[Cite as *State v. Billiter*, 2018-Ohio-5424.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MONROE COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

DANIEL R. BILLITER,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 17 MO 0019

Criminal Appeal from the
County Court of Monroe County, Ohio
Case No. #TRC1600084

BEFORE:
Cheryl L. Waite, Gene Donofrio, Kathleen Bartlett, Judges.

JUDGMENT:
Affirmed in part; Reversed in part; R.C. 4511.19(A)(1)(d) conviction vacated; Remanded.

Atty. James L. Peters, Monroe County Prosecutor, and
Atty. Helen Yonak, Assistant Prosecuting Attorney, 101 North Main Street, Room 15, P.O. Box 430, Woodsfield, Ohio 43793-0430, for Plaintiff-Appellee

Atty. John D. Falgiani, Jr., P.O. Box 8533, Warren, Ohio 44484, for Defendant-Appellant.

Dated: December 17, 2018

WAITE, J.

{¶1} Appellant Daniel R. Billiter appeals a September 22, 2016 Monroe County Court decision denying his motion to suppress the results of a deep lung breathalyzer test. Appellant argues that his breathalyzer test results were inadmissible because the device used during his test failed a subsequent calibration test. He argues that his R.C. 4511.19(A)(1)(d) conviction, which requires admissible test results, should be vacated. Appellant also contends that the admission of his test results, which revealed a blood alcohol content ("BAC") level above the threshold allowed by law, prejudiced the jury, so that his R.C. 4511.19(A)(1)(a) conviction also should be vacated. Appellant also asserts that his sentence is contrary to law. For the reasons provided, Appellant's R.C. 4511.19(A)(1)(a) conviction is reversed and vacated. However, Appellant's conviction pursuant to R.C. 4511.19(A)(1)(d) and his sentence for that conviction are affirmed.

Factual and Procedural History

{¶2} Ohio State Patrolman T.J. White was traveling Southbound on SR 7 in Monroe County when he observed Appellant's car traveling Northbound at what appeared to be an excessive speed. (10/19/17 Trial Tr., p. 102.) Trooper White activated his radar, which revealed that Appellant was traveling 71 mph in a 55 mph designated zone. Trooper White turned his car around and attempted to initiate a traffic stop. However, Appellant continued driving and turned onto multiple residential streets as Trooper White followed. At one point during the encounter, Trooper White used his manual siren in an attempt to catch Appellant's attention. A manual siren emits a louder sound, and while Appellant's break light lit up after the manual siren was activated, he continued to drive until the street dead ended into his driveway. He pulled his car into

the driveway and attempted to exit before Trooper White ordered him to remain inside his car.

{¶3} Trooper White asked Appellant to roll down his window. Appellant rolled down the window about an inch. The trooper was required to repeat his request several times before Appellant finally complied. Once the window had been lowered, Trooper White noticed a strong smell of alcohol. According to the trooper, Appellant's eyes were red, glassy, and bloodshot. Trooper White asked Appellant to exit the car. Appellant can be seen on the dash cam video stumbling as he exited the car. Appellant's speech is heavily slurred and mostly unrecognizable.

{¶4} Appellant informed Trooper White that he could not complete the field sobriety test due to an injured foot. He repeatedly asked for his pain medication. Trooper White attempted to conduct the "horizontal gaze nystagmus" test, however, Appellant refused to cooperate and would not move his eyes. (10/19/17 Trial Tr., p. 118.) Trooper White terminated the test due to a lack of cooperation.

{¶5} Appellant initially refused the portable breath test. However, once informed of the consequences of refusing the test, he relented. This test resulted in a reading of.131. The lowest end of the threshold set by R.C. 4511.19 penalizes driving with a BAC level of .08. Appellant repeatedly asked Trooper White to "[g]ive him a break" and let him go. (10/19/17 Trial Tr., pp. 124-125.) Appellant also stated that "he probably should have not been drinking and driving, but he still had to fight it." (10/19/17 Trial Tr., p. 125.) He told Trooper White that he fought his last DUI charge and prolonged the case for three years. He stated that it was his intent to do the same in this case.

