[Cite as *State v. Matzinger*, 2017-Ohio-324.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

STATE OF OHIO,	:	
	:	Case No. 16CA4
Plaintiff-Appellee,	:	
	:	
vs.	:	DECISION AND JUDGMENT
	:	ENTRY
VICTORIA MATZINGER	:	
	:	
Defendant-Appellant.	:	**Released: 01/19/17**

APPEARANCES:

Jessica G. D'Varga, The Law Offices of Saia & Piatt, Inc., Columbus, Ohio, for Appellant.

Paul G. Bertram, III, Marietta City Law Director, and Daniel Everson, Marietta City Assistant Law Director, Marietta, Ohio, for Appellee.

McFarland, J.

{¶1} Victoria Matzinger appeals the journal entry of judgment entered on September 17, 2015 in the Marietta Municipal Court. On June 21, 2015, Appellant was stopped for operating her vehicle left of center and ultimately arrested for operating a motor vehicle under the influence of alcohol, pursuant to R.C. 4511.19. She subsequently filed a motion to suppress which came on for hearing on September 14, 2015, which the trial court overruled.

{¶2} On appeal, Appellant argues the trial court erred in its finding that field sobriety tests were properly administered and documented. She also argues the

trial court erred in its finding that there was reasonable suspicion to remove her from the vehicle and finding probable cause for her arrest. Upon review of the record and relevant Ohio law, we find no merit to the two assignments of error. Accordingly, we overrule both assignments of error and affirm the judgment of the trial court.

FACTS

{¶3} Here, the Appellant was traveling northbound on S.R. 7 in Washington County when Trooper Seabolt of the Ohio State Highway Patrol observed her failing to stay within marked lanes and weaving within her own lane of travel. He initiated a traffic stop which turned into an investigation as to whether Appellant was operating her vehicle under the influence of alcohol. Appellant was charged with a violation of R.C. 4511.19. She entered a not guilty plea and filed a motion to suppress.

{¶4} The suppression motion was heard on September 14, 2015. The State presented the testimony of Trooper Seabolt. The State also played relevant portions of the DVD video and audio recording which Trooper Seabolt identified as being a true and accurate copy of the DVD he submitted to the Marietta City Law Director's Office. Appellant did not testify or offer any evidence. On September 17, 2015, the trial court filed its journal entry of judgment denying

Appellant's motion. Appellant proceeded to a jury trial on January 14, 2016, was found guilty, and sentenced by the trial court.

{¶5} This timely appeal followed. Where relevant below, we cite to the transcript of the suppression hearing for additional facts.

ASSIGNMENTS OF ERROR

> "I. THE TRIAL COURT ERRED IN FINDING THAT THE WALK & TURN AND ONE LEG STAND WERE PROPERLY ADMINISTERED AND CLUE (SIC.) PROPERLY DOCUMENTED."
>
> "II. THE TRIAL COURT ERRED IN FINDING THAT THERE WAS REASONABLE SUSPICION TO REMOVE MS. MATZINGER FROM THE VEHICLE TO PERFORM FIELD SOBRIETY TESTING AND PROBABLE CAUSE FOR HER ARREST FOR OVI."

STANDARD OF REVIEW

{¶6} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Davis*, 4th Dist. Athens No. 15CA26, 2016-Ohio-3539, ¶ 18; *State v. Gurley*, 54 N.E.2d 768, 2015-Ohio5361, (4th Dist.), citing *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, ¶ 100. At a suppression hearing, the trial court acts as the trier of fact and is in the best position to resolve factual questions and evaluate witness credibility. *Id.; State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. Thus, when reviewing a ruling on a motion to suppress, we defer to the trial court's findings of fact if they are supported by competent, credible evidence. *Gurley* at

¶ 16, citing *State v. Landrum*, 137 Ohio App.3d 718, 722, 739 N.E.2d 1159 (4th Dist.2000). However, "[a]ccepting those facts as true, we must independently determine whether the trial court reached the correct legal conclusion in analyzing the facts of the case." *Id.*, citing *Roberts* at ¶ 100.

