IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CATRENA GREEN,

Plaintiff,

vs. **Civil Action 2:09-CV-995**

Magistrate Judge King

ADAM THROCKMORTON,

Defendant.

OPINION AND ORDER

This is a civil rights action under 42 U.S.C. § 1983 in which plaintiff alleges that defendant's detention of plaintiff in connection with field sobriety tests, and his subsequent arrest of plaintiff, violated her rights under the Fourth and Fourteenth Amendments. With the consent of the parties, 28 U.S.C. § 636(c), this matter is before the Court on *Defendant, Trooper Adam Throckmorton's Motion for Summary Judgment*, Doc. No. 16 ("*Defendant's Motion*"). For the reasons that follow, *Defendant's Motion* is **GRANTED**.

I. BACKGROUND

A. Defendant Stops Plaintiff's Vehicle

On or about August 24, 2008, plaintiff, originally from and living in, Goose Creek, South Carolina, was driving to Ohio for a motorcycle event at the Ross County fairgrounds. *Deposition of Catrena Green*, Doc. No. 16-2, pp. 7, 11-14 ("*Plaintiff Depo.*"). She drove all day by herself from South Carolina, approximately 600 miles, reaching Ohio around 8:00 p.m. or 9:00 p.m. *Id.* at 12-15. After arriving at the motorcycle event, plaintiff left the fairgrounds around 10:00 p.m. or 11:00 p.m. the same evening in order to pick up some food at Wal-Mart. *Id.* at 19-20. Plaintiff testified that she

knew where she was going because she had seen the Wal-Mart on her way to the fairgrounds. *Id*. at 20.

As she was driving southbound to Wal-Mart on State Route 104, a straight 2-lane highway, plaintiff activated the high beam headlights ("brights") on her vehicle. *Id*. at 22; *Deposition of Trooper Adam Throckmorton, Doc. No. 16-1*, pp. 10-11, 17, 19 ("*Defendant Depo.*"). Defendant was driving in the opposite direction, driving northbound on State Route 104 towards the Ross County fairgrounds. *Plaintiff Depo.*, p. 22; *Defendant Depo.*, pp. 10-11. After defendant passed plaintiff on State Route 104, he made a U-turn and began pursuing her. *Plaintiff Depo.*, pp. 21-22; *Defendant Depo.*, p. 19. State Route 104 turned into four lanes by the time defendant caught up with plaintiff. *Defendant Depo.*, pp. 19-20, 22. After plaintiff entered an exit ramp, she crossed over the white berm line and defendant activated his lights and plaintiff pulled to the berm immediately. *Id*. at 22-25.

B. Defendant Asks Plaintiff to Perform Field Sobriety Tests

Defendant exited his vehicle and approached the driver's side of plaintiff's vehicle. *Defendant Depo.*, pp. 26-27; *Exhibit 13* to *Defendant Depo.* ("*Video*"), at 23:09:24.[1] He asked plaintiff for her driver's license, registration and proof of insurance. *Defendant Depo.*, p. 26; *Video* at 23:09:24. When plaintiff asked what she had done wrong, defendant advised her that she had "brighted" him on the highway with her headlights. *Plaintiff Depo.*, p. 22; *Defendant Depo.*, p. 26. Plaintiff responded that she was unable to see because of the rain. *Defendant Depo.*, p. 26; *Video* at 23:09:34. Plaintiff then told

[1]*Exhibit 13* is a copy of a DVD video that was taken on August 24, 2008, from defendant's vehicle, which was filed manually with the Clerk's office. *Order*, Doc. No. 18. References to the DVD time record reflect the approximate start time of an event.

defendant that her license and registration were in her purse in the trunk of her vehicle. *Plaintiff Depo.*, pp. 23-25; *Defendant Depo.*, p. 26. Defendant permitted plaintiff to exit her vehicle, but reminded her that her seat belt was still fastened when she unsuccessfully attempted to exit the vehicle. *Video* at 23:10:56. Plaintiff exited and opened the trunk to retrieve her license while defendant was standing beside her. *Plaintiff Depo.*, pp. 25-26; *Defendant Depo.*, pp. 26-28; *Video* at 23:10:57. Defendant did not see or smell alcohol or drugs when plaintiff opened her car or trunk door. *Defendant Depo.*, p. 45.

While the two were still standing near plaintiff's vehicle, plaintiff handed her license to defendant and he asked her whether she had been drinking or taking any drugs that evening. *Plaintiff Depo.*, p. 23; *Defendant Depo.*, pp. 29-30; *Video* at 23:11:32. Plaintiff denied consuming any alcohol or drugs and stated that she had drunk only water that evening. *Plaintiff Depo.*, p. 23; *Defendant Depo.*, pp. 29-30; *Video* at 23:11:33. Defendant advised plaintiff that he would like to look at her eyes and asked her to remove her glasses. *Plaintiff Depo.*, pp. 28-29; *Defendant Depo.*, pp. 29-30; *Video* at 23:11:42.

