[Cite as *State v. Perkins*, 2008-Ohio-5060.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 07AP-924
v.	:	(M.C. No. 2007 TRC 118726)
Ronald Perkins,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

O P I N I O N

Rendered on September 30, 2008

Richard C. Pfeiffer, Jr., City Attorney, *Lara N. Baker*, City Prosecutor, and *Orly Ahroni*, for appellee.

Shaw & Miller, and *Mark J. Miller*, for appellant.

APPEAL from the Franklin County Municipal Court.

McGRATH, P.J.

{¶1} Defendant-appellant, Ronald D. Perkins ("appellant"), appeals from the judgment of the Franklin County Municipal Court, convicting him of the following: operating a motor vehicle while intoxicated ("OVI"), in violation of R.C. 4511.19(A)(1), a first-degree misdemeanor ("count one"); operating a motor vehicle while intoxicated with a prior OVI within 20 years, in violation of R.C. 4511.19(A)(2), a first-degree misdemeanor ("count two"); driving under suspension, in violation of R.C. 4510.11, a first-degree misdemeanor ("count three"); driving under OVI suspension, in violation of R.C. 4510.14,

a first-degree misdemeanor ("count four"); operating a motor vehicle without a valid license, in violation of R.C. 4510.12(A)(1), a first-degree misdemeanor ("count five"); and failure to obey a traffic control device, in violation of R.C. 4511.12, a minor misdemeanor ("count six").

{¶2} On March 7, 2007, appellant was placed under arrest for the above-referenced offenses by Ohio State Highway Patrol Trooper Brian Alloi. According to Trooper Alloi, on March 7, 2007, at approximately 1:30 a.m., appellant turned right onto Interstate 71 against a red light where there was a posted "no turn on red" sign. Trooper Alloi began following appellant and observed him exceeding the posted 65 miles per hour speed limit and weaving within his own lane. Therefore, Trooper Alloi initiated a traffic stop. Trooper Alloi noticed an odor of alcohol and that appellant's eyes appeared glassy and bloodshot. Though appellant told Trooper Alloi someone had spilled alcohol in the vehicle the previous night, Trooper Alloi testified the odor of alcohol continued after appellant exited the vehicle. Trooper Alloi had appellant perform the Horizontal Gaze Nystagmus ("HGN") test. No other field sobriety tests were conducted because appellant had a leg injury and was on crutches at the time of the traffic stop. After the HGN test was completed, appellant was arrested and charged with OVI and the accompanying five charges.

{¶3} Appellant initially entered a plea of not guilty to all charges. On June 7, 2007, appellant filed a motion to suppress/dismiss, and asserted four separate arguments. A hearing on the motion to suppress was held on August 20, 2007. Trooper Alloi appeared before the court, as did Brian McDonald, who testified he spilled a full beer in the vehicle appellant was driving the day prior to appellant's arrest. The trial court

denied appellant's motion to suppress, and thereafter, appellant entered no-contest pleas to all charges. A pre-sentence investigation was ordered, and the matter was set for sentencing. At the sentencing hearing held on October 11, 2007, appellant was sentenced to the following: on counts one and two, appellant was sentenced to 180 days in jail with 160 days suspended upon compliance with the two-year probationary terms, a $350 fine, and a two-year driver's license suspension; on counts three, four, and five, appellant was sentenced to 180 days in jail with 176 days suspended upon compliance with the one-year probationary term to be served concurrently with counts one and two; and on count six, appellant was fined $50. Upon appellant's motion, the trial court stayed his sentences pending appeal to this court.

{¶4} Appellant timely appealed and brings the following five assignments of error for our review:

> ASSIGNMENT OF ERROR NO. I
>
> THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS BECAUSE THE STATE DID NOT ESTABLISH REASONABLE ARTICULABLE SUSPICION TO ADMINISTER THE HORIZONTAL GAZE NYSTAGMUS TEST.
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> ASSIGNMENT OF ERROR NO. II
>
> THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS BECAUSE THE STATE FAILED TO SATISFY ITS BURDEN THAT THE HGN TEST WAS ADMINISTERED IN SUBSTANTIAL COMPLIANCE WITH NHTSA STANDARDS.
>
> ASSIGNMENT OF ERROR NO. III
>
> THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS BECAUSE EVEN IF THE STATE DID SATISFY ITS INITIAL BURDEN OF SHOWING THE HGN TEST WAS CONDUCTED IN SUBSTANTIAL

> COMPLIANCE, THE APPELLANT MET HIS BURDEN OF IMPEACHING TROOPER ALLOI AND THE RESULTS OF THE HGN TEST SHOULD HAVE BEEN SUPPRESSED.
>
> ASSIGNMENT OF ERROR NO. IV
>
> THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS BECAUSE TROOPER ALLOI DID NOT HAVE PROBABLE CAUSE TO ARREST THE APPELLANT FOR OVI.
>
> ASSIGNMENT OF ERROR NO. V
>
> THE TRIAL COURT ERRED IN ACCEPTING THE APPELLANT'S NO-CONTEST PLEAS.
>
> A. THE TRIAL COURT ERRED IN FAILING TO PERSONALLY ADDRESS THE APPELLANT TO DETERMINE WHETHER HIS PLEAS WERE KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY MADE.
>
> B. THE TRIAL COURT ERRED IN FAILING TO INFORM THE APPELLANT OF THE POTENTIAL PENALTIES INVOLVED.