Assignment of Error I- Should the Field Sobriety Tests Have Been Suppressed?

{¶7} R.C. 4511.19(D)(4)(b) governs the admissibility of field sobriety tests and states:

> "In any criminal prosecution * * * for a violation of division (A) or (B) of this section, * * * if a law enforcement officer has administered a field sobriety test to the operator of the vehicle involved in the violation and if it is shown by clear and convincing evidence that the officer administered the test in substantial compliance with the testing standards for any reliable, credible, and generally accepted field sobriety tests that were in effect at the time the tests were administered, including, but not limited to, any testing standards then in effect that were set by the national highway traffic safety administration, all of the following apply:
>
> (i) The officer may testify concerning the results of the field sobriety test so administered.
>
> (ii) The prosecution may introduce the results of the field sobriety test so administered as evidence in any proceedings in the criminal prosecution or juvenile court proceeding.
>
> (iii) If testimony is presented or evidence is introduced under division (D)(4)(b)(i) or (ii) of this section and if the testimony or evidence is admissible under the Rules of Evidence, the court shall admit the testimony or evidence and the trier of fact shall give it whatever weight the trier of fact considers to be appropriate. *State v. Harrington*, 4th Dist. Jackson No. 16CA2, 2016-Ohio-4930, ¶ 19."

{¶8} Thus, "the results of the field sobriety tests are not admissible at trial unless the state shows by clear and convincing evidence that the officer administered the test in substantial compliance with NHTSA guidelines." *Harrington, supra,* quoting *State v. Codeluppi,* 139 Ohio St.3d 165, 2014-Ohio-1574, 10 N.E.3d 691, ¶ 11. If the state fails to introduce evidence of "a reliable field sobriety testing standard, either via testimony or through the introduction of the applicable manual, the state has failed to meet its burden of demonstrating [substantial] compliance." *Harrington, supra*, quoting *State v. Aldridge,* 3rd Dist. Marion No. 9–13–54, 2014-Ohio-4537, ¶ 18, quoting *State v. Kitzler,* 3rd Dist. Wyandot No. 16–11–03, 2011-Ohio-5444, ¶ 13. As the *Aldridge* court explained:

> " 'It is only logical that in order to prove substantial compliance with a given standard, there must be at minimum some evidence of the applicable standard for comparative purposes. Accordingly, where the suppression motion raises specific challenges to the field sobriety tests, the state must produce some evidence of the testing standards, be it through testimony or via introduction of the NHTSA or other similar manual or both.' *[Kitzler* at ¶ 13], quoting *State v. Bish,* 191 Ohio App.3d 661, 2010-Ohio-6604, 947 N.E.2d 257, ¶ 27 (7th Dist.). 'Testimony about how the trooper performed the field sobriety tests presents only half the picture.' *Id.,* quoting *Bish,* [191 Ohio App.3d 661] 2010-Ohio-6604 [947 N.E.2d 257], at ¶ 28. Without any standards to which to compare the trooper's procedure, it is impossible to determine whether those tests are admissible. *Id.*" *Id.* at ¶ 18.

{¶9} Prior to performing the field sobriety tests, Appellant notified Trooper Seabolt that she had a steel rod and several pins in one of her legs, and that

performing any type of balancing or walking test could be difficult. However, the trooper proceeded to administer the tests. Appellant directs us to the Eighth District Court of Appeals' decision in *State v. Gettings*, 8th Dist. Cuyahoga No. 99556 2013-Ohio-3536, wherein the appellate court held that when an officer is advised of leg problems, the problems should be taken into consideration and failing to do so should lead to suppression of the field sobriety testing. Based on the analysis set forth in *Gettings*, Appellant argues that the trial court should have suppressed the walk-and-turn test and the one-leg stand test in this case.

