[Cite as *Westlake v. Blakley*, 2019-Ohio-3670.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

CITY OF WESTLAKE, :

Plaintiff-Appellee, :

No. 107843

v. :

DEVON A. BLAKLEY, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: September 12, 2019

Criminal Appeal from the Rocky River Municipal Court
Case No. 18-TRC-00417

Appearances:

Michael P. Maloney, Director of Law, City of Westlake, and John J. Spellacy, Assistant Prosecuting Attorney, *for appellee*.

Michael C. Asseff, *for appellant*.

ANITA LASTER MAYS, J.:

{¶ 1} Defendant-appellant Devon A. Blakley ("Blakley") appeals her guilty plea and asks this court to vacate her convictions and remand this matter to the trial court for further proceedings. We affirm the decision of the trial court.

{¶ 2} Blakley pleaded no contest to operating a vehicle under the influence of alcohol and drugs ("OVI"), a first-degree misdemeanor, in violation of R.C. 4511.19(A)(1)(a); and lanes of travel upon roadways, a minor misdemeanor, in violation of R.C. 4511.25. In regard to the OVI count, the trial court sentenced Blakley to 180 days in jail; six months of community control; and a $400 fine. The trial court then suspended the 180 days in jail. The trial court issued Blakley a $25 fine for the lanes of travel violation. The trial court stayed execution of the sentence pending this appeal.

I. Facts and Procedural History

{¶ 3} On January 28, 2018, as Blakley was driving her vehicle westbound on I-90, Officer Timothy O'Neill ("Officer O'Neill") of the Westlake Police Department, observed it crossing the white edge line "about a foot or so" several times. Officer O'Neill followed Blakley's vehicle and subsequently pulled her over on the northwest side of the highway. Officer O'Neill stated that he had to lean in close to Blakley because of the interstate noise. In Officer O'Neill's police report, he stated that he could "immediately smell a strong odor of an alcoholic beverage emanating from Blakley. She also had blood shot eyes." Officer O'Neill asked Blakley if she had been drinking and she denied drinking alcohol. After Officer O'Neill informed Blakley that he could smell the odor of alcohol on her breath, Blakley continued to deny consuming alcohol. Officer O'Neill then asked Blakley to recite the alphabet from A to Z. Blakley complied, however, when she got to the letter U, Blakley then mixed up the final letters.

{¶ 4} At that point, Officer O'Neill radioed for a second police officer to assist him at the scene. Officer O'Neill asked Blakley where she was driving from, and she responded the Cleveland Convention Center. Officer O'Neill asked her about the event at the Convention Center, and Blakley told him "Beer Fest." Upon the arrival of the second police officer, Officer O'Neill performed three field sobriety tests ("FST"): the Horizontal Gaze Nystagmus ("HGN") test, the 9-Step Walk and Turn test, and the One-legged Stand test. In Officer O'Neill's police report, he stated that "Blakley's eyes tracked evenly and her pupils were equal in size." However, he observed 6 of 6 cues during the HGN test, which led him to believe that Blakley was intoxicated beyond the legal limit.

{¶ 5} During the 9-Step Walk and Turn test, Officer O'Neill noted that "Blakley could not stand as instructed during the instructional phase of test." Specifically, "Blakley took 18 steps forward instead of the 9 instructed and used her arms for balance." Officer O'Neill also noted that Blakley "turned incorrectly and then started moving around a lot stating she was cold." According to Officer O'Neill, Blakley performed the One-legged Stand test satisfactorily.

{¶ 6} After Blakley completed the FST, she was placed under arrest for OVI. After her arrival at the police station, Blakley was given an alcohol breath concentration ("BAC") test. Blakley's BAC result was .136, higher than the legal limit of .08. Blakley obtained counsel and later filed a motion to suppress any evidence obtained during the FST. Additionally, Blakley argued that Officer O'Neill did not have probable cause to arrest her. After the suppression hearing, the magistrate

determined that Officer O'Neill did not substantially comply with the administration of the 9-Step Walk and Turn test. Therefore, the magistrate granted Blakley's motion to suppress in part.

