[Cite as *State v. Pemberton*, 2009-Ohio-3177.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-G-2870**
- vs -	:	
DON R. PEMBERTON,	:	
Defendant-Appellant.	:	

Criminal Appeal from Chardon Municipal Court, Case No. 2007 TRC 10907.

Judgment: Affirmed.

James M. Gillette, City of Chardon Police Prosecutor, National City Bank Building, 117 South Street, #208, Chardon, OH 44024 (For Plaintiff-Appellee).

Robert R. Umholtz, Geauga County Public Defender, and *Paul J. Mooney*, Assistant Public Defender, 211 Main Street, Chardon, OH 44024 (For Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Don R. Pemberton appeals from a judgment of the Chardon Municipal Court which overruled his motion to suppress evidence. He claims the police officer made a warrantless entry into his residence and lacked probable cause to arrest him. We find his contentions to be without merit and therefore affirm the trial court's judgment.

{¶2} **Factual and Procedural Background**

{¶3} On December 26, 2007, Mr. Pemberton was involved in a crash and received a traffic citation charging him with (1) operating a vehicle while under the

influence of alcohol ("OVI") in violation of R.C. 4511.19(A)(1)(a), (2) a blood test refusal in violation of R.C. 4511.19(A)(2), and (3) a failure to maintain assured clear distance in violation of R.C. 4511.21(A). Mr. Pemberton entered a plea of not guilty to these charges and subsequently filed a motion to suppress evidence. After a hearing, the court denied his motion to suppress. He subsequently changed his plea from not guilty to no contest. Based on his plea, the court found him guilty of the offense of OVI[1] and this appeal followed.

{¶4} The transcript of the suppression hearing reflects the following circumstances leading to Mr. Pemberton's OVI conviction. On December 26, 2007, around 7:10 p.m., Tammy Calloway called the police to report that her vehicle had been hit from behind by a minivan. She provided the police the license plate of the vehicle. The dispatcher ran the license plate number, which revealed the name of the owner, Don Pemberton, his address, and a description of the vehicle. Deputy Jon Bilicic, a deputy of the Geauga County Sheriff's Office, was dispatched to investigate the traffic accident. On the way to the scene of the accident, Deputy Bilicic happened to pass by Mr. Pemberton's house, but did not see the minivan there.

{¶5} Deputy Bilicic met with Ms. Calloway at a gas station near the scene of the accident, where Ms. Calloway parked her badly damaged car. He obtained a short written statement from her regarding the accident. She informed Deputy Bilicic that while traveling eastbound on S.R. 422, she was rear-ended by a minivan. Both drivers stopped and exited their vehicle. The other driver was stumbling around, his speech "very slurred," and he appeared to be "very drunk." When she asked to see his driver's

1. The court imposed on Mr. Pemberton a jail term of 180 days, with 170 days suspended, a fine of $350, one year of license suspension, and two years of probation.

license, he handed her his credit card instead. Her vehicle, a Ford Escort, sustained heavy damage to the rear. After the brief encounter, Mr. Pemberton drove away. She followed his vehicle in order to obtain his license plate number; while doing so, she saw its hood fly off.

{¶6} After talking with Ms. Calloway, Deputy Bilicic drove to Mr. Pemberton's residence to continue his investigation. When he arrived, 20 minutes after he first passed the house on the way to the scene of the accident, he saw Mr. Pemberton's minivan parked outside the house. The front windshield was "totally smashed," with a spider web running across the entire windshield, and a portion of the hood was missing. The officer found Mr. Pemberton standing on his deck near the front door carrying some clothing items. He asked Mr. Pemberton to come to his patrol car. When Mr. Pemberton approached, Deputy Bilicic noticed he smelled of a strong and obvious odor of alcoholic beverage on his breath and his eyes were bloodshot and glassy. As the officer testified at the hearing, Mr. Pemberton "was kind of having a hard time walking, he was stumbling, and his speech was very slurred and he smelled like alcohol."