{¶10} The State of Ohio responds first by pointing out the National Highway Traffic Safety Administration ("NHTSA") manual was never made part of the trial court record or the record on appeal. As such, the State argues that regularity of the proceedings should be presumed. The State asks us to presume that the trial court substantially complied with the NHTSA standards and decline independent review of the administration and scoring of Appellant's field sobriety tests. However, while the State may show substantial compliance with standardized field sobriety tests by introducing the NHTSA manual, it need not necessarily introduce the NHTSA manual into evidence in every case. *Harrington, supra,* at ¶ 20, citing *State v. Perkins,* 10th Dist. Franklin No. 07AP–924, 2008-Ohio-5060, ¶ 16; *State v. Barnett,* 11th Dist. Portage No. 2006–P–0117, 2007-Ohio-4954, ¶ 25. Instead, the state may demonstrate substantial compliance through witness testimony to explain

the NHTSA standards and the officer's compliance with those standards. *Harrington, supra; Barnett* at ¶ 23. Thus, "[e]vidence of the NHTSA procedures, either by witness testimony or the manual itself, is sufficient." *Id.* at ¶ 25. Suppression of field sobriety tests is warranted when the State fails "to present any evidence whatsoever to demonstrate that the field sobriety tests were conducted in either substantial or strict compliance with the NHTSA standards." *Harrington, supra*, at ¶ 21, quoting *Gates Mills v. Mace*, 8th Dist. Cuyahoga No. 84826, 2005-Ohio-2191, ¶ 24. As such, we proceed to consideration of whether or not the evidence at suppression demonstrates that Trooper Seabolt substantially complied with NHTSA standards when administering the field sobriety tests at issue.

{¶11} The State also points out that *Gettings* is persuasive, not mandatory authority, and urges reliance on *State v. Hall*, 2nd Dist. Clark No. 05CA0006, 2005-Ohio-6672. The State argues: (1) there is no evidence that Trooper Seabolt noticed any irregularities in Appellant's walking or balance before he initiated field sobriety testing; (2) the information about Appellant's leg was not documented or corroborated; and (3) NHTSA standards do not require an officer to inquire about an OVI suspect's potential medical conditions or to adjust scoring to reflect consideration of the medical condition. The State concludes Trooper Seabolt substantially complied with the NHTSA standards and the field sobriety tests were properly admitted as evidence.

{¶12} In *Gettings*, the defendant pleaded no contest to operating a vehicle while intoxicated and was found guilty. He appealed the denial of his motion to suppress, arguing in part that the trial court erred in determining that the arresting officer performed the field sobriety tests in compliance with national guidelines. Gettings argued that the NHTSA manual provides restrictions on performing the one-leg stand test and the walk-and-turn test on people with knee issues.

{¶13} During the suppression hearing, Gettings testified that he suffered from knee problems and that he walked with a limp. Specifically, Gettings testified that he told the officer that he was going to "fail because my knees—I have a torn meniscus in my right leg." The officer admitted, under cross-examination, that he was aware that Gettings had knee issues and that his report documented those problems. In response to the testimony of Gettings, Officer Santiago was recalled to the witness stand by the State and testified that Gettings "said he had some knee issues from wrestling back in high school and [Gettings] stated that he had no problem standing or walking."

{¶14} The Eighth District Appellate court held:

> "We cannot ignore the fact that the one-leg-stand test and the walk-and-turn tests were performed by Gettings without Santiago's consideration of, and adaptation for, Gettings' alleged physical problem. Though the officer and Gettings provided conflicting testimony as to the seriousness of Gettings' knee problems, both sides admit that prior to administering those tests, Gettings advised Santiago that he had knee issues, which Santiago then documented in his report." *Id.* at 20.