{¶5} Appellant received leave to file a supplemental assignment of error, which is as follows, and will be referred to as assignment of error number six:

> THE TRIAL COURT ERRED IN ACCEPTING THE APPELLANT'S NO-CONTEST PLEAS WITHOUT COMPLYING WITH CRIMINAL RULE 11(D) WHICH GOVERNS PLEAS IN MISDEMEANOR CASES INVOLVING "SERIOUS OFFENSES."

{¶6} Appellant's first four assigned errors concern the trial court's denial of his motion to suppress. An appellate court's standard of review on a motion to suppress is twofold. *City of Columbus v. Weber*, 10th Dist. No. 06AP-845, 2007-Ohio-5446, at ¶7, citing *State v. Reedy*, 10th Dist. No. 05AP-501, 2006-Ohio-1212, at ¶5, citing *State v. Lloyd* (1998), 126 Ohio App.3d 95, 100-101. Because the trial court is in the best position to evaluate witness credibility, an appellate court must uphold the trial court's findings of

fact if they are supported by competent, credible evidence. Id., citing *Reedy*, citing *State v. Klein* (1991), 73 Ohio App.3d 486, 488. Upon accepting those facts as true, an appellate court must independently determine, as a matter of law, without deference to the trial court's conclusion, whether the facts meet the applicable legal standard. Id., citing *Reedy*, citing *State v. Claytor* (1993), 85 Ohio App.3d 623, 627.

{¶7} In his first assignment of error, appellant does not challenge the propriety of the initial traffic stop. Rather, appellant challenges the trooper's reasonable, articulable suspicion necessary to perform a field sobriety test.

{¶8} Probable cause is not needed before an officer may conduct field sobriety tests. *City of Columbus v. Anderson* (1991), 74 Ohio App.3d 768, 770. Rather, reasonable suspicion of criminal activity is all that is required to support further investigation. Id.; *State v. Klein* (Apr. 14, 1994), 10th Dist. No. 93AP-998. As recently reiterated by this court, "after making a valid investigative stop, an officer may investigate a suspect for impaired driving if reasonable and articulable facts exist to support the officer's decision." *Weber*, at ¶8, citing *State v. Downey* (1987), 37 Ohio App.3d 45, 46. See, also, *State v. George*, 5th Dist. No. 07-CA-2, 2008-Ohio-2773 (an independent reasonable suspicion based upon articulable facts that the person is intoxicated is required for an officer to perform a field sobriety test).

{¶9} In *Anderson*, this court found that speeding in the early morning hours and the odor of alcohol provided sufficient grounds for the officer to have a reasonable suspicion to warrant further investigation. Other Ohio appellate districts have found similar circumstances to constitute sufficient grounds for an officer to conduct field sobriety tests. *State v. Frakes*, 5th Dist. No. 07CA0013, 2008-Ohio-4204 (stubbornness

on having to use a turn signal, odor of alcohol, and red and glassy eyes sufficient indicia of intoxication to warrant administration of field sobriety tests); *State v. Howard*, 2nd Dist. No. 2007 CA 42, 2008-Ohio-2241 (speeding in conjunction with a strong odor of alcohol, bloodshot and glassy eyes, and continued odor of alcohol after the defendant exited the vehicle were sufficient to give the officer reasonable suspicion to conduct a field sobriety test); *City of Strongsville v. Spoonamore*, 8th Dist. No. 86948, 2006-Ohio-4884 (traffic violation, red and glassy eyes, slurred speech, and odor of alcohol sufficient to warrant further detention beyond traffic stop); *State v. Bunkley*, 7th Dist. No. 00 CA 224, 2002-Ohio-1162 (speeding at 1 a.m. in conjunction with strong odor of alcohol, bloodshot and glassy eyes, and admission of being at a party with no admission of consuming alcohol was sufficient to give rise to reasonable articulable suspicion to justify administration of field sobriety tests); *State v. Richter* (Nov. 15, 2000), 3rd Dist. No. 14-2000-20 (speeding in conjunction with moderate odor of alcohol and bloodshot eyes sufficient to justify conducting field sobriety tests); *State v. Whitt* (Nov. 9, 1993), 4th Dist. No. 93 CA 11 (glassy bloodshot eyes and odor of alcohol sufficient to warrant field sobriety tests); *State v. Chelikowsky* (Aug. 18, 1991), 4th Dist. No. 91 CA 27 (weaving within own lane and a strong odor of alcohol were sufficient to warrant field sobriety tests).