After she removed her glasses, defendant attempted to check plaintiff's gaze by asking her to follow the tip of his pen with her eyes while keeping her head still, administering a field sobriety test known as the horizontal gaze nystagmus test ("HGN test").[2] *Defendant*

[2]The HGN test is administered for a couple of reasons. *Defendant's Depo.*, pp. 40-41. It tests a person's ability to follow directions as well as detects nystagmus, an involuntary jerking of the eye. *Id*. The eyes of a person who is not under the influence of drugs can smoothly follow a stimulus, such as a pen, back and forth. *Id*. at 40. The eyes of an impaired person, however, "start to jerk as they follow the pen." *Id*. at 40-41.

Depo., pp. 39-40; *Video* at 23:12:02. After initially explaining how the HGN test worked and attempting to administer the test, defendant instructed plaintiff two more times to follow the tip of his pen with her eyes. *Defendant Depo.*, pp. 39-41; *Video* at 23:12:02, 23:12:19 and 23:12:57. During this time, plaintiff again denied being under the influence of drugs or alcohol. *Id*. Defendant advised plaintiff that she was not following his pen, but instead was looking in the opposite direction. *Video* at 23:13:14. He testified later that he was unable to observe whether or not plaintiff evidenced nystagmus. *Defendant Depo.*, p. 41. Defendant recorded on his report that plaintiff "could not follow pen." *Exhibit A*, attached to *Defendant Depo.* ("*Impaired Driver Report*"). Plaintiff does not recall taking the HGN test. *Plaintiff Depo.*, pp. 27-28, 38-39, 59-60.

After advising plaintiff that she could wear her glasses again, defendant asked plaintiff to perform an alphabet test. *Defendant Depo.*, pp. 42-43; *Video* at 23:13:28. After confirming that plaintiff knew the alphabet, defendant asked plaintiff to begin reciting the alphabet at the letter "L" and to stop at the letter "S." *Defendant Depo.*, pp. 42-43; *Video* at 23:13:53. Plaintiff recited these letters. *Video* at 23:14:17.

Defendant then administered a numbers test, asking plaintiff to count backwards beginning at the number 57 and ending at the number 42. *Id.* at 23:14:25; *Defendant Depo.*, p. 43. Plaintiff recited the numbers, hesitating between numbers 54 and 53 and numbers 47 and 46. *Video* at 23:14:37 and 23:14:52; *Defendant Depo.*, pp. 43-44. Defendant also observed "a slight slur to her words." *Defendant Depo.*, p. 44.

Next, defendant asked plaintiff if she had any medical problems with her legs, back, knees, ankles, neurological disorders or

"anything of that nature." *Video* at 23:15:10. After plaintiff denied having any of these problems, defendant administered the "one-leg test." *Id.*; *Defendant Depo.*, pp. 45-47. This is a "divided attention skills test," intended to determine whether a person can maintain their balance while following directions. *Defendant Depo.*, pp. 47-48. Defendant asked plaintiff to raise one foot six inches off the ground while keeping her arms at her side and to count "one one-thousand, two one-thousand, three one-thousand," etc., until asked to stop by defendant. *Video* at 23:15:45; *Defendant Depo.*, pp. 46-47. Defendant also explained that if plaintiff placed her foot down during the count, she must raise it again and continue counting from where she stopped. *Video* at 23:16:11. After defendant confirmed that plaintiff understood these instructions, *Defendant Depo.*, p. 45, plaintiff raised her foot and began counting. *Video* at 23:17:14. During this thirty-second test, plaintiff swayed, raised her arm approximately six inches away from her body for balance, hopped several times and put her foot down multiple times. *Id.*; *Defendant Depo.*, pp. 46-48; *Impaired Driver Report*. She also skipped the number 19 while counting. *Impaired Driver Report*; *Video* at 23:17:49.

Defendant then administered another field sobriety test, the "walk and turn" test. *Defendant Depo.*, pp. 52-53. Defendant asked plaintiff to stand with her arms to her side and place her right foot in front of her left foot, heel to toe, holding that position until he finished giving her test instructions. *Defendant Depo.*, pp. 52-53; *Video* at 23:18:22. Next, defendant explained that he wanted plaintiff to take nine heel-to-toe steps, walking toward her vehicle and counting each step out loud. *Video* at 23:18:32. Defendant also instructed plaintiff that, after the ninth step, she must turn 180

degrees with her right foot, taking small steps. *Id*. at 23:19:00; *Defendant Depo.*, pp. 52-53. Once she did that, defendant asked plaintiff to take another nine heel-to-toe steps back to where she started, keeping her arms at her side the entire time. *Video* at 23:19:14; *Defendant Depo.*, p. 53. In addition to swaying during the instructions and the test, plaintiff did not touch heel to toe at any point during the test and raised her arms away from her body for balance while walking. *Defendant Depo.*, pp. 53-54; *Impaired Driver Report*; *Video* at 23:19:27. Plaintiff also turned in the wrong direction. *Defendant Depo.*, pp. 53-54; *Impaired Driver Report*; *Video* at 23:19:36.

At the conclusion of this test, defendant asked plaintiff to remove her glasses and to follow his pen with her eyes while keeping her head still. *Video* at 23:19:55. After attempting to track her eyes, defendant advised plaintiff that her eyes still did not follow his pen. *Id*. at 23:20:14. Defendant then advised that plaintiff was under arrest. *Id*. at 23:20:21; *Defendant Depo.*, pp. 59-60. *See also Exhibits 4*, *5* and *6*, attached thereto. Plaintiff again denied drinking anything or taking any drugs. *Video* at 23:20:41; *Defendant Depo.*, p. 59.