{¶15} Gettings found the holding of *State v. Lange,* 12th Dist. Butler No. CA2007–09–232, 2008-Ohio-3595, to be persuasive. There Lange attempted to perform the walk-and-turn test but had problems successfully completing the test before he refused to continue. When the officer began to explain the one-leg-stand test to him, the defendant informed the officer that he had leg problems and the officer halted the test. The court determined that the "purpose of the walk and turn test to assist the officer in determining possible impairment is thwarted by the officer's lack of knowledge of appellee's leg problem." The Twelfth District then upheld the suppression of the results of the walk-and-turn field sobriety test because the administering officer failed to consider or adapt the test for the defendant's leg problems. The *Gettings* court further observed:

> "Gettings informed Santiago that he had knee problems that Santiago testified he documented in his report. Additionally, Santiago read a portion of the NHTSA manual, which notes problems with both the walk-and-turn and the one-leg-stand tests in individuals with "leg" problems. Santiago acknowledged this restriction during the oral hearing. However, even knowing all of the above, Santiago provided no consideration or adaptation of the test for Gettings' knee problems. The city provided no evidence to the court as to what adaptations or consideration the NHTSA manual requires, they simply disputed the extent of Gettings' knee problem. *Id.* at 22.
>
> Here, the city has failed to prove that the walk-and-turn and one-leg-stand field-sobriety tests were performed in substantial compliance with the NHSTA requirements. Accordingly, the trial court erred in failing to suppress the results of both the walk-and-turn and one-leg-stand field-sobriety tests. *Id*. at 23. *Lange, supra*; *State v. Baker*, 12th Dist. Warren No. CA2009–06–079, 2010-Ohio-1289." *Id.* at 23.

{¶16} In *Hall*, cited by the State, Hall appealed from his conviction for operating a motor vehicle while under the influence of alcohol (OMVI). One of his arguments raised on appeal of the denial of his motion to suppress was that Hall had a prior injury which should have caused the officers to not administer the one-leg stand and walk-and-turn tests because "the NHTSA manual instructs officers to ask their subjects whether the subject suffers from any medical or physical condition that might impair their ability to complete the test, and goes on to list several example conditions that do impact the test results."

{¶17} In its decision denying Hall's motion, the trial court found that "[w]hile attempting the one-leg stand, the defendant told officers he had been paralyzed ten years ago." In their written statement to the court, Officer Repik stated: "I asked if (Defendant) had any physical defects, which would prevent him from doing (the) test, and he said he had been paralyzed ten years ago and had a problem with his balance. He said he would try (the) test anyway."

{¶18} In its decision, the *Hall* court observed that Hall had not cited the provisions of the NHTSA Manual upon which he relied. The appellate court noted:

> "The 2004 Edition of the Manual states that a subject's "back, leg or middle ear problems" may produce difficulty in performing the one-leg stand test. (Section VIII-12). Further, a "suspect's age (and) weight" may interfere with his performance of the walk and turn test. (Section VIII-8). The NHTSA Manual does not require inquiries

> concerning such conditions. Neither does it limit or avoid giving the tests on account of them. However it happened, the record shows that the officers were aware of Defendant's alleged physical defects. That permitted Defendant to question the judgments the officer made concerning Defendant's performance of those tests in relation to the probable cause to arrest issue, which is the issue to which compliance with the NHTSA Manual expressly applies. *State v. Homan*, 89 Ohio St.3d, 421, 2000-Ohio-212, 732 N.E.2d 952 (superseded by statute as stated in *State v. Bozcar*, 113 Ohio St.3d 148, 2007-Ohio-1251, 863 N.E.2d 155.) We cannot find that the trial court erred when, absent any evidence of Defendant's alleged defect or the officer's failure to consider it, the court found substantial compliance with the NHTSA Manual in administering these tests."

