anthony*, 2016-Ohio-2905 at ¶ 21.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*, citing *State v. Jerks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991).

show that the defendant operated the vehicle within the meaning of R.C. 4511.01(HHH). However, there are several post-2004 cases, albeit none within the Twelfth District, that examine whether there was sufficient evidence to support a guilty conviction under R.C. 4511.19(A)(1) when the defendant was not seen driving the vehicle, but was instead unconscious or asleep in the driver's seat. These cases, outlined below, overwhelmingly find that facts similar to the facts in this case can support a guilty conviction for OVI. Because reasonable, articulable suspicion and probable cause are both lower standards than beyond a reasonable doubt, required for criminal conviction, these cases are helpful in determining whether Officer Wolf had a reasonable, articulable suspicion that the defendant committed an OVI offense, and later, whether Officer Wolf had probable cause to believe that the defendant had committed an OVI offense.

In *State v. Jamison*, 9th Dist. Summit No. 27664, 2016-Ohio-5122, the defendant argued that there was insufficient evidence to support his OVI conviction since the arresting officers did not directly see him operating his vehicle.<sup>50</sup> However, the defendant was observed "slumped over and sleeping" in the driver's seat, the left turn signal was on, the key was in the ignition with the engine running, and the vehicle was in gear.<sup>51</sup> The Ninth District Court of Appeals found that these observations, when testified to, provided sufficient evidence to support the jury's finding that the defendant was guilty, and the defendant's conviction was not against the manifest weight of the evidence.<sup>52</sup>

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<sup>50</sup> *State v. Jamison*, 9th Dist. Summit No. 27664, 2016-Ohio-5122, ¶ 32.

<sup>51</sup> *Id.* at ¶ 34.

<sup>52</sup> *Id.*

In *State v. Anthony*, 2016-Ohio-2905, 64 N.E.3d 591 (5th Dist.), the defendant conceded that he was intoxicated when he was arrested, but appealed his OVI conviction under R.C. 4511.19(A)(1)(a) on the basis that there was insufficient evidence to find that he “operated” the vehicle.<sup>53</sup> The evidence showed that the defendant’s vehicle was disabled on a public street, the defendant was observed in the driver’s seat, the defendant was later observed trying to use a jumper cable on the vehicle, and no one at the scene of the arrest claimed to have seen another person drive the vehicle to the location where it broke down.<sup>54</sup> The appellate court concluded that this evidence, although circumstantial, allowed a reasonable person to find beyond a reasonable doubt that the defendant had operated a vehicle.<sup>55</sup> The court ultimately affirmed the defendant’s conviction for OVI after finding that it was not against the sufficiency or the manifest weight of the evidence.<sup>56</sup>

In *Cleveland v. Sheppard*, 8th Dist. Cuyahoga No. 103166, 2016-Ohio-7393, the defendant appealed an OVI conviction.<sup>57</sup> On appeal, the defendant argued that his conviction was against the manifest weight of the evidence and was supported by insufficient evidence.<sup>58</sup> Patrolling officers discovered the defendant with his vehicle improperly parked with two tires on the street and two on a setback, the defendant was asleep in the driver’s seat of the car, the key was in the ignition, and the car was running.<sup>59</sup> Once the officers woke the defendant, they saw his eyes were red and

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<sup>53</sup> *Anthony*, 2016-Ohio-2905 at ¶ 16.

<sup>54</sup> *Id.* at ¶ 23.

<sup>55</sup> *Id.* at ¶ 25.

<sup>56</sup> *Id.* at ¶ 31.

<sup>57</sup> The OVI conviction stemmed from a violation of the Cleveland Codified Ordinances 433.01(A)(1), which is identical to R.C. 4511.19(A)(1).

<sup>58</sup> *Sheppard*, 2016-Ohio-7393 at ¶¶ 16, 29.