{¶7} Deputy Bilicic asked Mr. Pemberton if he had been involved in an accident and if he had been drinking. Mr. Pemberton said he had a lot to drink. Deputy Bilicic then asked him if he had been drinking before or after the accident. Mr. Pemberton said he had been drinking at his house after the accident. What transpired after this initial exchange is disputed – Deputy Bilicic and Mr. Pemberton offered different accounts of how the officer ended up inside Mr. Pemberton's house. Deputy Bilicic testified as follows:

{¶8} "A. I asked him if he could show me what he was drinking and where [] he was drinking, and he said, come on, I'll show you, and he walked into his house.

{¶9} "***.

{¶10} "A. Well, he went into his house, so I followed him, and he took me right into the kitchen and opened the refrigerator.

{¶11} "***.

{¶12} "A. [He] walked directly to the refrigerator and opened it up and said, let's have a drink.

{¶13} "Q. Now, when he walked in the door, what did he do with the door as he walked in?

{¶14} "A. Held it open.

{¶15} "Q. And you followed him in?

{¶16} "A. Yes."

{¶17} Deputy Bilicic acknowledged he did not have a warrant but testified that Mr. Pemberton "gave [him] permission" to enter his house. Deputy Bilicic elaborated on the circumstances of his entering the house as follows on cross-examination:

{¶18} "Q. Okay. I guess I would ask you, I want to get to the bottom of how you go from outside his house to inside his house. Did Mr. Pemberton verbally invite you into his home?

{¶19} "A. I asked him where he's been drinking, he said in his house. I go, where, *** can I see the containers; and he says, I'll show you where I've been drinking and what I've been drinking.

{¶20} "Q. And he said that outside the house?

{¶21} "A. Yes. Out in the driveway.

{¶22} "Q. And after that, you testified you guys walked into the house?

{¶23} "A. Right after he said he'll show me, he turned around and started walking into the house.

{¶24} "Q. Okay. Was there any – so there was no type of consent or signature allowing you, any consent allowing to enter?

{¶25} "A. No.

{¶26} "Q. But you are testifying he verbally stated, I'll show you, and then turned around and walked in the house?

{¶27} "A. Yes.

{¶28} "Q. And you followed him?

{¶29} "A. Yes."

{¶30} Deputy Bilicic further testified that once inside the house, Mr. Pemberton opened the refrigerator door, and he observed several bottles of beer but none were open. When he asked Mr. Pemberton to show him the bottles he drank, he walked him to a garbage can in the kitchen and pointed to it. Deputy Bilicic saw soda cans but not alcoholic beverage containers. He testified that he did not observe any empty containers of alcoholic beverages anywhere in the house. The officer described what transpired next:

{¶31} "A. Well, again, I asked him a second time if he had been drinking. I said, are you sure you have been drinking since the crash. [And he answered:] Well, maybe not.

{¶32} "At that point, based on my observations that he had a hard time walking, his speech was slurred and he had a strong odor, I said: Why don't we go out on the porch and do some tests.

{¶33} "Q. And so that was outside the front porch?

{¶34} "A. I think we actually walked out in the driveway."

{¶35} Mr. Pemberton offered a different account of how Deputy Bilicic entered his house. He stated that after the car accident, he went home and, while doing laundry, consumed four or five drinks of Jack Daniels mixed with iced tea. He testified he was home drinking for an hour and a half before Deputy Bilicic arrived at his house. He testified he just retrieved some dirty work clothes from his van when he saw the officer pulling into his driveway. Deputy Bilicic got out of his vehicle and asked him if he had had been drinking; he replied that he had been drinking quite a lot at home. When asked how the officer got inside his house, he testified as follows:

{¶36} "Q. Did he ask you where you had been drinking?

{¶37} "A. Yes. I told him at home.

{¶38} "Q. And then what happened after that question?

{¶39} "A. I went to put my stuff inside the house. I went inside the house and he followed me in.

{¶40} "Q. He followed you in?

{¶41} "A. Yes.

{¶42} "Q. Did he say: Can I come in?

{¶43} "A. No.

{¶44} "Q. Did he say: I need to come in?

{¶45} "A. No.

{¶46} "Q. Did he say anything like: You better let me in or else?

{¶47} "A. No.