Plaintiff was seated in the patrol car. Defendant and other troopers with at least one dog arrived at the scene and searched her vehicle. *Defendant Depo.*, pp. 60-61; *Plaintiff Depo.*, pp. 63-64. They found no drugs or alcohol in her vehicle. *Id*. Once at the jail, plaintiff submitted to a urine test, which later tested negative for alcohol and drugs. *Plaintiff Depo.*, pp. 60-61; *Exhibits 7*, *8*, *9* and *10*, attached to *Defendant Depo*.

On November 3, 2009, plaintiff filed this action, asserting two

claims. *Complaint and Jury Demand*, Doc. No. 1 ("*Complaint*"). Plaintiff specifically alleges that defendant's detention of plaintiff in connection with field sobriety tests, and his subsequent arrest of plaintiff, violated her rights under the Fourth and Fourteenth Amendments. *Id*. At the conclusion of discovery, defendant moved for summary judgment on both counts. *Defendant's Motion*. Plaintiff opposed *Defendant's Motion*, *Plaintiff's Memorandum In Opposition to Defendant's Motion for Summary Judgment*, Doc. No. 20 ("*Memo. in Opp.*") and, with the filing of defendant's reply memorandum, *Reply to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment*, Doc. No. 21 ("*Reply*"), this matter is now ripe for resolution.

II. STANDARD

The standard for summary judgment is well established. This standard is found in Rule 56 of the Federal Rules of Civil Procedure, which provides in pertinent part:

> The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c). Pursuant to Rule 56(c), summary judgment is appropriate if "there is no genuine issue as to any material fact ...." *Id.* In making this determination, the evidence must be viewed in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). Summary judgment is inappropriate if the dispute about a material fact is genuine, "that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). However, summary judgment is appropriate if the opposing

party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). The mere existence of a scintilla of evidence in support of the opposing party's position will be insufficient; there must be evidence on which the jury could reasonably find for the opposing party. *Anderson,* 477 U.S. at 251.

The party moving for summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. *Catrett,* 477 U.S. at 323. Once the moving party has met its initial burden, the burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson,* 477 U.S. at 250; *Talley v. Bravo Pitino Restaurant, Ltd.,* 61 F.3d 1241, 1245 (6th Cir. 1995)("nonmoving party must present evidence that creates a genuine issue of material fact making it necessary to resolve the difference at trial"). "Once the burden of production has so shifted, the party opposing summary judgment cannot rest on the pleadings or merely reassert the previous allegations. It is not sufficient to 'simply show that there is some metaphysical doubt as to the material facts.'" *Glover v. Speedway Super Am. LLC,* 284 F.Supp.2d 858, 862 (S.D. Ohio 2003)(citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). Instead, the non-moving party "must -- by affidavits or as otherwise provided in this rule -- set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2).

In ruling on a motion for summary judgment "[a] district court is

not ... obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim." *Glover,* 284 F.Supp. 2d at 862 (citing *InteRoyal Corp. v. Sponseller,* 889 F.2d 108, 111 (6th Cir. 1989)). Instead, a "court is entitled to rely, in determining whether a genuine issue of material fact exists on a particular issue, only upon those portions of the verified pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits submitted, specifically called to its attention by the parties." *Id.*

III. ANALYSIS

Plaintiff asserts claims under Section 1983. Defendant contends that he is entitled to summary judgment based on the affirmative defense of qualified immunity.

To state a colorable claim under 42 U.S.C. § 1983,[3] a plaintiff must allege the violation of a right secured by the constitution or laws of the United States by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Street v. Corr. Corp. of Am.*, 102 F.3d 810, 814 (6th Cir. 1996). To succeed on a claim under § 1983, a plaintiff must show that (1) a person (2) acting under color of state law (3) deprived her of her rights secured by the United States Constitution or its laws. *See Waters v. City of Morristown,*

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[3]Section 1983 provides in relevant part:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983.

242 F.3d 353, 358-59 (6th Cir. 2001). Because § 1983 is a method for vindicating federal rights, and is not itself a source of substantive rights, the first step in an action under § 1983 is to identify the specific constitutional right allegedly infringed. *Albright v. Oliver*, 510 U.S. 266, 271 (1994).

Plaintiff's claims are based on defendant's alleged actions while he was acting as a trooper with the Ohio State Patrol. The affirmative defense of qualified, or good faith, immunity shields government officials from liability for civil damages if their actions did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Parson v. Callahan,* – U.S. – , 129 S.Ct. 808, 815 (2009)(citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "Qualified immunity ordinarily applies unless it is obvious that no reasonably competent official would have concluded that the actions taken were lawful." *Chappell v. City of Cleveland,* 585 F.3d 901, 907 (2009).

When determining whether a right is "clearly established," this Court must look first to decisions of the Supreme Court, then to decisions of the United States Court of Appeals for the Sixth Circuit and other courts within this circuit, and finally to decisions of other circuits. *See Daugherty v. Campbell*, 935 F.2d 780, 784 (6th Cir. 1991). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Gardenhire v. Shubert*, 205 F.3d 303, 311 (6th Cir. 2000)(citing *Anderson v. Creighton*, 483 U.S. 635 640 (1987)). However, "this not to say that an official action is protected by qualified immunity unless the very action in question has previously

been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Creighton*, 483 U.S. at 640 (citations omitted).