{¶6} After impounding Appellant's car, Trooper White drove him to the Woodsville Police Department and conducted a breathalyzer test using the "BAC DataMaster." (10/19/17 Trial Tr., p. 127.) Before Trooper White administered the test, an automatic calibration test and an internal test were completed on the device. According to the ticket printed from the device, Appellant's BAC level was .131. On February 3, 2016, two days before Appellant's test, the device had passed a scheduled calibration test. However, on the next calibration test conducted on February 10, 2016, five days after Appellant's test, the device malfunctioned.

{¶7} On February 10, 2016, Appellant was charged with one count of OVI, a first degree misdemeanor in violation R.C. 4511.19(A)(1)(d); one count of OVI, a first degree misdemeanor in violation of R.C. 4511.19(A)(1)(a); one count of failure to wear a seatbelt, an unclassified misdemeanor in violation of R.C. 4513.263(B)(1); and one count of operating a motor vehicle in excess of the posted speed limit, a minor misdemeanor in violation R.C. 4511.21(D)(1).

{¶8} On March 11, 2016, Appellant filed a motion to suppress the field sobriety test and breathalyzer test results. Relevant to this appeal, Appellant argued that the results of the breathalyzer test were inadmissible due to the subsequent failure of the device's calibration test. The state presented testimony that the malfunction was not related to the actual testing process, but that the ticket printer malfunctioned. On September 22, 2016, the trial court denied Appellant's motion. The case proceeded to a jury trial which commenced on October 19, 2017. The jury found Appellant guilty on both OVI counts and the speeding count. The jury found him not guilty of the seatbelt charge.

{¶9} On October 26, 2017, the trial court sentenced Appellant to 180 days in jail with 60 days suspended. Of the 120 days to be served, the court permitted Appellant to serve thirty days on house arrest. The court additionally imposed five years of reporting probation and suspended Appellant's driver's license for two years, with credit for one year. The court imposed $550 in fines for the OVI conviction and $40 for the speeding conviction. While the trial court merged the OVI offenses for sentencing purposes, it is unclear on which count Appellant was sentenced. Appellant timely appealed his convictions and sentence. On December 15, 2017, the trial court denied Appellant's motion for stay of sentence pending appeal.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE RESULTS OF THE BREATHALYZER.

ASSIGNMENT OF ERROR NO. 2

THE JUDGMENT OF CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶10} Appellant's first two assignments of error address the trial court's denial of his motion to suppress the results of his breathalyzer test. In Appellant's first assignment, he seeks vacation of his R.C. 4511.19(A)(1)(d) conviction, which requires proof the accused had a BAC level of .08 to .169. He contends that his test results should have been suppressed because the device failed a subsequent calibration test. Absent admissible test results, he argues that he cannot be convicted for a violation of R.C. 4511.19(A)(1)(d). Appellant relies on three cases from our sister districts which held that breathalyzer test results are inadmissible when the device used to test the

defendant's BAC subsequently fails a calibration test. See *State v. Linard*, 5th Dist. No. 2008 AP 06-0046, 2009-Ohio-1578; *State v. Akers*, 4th Dist. No. 06CA22, 2007-Ohio-1684; *Upper Arlington v. Kimball*, 95 Ohio App.3d 630, 643 N.E.2d 177 (10th Dist.1994).

{¶11} In Appellant's second assignment he also seeks vacation of his R.C. 4511.19(A)(1)(a) conviction, arguing that although a BAC test is not required to support this conviction, admission of his test results improperly influenced the jury's decision.

{¶12} The state agrees that the test results should have been suppressed, and that suppression then requires Appellant's R.C. 4511.19(A)(1)(d) conviction be vacated. However, the state argues that R.C. 4511.19(A)(1)(a) does not require proof of any BAC level to support a conviction. The state contends that there is substantial evidence of record to support Appellant's conviction pursuant to R.C. 4511.19(A)(1)(a) without these test results.