{¶10} Appellant argues that pursuant to *State v. Reed*, 7th Dist. No. 05 BE 31, 2006-Ohio-7075, *State v. Dixon* (Dec. 1, 2000), 2nd Dist. No. 2000-CA-30, and *State v. Spillers* (Mar. 24, 2000), 2nd Dist. No. 1504, there was insufficient evidence presented here for conducting field sobriety tests, and therefore, his motion to suppress should have been granted. We find none of these cases applicable here. In *Spillers* and *Dixon*, the Second District determined the slight odor of alcohol combined with the admission to

having a few beers was insufficient to justify the administration of field sobriety tests. In those two cases, however, the Second District's holding hinged on the fact the arresting officer noticed only a "slight" odor of alcohol. *State v. Marshall* (Dec. 28, 2001), 2nd Dist. No. 2001-CA-35 (distinguishing *Spillers* and *Dixon* and holding speeding, a "strong" odor of alcohol, and red eyes were sufficient to provide reasonable articulable suspicion to conduct field sobriety tests despite that the driver's speech was clear, he had no problems walking, and produced a valid license). In *Reed*, the Seventh District held a non-moving violation of improperly tinted windows, a "slight" odor of alcohol, red eyes and admission of consuming alcohol were insufficient to justify administering field sobriety tests. Here, however, we are not presented with a slight odor of alcohol or a non-moving violation as was the court in *Reed*, thus we do not find it analogous to the matter at hand.

{¶11} In the case sub judice, at 1:30 a.m., appellant was observed driving between 73 and 75 miles per hour in a 65 miles per hour speed limit, and weaving within his own lane after turning against a red light where there was a posted "no turn on red" sign. Upon talking with appellant, Trooper Alloi observed a "strong odor of an alcoholic beverage and that [appellant's] eyes were also bloodshot and glassy." (Aug. 20, 2007 Tr. at 8.) Though appellant stated alcohol had been spilled in the vehicle the day prior, Trooper Alloi noticed the odor of alcohol continued after appellant exited the car.

{¶12} Based on the totality of the circumstances, we believe Trooper Alloi had sufficient indicia of intoxication to establish reasonable and articulable suspicion to request appellant to submit to field sobriety testing, and therefore, the trial court did not err in denying appellant's motion to suppress on this basis. Accordingly, we overrule appellant's first assignment of error.

{¶13} Because they are interrelated, we will address appellant's second and third assignments of error together. In these two assignments of error, appellant contends the trial court erred in denying his motion to suppress because appellee failed to satisfy its burden that the HGN test was administered in substantial compliance with the National Highway Traffic Safety Administration ("NHTSA") standards. Specifically, appellant argues this is so because appellee failed to introduce a copy of the NHTSA manual at the motion hearing, and Trooper Alloi did not testify as to the standardized requirements of the guidelines for the HGN test to be administered.

{¶14} In *State v. Homan* (2000), 89 Ohio St.3d 421, the Supreme Court of Ohio held that in order for the field sobriety tests to serve as evidence of probable cause to arrest, such tests must be performed in strict compliance with the procedures promulgated by the NHTSA. However, R.C. 4511.19(D)(4)(b), effective April 9, 2003, provides in pertinent part:

> (b) In any criminal prosecution or juvenile court proceeding for a violation of division (A) or (B) of this section, of a municipal ordinance relating to operating a vehicle while under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, or of a municipal ordinance relating to operating a vehicle with a prohibited concentration of alcohol, a controlled substance, or a metabolite of a controlled substance in the whole blood, blood serum or plasma, breath, or urine, if a law enforcement officer has administered a field sobriety test to the operator of the vehicle involved in the violation and if it is shown by clear and convincing evidence that the officer administered the test in substantial compliance with the testing standards for any reliable, credible, and generally accepted field sobriety tests that were in effect at the time the tests were administered, including, but not limited to, any testing standards then in effect that were set by the national highway traffic safety administration, all of the following apply:
>
> (i) The officer may testify concerning the results of the field sobriety test so administered.

> (ii) The prosecution may introduce the results of the field sobriety test so administered as evidence in any proceedings in the criminal prosecution or juvenile court proceeding.
>
> (iii) If testimony is presented or evidence is introduced under division (D)(4)(b)(i) or (ii) of this section and if the testimony or evidence is admissible under the Rules of Evidence, the court shall admit the testimony or evidence and the trier of fact shall give it whatever weight the trier of fact considers to be appropriate.

{¶15} The Supreme Court of Ohio recognized that under this amended version of R.C. 4511.19(D)(4)(b), "the arresting officer no longer needs to have administered field sobriety tests in strict compliance with testing standards for the test results to be admissible at trial." *State v. Schmitt*, 101 Ohio St.3d 79, 2004-Ohio-37, at ¶9. Rather, an officer may now testify concerning the results of a field sobriety test administered in substantial compliance with the testing standards. Id. Additionally, "HGN test results are admissible in Ohio without expert testimony so long as the proper foundation has been shown both as to the administering officer's training and ability to administer the test and as to the actual technique used by the officer in administering the test." *State v. Boczar*, 113 Ohio St.3d 148, 2007-Ohio-1251, at ¶27.