The plaintiff bears the burden of establishing that the defendant is not entitled to qualified immunity. *Untalan v. City of Lorain*, 430 F.3d 312, 314 (6th Cir. 2005). The plaintiff must demonstrate both that a constitutional right was violated and that the right was clearly established at the time of the violation. *Chappell*, 585 F.3d at 907. In determining whether the required showings have been made, a court has the discretion to decide which of the two elements to address first. *Pearson*, 129 S.Ct. at 818.

With this framework in mind, the Court turns to the question of whether the defendant is entitled to summary judgment on the basis of qualified immunity.

A. Defendant's Detention of Plaintiff for Field Sobriety Tests (First Cause of Action)

Plaintiff alleges that defendant violated her rights under the Fourth and Fourteenth Amendments to the United States Constitution when defendant detained her in order to administer field sobriety tests. The Fourth Amendment, applicable to the states through the Fourteenth Amendment, *see Mapp v. Ohio,* 367 U.S. 643, 655 (1961), provides, "[t]he right of the people to be secure in their persons, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause. . . ." U.S. Const. amend. IV. The protections afforded by the Fourth Amendment "'extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest.'" *United States v. Arvizu*, 534

U.S. 266, 273 (2002) (quoting *Terry v. Ohio*, 392 U.S. 1, 9 (1968)). In this circuit, a law enforcement officer does not run afoul of the Fourth Amendment when stopping a motorist "'so long as the officer has probable cause to believe that the motorist has violated a traffic law.'" *United States v. Smith*, 601 F.3d 530, 542 (6th Cir. 2010) (quoting *United States v. Bell*, 555 F.3d 535, 539 (6th Cir. 2009)).

However, detaining a motorist "'any longer than is reasonably necessary to issue the traffic citation' requires 'reasonable suspicion that the individual has engaged in more extensive criminal conduct." *Smith*, 601 F.3d at 542. *See also United States v. Bell*, 555 F.3d 535, 541 (6th Cir. 2009) ("'A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.'") (quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)). "That is, without such reasonable suspicion [of more extensive criminal activity], all the officer's actions must be 'reasonably related in scope to circumstances justifying the original interference.'" *United States v. Townsend*, 305 F.3d 537, 541 (6th Cir. 2002)(quoting *United States v. Hill*, 195 F.3d 258, 264 (6th Cir. 1999)). *See also Hill*, 195 F.3d at 264 ("Once the purpose of the traffic stop is completed, a motorist cannot be further detained unless something that occurred during the stop caused the officer to have a reasonable and articulable suspicion that criminal activity was afoot.").

"Reasonable suspicion" is "more than a mere hunch[.]" *United States v. Campbell*, 549 F.3d 364, 370 (6th Cir. 2008) (quoting *Dorsey v. Barber*, 517 F.3d 389, 395 (6th Cir. 2008)). Instead,

> "[r]easonable suspicion requires specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant the continued detention of a motorist after a traffic stop." *See United States v. Perez*, 440 F.3d 363, 372 (6th Cir. 2006) (quoting *United States v. Smith*, 263 F.3d 571, 588 (6th Cir. 2001)). Reviewing courts "must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002) (citations omitted). . . . The totality of the circumstances analysis permits police officers "to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person." *United States v. Martin*, 289 F.3d 392, 398 (6th Cir. 2002).

United States v. Ellis, 497 F.3d 606, 612-13 (6th Cir. 2007).

In the case *sub judice*, it is undisputed that, on August 24, 2008, plaintiff was driving toward oncoming traffic with her high beams activated. *Defendant Depo.*, pp. 10-11, 17-19; *Plaintiff Depo.*, p. 22. The failure to dim high beams when approaching oncoming traffic violates O.R.C. § 4513.15 (headlight illumination requirements; protection of oncoming drivers; high beam indicator). Plaintiff's admitted failure to dim her brights was sufficient to justify defendant's initial stop of plaintiff's vehicle because she was violating a traffic law. *See*, *e.g.*, *Smith*, 601 F.3d at 542; *Simpson*, 520 F.3d at 541. *See also Defendant Depo.*, p. 18 (defendant stopped plaintiff because of her use of high beams); *Plaintiff Depo.*, p. 34 (agreeing that defendant stopped plaintiff because of her use of high beams); *Memo. in Opp.*, p. 9 ("The high beams justified the stop."); *Reply*, p. 10 (stating that plaintiff's admitted violation of O.R.C. § 4513.15 "was a proper basis for the stop of the Plaintiff"); *Exhibit 5*, attached to *Defendant Depo.* (citing, *inter alia*, failure to dim).

However, before he could lawfully further detain plaintiff and administer the field sobriety tests, defendant must have had a reasonable suspicion of additional unlawful activity, based on something that occurred during the stop. *See Townsend*, 305 F.3d at 541; *Hill*, 195 F.3d at 264. Defendant contends that he possessed the requisite reasonable suspicion based on several factors, including the facts that (1) plaintiff's pupils were constricted even though it was dark outside; (2) she appeared to be confused; (3) her reactions were slow; (4) she had activated her high beams; (5) she crossed over the white fog line on the side of the road; and (6) she was unsteady on her feet. Defendant's argument is well-taken.