{¶13} A motion to suppress presents mixed issues of law and fact. *State v. Lake*, 151 Ohio App.3d 378, 2003-Ohio-332, 784 N.E.2d 162, ¶ 12 (7th Dist.), citing *State v. Jedd*, 146 Ohio App.3d 167, 171, 765 N.E.2d 880 (4th Dist.2001). If a trial court's findings of fact are supported by competent credible evidence, an appellate court must accept them. *Id*. The court must then determine whether the trial court's decision met the applicable legal standard. *Id*.

{¶14} O.A.C. 3701-53-04 provides:

> (A) A senior operator shall perform an instrument check on approved evidential breath testing instruments listed under paragraphs (A)(1), (A)(2), and (B) of rule 3701-53-02 no less frequently than once every seven days in accordance with the appropriate instrument checklist for the

instrument being used. The instrument check may be performed anytime up to one hundred and ninety-two hours after the last instrument check.

(1) The instrument shall be checked to detect radio frequency interference (RFI) using a hand-held radio normally used by the law enforcement agency performing the instrument check. The RFI detector check is valid when the evidential breath testing instrument detects RFI or aborts a subject test. If the RFI detector check is not valid, the instrument shall not be used until the instrument is serviced.

(2) An instrument shall be checked using a solution containing ethyl alcohol approved by the director of health. An instrument check result is valid when the result of the instrument check is at or within five one-thousandths (0.005) grams per two hundred ten liters of the target value for that approved solution. An instrument check result which is outside the range specified in this paragraph shall be confirmed by the senior operator using another bottle of approved solution. If this instrument check result is also out of range, the instrument shall not be used until the instrument is serviced or repaired.

{¶15} At least three other appellate districts when faced with this question have held that a device that fails a calibration test performed after the administration of a contested breath test does not satisfy the requirements of O.A.C. 3701-53-04(A). See *Linard*, *supra*, *Akers*, *supra*, and *Upper Arlington*, *supra*.

{¶16} In *Kimball*, a successful calibration test was completed on August 3, 1993, three days before appellant's test. *Id.* at 631-632. Four days after the test, the device

failed a calibration test. Although there was no evidence that a problem with the machine existed during appellant's test, the *Kimball* court reversed the trial court's decision to deny his motion to suppress the test results. Given that test results are crucial to a conviction under this code section and that there was no way to ensure the malfunction occurred after appellant took his test and not before or during, the court ruled the test results were inadmissible. *Id.* at 633.

{¶17} In *Akers*, the device failed a calibration test five days before appellant's breath test. *Id.* at ¶ 3. On the same date, the device passed a second calibration test. The day after appellant's test, the machine again failed a calibration test and instead of retesting the unit, the device was replaced by a new unit. The *Akers* court reversed the trial court's decision to deny appellant's motion to suppress the test results. The court explained that the device failed a post-test calibration test, and since a follow up test was not attempted, the calibration test did not satisfy O.A.C. 3701-53-04(A) and the results were inadmissible. *Id.* at ¶ 14.

{¶18} In *Linard*, the device passed a calibration test prior to appellant's test. Six days after the test, the calibration test failed due to radio frequency interference. *Id.* at ¶ 15. A second test was attempted and the device passed the radio frequency test but failed the solution test. As a result, the device was taken out of circulation and sent out for repairs. On appeal, the Fourth District reversed its prior decisions in *State v. Franz*, 4th Dist. No. 04-CA-000013, 2005-Ohio-1755 and *State v. Parker*, 4th Dist. No. 94-CA-483, 1995 WL 495273 (May 9, 1995) and agreed with the *Kimball* and *Akers* courts. Consequently, the *Linard* court held that appellant's test results were inadmissible. *Id.* at ¶ 24.