{¶48} "Q. Did you – you heard his testimony. Did you invite him in?

{¶49} "A. No.

{¶50} "Q. Did you enter the house without saying anything, turn around, open the door to let him in?

{¶51} "A. No.

{¶52} "Q. Why did you walk in the house when the deputy was in your yard?

{¶53} "A. My arms was [sic] *** [f]ull of my heavy flannels. ***.

{¶54} "Q. So the last thing you told him before he walked in your house uninvited, according to you, was that you had a lot to drink at home, roughly, and then you were going to go put your clothes inside?

{¶55} "A. Yea.

{¶56} "Q. How did you know that he was following you in?

{¶57} "A. I heard the door open back up. It was totally closed, because I've got that spring thing on there. It wasn't totally closed when I walked in, but close to it. You can hear it.

{¶58} "***.

{¶59} "*** When he was asking me those questions, we were standing right by the screen door. So I went in to put my stuff down on the couch, right there, and that's when he followed me in.

{¶60} "Q. Okay. And once you guys got inside, then what was the first question he asked you once you walked into the house?

{¶61} "A. He asked me where the alcohol was in the house.

{¶62} "Q. Where the alcohol was in the house?

{¶63} "A. Yes. That I had been drinking. And I took him over to the refrigerator, on the top of the refrigerator was a bottle of Jack Daniels, a bottle of Johnny Walker, and I opened up the refrigerator and showed him the beer inside the refrigerator, too.

{¶64} "***.

{¶65} "Q. So it's your testimony that you never gave any consent, any signed consent for Deputy Bilicic to enter your house?

{¶66} "A. No.

{¶67} "Q. He just followed you?

{¶68} "A. Yes."

{¶69} According to Deputy Belicic's testimony, after they left the house and returned to the driveway, he conducted a horizontal gaze nystagmus ("HGN") test, during which he observed nystagmus in each eye, an indication of intoxication. Mr. Pemberton refused to perform the walk and turn and the one leg stand tests but agreed to a portable breath test, which registered a blood alcohol content of .170.

{¶70} After the portable breath test, Mr. Pemberton refused to perform any additional tests. Deputy Bilicic testified that, *based on the crash and his observations*, he arrested Mr. Pemberton at that point for OVI. The officer transported him to the sheriff's office for a breath test. Mr. Pemberton refused the breath test while there, at around 8:10 p.m.

{¶71} On appeal, Mr. Pemberton raises one assignment of error:

{¶72} "The trial court erred to the prejudice of defendant-appellant in denying his motion to suppress evidence and failing to rule on several issues in the motion."

{¶73} Under the assignment of error, he raises the following issues:

{¶74} "[1.] Whether the Motion to Suppress should have been granted based on sufficient [sic] probable cause existing to arrest and further detain appellant after the initial encounter for operation [sic] motor vehicle under influence.

{¶75} "[2.] Whether the Motion to Suppress should have been denied based on Appellant's supposed consent to the warrantless intrusion of the deputy into his residence.

{¶76} "[3.] Whether Appellant's Motion to Suppress should have been granted as the deputy failed to properly administer the horizontal gaze nystagmus (HGN) test and appellant was not properly advised of the consequences of refusal for chemical testing.

{¶77} "[4.] Whether Appellant's Motion to Suppress should have been granted as in not permitting the portable breath test results admissible [sic]."

{¶78} **Standard of Review**

{¶79} An appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Korman*, 11th Dist. No. 2004-L-064, 2006-Ohio-1795, ¶12, citing *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. "The appellate court must accept the trial court's factual findings, provided they are supported by competent, credible evidence. *** Thereafter, the appellate court must independently determine

whether those factual findings meet the requisite legal standard." Id. citing *State v. McNamara* (1997), 124 Ohio App.3d 706.