{¶19} In *State v. Rabe*, 12th Dist. Clermont No. CA2013-09-068, 2014-Ohio-2008, the appellate court found that the trooper substantially complied with NHTSA requirements when administering the field sobriety tests, despite Rabe's arguments otherwise in a motion to suppress. The appellate court held that review of the trooper's testimony and the video demonstrated that the trooper properly explained the testing to Rabe, and properly directed Rabe in taking each test. The appellate court found:

> "Trooper Untied followed NHTSA guidelines by discussing any possible medical conditions with Rabe, and Rabe informed Trooper Untied that he had inner ear problems, an injured rotator cuff, and bulging disks in his back. Rabe also informed Trooper Untied that he had taken a sleeping pill that evening. Trooper Untied's testimony and the video demonstrate that Trooper Untied took Rabe's medical impairments into consideration when conducting the field sobriety tests. For example, at one point during the one-leg-stand test, Trooper Untied gave Rabe the option of using either leg on which to balance because Rabe complained that his pinched nerve made it difficult to stand on his right leg. However, at no other time did Rabe state that he was unable to perform any of the tests because of his medical

> conditions, other than stating that his back hurt during the one-leg-stand test. There is no indication in the record that Rabe was unable to perform the tests or that Rabe's alleged medical conditions made the results of the tests unreliable or skewed." *Id.* at ¶¶ 27-28.

{¶20} Based on the facts of the case, the appellate court found the State carried its burden to demonstrate substantial compliance with the NHTSA requirements so that the tests were admissible and Rabe's motion to suppress was properly overruled.

{¶21} In *State v. Falconer*, 5th Dist. Stark No. 2011CA0023, 2012-Ohio-2293, the appellant also argued his HGN test should have been suppressed because he suffered from a medical condition that could affect his eyes and that affected the results. The appellate court noted the trooper's testimony as follows:

> " 'During the lack of smooth pursuit test I did not notice either of those clues in Mr. Falconer's eye, eyes rather, but not because it wasn't there it may have been there it may not have been there but because um Mr. Falconer was unable or did not follow my instructions and did not follow the stimulus as I requested.' Trooper Maier stated he found four clues out of six and appellant 'could not complete the test correctly.' On cross-examination, Trooper Maier admitted that appellant's medical condition called 'palsy' was familiar and recalled seeing that appellant's face on one side 'was kind of drooping.' "

{¶22} The appellate court noted, however, that Falconer did not present any evidence on his medical condition and the possible effect on the HGN test. As such, upon review, the appellate court found the trial court did not err in denying the motion to suppress.

{¶23} Turning now to the transcript of proceedings in this case to determine whether the State demonstrated substantial compliance through Trooper Seabolt's testimony, i.e., whether his testimony explained the NHTSA standards and his compliance, Trooper Seabolt testified he was familiar with the NHTSA manual because he had been trained about it initially at the Ohio State Highway Patrol Academy, and he had been trained on the 2013 manual revision. His training with the NHTSA manual included training on standardized field sobriety tests. After Trooper Seabolt administered the Horizontal Gaze Nystagmus Test, he administered the one-leg stand test and the walk-and-turn test. He testified Appellant mentioned to him she had a problem with her left leg. As in Rabe, *supra*, Appellant was given an option with regard to her alleged left leg problem. Trooper Seabolt advised her that she was free to use whichever leg she felt the most comfortable using.

{¶24} Regarding the one-leg stand test, Trooper Seabolt testified that the one-leg stand test, a divided attention test, had 3 stages, and that he administered it on a reasonably dry, hard, level and nonslippery portion of the roadway; he explained and demonstrated to Appellant how to perform the test, (these instructions were actually repeated during his testimony); he timed and observed Appellant performing the test and that he observed 3 of the 4 clues (he actually described the four possible clues and testified that Appellant swayed while

balancing, raised her arms more than 6 inches for balance, and put her foot down 6 times; and that he completed an impaired driver report to document her performance after the test was completed.

{¶25} Regarding the walk-and-turn test, Trooper Seabolt testified it was another divided attention test with two stages, the initial instructions and the actual walking; it was administered at the exact same spot; he gave the instructions listed in the NHTSA manual (he actually described these instructions to the court); and he observed her from a safe distance and that she exhibited 4 out of 8 clues, which he described, and he compared his perceptions to the research contained in the NHTSA manual.