{¶ 7} The magistrate determined that Blakley passed the One-legged Stand test. In its decision, the magistrate determined that "this Court's review of the record shows that Officer O'Neill substantially complied with the NHTSA standards in administering the HGN." The magistrate noted that Blakley did not address her probable-cause argument at the suppression hearing, but did mention it in her motion. The magistrate stated that

> the totality of the facts and circumstances for purposes of whether probable cause existed to make an arrest for OVI are as follows: The Defendant was stopped for weaving several times at 12:12 a.m. after returning from a Beer Festival in Cleveland, Ohio. Officer O'Neill observed the odor of alcohol from the Defendant, bloodshot eyes, flushed face (although not reported in his report), and her inability to correctly recite the alphabet * * * Based on the totality of the circumstances, this Court holds that Officer O'Neill had probable cause to arrest the Defendant for OVI."

Magistrate's journal entry (Aug. 9, 2018).

{¶ 8} On September 27, 2018, after the trial court overruled Blakley's previously filed objections to the magistrate's decision, Blakley pleaded no contest to the charges and was sentenced accordingly. She filed this appeal assigning two errors for this court's review:

> I. The trial court erred in affirming the magistrate's decision finding that the arresting officer substantially complied with the testing standards set forth by the National Highway Traffic Safety Administration ("NHTSA") regarding administration of the HGN test upon appellant; and

II. The trial court erred in affirming the magistrate's decision that the officer had probable cause to arrest the appellant for OVI.

II. Motion to Suppress

A. Standard of Review

{¶ 9} We review a trial court's decision on a motion to suppress under a mixed standard of review.

> "In a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and evaluate witness credibility." *State v. Curry*, 95 Ohio App.3d 93, 96, 641 N.E.2d 1172 (8th Dist.1994). The reviewing court must accept the trial court's findings of fact in ruling on a motion to suppress if the findings are supported by competent, credible evidence. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. With respect to the trial court's conclusion of law, the reviewing court applies a de novo standard of review and decides whether the facts satisfy the applicable legal standard. *Id.*, citing *State v. McNamara*, 124 Ohio App.3d 706, 707 N.E.2d 539 (4th Dist.1997).

State v. Miller, 8th Dist. Cuyahoga No. 106946, 2018-Ohio-4898, ¶ 22.

B. Whether During an OVI Investigatory Search where the Arresting Officer's Initial Placement of the Stimulus is at a Height Level with the Top of [Blakley's] Head During the HGN Test, does that Render the Entirety of the Test Invalid and Inadmissible

{¶ 10} Blakley argues that the trial court erred by not suppressing the HGN test results because Officer O'Neill incorrectly administered the test. It has been determined that:

> [a] motion to suppress must state its legal and factual bases with sufficient particularity to place the prosecutor and the court on notice of the issues to be decided. *State v. Shindler*, 70 Ohio St.3d 54, 58, 636 N.E.2d 319 (1994). Once a defendant sets forth a sufficient basis

> for a motion to suppress, the burden shifts to the state to demonstrate proper compliance with the regulations involved. *Middleburg Hts. v. Gettings*, 8th Dist. Cuyahoga No. 99556, 2013-Ohio-3536, ¶ 10. In driving-under-the-influence cases, if a motion sufficiently raises an issue involving the applicable regulations, the state must then show substantial compliance with the regulation at issue. *Id*.

Cleveland v. Krivich, 2016-Ohio-3072, 65 N.E.3d 279, ¶ 13 (8th Dist.).