{¶16} Appellant emphasizes that appellee did not introduce the NHTSA manual into evidence. As recently stated by the Eleventh District in *State v. Barnett*, 11th Dist. No. 2006-P-0117, 2007-Ohio-4954, "Ohio courts have not held that the state must introduce the NHTSA manual in each case. Evidence of the NHTSA procedures, either by witness testimony or the manual itself, is sufficient." Id. at ¶25. "While the NHTSA manual *may* be introduced into evidence, substantial compliance can also be shown by witness testimony with respect to the NHTSA standards and the officer's actions in conformity

with the standards." Id. at ¶23 (emphasis added). See, also, *State v. Penix,* 11th Dist. No. 2007-P-0086, 2008-Ohio-4050; *George*, supra; *State v. Matus*, 6th Dist. No. WD-06-072, 2008-Ohio-377; *State v. Nickelson* (July 20, 2001), 6th Dist. No. H-00-036. Further, some evidence of the particular testing standards used must be presented in order for the court to determine whether the standards have been complied with. *Matus*, at ¶21, citing *State v. Jimenez*, 12th Dist. No. CA2006-01-005, 2007-Ohio-1658, citing *Schmitt*, supra; *State v. Loveridge*, 3rd Dist. No. 9-06-46, 2007-Ohio-4493; *State v. Brown* (2006), 166 Ohio App.3d 638, 2006-Ohio-1172.

{¶17} It is undisputed the NHTSA manual was not introduced into evidence. Consequently, we must determine whether Trooper Alloi's testimony established by clear and convincing evidence that the field sobriety testing substantially complied with accepted testing standards. Upon review of the evidence, we find that it does.

{¶18} Trooper Alloi testified he received training in the detection of persons driving while impaired by alcohol or drugs at the academy in 1998 from the 1996 NHTSA manual. Trooper Alloi attends a yearly in-service to get updates on new information and field sobriety tests, and gets a copy of every new NHTSA manual that is published. Trooper Alloi explained the HGN test he performed was the NHTSA standardized test. Trooper Alloi explained in detail the three segments of which the HGN test consists and that the testing officer looks for six clues. Trooper Alloi described in this case he first checked for "equal tracking to make sure both eyes track the stimulus at the same time." (Aug. 20, 2007 Tr. at 10.) Trooper Alloi then explained the next three portions of the HGN test. Trooper Alloi testified that according to NHTSA guidelines, an officer must observe

four or more clues to indicate a failing test. A failing HGN test indicates a 77 percent likeability that the subject would test over 0.10 blood alcohol concentration ("BAC").

{¶19} After explaining the HGN test, Trooper Alloi testified he conducted the HGN test in accordance with the training he received. Based upon Trooper Alloi's testimony regarding NHTSA guidelines, and his testimony regarding the testing of appellant, we find no error in the trial court's finding that there was substantial compliance with the NHTSA guidelines. Trooper Alloi testified as to his training and qualifications to perform the HGN test, and in detail described the technique used. Trooper Alloi further testified he was trained under the NHTSA manual, what the standardized HGN test consists of, and that he believed he conducted the test in accordance with the standardized requirements.

{¶20} Therefore, we find the record consists of sufficient evidence that the HGN test administered by Trooper Alloi substantially complied with NHTSA requirements, and that the trial court did not err in denying appellant's motion to suppress with respect to this issue.

{¶21} Appellant next contends the results of the HGN test should have been suppressed because the trooper performed the test with appellant facing the rear of his car, which had on its rear lights and a blinking turn signal. However, as appellee contends, there is no evidence that this was in violation of the NHTSA manual. Trooper Alloi testified the rotating, oscillating lights from his cruiser's light bar can affect the HGN test results; therefore, the subject is to be faced away from the light bar, as appellant was here. When asked if appellant's rear lights could affect the HGN test results, Trooper Alloi answered in the negative.

{¶22} The trial court found that turning appellant away from the cruiser's rotating, oscillating overhead lights was in strict compliance with the HGN directives. Apart from appellant's counsel's question to Trooper Alloi regarding whether rear lights and/or a turn signal can affect the HGN test results, and Trooper Alloi's response in the negative, there is no evidence in the record to suggest that having appellant face the rear of his own vehicle was in violation of the NHTSA manual.

{¶23} Accordingly, we overrule appellant's second and third assignments of error.

{¶24} In his fourth assignment of error, appellant contends his motion to suppress should have been granted because Trooper Alloi did not have probable cause to arrest appellant.

{¶25} After making a valid investigatory stop, an officer may investigate a suspect for impaired driving if reasonable and articulable facts exist to support that decision. *Weber*, supra, at ¶8. Any subsequent arrest must be based on probable cause to make it at that time. Id., citing *State v. Timson* (1974), 38 Ohio St.2d 122, paragraph one of the syllabus. The test for probable cause to justify an arrest is "whether at that moment the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [arrestee] had committed or was committing an offense." Id. quoting *Beck v. Ohio* (1964), 379 U.S. 89, 91, 85 S.Ct. 223. "The subjective intentions of the [arresting] officers are irrelevant in a probable cause determination. Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest." Id., quoting *State v. Cabell,* 6th Dist. No. L-06-1026, 2006-Ohio-4914, at ¶27, citing *Devenpeck v. Alford* (2004), 543 U.S. 146, 152, 125 S.Ct. 588.