{¶80} A review of Mr. Pemberton's motion to suppress indicates he raised several grounds for suppression of the evidence: (1) there was no probable cause to arrest or to further detain him after the initial stop; (2) the warrantless intrusion into his residence rendered any evidence obtained as a result of the warrantless search inadmissible; (3) the result of the HGN test was inadmissible because the test was not done in substantial compliance with the standard procedures; (4) the portable breath test is not an approved evidentiary breath testing instrument; (5) he should not have been considered as having refused the breath test because such a request had been improper due to the fact that he consumed the alcohol after and not before operating his vehicle; (6) he was not properly advised of the consequences of his refusal to take the breath test; and (7) the statements made by him and the tests conducted were obtained in violation of his Fifth Amendment right against self-incrimination and both his Fifth Amendment and Sixth Amendment right to counsel as applicable under the Fourteenth Amendment.

{¶81} In its judgment, the trial court stated that under the totality of the circumstances, including (1) the written statement by the victim of the crash that Mr. Pemberton was very drunk, (2) Deputy Bilicic's conversation with him, and (3) the officer's observation of a lack of open alcoholic beverage containers in the house, the officer had probable cause to arrest Mr. Pemberton for OVI.

{¶82} Mr. Pemberton does not challenge the officer's conduct prior to the time he entered his house. The first event he complains of concerns the officer's entry into

his residence. Mr. Pemberton claims that Deputy Bilicic entered his home without his consent, and therefore, the entry constituted a warrantless search and seizure inside his home, in violation of his Fourth Amendment rights.

{¶83} **Whether the Officer Entered the Home with Consent**

{¶84} "An established exception to the rule that entry of a home requires a warrant or exigent circumstances is where the entry is pursuant to a voluntary consent. Police do not need a warrant, probable cause, or even a reasonable, articulable suspicion to conduct a search when a suspect voluntarily consents to the search. A search conducted pursuant to a valid consent is constitutionally permissible. Moreover, a voluntary consent need not amount to a waiver. Consent can be voluntary without being an 'intentional relinquishment or abandonment of a known right or privilege.' Rather, the proper test is whether the totality of the circumstances demonstrates that the consent was voluntary. The state has the burden to prove consent was freely and voluntarily given by clear and convincing evidence." *Bainbridge v. Kaseda*, 11th Dist. No. 2007-G-2797, 2008-Ohio-2136, ¶28 (internal citations omitted).

{¶85} Our review of the voluntariness of consent to search is limited to a determination of whether the trial court's decision was clearly erroneous. *Kaseda* at ¶27, citing *State v. Samples* (June 24, 1994), 11th Dist. No. 93-G-1787, 1994 Ohio App. LEXIS 2752, *6.

{¶86} Here, Deputy Bilicic testified Mr. Pemberton invited him to go inside his house so that he could show him that his intoxication was a result of the large quantity of alcoholic beverages he consumed after he arrived at his house. According to Deputy Bilicic, Mr. Pemberton said to him: "I'll show you," and then opened the door and walked

inside, with Deputy Bilicic following him two feet behind. Mr. Pemberton's account of what happened differed. He denied inviting the officer into his house. He testified that he was going inside the house to put down his clothes, and, after he walked inside, he heard the screen door open and saw that the officer followed him inside. Both of them testified, however, that once they were inside the house, Mr. Pemberton opened the refrigerator to show Deputy Bilicic what he had been drinking and also showed him his trash can.

{¶87} Reviewing the conflicting testimony, we bear in mind that at a hearing on a motion to suppress, "the trial court functions as the trier of fact, and, therefore is in the best position to weigh the evidence by resolving factual questions and evaluating the credibility of any witnesses." *State v. Molek*, 11th Dist. No. 2001-P-0147, 2002-Ohio-7159, ¶24, citing *State v. Mills* (1992), 62 Ohio St.3d 357, 366. "The court of appeals is bound to accept factual determinations of the trial court made during the suppression hearing so long as they are supported by competent and credible evidence." *State v. Hines*, 11th Dist. No. 2004-L-066, 2005-Ohio-4208, ¶14, citing *State v. Searls* (1997), 118 Ohio App.3d 739, 741. When reviewing a ruling on a motion to suppress, we give "due deference to the trial court's assignment of weight and inferences drawn from the evidence." *State v. Perl*, 11th Dist. No. 2006-L-082, 2006-Ohio 6100, ¶9, citing *State v. Hummel* (2003), 154 Ohio App.3d 123, 2003-Ohio-4602, ¶11.