1. Dilated pupils

First, defendant explained that an individual's eyes generally dilate in the darkness in order to take in more light and see better. *Defendant Depo.*, pp. 7, 32. Defendant testified that, when he pulled over plaintiff and was standing two or three feet away from her, he pointed his flashlight away from her face so that the outer fringes of the light illuminated her face, which allowed him to see her pupils. *Id*. at 32-33. Defendant further testified that, although it was dark at the time, plaintiff's pupils were constricted. *Id*. at 31-32; *Impaired Driver Report*. Defendant explained that this constriction is an indicator of impairment because certain chemicals or drugs will hamper the eyes' ability to dilate in the darkness. *Defendant Depo.*, pp. 7-8, 32-33. Plaintiff, however, disputes that defendant was able to see her face from where he was standing in the darkness and denies that her pupils were constricted. Plaintiff's arguments are

unpersuasive. First, plaintiff offers nothing than her own speculation that defendant was unable to see her pupils while using his flashlight in the darkness. *Memo. in Opp.*, p. 3. Second, plaintiff previously admitted that she did not know whether or not her pupils were constricted. *Plaintiff Depo.*, p. 29. Accordingly, the Court is persuaded that the constriction of plaintiff's pupils was one of the factors creating a basis for reasonable suspicion.

2. Confusion

Defendant believed that plaintiff was confused when answering some of his questions, contributing to his conclusion that she was impaired. *Defendant Depo.*, pp. 8-9, 31. Plaintiff disagrees, arguing that "the video indicates that there was no confusion at all, that her answers were direct and responsive." *Memo. in Opp.*, p. 4. However, plaintiff provides no particular citation in the video to bolster her assertion. In addition, she conceded in her deposition that being tired could have made it more difficult for her to understand what was going on when she was pulled over by defendant. *Plaintiff Depo.*, pp. 29-30, 33. Indeed, plaintiff forgot to take off her seat belt when exiting her vehicle and responded "Oh, yeah" when defendant reminded her to unlatch the belt. *Video* at 23:10:48. Therefore, plaintiff's confusion served as a second factor creating reasonable suspicion.[4]

3. Slow reactions

Defendant noticed that plaintiff's reactions were slow, suggesting impairment. *Defendant Depo.*, p. 31. Plaintiff again

[4]In reaching this conclusion, the Court rejects defendant's statement that he had to ask for plaintiff's license "a couple of times." *Defendant Depo.*, pp. 33-34. After reviewing the video, the Court was unable to confirm that defendant requested plaintiff's license more than once.

disagrees, arguing that "the video indicates that her reactions were appropriate and prompt." *Memo. in Opp.*, p. 4. Notwithstanding the fact that plaintiff fails to cite to a specific portion of the video to support this assertion, she previously admitted that being tired could have slowed her reactions during her interaction with defendant. *Plaintiff Depo.*, pp. 29-30, 33. Accordingly, plaintiff's slow reactions contribute to a finding of reasonable suspicion.

4. Failing to dim high beams

Defendant testified that, prior to pulling over plaintiff's vehicle, she had exhibited a sign of impairment by failing to dim her high beams. *Defendant Depo.*, pp. 23-24. Plaintiff does not deny that she failed to dim her brights. *Plaintiff Depo.*, pp. 22, 34. Instead, she disputes the significance of this behavior, arguing that (1) she activated her high beams because of the rain and intersecting access roads, and (2) high beams are not a predictor of impairment under standards promulgated by the National Highway Traffic Safety Administration ("NHTSA"). *Memo. in Opp.*, pp. 2-3, 9; "Visual Detection of DWI Motorists," attached thereto ("NHTSA Standards"). Plaintiff's arguments are without merit. As an initial matter, plaintiff's proffered innocent explanation for driving with high beams does not preclude defendant from taking this behavior into account in formulating a reasonable suspicion that plaintiff had been driving while impaired. *See United States v. Perez*, 440 F.3d 363, 371 (6th Cir. 2006) (totality of the circumstances requires that the court "determine whether the individual factors, taken as a whole, give rise to reasonable suspicion, even if each individual factor is entirely consistent with innocent behavior when examined separately.") (quoting

United States v. Smith, 263 F.3d 571, 588 (6th Cir. 2001)); *United States v. Richardson*, 385 F.3d 625, 631 (6th Cir. 2004) ("[E]ven a string of innocent behavior added together may amount to reasonable suspicion of criminal activity.").

In addition, plaintiff's unauthenticated print-out of what is purported to be a compilation of NHTSA standards from a website to support her contention that high beams are not an indicator of impairment cannot be considered on summary judgment. Only authenticated documents may be considered on summary judgment. *See*, *e.g.*, *Fox v. Michigan State Police Dep't*, No. 04-2078, 173 Fed. Appx. 372, at *375 (6th Cir. Feb. 24, 2006) (affirming decision to disregard unauthenticated documents that were unsworn and uncertified and therefore inadmissible); *Moore v. Holbrook*, 2 F.3d 697, 699 (6th Cir. 1993) ("This court has ruled that documents submitted in support of a motion for summary judgment must satisfy the requirements of Rule 56(e); otherwise, they must be disregarded."). Moreover, even if the Court considered the substance of the *NHTSA Standards* offered by plaintiff, the Court notes that the predictors discussed in this document are not intended to be a comprehensive list of factors to be considered by law enforcement officers. *NHTSA Standards*, p. 2 (stating that the NHTSA "developed a list of *more than 100 driving cues*" that "was reduced to 24 cues" that "are the *most* predictive of impairment[,]" which "*can* be used by officers to detect" impaired motorists) (emphasis added). Accordingly, simply because high beams are not listed in plaintiff's proffered print-out does not establish that high beams are not a predictor of impaired behavior. Indeed, defendant, a member of the Ohio State Highway Patrol ("OSHP") since