{¶ 11} During the state's case,

> [u]nder R.C. 4511.19(D)(4)(b), an officer may testify concerning the results of the field sobriety test if the officer administered the test in "substantial compliance" with the testing standards. Therefore, "in order for the results of the field sobriety tests to be admissible, the city must demonstrate by clear and convincing evidence that the officer performing the testing substantially complied with accepted testing standards." *State v. Hyppolite*, 8th Dist. Cuyahoga No. 103955, 2016-Ohio-7399, 76 N.E.3d 539, ¶ 47, citing *Middleburg Hts. v. Gettings*, 8th Dist. Cuyahoga No. 99556, 2013-Ohio-3536, ¶ 12; *Parma Hts. v. Dedejczyk*, 8th Dist. Cuyahoga No. 97664, 2012-Ohio-3458, ¶ 42. The city may demonstrate what the NHTSA standards are through competent testimony and/or by introducing the applicable portions of the NHTSA manual. *State v. Boczar*, 113 Ohio St.3d 148, 2007-Ohio-1251, 863 N.E.2d 155, ¶ 28; *see State v. Jackman*, 8th Dist. Cuyahoga No. 89835, 2008-Ohio-1944, ¶ 24 ("Under Ohio law, the state is not required to introduce the NHTSA guidelines or expert testimony.").
>
> Substantial compliance is not defined in R.C. 4511.19(D)(4)(b); therefore, courts have some discretion in determining the "'substantiability of the compliance.'" *Hyppolite* at ¶ 48, quoting *State v. Perry*, 129 Ohio Misc. 61, 2004-Ohio-7332, 822 N.E.2d 862, ¶ 45. Thus, a determination of whether the facts satisfy the substantial compliance standard is made on a case-by-case basis. *Hyppolite*; *Dedejczyk* at ¶ 42.

Cleveland v. Cunningham, 8th Dist. Cuyahoga No. 105403, 2018-Ohio-844, ¶ 32-33.

{¶ 12} Further, it has been held that

> "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, 863 N.E.2d 155, ¶ 28. We have previously detailed the parameters of the HGN test set forth by the NHTSA manual as follows:
>
> the NHTSA manual provides that "a police officer should instruct the suspect that [he is] [or she is] going to check the suspect's eyes, that the suspect should keep [his] [or her] head still and follow the stimulus with [his] [or her] eyes, and that the suspect should do so until told to stop. After these initial instructions are provided, the officer is instructed to position the stimulus approximately 12 to 15 inches from the suspect's nose and slightly above eye level. The officer is then told to check the suspect's pupils to determine if they are of equal size, the suspect's ability to track the stimulus, and whether the suspect's tracking is smooth. The officer is then to check the suspect for nystagmus at maximum deviation and for onset of nystagmus prior to 45 degrees." The manual instructs the officer to repeat each of the three portions of the HGN test.

State v. Johnson, 12th Dist. Preble No. CA2017-12-016, 2018-Ohio-3621, ¶ 16, quoting *State v. Clark*, 12th Dist. Brown No. CA2009-10-039, 2010-Ohio-4567, ¶ 22-23.

{¶ 13} According to the NHTSA Standardized Field Sobriety Testing Appendix A online manual, when testing the HGN, the officer should look for three indicators, "(1) if the eye cannot follow a moving object smoothly, (2) if jerking is distinct when the eye is at maximum deviation, and (3) if the angle of onset of jerking is within 45 degrees of center." National Highway Traffic Safety Administration, Standardized Field Sobriety Testing, http://www.nhtsa.gov/people/injury/alcohol/SFST/ appendix_a.htm (accessed June 22, 2019).

{¶ 14} In addition, the 2018 updated NHTSA standards governing the HGN test gives officers an 8-step process that they need to follow when performing the HGN test. It states,

> 1. Have subject remove glasses if worn.
>
> 2. Stimulus held in proper position (approximately 12"-15" from nose, just slightly above eye level).
>
> 3. Check for equal pupil size and resting nystagmus.
>
> 4. Check for equal tracking.
>
> 5. Smooth movement from center of nose to maximum deviation in approximately 2 seconds and then back across subject's face to maximum deviation in right eye, then back to center. Check left eye, then right eye. (Repeat).
>
> 6. Eye held at maximum deviation for a minimum of 4 seconds (no white showing). Check left eye, then right eye. (Repeat).
>
> 7. Eye moved slowly (approximately 4 seconds) from center to 45 angle. Check left eye, then right eye. (Repeat).
>
> 8. Check for Vertical Gaze Nystagmus. (Repeat).