{¶26} We find the decisions rendered in *Hall*, *Rabe*, and *Falconer* to be more persuasive than the broad reasoning applied in *Gettings*, given that these courts recognize the unsubstantiated nature of the defendants' claims of medical conditions and issues possibly affecting the results of field sobriety tests ("FSTs"). Based on the above facts, we find Trooper Seabolt's testimony shows he substantially complied with the NHTSA manual when conducting Appellant's field sobriety testing. The evidence shows he had been trained on the NHTSA manual, was familiar with the updated version, and gave the instructions listed in the manual as well as compared the results of her tests to the research contained in the manual. The evidence further shows that Appellant informed Trooper Seabolt of

an alleged left leg problem, that she had had surgery on it and "had a plate and some screws in her leg." Trooper Seabolt told her she was free to use either leg to perform the one leg stand and the walk-and-turn tests. We further observe, at suppression, as in *Hall, Rabe*, and *Falconer,* there was no evidence presented regarding Appellant's alleged leg problem and its possible effect on the FST's at issue.

{¶27} Based on the foregoing, and absent evidence of the alleged left leg problem or Trooper Seabolt's failure to give consideration to it, we find the Trooper substantially complied with the NHTSA manual in conducting the field sobriety tests while investigating Appellant for possible impairment. As such, we overrule Appellant's first assignment of error and affirm the judgment of the trial court.

Assignment of Error II: Was there a reasonable suspicion to remove Appellant from the vehicle and conduct field sobriety testing?

{¶28} Under the second assignment of error, Appellant raises two separate and significant arguments. However, we note that she has failed to separately argue the assignments of error as required by App.R. 16(A)(7). While App.R. 12(A)(2) provides authority to disregard her assignments of error on this basis, we may still address the assignments in the interest of justice. *State v. Reye*, 9th Dist. Lorain No. 15CA010770, 2016-Ohio-3495, ¶ 5. *See also Comisford v. Erie Ins. Property Cas. Co.*, 4th Dist. Gallia No. 10CA3, 2011-Ohio-1373, ¶ 29. Because in

this case it appears to be a simple matter of form, we proceed to consider both arguments.

{¶29} Appellant first argues Trooper Seabolt did not have reasonable suspicion to remove her from the vehicle and conduct field sobriety testing. Appellant argues the testimony indicated only the odor of alcohol was nondescript and came from the vehicle in which there was also a passenger. She points out that Trooper Seabolt did not inquire as to other reasons besides alcohol consumption which could have caused her to have bloodshot eyes. She also asserts her admission of having consumed only one beer hours before she operated the vehicle does not create a reasonable suspicion that she was intoxicated.

{¶30} Trooper Seabolt testified he decided to remove Appellant from the vehicle for field sobriety testing based on the odor of alcohol, glassy and bloodshot eyes, and conflicting statements about the time she consumed alcohol. Trooper Seabolt testified Appellant first told him she consumed a beer at 8:00 p.m. The traffic stop was at approximately 1:45 a.m. on June 21, 2015. When he rephrased his question and inquired "how long it had been" since she consumed alcohol, she advised it had been about 3 hours, which would be closer to 10:45 p.m.

{¶31} The State of Ohio points out, in addition to the above, Trooper Seabolt, in the early morning hours, had already noticed erratic driving and marked

lane violations. The State concludes Trooper Seabolt had reasonable suspicion to request Appellant to exit the vehicle and submit to further investigation. We agree.