2003, received as part of his training to become a trooper forty hours of instruction regarding the detection and apprehension of impaired drivers. *Defendant Depo.*, pp. 6, 48. Defendant is entitled to rely on this specialized training and experience when forming the requisite reasonable suspicion under the totality of the circumstances. *See*, *e.g.*, *United States v. Martin*, 289 F.3d 392, 398 (6th Cir. 2002) (stating that officers may "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person.").

5. Crossing marked lane

Defendant also testified that, while he was following plaintiff prior to the stop, plaintiff's vehicle crossed the white berm line, also suggesting impairment. *Defendant Depo.*, pp. 23-24. Again, plaintiff does not dispute that the video establishes that her vehicle crossed the white line at some point while defendant was driving behind her prior to the stop. *Memo. in Opp.*, pp. 3 n.1, 9. *See also Video* at 23:08:30. Instead, plaintiff disputes the significance of this behavior. However, as discussed *supra*, under the totality of the circumstances, defendant is entitled to rely on his own training and experience as well as factors that are consistent with innocent behavior in forming a reasonable suspicion. *See Perez*, 440 F.3d at 371; *Martin*, 289 F.3d at 398.

6. Instability

Finally, defendant testified that plaintiff was "a little bit unstable getting out of the vehicle [in order to retrieve her license

in the trunk], kind of wobbly." *Defendant Depo.*, p. 27. Plaintiff denies that she was unsteady when exiting the vehicle, arguing that "the video indicates nothing at all, that she exited the vehicle with complete steadiness." *Memo. in Opp.*, p. 4. Notwithstanding her confusion related to unfastening her seat belt, the Court cannot say one way or the other whether plaintiff was unstable on her feet while exiting her vehicle. *See Video* at 23:10:58. Regardless, even assuming that plaintiff did not exhibit instability, the Court concludes that all the other factors discussed *supra* could give rise to the requisite reasonable suspicion that plaintiff was impaired, justifying her continued detention in order to administer field sobriety tests.

Plaintiff's additional arguments to the contrary do not militate a different result. For example, plaintiff contends that detaining her was improper where, *inter alios*, defendant admitted that he did not smell or see alcohol or drugs on her person or vehicle. However, this fact is not dispositive. Instead, this information is merely one factor to be weighed when considering the totality of the circumstances. *See*, *e.g.*, *Ellis*, 497 F.3d at 612-13. Similarly, plaintiff's contention that she denied drinking or taking drugs does not preclude a finding of reasonable suspicion. *Id*. Indeed, defendant testified that people frequently lie to him. *Defendant Depo.*, p. 83. In addition, defendant testified that he has arrested people who later plead guilty to, or have been convicted of, driving while impaired. *Id*. Plaintiff's denial therefore does not preclude a finding of reasonable suspicion sufficient to warrant her further detention. *See Martin*, 289 F.3d at 398.

Under these facts, the Court concludes that defendant had a reasonable suspicion that plaintiff was engaged in criminal activity, *i.e.*, driving while impaired, and was therefore justified in further detaining her in order to administer sobriety tests. Accordingly, defendant is entitled to summary judgment on plaintiff's claim based on her detention for field sobriety tests (First Cause of Action).

B. Plaintiff's Arrest (Second Cause of Action)

Plaintiff also claims that she was arrested in violation of her constitutional rights. *Complaint*, ¶¶ 18-19. A "false arrest claim under federal law requires a plaintiff to prove that the arresting officer lacked probable cause to arrest the plaintiff." *Voyticky v. Timberlake*, 412 F.3d 669, 677 (6th Cir. 2005). Probable cause to arrest requires that there be "'facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing or is about to commit an offense.'" *Crockett v. Cumberland Coll.*, 316 F.3d 571, 580 (6th Cir. 2003) (quoting *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979)). *See also United States v. Romero*, 452 F.3d 610, 615-16 (6th Cir. 2006) ("The substance of all the definitions of probable cause is a reasonable ground for belief of guilt.") (internal quotation marks omitted), *cert. denied*, 127 S. Ct. 1321 (2007). Whether there exists a probability of criminal activity "is assessed under a reasonableness standard based on 'an examination of all facts and circumstances *within an officer's knowledge at the time of an arrest*.'" *Crockett*, 316 F.3d at 580 (emphasis in original) (quoting *Estate of Dietrich v.*

Burrows, 167 F.3d 1007, 1012 (6th Cir. 1999)). *See also Everson v. Leis*, 556 F.3d 484, 499 (6th Cir. 2009) ("A determination of whether probable cause existed requires us to examine the totality of the circumstances, and we may 'consider only the information possessed by the arresting officer at the time of the arrest.'") (quoting *Harris v. Bornhorst*, 513 F.3d 503, 511 (6th Cir. 2008), *cert. denied*, 128 S. Ct. 2938 (2008)); *Ross v. Duggan*, 402 F.3d 575, 585 n. 6 (6th Cir. 2004) ("Assessment of probable cause should consider the totality of the circumstances. This totality of the circumstances analysis includes a realistic assessment of the situation from a law enforcement officer's perspective.") (internal citations omitted).