{¶19} The state confesses judgment in this matter regarding Appellant's R.C. 4511.19(A)(1)(d) conviction. We agree with our sister districts and adopt the reasoning in *Upper Arlington*, *Akers*, and *Linard*. Given that a conviction under this section is dependent on an accurate machine reading, and given that there is no way to determine at what point the machine malfunctioned, the test result from a machine that fails its next calibration test subsequent to the BAC test in issue should be suppressed for purposes of a charge lodged pursuant to R.C. 4511.19(A)(1)(d). Consequently, Appellant's test results were inadmissible and his R.C. 4511.19(A)(1)(d) conviction, which requires a BAC reading of .08 to .169, is reversed and vacated. The issue next becomes whether Appellant's R.C. 4511.19(A)(1)(a) conviction can be affirmed.

{¶20} R.C. 4511.19(A)(1)(a) provides that: "[n]o person shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation * * * [t]he person is under the influence of alcohol, a drug of abuse, or a combination of them." To support a conviction of R.C. 4511.19(A)(1)(a), "the state must prove that the defendant operated a vehicle 'when his faculties were appreciably impaired by the consumption of alcohol.' " *State v. Smith*, 7th Dist. No., 2007-Ohio-3182, ¶ 76, citing *State v. Crites*, 7th Dist. No. 99-518-CA, 2000 WL 1781450, *3 (Nov. 30, 2000). "As such, the defendant's behavior is a primary consideration." *Smith* at ¶ 76, citing *Crites*.

{¶21} According to the state, the record contains sufficient evidence to show that Appellant operated his vehicle under the influence of alcohol even without the BAC test results. Appellant responds by arguing that this conviction must be vacated due to the prejudice suffered from allowing the jury to hear that his BAC was over the legal limit.

{¶22} A videotape of the encounter was shown to the jury. The record includes both a dash camera and a rear view camera video which collectively show each event that occurred from the time Trooper White observed Appellant's car until they arrived at the Woodsville Police Department. Appellant is shown on the video driving on SR 7 with Trooper White following behind with his emergency lights activated. Appellant did not pull over or otherwise stop his car. Appellant is shown turning onto multiple residential streets and then continuing to drive until he eventually pulled into his driveway. It is apparent from the video that Appellant knew that Trooper White was attempting to initiate a traffic stop, as his brake lights lit up when Trooper White activated the manual siren. However, Appellant continued driving and only stopped when he pulled into his driveway, where he attempted to exit his car.

{¶23} Trooper White can be seen exiting his cruiser and ordering Appellant to remain inside the car. Trooper White was repeatedly required to ask Appellant to roll down his window, because Appellant rolled down his window only inches at a time before he finally fully complied with the order. When asked why he did not immediately stop his car and pull over, Appellant said that he lived nearby and he was nervous. Trooper White told Appellant he smelled alcohol inside the car and asked Appellant how much he had consumed. Appellant denied drinking any alcohol and said that he had just brushed his teeth.

{¶24} Trooper White ordered Appellant out of the car. Appellant can be seen stumbling as he exits the car and as he walked to the area behind his car. Appellant claimed that he could not complete the field sobriety test due to an injured foot. Trooper White attempted to perform the horizontal gaze nystagmus test, however, Appellant

refused to move his eyes and kept asking for his pain medication. When Appellant refused to comply after three warnings, Trooper White terminated the test and attempted to perform a portable breath test. Appellant initially refused the test, agreeing to take the test only after Trooper White explained the consequences of refusal and placed him under arrest.

{¶25} Appellant can be heard on the videotape mumbling and badly slurring his words as Trooper White attempted to place him in the backseat of his cruiser. Appellant had difficulty in entering the backseat of the car. While inside the cruiser, Appellant can be heard cursing and moving around. Once Trooper White gets inside the cruiser, Appellant asked him multiple times to "give him a break," "cut him some slack," and said that he "won't do it again." (Exh. 1.) Appellant asked Trooper White to "just give him a ticket and forget about it." (Exh. 1.) Appellant can also be heard explaining to Trooper White that he would tie the case up in the court system, including the Seventh District Court of Appeals and the Ohio Supreme Court. He explained that he dragged his previous OVI conviction out for three years. Again, not all of his conversation is clearly understandable.