{¶26} "Thus, in determining whether probable cause exists to arrest a suspect for driving under the influence of alcohol, the court must examine whether, at the moment of the arrest, the officer had 'sufficient information, derived from a reasonably trustworthy source of facts and circumstances, sufficient to cause a prudent person to believe that the suspect was driving under the influence of alcohol.' " Id. at ¶9, quoting *Homan,* supra, citing *Beck,* supra. "In determining whether probable cause to arrest existed, a reviewing court should examine the 'totality of the circumstances.' " Id. quoting *Illinois v. Gates* (1983), 462 U.S. 213, 230-231, 103 S.Ct. 2317.

{¶27} According to appellant, there was no probable cause for appellant's arrest because the HGN test was not administered in substantial compliance with NHTSA standards, and therefore, the results could not be used in determining probable cause to arrest. We, however, have already determined the HGN test was administered in substantial compliance with NHTSA standards, and therefore we find no merit to this aspect of appellant's argument. In the alternative, appellant contends, even if the HGN test results are admissible, there is no probable cause for his arrest because appellant was stopped for a de minimus traffic violation, there was an explanation given by appellant for the odor of alcohol, there was no admission of drinking, appellant's speech was clear, appellant was polite, cooperative and alert, and though he had bloodshot, glassy eyes, Trooper Alloi admitted red eyes could be caused by a number of innocent reasons. In support of his contention, appellant relies on this court's decision in *State v. Gray*, 10th Dist. No. 01AP-1251, 2002-Ohio-4328, and a number of cases from other Ohio appellate districts. However, in *Gray*, and the remaining cases cited by appellant, the

results of any failed field sobriety tests were not considered. Thus, those cases have no direct application here.

{¶28} In *Weber*, supra, this court was presented with the following:

> Defendant notes that the evidence at the suppression hearing demonstrated that he was polite and cooperative, that there was no sign of bad driving or slurred speech, that he produced his license and the vehicle registration without any trouble, and that he had no trouble getting out of the vehicle upon the request of the officer. However, other evidence at the suppression hearing demonstrated that defendant had a strong odor of alcohol emanating from his person, that he had glassy and bloodshot eyes, and that he exhibited three clues on the walk-and-turn test, which according to the NHTSA manual, reliably indicated a BAC above 0.10.
>
> Id. at ¶26.

{¶29} This court held that based on the totality of the circumstances, the facts within the knowledge of the arresting officer were sufficient to cause a prudent person to believe that defendant was driving under the influence of alcohol and thereby sufficient to establish probable cause for the arrest. See, also, *State v. Slocum*, 11th Dist. No. 2007-A-0081, 2008-Ohio-4157 (2:22 a.m. weekend traffic stop, bloodshot/glassy eyes, slurred speech, strong odor of alcohol and admission to having three beers amounted to probable cause for OVI arrest); *Penix*, supra (speeding at 1:51 a.m., odor of alcohol, admission to consuming alcohol and failed HGN test supported a finding of probable cause to arrest appellant for OVI).

{¶30} Here, evidence was presented that appellant's speech was clear and he was polite and cooperative and alert. However, the other evidence presented at the hearing was that at 1:30 a.m., appellant turned right against a red light where there was a posted "no turn on red" sign, appellant was traveling between 73 and 75 miles per hour in

a 65 miles per hour zone, and appellant was observed weaving within his own lane. Upon talking with appellant, Trooper Alloi noticed a strong odor of alcohol and that appellant's eyes were bloodshot and glassy. Though appellant told trooper Alloi alcohol had been spilled in the car the previous day, Trooper Alloi noticed the odor of alcohol continued after appellant exited the vehicle. Also, appellant exhibited four of six clues on the HGN test, which indicates a failed test, and a 77 percent likeability that he would test over 0.10 BAC.

{¶31} Upon review of the totality of the circumstances, we find the facts within the knowledge of Trooper Alloi were sufficient to cause a prudent person to believe appellant was driving under the influence of alcohol. Consequently, we find the evidence was sufficient to establish probable cause for appellant's arrest and that the trial court did not err in denying appellant's motion to suppress on this basis. Accordingly, we overrule appellant's fourth assignment of error.

{¶32} Because they are interrelated, we will address appellant's fifth and sixth assignments of error together. In his fifth assignment of error, appellant contends the trial court erred in accepting his no-contest pleas. Specifically, appellant argues the trial court failed to personally address him to determine whether his pleas were knowingly, intelligently, and voluntarily made. Appellant initially asserted his pleas were governed by Crim.R. 11(E), because his were petty offenses; however, in his supplemental assignment of error, appellant contends the trial court did not comply with Crim.R. 11(D), which governs pleas in misdemeanor cases involving serious offenses.

{¶33} As is relevant here, Crim.R. 11 provides:

(A) Pleas

A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no-contest. A plea of not guilty by reason of insanity shall be made in writing by either the defendant or the defendant's attorney. All other pleas may be made orally. The pleas of not guilty and not guilty by reason of insanity may be joined. If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

(B) Effect of guilty or no-contest pleas

With reference to the offense or offenses to which the plea is entered:

(1) The plea of guilty is a complete admission of the defendant's guilt.

(2) The plea of no-contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.