{¶32} A traffic stop may be based upon less than probable cause when an officer possesses reasonable suspicion that the driver has committed, or is committing, a crime, including a minor traffic violation. *State v. Brown*, 4th Dist. Scioto No. 13CA3585, 2016-Ohio-1453, ¶ 21; *State v. May*, 119 Ohio St.3d 406, 2008-Ohio-4539, 894 N.E.2d 1204, at ¶ 23; *State v. Williams*, 4th Dist. Ross No. 14CA3436, 2014-Ohio-4897, ¶ 8; *State v. Ward*, 4th Dist. Washington No. 10CA30, 2011-Ohio-1261, ¶ 13. To justify a traffic stop based upon reasonable suspicion, the officer must be able to articulate specific facts that would warrant a person of reasonable caution to believe that the driver has committed, or is committing, a crime, including a minor traffic violation. *Williams* at ¶ 8. A court that must determine whether an officer possessed probable cause or a reasonable suspicion to stop a vehicle must examine the totality of the circumstances. *Mays* at ¶ 7. "[T]he question whether a traffic stop violates the Fourth Amendment * * * requires an objective assessment of a police officer's actions in light of the facts and circumstances." *Bowling Green v. Godwin*, 110 Ohio St.3d 58, 2006-Ohio-3563, 850 N.E.2d 698, at ¶ 14. "[T]he existence of probable cause [or reasonable suspicion] depends on whether an objectively reasonable police officer would

believe that [the driver]'s conduct * * * constituted a traffic violation, based on the totality of the circumstances known to the officer at the time of the stop." *Id*. at ¶ 16, 850 N.E.2d 698.

{¶33} This court has previously determined that a traffic stop complies with the Fourth Amendment's reasonableness requirement if an officer possesses probable cause or reasonable suspicion to believe that a driver committed a marked lanes violation. *State v. Crocker*, 4th Dist. Scioto No. 14CA3640, 2015-Ohio-2528, 38 N.E.3d 369, ¶ 62; *State v. Littlefield*, 4th Dist. Ross No. 11CA3247, 2013-Ohio-481, ¶ 15.[1]

{¶34} Upon a lawful traffic stop, an officer must have reasonable suspicion of OVI before administering field sobriety tests. *State v. Koczwara*, 7th Dist. Mahoning No. 13MA149, 2014-Ohio-1946, ¶ 15; *State v. Keene*, 7th Dist. Mahoning No. 08MA95, 2009-Ohio-1201, ¶ 12; *State v. Wilson*, 7th Dist. Mahoning No. 01CA241, 2003-Ohio-1070, ¶ 17. The reasonable suspicion test looks at the "specific and articulable facts" provided by the officer and any rational inferences to be derived from those facts. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, (1968). *State v. Batchili*, 113 Ohio St.3d 403, 2007-Ohio-2204, 865 N.E.2d 1282, ¶ 19 (the test is based upon a collection of factors, not the individual factors themselves). An inchoate hunch or unparticularized suspicion about criminal

[1] Furthermore, it is well-established that an officer can ask a person to alight from a vehicle during a lawful traffic stop without having reasonable suspicion of any further criminal activity. *Koczwara, supra*, at ¶ 18; *Pennsylvania v. Mimms*, 434 U.S. 106, 111, 98 S.Ct. 330, (1977).

activity is not sufficient, but the suspicion required need not rise to the level of probable cause for arrest. *Koczwara, supra,* at ¶ 16; *Terry,* 392 U.S. at 27. We have also stated that an officer need not artfully articulate his justifications as we view the evidence in the record regarding the specific facts the officer stated that he had before him. *State v. Lockett,* 7th Dist. Columbiana No. 12CO13, 2013-Ohio-896, ¶ 30; *State v. Whitfield,* 7th Dist. Mahoning No. 99CA111, 2000-Ohio-2596, ¶ 7. The totality of the circumstances are evaluated to ascertain whether there was reasonable suspicion to believe appellant was intoxicated in order to detain him for field sobriety testing. *State v. Wilson*, 7th Dist. Mahoning No. 01CA241, 2003-Ohio-1070, ¶ 17.

{¶35} Based on Trooper Seabolt's testimony above, we find he possessed reasonable articulable suspicion to believe Appellant was intoxicated at the time of her stop. In addition to his testimony about her erratic driving, odor of alcohol, bloodshot eyes, the trial court found Appellant's conflicting statements to be a further factor indicating impairment. Based on the above, we find the trooper' s request that Appellant exit the vehicle and submit to field sobriety testing did not violate the Fourth Amendment. We find no merit to Appellant's argument hereunder.