National Highway Traffic Safety Administration, DWI Detection and Standardized Field Sobriety Testing Participant Manual, https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/sfst_full_participant_manual_2018.pdf (accessed July 9, 2019).

{¶ 15} Blakley contends that Officer O'Neill failed to demonstrate substantial compliance with NHTSA standards governing the HGN test because Officer O'Neill placed the stimulus above eye level and that the test was done facing traffic. However, after a review of the video, the evidence shows that the test was

conducted with Blakley standing perpendicular to oncoming traffic, not facing traffic. Additionally, the video shows that Officer O'Neill's placement of the stimulus was not contrary to the NHTSA instructions.

{¶ 16} We first look to Officer O'Neill's training and his ability to administer the test. The following testimony was adduced at trial:

City:	* * * officer, have you been trained in the performance of field sobriety tests?
Officer O'Neill:	Yes.
City:	And where were you trained and when were you trained?
Officer O'Neill:	Originally I would have been trained and I went to the academy, Cleveland Heights Academy. In 1992 I attended Parma Heights ADAP class. [In] 2006 I did a refresher and again in 2017 I did an in house refresher.
City:	And when you say ADAP class that was Advanced Detection Apprehension and Prosecution of persons under the influence of alcohol?
Officer O'Neill:	Correct.
City:	And that was 1992?
Officer O'Neill:	Correct.
City:	And then a refresher course in 2006; is that correct?
Officer O'Neill:	Correct.
City:	And then a refresher May 1, 2017?
Officer O'Neill:	Correct.

(Tr. 13.) The record shows that the foundation was laid regarding Officer O'Neill's training and ability to administer the FST.

{¶ 17} Thereafter, at the hearing, Officer O'Neill was asked to describe to the court how he performed the HGN test. Officer O'Neill stated that he first checked Blakley's pupil size, making sure both pupils are equal size. (Tr. 20.) Then, Officer O'Neill testified that he checked for Blakley's pupil tracking. *Id*. Next, Officer O'Neill testified as to why he check for pupil size and tracking, stating "head injury, something of that nature. That would be one of the things we do look for." (Tr. 21.) Officer O'Neill then testified that he looked for lack of smooth pursuit of the eye. *Id*.

{¶ 18} Officer O'Neill went on to state that Blakley's eyes were involuntarily jerking, not tracking smoothly. Officer O'Neill testified that he looked for an onset of nystagmus prior to 45 degrees. Officer O'Neill stated that he observed nystagmus prior to 45 degrees in both of Blakley's eyes. After reviewing all of the evidence, we determine that there is clear and convincing evidence that Officer O'Neill substantially complied with the NHTSA standards while performing the HGN test.

{¶ 19} Blakley also contends that the inappropriate placement of the stimulus renders the HGN test invalid and inadmissible as an unreasonable search and seizure. We have already determined that the trial court did not err in determining that Officer O'Neill substantially complied with the administration of the HGN. However, we will address the constitutional issue.

The Fourth Amendment of the U.S. Constitution, which is enforceable against the states through the Due Process Clause of the Fourteenth Amendment, provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." *See Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Article I, Section 14 of the Ohio Constitution has language almost identical to the Fourth Amendment and affords Ohioans the same protections against unreasonable searches and seizures. *State v. Robinette*, 80 Ohio St.3d 234, 245, 685 N.E.2d 762 (1997).

A traffic stop constitutes a seizure and implicates Fourth Amendment protections. *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). Nevertheless, a warrantless traffic stop is constitutionally valid if the officer making the stop has "a reasonable suspicion," based on specific and articulable facts, that "criminal activity may be afoot." *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1967); *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, 894 N.E.2d 1204, syllabus.

Reasonable suspicion for a "Terry stop" requires something more than an "inchoate and unparticularized suspicion or 'hunch.'" *Terry* at 27. The propriety of an investigative stop must be viewed in light of the totality of the circumstances "as viewed through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold." *State v. Andrews*, 57 Ohio St.3d 86, 87-88, 565 N.E.2d 1271 (1991).