{¶26} In addition to the video, Trooper White provided testimony about the encounter. Trooper White testified that a strong smell of alcohol emanated from Appellant's car once Appellant finally rolled down his window. (10/19/17 Trial Tr., p. 133.) He described Appellant's eyes as red, glassy, and bloodshot. He testified that he terminated the eye test due to Appellant's lack of cooperation and stated that Appellant was uncooperative through most of the encounter. Trooper White stated that he observed two clues in Appellant's eyes before the test was terminated. He stated that

Appellant asked him to cut him a break and just give him a ticket. According to Trooper White, Appellant said "he probably should have not been drinking and driving, but he still had to fight it." (10/19/17 Trial Tr. pp. 123-125.) These exact words cannot be heard on the video. Again however, most of Appellant's words are slurred and barely recognizable.

{¶27} The jury also did hear testimony regarding the failed calibration test that occurred days after Appellant's test. Defense counsel elicited testimony from Trooper White that the device failed its subsequent calibration test, was taken out of circulation and sent out for repair.

{¶28} Ordinarily, the introduction of evidence which was improperly admitted would be grounds for reversal. However, this case involves unique facts which render any error harmless: the video of the incident that was played to the jury and admitted into evidence. The video clearly shows that Appellant was intoxicated.

{¶29} The video coupled with Trooper White's testimony provides substantial competent and credible evidence to support the jury's finding that Appellant operated his vehicle while under the influence of alcohol. While blood-alcohol content is an element of a charge pursuant to R.C. 4511.19(A)(1)(d), the lack of a BAC test result does not mandate an acquittal when the offense is a violation of R.C. 4511.19(A)(1)(a). *State v. Stengel,* 5th Dist. No. 17-CA-38, 2018-Ohio-2286, ¶ 51-53. Although the test results in this matter were inadmissible and the jury obviously was aware of the BAC reading due to the other charge, the record contains a plethora of evidence sufficient to support Appellant's R.C. 4511.15(A)(1)(a) conviction. We note, again, that the trial court permitted defense counsel to question Trooper White about the failed calibration

test, and the jury was aware that there were failure issues with the device. Hence, the conviction entered pursuant to R.C. 4511.19(A)(1)(a) is affirmed even though his R.C. 4511.19(A)(1)(d) conviction is reversed and vacated.

{¶30} In explaining Appellant's sentence, we note that the state did not elect which OVI conviction it wished the trial court to utilize at sentencing once the offenses were merged. Additionally, the trial court did not specify which count was used either at the sentencing hearing or within its sentencing entry. Regardless, as both offenses are misdemeanors of the first degree and carry a maximum of 180 days in jail, Appellant's sentence would remain the same whether he was sentenced pursuant to the R.C. 4511.19(A)(1)(d) conviction which must be vacated or his R.C. 4511.19(A)(1)(a) conviction, which remains valid. Hence, to the extent this may be error it is entirely harmless, here.

{¶31} Based on the foregoing, Appellant's first assignment of error has merit and is sustained. However, his second assignment is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 3

THE SENTENCE WAS CONTRARY TO LAW.

{¶32} Appellant argues that a second OVI offense is considered to be "low tier" and does not support a maximum sentence. Appellant contends that his sentence is twelve times the minimum sentence. Appellant points out that he did not drive erratically and did not cause an accident. Further, Appellant argues that the trial court did not consider whether community control was appropriate in this case.

{¶33} In response, the state points out that Appellant's sentence is within the statutory guidelines. The state also posits that Appellant has served his entire jail sentence and is currently serving the probation portion of his sentence.

{¶34} A misdemeanor sentence is reviewed for an abuse of discretion. *State v. Reynolds*, 7th Dist. No. 08-JE-9, 2009-Ohio-935, ¶ 9, citing R.C. 2929.22; *State v. Frazier*, 158 Ohio App.3d 407, 2004-Ohio-4506, 815 N.E.2d 1155, ¶ 15 (1st Dist.). "An abuse of discretion is more than an error of judgment; it requires a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable." *State v. Nuby*, 7th Dist. No. 16 MA 0036, 2016-Ohio-8157, ¶ 10, citing *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶35} Pursuant to R.C. 2929.21(B):

> A sentence imposed for a misdemeanor or minor misdemeanor * * * shall be reasonably calculated to achieve the two overriding purposes of misdemeanor sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar offenses committed by similar offenders.