Assignment of Error II: Was there probable cause to arrest Appellant for OVI?

{¶36} A police officer has probable cause for an arrest if the facts and circumstances within his knowledge are sufficient to cause a reasonably prudent person to believe that the defendant has committed the offense. *State v. Roar,* 4th Dist. Pike No. 13CA842, ¶ 28; *State v. Hollis*, 5th Dist. Richland No. 12CA34, 2013-Ohio-2586, ¶ 28; *State v. Cummings*, 5th Dist. Stark No. 2005-CA-00295, 2006-Ohio-2431, ¶ 15, citing *State v. Heston,* 29 Ohio St.2d 152, 280 N.E.2d 376 (1972). When evaluating probable cause to arrest for OVI, the totality of the facts and circumstances can support a finding of probable cause to arrest even where no field sobriety tests were administered. *Hollis, supra; State v. Homan*, 89 Ohio St.3d 421, 427, 732 N.E.2d 952 (2000)(superseded by statute). Furthermore, a police officer does not have to observe poor driving performance in order to affect an arrest for driving under the influence of alcohol if all the facts and circumstances lead to the conclusion that the driver was impaired. *Hollis, supra*; *State v. Harrop,* 5th Dist. Muskingum No. CT2000–0026, 2001 WL 815538 (July 2, 2001), citing *Atwell v. State,* 35 Ohio App.2d 221, 301 N.E.2d 709 (8th Dist.1973).

{¶37} Under the second assignment of error, Appellant also argues that the non-descript odor of alcohol, her admission to having drunk one beer hours earlier, and her failing of the field sobriety tests when they were not properly conducted or

scored does not create probable cause to arrest her for OVI. However, we have resolved the issue of the field sobriety testing above.

{¶38} Again, at the suppression hearing, Trooper Seabolt testified that he first noticed Appellant's erratic driving and marked lanes violations. Upon encountering Appellant in her vehicle, he noticed an odor of alcohol coming from the vehicle. He observed she had bloodshot and glassy eyes. He obtained an admission from her that she had been drinking. Based on these articulable facts, he requested field sobriety testing.

{¶39} Trooper Seabolt further testified when Appellant exited the vehicle, he smelled the odor of alcoholic beverage on her person. In his testimony, the Trooper next described the HGN test. He testified he observed 4 of 6 possible clues. After checking her eyes, he administered the one-leg stand test and the walk-and-turn test. As indicated above, he advised her she could use whichever leg she felt more comfortable using.

{¶40} During the one-leg stand test, he observed 3 of 4 possible clues. She swayed and raised her arms more than six inches for balance. She also put her foot down six times. During the walk-and-turn test, Appellant did not keep balance. She also started the test before he completed the instructions. Trooper Seabolt testified she exhibited 4 out of 8 clues of impairment on this test.

{¶41} Trooper Seabolt also testified he conducted the Romberg test, which involves having a person stand with feet together, arms down, head tilted, eyes closed, for 30 seconds. He testified as to one clue, that Appellant swayed more than 2 inches, side by side and front to back. All tests were conducted with substantial compliance to NHTSA standards.

{¶42} In conclusion at the hearing, Trooper Seabolt testified that Appellant's driving, his contact with her, and the field sobriety testing caused him to believe he had probable cause to arrest. Based on the facts and circumstances in the record, we find it was reasonable for Trooper Seabolt to believe Appellant had committed the offense of operating a motor vehicle under the influence of alcohol. We also find Trooper Seabolt had probable cause to make the arrest for OVI. We find no merit to Appellant's third and final argument.

{¶43} For the foregoing reasons, Appellant's second assignment of error is overruled. Accordingly, the judgment of the trial court which denied Appellant's motion to suppress is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Marietta Municipal Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Harsha, J.: Concurs in Judgment Only.
Hoover, J.: Dissents.

For the Court,

BY: _____
Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.