Once a driver has been lawfully stopped, however, an officer may not request a motorist to perform field sobriety tests unless the request is separately justified by a reasonable suspicion based upon articulable facts that the motorist is intoxicated. *Parma Hts. v. Dedejczyk*, 8th Dist. Cuyahoga No. 97664, 2012-Ohio-3458, ¶ 29, citing *State v. Evans*, 127 Ohio App.3d 56, 62, 711 N.E.2d 761 (11th Dist.1998). A court will analyze the reasonableness of the request based on the totality of the circumstances, viewed through the eyes of a reasonable and prudent police officer on the scene who must react to events as they unfold. *State v. Dye*, 11th Dist. Portage No. 2001-P-0140, 2002-Ohio-7158, ¶ 18.

In order for the results of field sobriety tests to be admissible, the state is not required to show strict compliance with testing standards, but

> must instead demonstrate that the officer substantially complied with the National Highway Traffic Safety Administration ("NHTSA") standards. R.C. 4511.19(D)(4)(b); *State v. Clark*, 12th Dist. Brown No. CA2009-10-039, 2010-Ohio-4567, ¶ 11. "A determination of whether the facts satisfy the substantial compliance standard is made on a case-by-case basis." *State v. Fink*, 12th Dist. Warren Nos. CA2008-10-118 and CA2008-10-119, 2009-Ohio-3538, ¶ 26. If a field sobriety test is administered in substantial compliance with the applicable NHTSA standards, the results of that test are admissible; however, the weight to be given that evidence at trial is left to the trier of fact. *Columbus v. Weber*, 10th Dist. Franklin No. 06AP-845, 2007-Ohio-5446, ¶ 18.

Cleveland v. Maxwell, 8th Dist. Cuyahoga No. 104964, 2017-Ohio-4442, ¶ 17-21.

{¶ 20} As stated by this court,

> "'[i]n order for the results of field-sobriety tests to be admissible, the state is not required to show strict compliance with testing standards, but must instead demonstrate that the officer substantially complied with NHTSA standards. R.C. 4511.19(D)(4)(b); *State v. Clark*, 12th Dist. No. CA2009-10-039, 2010-Ohio-4567, ¶ 11. 'A determination of whether the facts satisfy the substantial compliance standard is made on a case-by-case basis.' *State v. Fink*, 12th Dist. Nos. CA2008-10-118 and CA2008-10-119, 2009-Ohio-3538, ¶ 26. The state may demonstrate what the NHTSA standards are through competent testimony and/or by introducing the applicable portions of the NHTSA manual. *State v. Boczar*, 113 Ohio St. 3d 148, 2007-Ohio-1251, 863 N.E.2d 155, at ¶ 28.
>
> But even if a court finds that the officer did not substantially comply with the NHTSA standards (which would require the results of the tests to be excluded), the officer's testimony regarding the defendant's performance on nonscientific field-sobriety tests is admissible under Evid.R. 701. *State v. Schmitt*, 101 Ohio St.3d 79, 2004-Ohio-37, 801 N.E.2d 446, ¶ 14-15.'"

Middleburg Hts. v. Gettings, 8th Dist. Cuyahoga No. 99556, 2013-Ohio-3536, ¶ 12, quoting *Parma Hts. v. Dedejczyk*, 8th Dist. Cuyahoga No. 97664, 2012-Ohio-3458, at ¶ 42-43.

{¶ 21} Applying the foregoing to the circumstances presented in this case, we find the initial traffic stop, including the nonscientific alphabet field sobriety test, and subsequent administration of scientific FST did not constitute an illegal search and seizure of Blakley.

{¶ 22} Blakley's first assignment of error is overruled.

III. Probable Cause

A. Standard of Review

{¶ 23} Accordingly,

> [t]he standard for probable cause is whether "at the moment of the arrest, the police 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." *State v. Homan*, 89 Ohio St.3d 421, 427, 732 N.E.2d 952 (2000), superseded by statute on other grounds as recognized in *State v. Boczar*, 113 Ohio St.3d 148, 2007-Ohio-1251, 863 N.E.2d 155. The test is an objective one. *State v. Deters*, 128 Ohio App.3d 329, 333, 714 N.E.2d 972 (1st Dist.1998).