<sup>59</sup> *Id.* at ¶ 22.

glassy and that he smelled of alcohol.<sup>60</sup> The defendant claimed he was waiting in the car for his girlfriend who was at a nearby tavern, but the tavern was closed and locked.<sup>61</sup> No one else arrived while the defendant was performing his field sobriety tests, which he failed. The appellate court opined that “[f]rom the evidence, the court could infer that the [the defendant] did not simply have control of the vehicle while waiting for someone, but instead moved the vehicle to that location, parking it partially on the street and partially in the treelawn.”<sup>62</sup> Accordingly, the court found that the evidence was sufficient and that the conviction was not against the manifest weight of the evidence.<sup>63</sup>

In *State v. Halpin*, 2d Dist. Clark No. 07CA78, 2008-Ohio-4136, the defendant appealed her conviction for OVI, to which she pled no contest. The defendant argued that she had not been seen operating her vehicle, which is a necessary element of R.C. 4511.19(A).<sup>64</sup> Troopers found the defendant behind the wheel of her vehicle, the vehicle's motor was running and in the drive gear position, the defendant's foot was on the brake pedal, and the vehicle was found at a stop sign.<sup>65</sup> The appellate court held that reasonable minds could find, beyond a reasonable doubt, that the defendant had caused movement to the vehicle to bring it to that location, and as such the defendant had operated her vehicle.<sup>66</sup>

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at ¶ 24.

<sup>63</sup> *Id.* at ¶¶ 24, 31.

<sup>64</sup> *State v. Halpin*, 2d Dist. Clark No. 07CA78, 2008-Ohio-4136, ¶ 24.

<sup>65</sup> *Id.* at ¶ 25.

<sup>66</sup> *Id.* See *State v. Adams*, 3d Dist. Crawford No. 3-06-24, 2007-Ohio-4932, ¶¶ 22-23 (finding that the defendant did operate his vehicle within the meaning of R.C. 4511.01(HHH) where the evidence showed the defendant was found “sloped” over his steering wheel, the vehicle was located in a lane, and the vehicle was running).

In the instant case the defendant was found behind the wheel of his car in the driver's seat, his foot was on the brake, the key was in the ignition, the car was on and in the drive gear, and the car was stopped on the side of a residential street. Given these facts, Officer Wolf could have inferred that the defendant must have driven his car to 85 Crosstown Street while under the influence of drugs and/or alcohol. It is not as though the defendant was parked outside of a bar sleeping in his car and using it as a hotel room for the night. Furthermore, sober drivers are generally not in the habit of taking a nap while stopped in the opposite direction of traffic without first placing their vehicles in park or taking cigarettes out of their mouths. Although the defendant claimed he was waiting for his girlfriend, she never arrived during the sobriety tests. As such, Officer Wolf had a reasonable, articulable suspicion to believe that the defendant operated, which is to say moved, his vehicle while under the influence of alcohol, drugs, or a combination of both.

It is undisputed that after Officer Wolf conducted the field sobriety tests he placed the defendant under arrest. Generally, to arrest a person a police officer must have a warrant, unless the police officer has probable cause at the time of arrest.<sup>67</sup> "The test for establishing probable 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

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<sup>67</sup> *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, 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.").

offense.”<sup>68</sup> 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.”<sup>69</sup>

“Probable cause deals with ‘probabilities – the factual and practical nontechnical considerations of everyday life on which reasonable and prudent men act – and is a fluid concept, to be based on the totality of the circumstances, and not reduced to a neat set of legal rules.”<sup>70</sup> Probable cause is not “the quantum of evidence necessary to convict a criminal defendant.”<sup>71</sup> If there is probable cause, then the “arresting officer is not required to obtain a warrant in order to apprehend a suspected felon in a public place.”<sup>72</sup>

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<sup>68</sup> *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.”).