{¶88} In finding the officer's entry to be with consent, the trial court resolved the conflicting testimony in the state's favor. The trial court apparently believed the officer's account of the event to be more credible than that of Mr. Pemberton.

{¶89} The transcript reflects both Deputy Bilicic and Mr. Pemberton testified that while the officer was inside his house, Mr. Pemberton voluntarily showed him his refrigerator and trash can. The voluntariness of his conduct, and more importantly, a lack of protests or objections by Mr. Pemberton during the officer's presence in his house, corroborates Deputy Bilicic's account of how he entered the house. The trial court's finding that Deputy Bilicic entered Mr. Pemberton's residence with his consent is supported by competent and credible evidence, and we cannot conclude this finding is "clearly erroneous."

{¶90} We further note that Deputy Bilicic's conduct while inside Mr. Pemberton's residence did not exceed the scope of Mr. Pemberton's consent. "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness -- what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Kaseda* at ¶28, citing *Florida v. Jimeno* (1991), 500 U.S. 248, 251. Here, the scope of Mr. Pemberton's consent was limited to an examination of the evidence that would support his claim that his intoxication was the result of the alcoholic beverages he had been consuming in his house after the accident. It is undisputed that Deputy Bilicic left the house immediately after Mr. Pemberton showed him his refrigerator and trash can in the kitchen. His presence in the house did not exceed the scope of consent given by Mr. Pemberton.

{¶91} **Probable Cause to Arrest**

{¶92} After viewing the contents of Mr. Pemberton's refrigerator and trash can, which revealed no apparently recent alcoholic beverage consumption, Deputy Bilicic asked him to go outside for field sobriety tests. While on his driveway, Deputy Bilicic

conducted the HGN, which indicated intoxication. Mr. Pemberton refused to take the walk and turn and the one leg tests, but agreed to take a portable breath test, which showed a blood alcohol content of .170. Mr. Pemberton refused any additional testing afterwards. Deputy Bilicic decided then to place him under arrest, "based on the crash and [his] observations." The question presented here is whether Deputy Bilicic had probable cause to arrest under these circumstances.

{¶93} "[A] police officer has probable cause to arrest for driving under the influence where the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a prudent man in believing that the accused had operated the vehicle while under the influence. In making this determination, each drunk driving case must be decided on its own particular and peculiar facts." *State v. Zaken*, 2006-A-0036, 2007-Ohio-2306, ¶16, citing *State v. Hummel*, 154 Ohio App.3d 123, 2003-Ohio-4602, ¶30. See, also, *State v. Schmitt*, 101 Ohio St.3d 79, 2004-Ohio-37, ¶8. "Probable cause is a flexible, common sense standard dealing with probabilities, not certainties." *State v. Kock*, 11th Dist No. 2008-L-067, 2008-Ohio-5859, ¶20, citing *Texas v. Brown* (1983), 460 U.S. 730, 735 and *Brinegar v. United States* (1949), 338 U.S. 160, 175. In determining whether an officer has probable cause, a reviewing court must analyze the totality of the circumstances. *Kock at* ¶20, citing *State v. Brown*, 11th Dist. No. 2006-L-040, 2007-Ohio-464, ¶22.

{¶94} In *State v. Filchock* (2006), 166 Ohio App.3d 611, 2006-Ohio-2242, this court reviewed a case with similar factual circumstances. There, the arresting officer did not personally observe the defendant operate the vehicle while under the influence. Instead, he received a radio report regarding a serious accident in which the

defendant's vehicle rear-ended another vehicle. Based on information obtained from the defendant's license plate found at the crash scene, the officer went to the defendant's home to further investigate the accident. The officer observed the defendant's damaged truck and noticed that the defendant smelled of alcohol about his person, his speech was slow and deliberate, and his eyes were bloodshot. The defendant admitted to having consumed one drink at home but denied consuming any alcohol prior to returning home. He refused to submit to field sobriety tests and the officer arrested him for OVI. We concluded that the officer had probable cause to arrest based on the radio report of the defendant's involvement in a serious accident and his observations of the defendant's person, even though he had not personally observed him operating his vehicle. Id. at ¶64.