State v. Bremenkamp, 1st Dist. Hamilton Nos. C-130819 and C-130820, 2014-Ohio-5097, ¶ 9.

{¶ 24} In determining whether the police had probable cause to arrest for OVI, we must determine whether Officer O'Neill had information sufficient to cause a prudent person to believe that Blakley was driving under the influence. *Gettings* at ¶ 26, citing *Beck v. Ohio*, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964). "A probable-cause determination is based on the 'totality' of facts and circumstances within a police officer's knowledge. *Id.*, citing *State v. Miller*, 117 Ohio App.3d 750,

761, 691 N.E.2d 703 (11th Dist.1997)." *Strongsville v. Vavrus*, 8th Dist. Cuyahoga No. 100477, 2014-Ohio-1843, ¶ 11.

B. Whether, Upon the Suppression of Field Sobriety Test Results, an Officer has Probable Cause to Arrest a Suspect for OVI

{¶ 25} Blakley argues that Officer O'Neill did not have probable cause to arrest her for OVI.

> An officer may arrest a suspect without a warrant when he [or she] has probable cause to believe that the suspect was operating a motor vehicle under the influence of alcohol. *State v. Henderson*, 51 Ohio St.3d 54, 554 N.E.2d 104 (1990). "Probable cause exists when the arresting officer has sufficient information from a reasonably trustworthy source to warrant a prudent person in believing that the suspect has committed or was committing the offense." *State v. Otte*, 74 Ohio St.3d 555, 559, 660 N.E.2d 711 (1996). "Probable cause 'has come to mean more than bare suspicion,' but 'less than evidence which would justify condemnation' or conviction." *United States v. Thomas*, 11 F.3d 620, 627 (6th Dist.1993), quoting *Brinegar v. United States*, 338 U.S. 160, 175, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949).

S. Euclid v. Bautista-Avila, 2015-Ohio-3236, 36 N.E.3d 246, ¶ 17 (8th Dist.).

{¶ 26} Officer O'Neill observed Blakley's vehicle crossing over the white edge line several times. After stopping Blakley's vehicle, Officer O'Neill observed that Blakley's eyes were bloodshot, her face was flushed, and smelled an odor of alcohol coming from her breath. Blakley also told Officer O'Neill that she was coming from Beer Fest. Officer O'Neill requested that Blakley recite the alphabet, and Blakley had trouble finishing the recitation.

> "The standard of probable cause is a practical, nontechnical concept that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

> Probable cause is a fluid concept, turning on the assessment of probabilities in particular factual contexts, not readily or even usefully reduced to a neat set of legal rules. *Id.* In substance, probable cause depends upon the totality of the circumstances that present reasonable grounds for belief of guilt, and that belief of guilt must be particularized with respect to the person to be searched or seized. *Maryland v. Pringle*, 540 U.S. 366, 124 S.Ct. 795, 157 L.Ed.2d 769, (2003); *Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979). To determine whether an officer had probable cause to arrest an individual, a court must examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause. *Pringle*."

State v. Pencil, 2d Dist. Clark No. 07CA0057, 2007-Ohio-7164, ¶ 15, citing *State v. Thomas*, 2d Dist. Montgomery No. 21430, 2006-Ohio-6612, ¶ 9.

{¶ 27} At the time of the incident, Officer O'Neill was a 26-year veteran of the Westlake Police Department. He testified that he was trained in the performance of field sobriety tests, first at the police academy. Then Officer O'Neill testified that he took a refresher course in 2006 and 2017. He testified as to the observations he made in his decision to perform FST's on Blakley.