{¶36} When imposing a misdemeanor sentence, a trial court has the "discretion to determine the most effective way to achieve the purposes and principles of sentencing" provided in R.C. 2929.21. Unless a specific sentence is required, a court may impose any sanction or combination of sanctions provided under R.C. 2929.24 through 2929.28. R.C. 2929.22(A).

{¶37} Pursuant to R.C. 2929.22(B)(1), the trial court must consider the following seven factors in determining the appropriate sentence for a misdemeanor:

(a) The nature and circumstances of the offense or offenses;

(b) Whether the circumstances regarding the offender and the offense or offenses indicate that the offender has a history of persistent criminal activity and that the offender's character and condition reveal a substantial risk that the offender will commit another offense;

(c) Whether the circumstances regarding the offender and the offense or offenses indicate that the offender's history, character, and condition reveal a substantial risk that the offender will be a danger to others and that the offender's conduct has been characterized by a pattern of repetitive, compulsive, or aggressive behavior with heedless indifference to the consequences;

(d) Whether the victim's youth, age, disability, or other factor made the victim particularly vulnerable to the offense or made the impact of the offense more serious;

(e) Whether the offender is likely to commit future crimes in general, in addition to the circumstances described in divisions (B)(1)(b) and (c) of this section;

(f) Whether the offender has an emotional, mental, or physical condition that is traceable to the offender's service in the armed forces of the United States and that was a contributing factor in the offender's commission of the offense or offenses;

(g) The offender's military service record.

{¶38} Pursuant to R.C. 2929.22(C),

> Before imposing a jail term as a sentence for a misdemeanor, a court shall consider the appropriateness of imposing a community control sanction or a combination of community control sanctions under sections 2929.25, 2929.26, 2929.27, and 2929.28 of the Revised Code. A court may impose the longest jail term authorized under section 2929.24 of the Revised Code only upon offenders who commit the worst forms of the offense or upon offenders whose conduct and response to prior sanctions for prior offenses demonstrate that the imposition of the longest jail term is necessary to deter the offender from committing a future crime.

{¶39} The trial court in this matter sentenced Appellant to 180 days in jail with 60 days suspended. Of the 120 days to be served, the trial court permitted Appellant to serve thirty on house arrest. The trial court imposed five years of reporting probation and suspended Appellant's driver's license for two years with credit for one year already served. The court imposed $550 in fines. Appellant also received a $40 fine for his speeding conviction.

{¶40} Even though it is the maximum penalty, Appellant's sentence falls within the statutory guidelines. Additionally, the court suspended sixty days of the jail sentence and allowed an additional thirty days to be served on house arrest. The trial court also informed Appellant that his five year probation term would be reduced to two years if all fines and costs were paid by that time.

{¶41} Appellant complains that the trial court did not specifically refer to the R.C. 2929.22 factors. "A silent record raises the presumption that the trial court considered all of the factors listed in R.C. 2929.22." *City of Youngstown v. Cohen*, 7th Dist. No., 2008-Ohio-1191, ¶ 85, citing *State v. Cole*, 8 Ohio App.3d 416, 418, 457 N.E.2d 873 (12th Dist.1982). A review of the record demonstrates that the trial court considered the pertinent factors.

{¶42} A trial court is to consider the nature and circumstances of the offense. Here, Appellant did not immediately pull his car over. Instead, he drove all the way home, stopping only in his driveway, and then tried to exit his car despite his obvious knowledge that Trooper White was attempting to initiate a traffic stop. He was also driving sixteen miles per hour over the posted speed limit. Appellant was uncooperative during the entire encounter and showed obvious signs of intoxication. This was Appellant's second OVI conviction within the past six years. Driving while intoxicated poses an obvious risk of dangers to others. Although no one was injured in this case, the court is required to look at the *risk* of a danger to others. Driving at a high rate of speed while also impaired also presents an obvious risk to other drivers. Based on this record, the trial court did not abuse its discretion in determining Appellant's sentence.