{¶95} Here, Detective Bilicic responded to a dispatch regarding a crash in which Mr. Pemberton's vehicle rear-ended Ms. Calloway's vehicle. Detective Bilicic interviewed Ms. Calloway, who described Mr. Pemberton as "stumbling around," "very drunk," and his speech as "very slurred." The officer observed her vehicle to have sustained heavy damages to the rear. At Mr. Pemberton's residence, he also observed heavy damage in the front windshield and the hood of Mr. Pemberton's vehicle. When speaking to Mr. Pemberton, the officer smelled a strong odor of alcohol on his breath; noted his bloodshot eyes and slurring speech; and observed his stumbling.

{¶96} Mr. Pemberton insisted he only consumed the alcohol at home after the accident. However, given the brief lapse of time between the crash and the officer's arrival at his residence, and the lack of any open or partially consumed alcoholic containers in his house, Officer Bilicic reasonably discredited his claim. Although he

conducted the HNG test and the portable breath test on Mr. Pemberton, the officer testified that he arrested Mr. Pemberton based on the crash, which caused serious damages on both vehicles, and his observations of Mr. Pemberton's person. We further note the officer's observations are corroborated by the descriptions given by the victim, who is presumed reliable. *State v. Claiborne* (Jan. 24, 1997), 2d Dist. No. 15964, 1997 Ohio App. LEXIS 195, *10 (an identified citizen informant who is a victim of or witness to a crime is presumed reliable). Given the totality of the evidence, therefore, we conclude that at the moment of the arrest, the officer had sufficient information to cause him to believe Mr. Pemberton was driving under the influence. Consequently, probable cause existed to arrest Mr. Pemberton.

{¶97} Although we have addressed the issue raised by Mr. Pemberton regarding whether the officer's entry of his residence was with consent, we note that all the information forming the officer's belief that Mr. Pemberton was driving under the influence was obtained *prior to* his entry of Mr. Pemberton's residence.

{¶98} Mr. Pemberton also complains the portable breath test was not reliable evidence. Regarding the portable breath test, the state acknowledges that the test is not a reliable indicator of impairment and also that the test is not approved by the Ohio Department of Health as a breath testing device. O.A.C. 3701-53-02. The state recognizes it is well-established that the test is not admissible for probable cause determination or for trial. See *State v. Delarosa*, 11th Dist. No. 2003-P-0129, 2005-Ohio-3399, ¶55. Although the officer testified he conducted the portable breath test, the record does not reflect the state attempted to have this evidence admitted for either probable cause determination or for trial.

{¶99} **Whether the HGN Test was Administered in Substantial Compliance**

{¶100} Mr. Pemberton also maintains the HGN test was not administered in substantial compliance of the standard procedures, and therefore the officer's testimony regarding the test should have been suppressed.

{¶101} Regarding the HGN test, Deputy Bilicic testified that he had received training on this test and had proper certification; that he was familiar with the National Highway Traffic Safety Administration ("NHTSA") manual regarding its proper administration; and that the HGN test he conducted on Mr. Pemberton was consistent with the requirements of the NHTSA manual. The officer testified that he instructed Mr. Pemberton to stand, face him, put his hands on his cheeks, hold his head still, and follow the officer's finger with his eyes without moving his head. Deputy Bilicic used a flashlight to see Mr. Pemberton's face and held the flashlight off to the side to avoid shining it directly into Mr. Pemberton's eyes. The officer then held a finger, 12 inches away, in the center of Mr. Pemberton's face, before moving it to the left and holding it there for two seconds. He did the same for the right eye, again looking for a jerking in the eyes. He observed "the eyeball bouncing, which is the lack of smooth pursuit," an indication of impairment. He then checked for distinct sustained nystagmus and observed it in each eye, which again indicated alcohol impairment. The officer then performed the third part of the test -- "nystagmus prior to 45 degree," during which he observed in both eyes distinct nystagmus before reaching 45 degrees.