<sup>69</sup> *Way*, 2009-Ohio-96 at ¶ 30, citing *State v. Homan*, 89 Ohio St.3d 421, 427, 732 N.E.2d 952 (2000). Cf. *State v. Finch*, 24 Ohio App.3d 38, 492 N.E.2d 1254 (12th Dist. 1985), at paragraph two of the syllabus (“Where a police officer had not observed the arrestee driving in an erratic or unsafe manner, had not witnessed impaired motor coordination, and had not instructed the arrestee to perform field sobriety tests, the officer did not have probable cause to arrest the driver for violation of R.C. 4511.19; i.e. the mere presence of drunkenness (bloodshot eyes, slurred speech, the odor of alcohol) is not sufficient to constitute probable cause for arrest for driving under the influence.”).

<sup>70</sup> *State v. Crittendon*, 12th Dist. Clermont No. CA2001-03-04-045, 2001 WL 1462784, \*2 (Nov. 19, 2001), quoting *State v. Ingram*, 20 Ohio App.3d 55, 61 (12th Dist. 1984). See *Grisham*, 2014-Ohio-3558 at ¶ 31, citing *State v. Oglesby*, 12th Dist. Clinton No. CA2013-12-027, 2005-Ohio-6556, ¶ 17 (“A probable cause determination is based upon the totality of the facts and circumstances.”).

<sup>71</sup> *Harris v. U.S.*, 422 F.3d 322, 327, 2005 Fed.App. 0376P (6th Cir. 2005). See *Criss v. City of Kent*, 867 F.2d 259, 262 (6th Cir. 1988).

<sup>72</sup> *Ingram*, 20 Ohio App.3d at 57, citing *Steagold v. United States*, 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed. 38 (1981).

The defendant has not argued that, following the field sobriety tests, the facts and circumstances were inadequate for Officer Wolf to believe that the defendant was under the influence of drugs and/or alcohol. Instead, the defendant argues that Officer Wolf lacked probable cause to believe that the defendant had *operated* his vehicle while under the influence of drugs and/or alcohol.

The court finds that the same facts that provided Officer Wolf with reasonable, articulable suspicion to believe the defendant moved his vehicle also gave Officer Wolf probable cause to believe that the defendant moved his vehicle. As discussed, Officer Wolf could infer from the circumstances under which he first found the defendant that the defendant had driven his car to 85 Crosstown Street while under the influence of alcohol, drugs, or a combination of both. Although the defendant offered an "alternate explanation" as to why he was in the car, that being he was waiting for his girlfriend to go fishing, that alternate explanation "does not eliminate the existence of probable cause."<sup>73</sup> Accordingly, the court finds that Officer Wolf had probable cause to arrest the defendant for the two charged OVI offenses.

## CONCLUSION

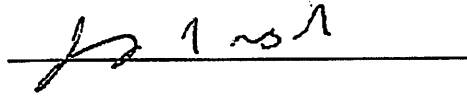
For the foregoing reasons, the defendant's motion to suppress is not well-taken and denied.

**IT IS SO ORDERED.**

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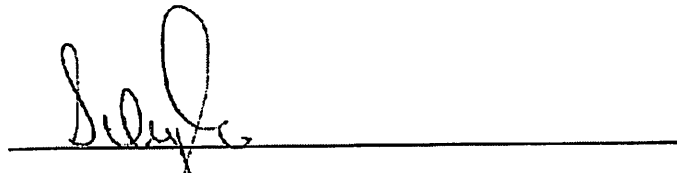
<sup>73</sup> *Zehenni*, 2016-Ohio-8233 at ¶ 41.

DATED: 9-29-17

  
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Judge Jerry R. McBride

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Decision/Entry were sent on this 29th day of ~~September~~ 2017 by e-mail to Zachary A. Zipperer, at [zzipperer@clermontcountyohio.gov](mailto:zzipperer@clermontcountyohio.gov), and Darren Miller, at [dmiller@clermontcountyohio.gov](mailto:dmiller@clermontcountyohio.gov), Assistant Prosecuting Attorneys, and to Joshua R. Crousey, Attorney for the Defendant, at [jcrousey@williamjrapp.com](mailto:jcrousey@williamjrapp.com).

  
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Judicial Assistant to Judge McBride