{¶43} In the sentencing entry the trial court imposed the fine "combined, for counts one and two." (10/26/17 J.E.) Counts one and two are the OVI counts which were merged for sentencing purposes. "As this court and the Ohio Supreme Court have stated multiple times, two merged counts cannot both receive sentences, even concurrent sentences." *State v. Smith*, 7th Dist. No. 11 MA 120, 2013-Ohio-756, ¶ 74. While the trial court's language in the entry was certainly inartful, based on the

sentencing entry as a whole it is clear that the intent was to issue only one fine on the merged counts. The trial court was well aware that the counts merged and that the sentencing parameters for both were identical. While this is not the minimum fine, it is only $25 more than the statutory minimum. Thus, despite the fact that taken out of context it might appear that the court was ordering two fines to be "combined," when looking at the entry it is obvious that this could not be the case, as the fine amount would have to total $1050, at least, based on the statutory minimum.

{¶44} Appellant's third assignment of error is without merit and is overruled.

Conclusion

{¶45} Appellant contends that his BAC reading was inadmissible at trial due to the later failure of its calibration test. Consequently, he argues that his conviction pursuant to R.C. 4511.19(A)(1)(d), which requires an admissible test result, must be vacated. Additionally, he argues that the admission of these test results prejudiced the jury, requiring his conviction pursuant to R.C. 4511.19(A)(1)(a) to be also vacated. For the reasons provided, Appellant's R.C. 4511.19(A)(1)(d) conviction is reversed and vacated. However, his R.C. 4511.19(A)(1)(a) conviction and sentence are affirmed.

Donofrio, J., concurs in part; dissents in part. See concurring in part and dissenting in part opinion.

Bartlett, J., concurs.

Donofrio, J., concurring in part; dissenting in part opinion.

{¶46} I respectfully concur in part with, and dissent in part from, the majority opinion.

{¶47} I concur with the majority that the trial court erred in overruling the motion to suppress and allowing the results of the breathalyzer test to be admitted into evidence. Therefore, I concur that appellant's R.C. 4511.19(A)(1)(d) conviction, for the OVI per se violation, must be reversed and vacated.

{¶48} I dissent, however, because I would also reverse appellant's R.C. 4511.19(A)(1)(a) conviction on the remaining OVI charge.

{¶49} Under the facts of this case, I would find that that the evidence of appellant's .131 breathalyzer test result was highly prejudicial. First and foremost, this was a jury trial. And the jury heard the evidence that on his breathalyzer test, appellant tested a .131 when the legal limit is .08. Once the jury heard this evidence, it is hard to imagine that they did not consider it when weighing whether appellant was guilty of operating his vehicle while under the influence of alcohol. It would likely skew the way the jury viewed the remainder of the evidence. Second, there was no evidence of impaired driving in this case. The trooper effectuated a traffic stop of appellant because appellant was speeding. Appellant was not driving erratically, which could suggest impaired driving. There was no evidence that appellant swerved, drove off the road, caused an accident, or otherwise operated his vehicle in an erratic manner. Based on these circumstances, I would find it likely that the evidence of appellant's .131 breathalyzer test result was exceedingly prejudicial.

{¶50} For these reasons, I would reverse appellant's R.C. 4511.19(A)(1)(a) conviction and remand this matter for a new trial on this charge.

For the reasons stated in the Opinion rendered herein, Appellant's first assignment of error is sustained and his R.C. 4511.19(A)(1)(d) conviction is hereby reversed and vacated. Appellant's second and third assignments are overruled and his R.C. 4511.19(A)(1)(a) conviction and his sentence are affirmed. It is the final judgment and order of this Court that the judgment of the County Court of Monroe County, Ohio, is affirmed in part, reversed in part and vacated in part. Costs to be taxed against the Appellee.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.