{¶102} Mr. Pemberton complains that the officer used his finger as the stimulus instead of a pencil or penlight as mentioned in the NHTSA manual; that the test was conducted in the dark; and that the officer instructed him to hold his hands on his

cheeks. Having reviewed the officer's testimony, we are satisfied his administration of the test was in substantial compliance with the NHTSA standards, pursuant to R.C. 4511.19(D)(4)(b). The use of a pencil or penlight as the stimulus is suggestive only and we fail to see how the officer's use of a finger as opposed to a pencil or penlight would affect the test result. Although the test was conducted in the evening, the officer used a flashlight for illumination purposes. Finally, nothing in the NHTSA manual regulates where the subject's hands are to be placed and we fail to see how the placement of the subject's hands on his or her cheeks would impact the test result.

{¶103} **The Officer's Alleged Failure to Advise Consequences of Chemical Test**

{¶104} After Deputy Bilicic arrested Mr. Pemberton, he transported him to the sheriff's office, where Mr. Pemberton was requested to take a BAC Data Master Test but refused. At the suppression hearing, when Deputy Bilicic was asked if he read to Mr. Pemberton the BMV 2255 form, which advises a driver the consequences of refusing a chemical test, Deputy Bilicic testified that he read the form to Mr. Pemberton while he was in his patrol car before he transported him to the sheriff's office. Mr. Pemberton contends on appeal that the officer failed to properly advise him of the consequences of refusing to take the chemical test.

{¶105} R.C. 4511.19 states in pertinent part: "(A)(1) No person shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, any of the following apply: (a) The person is under the influence of alcohol, a drug of abuse, or a combination of them."

{¶106} R.C. 4511.19 (A)(2) states:

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

{¶108} "(a) Operate any vehicle, streetcar, or trackless trolley within this state while under the influence of alcohol, a drug of abuse, or a combination of them;

{¶109} "(b) Subsequent to being arrested for operating the vehicle, streetcar, or trackless trolley as described in division (A)(2)(a) of this section, being asked by a law enforcement officer to submit to a chemical test or tests under section 4511.191 of the Revised Code, and being advised by the officer in accordance with section 4511.192 of the Revised Code of the consequences of the person's refusal or submission to the test or tests, refuse to submit to the test or tests."

{¶110} As we explained in *State v. Turner*, 11th Dist. No. 2007-P-0090, 2008-Ohio-3898, "R.C. 4511.19(A)(2) prohibits a person who has been convicted of a prior OVI offense in the previous 20 years from (1) operating a motor vehicle under the influence of alcohol and (2) refusing to submit to a chemical test after being asked to do so by a law enforcement officer." Id. at ¶41.

{¶111} "Violations of R.C. 4511.19(A)(1)(a) and R.C. 4511.19(A)(2) are both classified as the offense of operating a motor vehicle under the influence of alcohol. For certain repeat offenders, R.C. 4511.19(A)(2) adds the additional element of refusing to submit to a chemical test. The distinction between these offenses is that the minimum, mandatory jail terms are greater for a violation of R.C. 4511.19(A)(2) than they are for a violation of R.C. 4511.19(A)(1)(a)." Id. at ¶42.

{¶112} Here, Mr. Pemberton was charged with both offenses under R.C. 4511.19(A)(1)(a) and R.C. 4511.19(A)(2). However, he was only convicted of the former offense.

{¶113} We do not believe the brief lapse of time between the officer's reading of the BMV Form 2255 while Mr. Pemberton was still in the officer's patrol car and the actual request of the chemical test at the sheriff's office renders the requisite advice invalid. More importantly, even if the advice had been improperly provided, Mr. Pemberton was *not* convicted of an operation of a vehicle under the influence of alcohol under R.C. 4511.19(A)(2), and therefore, he suffered no prejudice from any alleged impropriety. Accordingly, the issue of whether the officer properly advised him of the consequences of refusing to take the chemical test is immaterial.

{¶114} For all the foregoing reasons, Mr. Pemberton's assignment of error is overruled.

{¶115} The judgment of the Chardon Municipal Court of Geauga County is affirmed.

TIMOTHY P. CANNON, J., concurs,

DIANE V. GRENDELL, J., concurs in judgment only.