"The Fourth Amendment does not require that a police officer *know* a crime occurred at the time the officer arrests or searches a suspect . . . . The Fourth Amendment, after all, necessitates an inquiry into probabilities, not certainty." *Thacker v. City of Columbus*, 328 F.3d 244, 256 (6th Cir. 2003) (citing *United States v. Strickland*, 144 F.3d 412, 415 (6th Cir. 1998)) (emphasis in original). *See also Brooks v. Rothe*, 577 F.3d 701, 706 (6th Cir. 2009) ("'The validity of the arrest does not depend on whether the suspect actually committed a crime[.]'") (quoting *Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979)). Thus, a police officer need not have proof of each element of the offense for which the suspect is arrested. *Thacker*, 328 F.3d at 256.

Finally, the existence of probable cause is a jury question, unless there is only one reasonable determination that is possible. *Gardenhire v. Schubert*, 205 F.3d 303, 315 (6th Cir. 2000). However, "under § 1983, 'an arresting agent is entitled to qualified immunity

if he or she could reasonably (even if erroneously) have believed that the arrest was lawful, in light of clearly established law and the information possessed at the time by the arresting agent.'" *Everson*, 556 F.3d at 499 (quoting *Harris*, 513 F.3d at 511). *See also Pierson v. Ray*, 386 U.S. 547, 555 (1967) (noting that "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does"). *Cf*. *Baker v. McCollan*, 443 U.S. 137, 145 (1979) ("The Constitution does not guarantee that only the guilty will be arrested.").

In the case *sub judice*, defendant argues that there was probable cause to arrest plaintiff for driving while impaired based on her behavior, including her poor performance on the field sobriety tests. Plaintiff disagrees, disputing, *inter alia*, the existence and significance of the tests and offering explanations for her performance.

Plaintiff's arguments are not well-taken. First, she contends that defendant did not administer the HGN test. *Memo. in Opp*, p. 6. However, plaintiff previously admitted that she did not recall whether or not she took this test. *Plaintiff Depo.*, pp. 27-28, 38-39, 59-60. More significantly, the evidence on the video, showing defendant administering the HGN test, directly belies plaintiff's current assertion that it was not administered. *See*, *e.g.*, *Video* at 23:12:02 through 23:12:57; 23:13:14. Accordingly, defendant's testimony that plaintiff was unable to follow the pen with her eyes is uncontroverted and supports a finding of probable cause. *Defendant Depo.*, pp. 39-41. *See also Impaired Driver Report*.

Second, plaintiff acknowledges that she hesitated while reciting numbers, but insists that she performed the numbers test competently. *Memo. in Opp.*, p. 6. It is therefore undisputed that plaintiff hesitated while reciting numbers during the field sobriety test. Plaintiff's insistence that this hesitation is not significant does not create a genuine issue of material fact. Equally unavailing is her assertion that she performed competently "[f]or someone who had just driven 600 miles and tested at 11:20 at night[.]" *Memo. in Opp.*, p. 6. Plaintiff points to no evidence in the record that establishes that she explained this to defendant. Even if she had, however, the fact that there may be an innocent explanation for her behavior does not preclude defendant from relying on this performance to support a finding of probable cause. *See*, *e.g.*, *United States v. Wright*, 16 F.3d 1429, 1438 (6th Cir. 1994) ("Often, innocent behavior will form the grounds for probable cause."). Indeed, taking "a realistic assessment of the situation from a law enforcement officer's perspective[,]" *Ross*, 402 F.3d at 585 n. 6, hesitating during a numbers sobriety test – regardless of plaintiff's insistence that hesitation may be "normal in speech" – may support a finding of probable cause.

Third, plaintiff denies that defendant testified that plaintiff's speech was slurred. *Memo. in Opp.*, p. 5. However, defendant specifically testified that plaintiff spoke with "a slight slur to her words" during the numbers test. *Defendant Depo.*, pp. 43-44. *See also Impaired Driver Report*. Plaintiff also argues that her manner of speech "is [that of]an African-American women [sic] from Goose Creek South Carolina whose accent is somewhat different than a

Midwesterner's accent." *Memo. in Opp.*, p. 6. However, plaintiff has pointed to no evidence in the record that she offered this explanation to defendant during the events leading up to her arrest. *See Everson*, 556 F.3d at 499 (stating that an analysis of probable cause, under the totality of the circumstances, requires that a court consider "only the information possessed by the arresting officer at the time of the arrest") (internal quotation marks omitted). In addition, even if she had offered this explanation, simply because there may have been an innocent explanation for plaintiff's manner of speaking does not foreclose the conclusion that this factor supports a finding of probable cause. *See*, *e.g.*, *Wright*, 16 F.3d at 1438.