(3) When a plea of guilty or no-contest is accepted pursuant to this rule, the court, except as provided in divisions (C)(3) and (4) of this rule, shall proceed with sentencing under Crim. R. 32.

* * *

(D) Misdemeanor cases involving serious offenses

In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no-contest, and shall not accept such plea without first addressing the defendant personally and informing the defendant of the effect of the pleas of guilty, no-contest, and not guilty and determining that the defendant is making the plea voluntarily. Where the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no-contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim. R. 44 by appointed counsel, waives this right.

> **(E) Misdemeanor cases involving petty offenses**
>
> In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no-contest, and shall not accept such plea without first informing the defendant of the effect of the plea of guilty, no-contest, and not guilty.
>
> The counsel provisions of Crim. R. 44(B) and (C) apply to division (E) of this rule.

{¶34} As indicated, Crim.R. 11(E) governs misdemeanor cases involving petty offenses, and Crim.R. 11(D) governs misdemeanor cases involving serious offenses. Pursuant to Crim.R. 2(C), "Serious offense" means any felony, and any misdemeanor for which the penalty prescribed by law includes confinement for more than six months. Pursuant to Crim.R. 2(D), "Petty offense" means a misdemeanor other than a serious offense. Similarly, Traf.R. 2(E) defines "serious offense" as an offense for which the penalty prescribed by law includes confinement for more than six months, and Traf.R. 2(D) defines "petty offense" as an offense for which the penalty prescribed by law includes confinement for six months or less.

{¶35} Appellant had six charges, five that were misdemeanors of the first-degree and one that was a minor misdemeanor. It is undisputed that convictions for these offenses, individually, are classified as petty offenses, and thus Crim.R. 11(E) is applicable. Appellant, however, contends that because he was charged with more than one misdemeanor, he could have received a sentence resulting in confinement for more than six months, if the maximum sentences were ordered to run consecutively. Therefore, it is appellant's contention Crim.R. 11(D) is applicable here. In support of this contention, appellant relies on *State v. Moore* (1996), 111 Ohio App.3d 833, and *State v. Price* (Nov. 27, 1998), 7th Dist. No. 97 C.A. 91.

{¶36} In *Price*, the Seventh District held that because the defendant was charged with two first-degree misdemeanors, which could have resulted in a sentence of confinement for one year, Crim.R. 11(D) applied. Similarly, in *Moore*, the Seventh District again held that since a defendant was charged with two first-degree misdemeanors, which could have resulted, and did result, in a sentence of confinement for one year, Crim.R. 11(D) was applicable. Since the time of those cases, however, the Seventh District decided *State v. Thompson*, 7th Dist. No. 03 MA 247, 2005-Ohio-6448, in which the defendant was charged with multiple misdemeanors, and he entered a no-contest plea to two of them. The *Thompson* court, without any reference to *Moore* or *Price*, classified the convicted offenses as petty offenses and not serious offenses.

{¶37} Further, the Eleventh District has been confronted with whether a defendant is entitled to a trial by jury without a demand if the aggregate sentence the defendant faced was greater than six months. *State v. Palo*, 11th Dist. No. 2002-A-0095, 2005-Ohio-6906. Following *Lewis v. United States* (1996), 518 U.S. 322, 116 S.Ct. 2163, the Eleventh District held that when determining whether or not an "offense" is "petty" or "serious" the test is whether the potential sentence for each offense charged is less than six months, not the amount of time a defendant faces if convicted of each charge and sentenced to consecutive terms.

{¶38} In *Lewis*, the United States Supreme Court stated:

> * * *The Sixth Amendment reserves the jury trial right to defendants accused of serious crimes. As set forth above, we determine whether an offense is serious by looking to the judgment of the legislature, primarily as expressed in the maximum authorized term of imprisonment. Here, by setting the maximum authorized prison term at six months, the Legislature categorized the offense of obstructing the mail as petty. The fact that petitioner was charged with two counts of

> a petty offense does not revise the legislative judgment as to the gravity of that particular offense, nor does it transform the petty offense into a serious one, to which the jury trial right would apply.* * *
>
> Id. at 327.

{¶39} "Where we have a judgment by the legislature that an *offense* is 'petty,' we do not look to the potential prison term faced by a *particular defendant* who is charged with more than one such petty offense." Id. at 328. (Emphasis sic.)

{¶40} Similarly, in *City of Cleveland v. Oppman* (Sept. 8, 1994), 8th Dist. No. 66282, the trial court consolidated all the defendant's offenses into one trial, thereby exposing him to a possible aggregate sentence in excess of six months. Therefore, the defendant argued his violations constituted serious offenses, not petty offenses, and that a jury trial was mandated in the absence of an express written waiver. The Eighth District followed "[o]ther appellate districts in Ohio [that] have declined to follow the aggregation theory in similar petty offense cases where the defendant failed to make the jury demand required by Crim. R. 23(A)." Id.