> Once a driver has been lawfully stopped, an officer may not administer field sobriety tests unless the invasion of privacy is separately justified by a reasonable suspicion based upon articulable facts that the motorist is impaired. *Dedejczyk*, 8th Dist. Cuyahoga No. 97664, 2012-Ohio-3458, ¶ 29, citing *State v. Evans*, 127 Ohio App.3d 56, 62, 711 N.E.2d 761 (11th Dist.1998). Importantly, reasonable suspicion does not require an officer to observe and relate overt signs of intoxication. "A court will analyze the reasonableness of the request based on the totality of the circumstances, viewed through the eyes of a reasonable and prudent police officer on the scene who must react to events as they unfold." *Maxwell*, 8th Dist. Cuyahoga No. 104964, 2017-Ohio-4442, ¶ 20, citing *State v. Dye*, 11th Dist. Portage No. 2001-P-0140, 2002-Ohio-7158, ¶ 18. In *Evans*, the court outlined a nonexclusive list of factors to consider in making this determination. The factors include the following:

(1) the time and day of the stop (Friday or Saturday night as opposed to, e.g., Tuesday morning);

(2) the location of the stop (whether near establishments selling alcohol);

(3) any indicia of erratic driving before the stop that may indicate a lack of coordination (speeding, weaving, unusual braking, etc.);

(4) whether there is a cognizable report that the driver may be intoxicated;

(5) the condition of the suspect's eyes (bloodshot, glassy, glazed, etc.);

(6) impairments of the suspect's ability to speak (slurred speech, overly deliberate speech, etc.);

(7) the odor of alcohol coming from the interior of the car, or, more significantly, on the suspect's person or breath;

(8) the intensity of that odor, as described by the officer ("very strong," "strong," "moderate," "slight," etc.);

(9) the suspect's demeanor (belligerent, uncooperative, etc.);

(10) any actions by the suspect after the stop that might indicate a lack of coordination (dropping keys, falling over, fumbling for a wallet, etc.); and

(11) the suspect's admission of alcohol consumption, the number of drinks had, and the amount of time in which they were consumed, if given.

Evans at 63, fn. 2. No single factor controls the outcome. *Cleveland v. Martin*, 2018-Ohio-740, 107 N.E.3d 809, ¶ 14 (8th Dist.).

{¶ 28} Officer O'Neill testified that he observed Blakley's erratic driving on the highway late Saturday night, early Sunday morning, around midnight. Officer

O'Neill testified that after he approached Blakley's vehicle, he smelled a strong order of an alcoholic beverage emanating from Blakley's person and observed that Blakley had bloodshot eyes. Although Blakley denied alcohol consumption, she did admit that she was coming from "Beer Fest" at the Cleveland Convention Center. Finally, before the FST, Blakley's inability to recite the alphabet was a factor considered by Officer O'Neill in his determination that Blakley was impaired.

{¶ 29} We conclude that, based upon the totality of these facts and circumstances, a reasonable police officer, relying upon his training and experience, could conclude that there was probable cause to believe that Blakley was operating her vehicle under the influence of alcohol. *See*, *e.g.*, *id.* at ¶ 18.

{¶ 30} We note that even in the absence of the field sobriety tests, probable cause may exist.

> "'In determining whether the police had probable cause to arrest an individual for DUI, we consider whether, at the moment of arrest, the police 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. In making this determination, [a court] will examine the "totality" of facts and circumstances surrounding the arrest. (Citations omitted). Furthermore, "probable cause to arrest does not necessarily have to be based, in whole or in part, upon a suspect's poor performance [on the field sobriety tests]."'

State v. Scott, 9th Dist. Summit No. 20582, 2001-Ohio-1786, quoting *State v. Homan*, 89 Ohio St.3d 421, 427, 732 N.E.2d 952 (2000).

{¶ 31} Based on the totality of the circumstances, the indicia in the instant matter supported the trial court's determination that probable cause existed to

arrest Blakley for driving under the influence. We find that the trial court did not err.

{¶ 32} Blakley's second assignment of error is overruled.

{¶ 33} Judgment is affirmed.

It is ordered that the appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Rocky River Municipal Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

_____
ANITA LASTER MAYS, JUDGE

PATRICIA ANN BLACKMON, P.J., and
LARRY A. JONES, SR., J., CONCUR