Fourth, although plaintiff admits to "minor hand waving and putting her foot down" during the one-leg stand test, she challenges the reasonableness of defendant's interpretation of her performance in this regard. *Memo. in Opp.*, pp. 6-7. *See also Impaired Driver Report* (noting plaintiff's failure to comply with the test's requirements). Again, defendant was entitled to construe plaintiff's behavior under the totality of the circumstances. *Ross*, 402 F.3d at 585 n. 6. Indeed, "a realistic assessment of the situation from a law enforcement officer's perspective[,]" *id*., weighs in favor of defendant's conclusion that plaintiff was impaired. Plaintiff's suggestion that defendant's assessment should take into account that plaintiff is a "heavy set middle aged woman" is without merit. She points to no authority supporting the contention that performance on this test turns on an individual's weight and age. Therefore, plaintiff has offered no admissible evidence to controvert defendant's conclusion that plaintiff performed poorly on this test. Accordingly,

failing to properly perform this test weighs in favor of probable cause.

Fifth, for the walk and turn test, defendant reported that plaintiff had difficulty maintaining her balance, turned the wrong way and "did not touch heel to toe at any point in time [as instructed], so there was a gap in between her back foot and her front foot during the whole test." *Defendant Depo.*, p. 53. *See also Impaired Driver Report* (noting plaintiff's deficiencies in performance on this test); *Video* at, *e.g.*, 23:19:27. Plaintiff appears to concede that she performed poorly, as described, but appears to suggest that her failures should be excused because defendant "did not take into account that Ms. Green had a full skirt on that would make it nearly impossible to see her feet directly beneath her." *Memo. in Opp.*, p. 7. Plaintiff cites to no authority to support her contention that defendant could not rely on plaintiff's failure to perform the test as instructed because her clothing[5] obscured her view of her feet. Even assuming this innocent explanation for plaintiff's performance,[6] defendant was still entitled to consider plaintiff's behavior in this regard when assessing whether or not there was probable cause to arrest plaintiff. *See*, *e.g.*, *Wright*, 16 F.3d at 1438. Based on the totality of the circumstances described *supra*, the Court concludes that probable cause existed to arrest plaintiff for driving while impaired in contravention of O.R.C. § 4511.19. *See also Exhibits 5*

[5]The Court notes that the video establishes that plaintiff's skirt is about knee-length.

[6]The Court, however, is not persuaded that people must watch their feet in order to walk heel-to-toe.

and *9*, attached to *Defendant Depo*.

Having so concluded, the Court finds plaintiff's additional arguments unavailing. For example, plaintiff attacks the integrity of field sobriety tests in general, arguing that the tests are "subjective" and do not assess different levels of impairment. *Memo. in Opp.*, pp. 7-8 (citing *Defendant Depo.*, pp. 49-55, 74-75, 77). However, plaintiff cites to no authority to support the proposition that a law enforcement officer may not rely on field sobriety test performance when assessing an individual's impairment under the totality of the circumstances.

Equally unavailing is plaintiff's complaint that defendant failed to administer a portable breath test ("PBT"). *Memo. in Opp.*, p. 8 (citing a print-out of the OSHP policy and procedure manual, attached thereto). First, this document is not authenticated and is therefore inadmissible on summary judgment for the reasons discussed *supra*. *See*, *e.g.*, *Fox*, 173 Fed. Appx. 372, at *375; *Moore*, 2 F.3d at 699. Second, defendant testified that plaintiff evidenced no odor of alcohol, so he was focused on plaintiff's possible impairment by drugs, not alcohol. *Defendant Depo.*, p. 87. A PBT would not have assisted in that determination. *Id*. Third, plaintiff's poor performance on all of the other sobriety tests provided ample evidence supporting a conclusion on defendant's part of probable cause.

Similarly, the fact that defendant admitted that he did not smell or see drugs or alcohol on plaintiff's person or in her vehicle is not dispositive. As discussed *supra*, whether or not probable cause existed "is assessed under a reasonableness standard," *Crockett*, 316 F.3d at 580 (emphasis in original) (internal quotation marks omitted),

considering the totality of the circumstances. *Everson*, 556 F.3d at 499. Accordingly, the fact that defendant did not see or smell drugs or alcohol was only one factor in determining whether probable cause existed.

Finally, plaintiff notes that the urine test later administered to her at the police station was negative for alcohol and drugs. *Memo. in Opp.*, p. 8. *See also Exhibits 8* and *10*, attached to *Defendant Depo.* Plaintiff argues that, based on this result, "the officer almost certainly got it wrong with respect to his interpretation of Ms. Green's demeanor at the scene. This alone suggests that there is a genuine issue of material fact." *Memo. in Opp.*, p. 12. However, as the Court previously discussed, plaintiff's ultimate exoneration does not undermine a finding of probable cause based on the information available to defendant at the time of the arrest. *See*, *e.g.*, *Brooks*, 577 F.3d at 706; *Pierson*, 386 U.S. at 555; *Baker*, 443 U.S. at 145. Accordingly, based on the foregoing, the Court concludes that defendant is entitled to summary judgment on plaintiff's claim of false arrest (second cause of action).

WHEREUPON, *Defendant, Trooper Adam Throckmorton's Motion for Summary Judgment*, Doc. No. 16, is **GRANTED** in its entirety. The Clerk shall enter **FINAL JUDGMENT** in this case.

October 22, 2010

s/Norah McCann King
Norah McCann King
United States Magistrate Judge