{¶41} Additionally in *State v. Van Winkle* (Dec. 22, 1993), 2nd Dist. No. 13940, the defendant was charged with four misdemeanors. The defendant entered uncounseled pleas of guilty to all the charges, and the defendant was sentenced to an aggregate nine-month prison term. A month later, the defendant, through counsel, moved to withdraw his pleas. The Second District stated:

> Because the charged misdemeanors were all petty offenses, the trial court's responsibilities were as prescribed in Crim.R. 11(E), quoted *supra*, rather than Crim.R. 11(D), which requires, in contrast to Crim.R. 11(E), that the trial court determine that a plea of guilty is entered voluntarily. Van Winkle's reliance upon Crim.R. 11(D) is misplaced.

{¶42} Also notable is *City of North Ridgeville v. Roth*, 9th Dist. No. 03CA008396, 2004-Ohio-4447. Roth was charged with four misdemeanors of the first-degree and initially pled not guilty to all charges. At a later time, Roth withdrew his not-guilty pleas on two of the charges and entered no-contest pleas, and the two remaining charges were dismissed. On appeal, Roth argued the trial court erred in finding his no-contest pleas were made knowingly, voluntarily, and intelligently. Roth argued that his charged offenses were not "petty offenses" under the Traffic Rules but, rather, because the aggregate sum of possible maximum penalties for the four charges amounted to a period of more than six months, his charged offenses were serious offenses. Analyzing the applicable Traffic Rules, the Ninth District stated:

> Under Traf.R. 2(D), a "petty offense" is defined as "an offense for which the penalty prescribed by law includes confinement for six months or less[,]" and Traf.R. 2(E) defines a "serious offense" as "an offense for which the penalty prescribed by law includes confinement for more than six months." These definitions provide no provision for the accumulation of potential maximum penalties to change the level of the offense. Therefore, Mr. Roth's argument that the charges amount to serious offenses defies logic, and Traf.R. 10(D) governing petty offenses applies.
>
> Id. at ¶17.

{¶43} In light of the above-described precedent, including the United States Supreme Court decision in *Lewis*, we find no merit to appellant's position that because the aggregate sum of the possible maximum sentences of the six charges amounted to a period of more than six months confinement, the charged offenses constitute serious offenses rather than petty offenses.

{¶44} Given that appellant's convictions are classified as petty offenses pursuant to Crim.R. 2(D), we find Crim.R. 11(E) applies to the case at bar. Though appellant

concedes Crim.R. 11(E) does not command the trial court to address the defendant personally to determine whether he is making a no-contest plea voluntarily, appellant argues that this court's prior precedent establishes that a trial court must do so under Crim.R. 11(E). Appellant also argues the trial court failed to inform him of the potential penalties involved. Therefore, appellant requests this court reverse his convictions.

{¶45} In *Columbus v. Baba*, 10th Dist. No. 01AP-341, 2002-Ohio-831, this court held that since the trial court's failure to engage defendant in a dialogue or colloquy to determine whether the plea was being offered voluntarily was reversible error. The fact that the defendant and his counsel signed a "Waiver of Trial by Jury" form did not cure the problem of failing to personally address the defendant to determine whether or not the no-contest plea was voluntarily made. This court also held in *Baba* that the trial court's failure to inform the defendant of the potential penalties involved was reversible error.

{¶46} However, since that time the Supreme Court of Ohio decided *State v. Jones*, 116 Ohio St.3d 211, 2007-Ohio-6093. In paragraph one of the syllabus, the Supreme Court states, "[i]n accepting a plea to a misdemeanor involving a petty offense, a trial court is required to inform the defendant only of the effect of the specific plea being entered. Crim. R. 11(E) construed."

{¶47} In reviewing a certified conflict, the *Jones* court reviewed this court's decision in *State v. Horton-Alomar*, 10th Dist. No. 04AP-744, 2005-Ohio-1537, in which this court held a trial court substantially complies with Crim.R. 11(E) by notifying a defendant of the maximum penalties that could result from the defendant's plea of guilty and the waiver of the right to a jury trial that results from the plea. *Horton-Alomar* was in conflict with *State v. Jones*, 7th Dist. No. 05-MA-69, 2006-Ohio-3636, which held because

a defendant was not informed of the effect of his guilty or no-contest plea, his plea was not entered knowingly, voluntarily and intelligently. The Supreme Court of Ohiophrased the issue before it as "how a court accepts a plea to a petty misdemeanor, or more specifically, how a court informs a defendant of the 'effect of a plea,' pursuant to Crim.R 11(E)." Id. at ¶5.

{¶48} A trial court's obligation in accepting a plea depends upon the level of offense to which the defendant is pleading. Id. at ¶6, citing *State v. Watkins*, 99 Ohio St.3d 12, 2003-Ohio-2419. Interpreting Crim.R. 11, the Supreme Court of Ohio reiterated that in felony cases and misdemeanor cases involving serious offenses, a judge must not only inform the defendant of the effect of his plea, but also personally address the defendant and determine the plea is being made voluntarily. Because Jones entered a plea of guilty to a first-degree misdemeanor, the plea was entered to a petty offense, and "the trial court was required, pursuant to Crim.R. 11(E), to inform Jones of the effect of the plea." Id. at ¶14. As indicated, infra, the court stated, "[t]herefore, we hold that in accepting a plea to a misdemeanor involving a petty offense, a trial court is required to inform the defendant only of the effect of the specific plea being entered. In this case, the trial court was required to inform Jones only of the effect of a guilty plea, the plea he entered." Id. at ¶20. For a no-contest plea, "a defendant must be informed that the plea of no-contest is not an admission of guilt but is an admission of the truth of the facts alleged in the complaint, and that such plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding." Id. at ¶23, citing Traf.R. 10(B)(2); Crim.R. 11(B)(2). Because there was no evidence in the record of Jones being

informed as to the effect of his guilty plea, the court analyzed whether Jones was prejudiced thereby. Finding that he was not, the Court affirmed his convictions.

{¶49} Here, the trial court expressly informed appellant on March 3, 2007, in a mass arraignment hearing, of the following:

> A plea of no-contest is not an admission of your guilt. It is an admission of the truth of the facts alleged on the complaint or ticket. This plea will not be used against you in any subsequent criminal or civil proceeding. After I review the facts surrounding the circumstances and the explanation of the circumstances, I will make a determination as to whether or not you're guilty. If I find, based on Ohio law, that your conduct did violate Ohio law, you will be found guilty on your plea of no-contest, and you will be sentenced here today provided I have sufficient information available to me.
>
> If you plead guilty or no-contest today, you're giving up several important constitutional rights. These include the right to have an attorney present and the right to a reasonable continuance in order to seek the advice of an attorney; the right to have a trial before a judge or, if the charge carries possible jail time, a trial before a jury; the right to confront your accuser and cross-examine witnesses, present your own witnesses and your own evidence; your right to testify or remain silent; your right to appeal the decision of the Court; and the requirement that the State prove your guilty beyond a reasonable doubt.

(March 8, 2007 Tr. at 4-5.)

{¶50} Further, the trial court stated:

> At this time I would like to inform you of the possible penalties I could impose. If you are charged with a minor misdemeanor, the maximum penalties I could impose is a $150 fine and 30 hours of community service. If you are charged with a misdemeanor of the fourth degree, the maximum possible penalty I could impose is a $250 fine, 30 days in jail, and 200 hours of community service. If you are charged with a misdemeanor of the third degree, the maximum penalty I could impose is a $500 fine, 60 days in jail, and 200 hours of community service. If you are charged with a misdemeanor of the second degree, the maximum penalty I could impose is

> a $750 fine, 90 days in jail, and 200 hours of community service. If you are charged with a misdemeanor of the first-degree, the maximum penalty I could impose is a $1,000 fine, 180 days in jail, and 500 hours of community service.

Id. at 7.

{¶51} The trial court then instructed that when the defendant's name is called, he or she is to step up to the front table where a number of questions will be asked. Appellant indicated his counsel could not be there that day, but he would be entering a plea of not guilty to all charges.

{¶52} Despite the colloquy given by the trial court at the March 8, 2007 arraignment hearing, appellant suggests this was not sufficient because it was not reiterated at the time appellant entered the no-contest plea. Instead, at that time, the trial court asked appellant what his plea was to each of the charges, and appellant answered "no-contest" to all of them. (Aug. 20, 2007 Tr. at 78-79.)

{¶53} We are cognizant of appellant's argument that the following language from *Jones* is merely dicta, but nonetheless we find it instructive. In ¶20, footnote 3, the Court stated:

> Crim.R. 11(E) requires that a trial court inform the defendant of the effect of the plea before accepting a no-contest or guilty plea. It does not, however, require that this information be necessarily given at the same hearing. The dissent fails to recognize that trial courts often conduct mass arraignment hearings in which defendants are informed of their constitutional rights as well as the effect of the plea of guilty, no-contest, and not guilty. See, e.g., *State v. Trushel*, 3rd Dist. No. 13-04-44, 2005-Ohio-3763; *State v. Lanton*, 2nd Dist. No. 02CA124, 2003-Ohio-4715; *State v. Maley*, 7th Dist. No. 01 CO 38, 2002-Ohio-5220. The record in this case does not contain a transcript of Jones's arraignment hearing; therefore, we do not know whether he was advised at that time of the effect of the plea.

{¶54} Although not given at the time he entered his no-contest pleas, here the record reflects appellant was informed of the effect of the specific plea being entered pursuant to Crim.R. 11(E). As *Jones* indicates, in accepting a plea to a misdemeanor involving a petty offense, a trial court is required to inform the defendant only of the effect of the specific plea being entered. Id. at syllabus paragraph one. Addtionally, appellant signed an "Advice of Rights and Waiver of Trial by Jury" indicating he was advised as to the effect of a plea of no-contest. Thus, we find the trial court complied with *Jones*, and in effect with Crim.R. 11(E) and Crim.R. 11(B)(2), and appellant was informed as to the effect of a no-contest plea as is required when a trial court accepts a plea of no-contest to a misdemeanor for a petty offense.

{¶55} Accordingly, we overrule appellant's fifth and sixth assignments of error.

{¶56} For the foregoing reasons, appellant's six assignments of error are overruled, and the judgment of the Franklin County Municipal Court is hereby affirmed.

Judgment affirmed.

BROWN and FRENCH, JJ., concur.

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