



in that any DUI testing done at Troop B Headquarters is suppressed. This includes the two standardized field sobriety tests and the results of the intoxalyzer breath test. The Court denies the part of the motion seeking to dismiss the case because of the alternative charging in the Complaint. The Defendant is charged with DUI (second) for operating or attempting to operate a vehicle while under the influence of alcohol or drugs with a blood or breath alcohol concentration as measured within two hours of the time of operating or attempting to operate a vehicle, of .08 or more. The alternative charge is that the Defendant operated or attempted to operate a motor vehicle under the influence of alcohol to a degree that rendered the Defendant incapable of safely driving a vehicle. The State may still proceed on the alternative charge of the DUI.

#### **FINDINGS OF FACT**

The Findings of Fact in this case are based on the Court's viewing of State's Exhibit No. 1, and the testimony at the hearing on the Defendant's motion. Further findings may be made as necessary in the Analysis/Discussion section.

1. At approximately 8:00 a.m., on January 1, 2009, the Defendant was stopped for speeding by a Kansas Highway Patrol Trooper in Topeka, Shawnee County, Kansas. The Defendant was driving a large sport-utility-vehicle (SUV) westbound on Interstate 70 at approximately First Street. The Defendant pulled off of I-70 at the McVicar exit and pulled over to the shoulder of the exit ramp, which was a down-hill incline.

2. The weather appears to be clear, sunny, and cold. The Trooper testified it was cold. The Defendant can be observed with his jacket/coat on as he stepped from the SUV. He later removes it for a short time and puts it back on. The wind can be heard blowing into the Trooper's

microphone.

3. The Trooper approached the SUV and observed multiple occupants. As the driver lowered his window, the Trooper asked that the rear driver's side window also be lowered so he could observe all the occupants. That was done. There were four other occupants in the SUV.

4. Upon request, the Defendant provided driver's license and other information. There was no difficulty in providing the requested information. The Defendant also confirmed his address for the Trooper.

5. The Trooper smelled the odors of alcohol and cologne emanating from the SUV. The Trooper asked the Defendant if he had been drinking. The Defendant answered that he had not been drinking. When told his eyes were bloodshot and again asked about drinking, the Defendant responded that he had not slept in three hours and had not been drinking. When later asked if he were tested, would he test zero alcohol, the Defendant indicated he might not test zero.

6. The Trooper asked the Defendant to step out of the SUV. The Trooper had drawn his weapon from its holster. It is not clear whether the Defendant knew the weapon was drawn. The Trooper's arm and weapon can be observed to be extended to the side and back of the Trooper as he shifted his body while the Defendant stepped out of the SUV. The Trooper places the weapon back in its holster.

7. As the Trooper engaged the Defendant with the questions and the request to step from the SUV, the Trooper advised the remaining occupants to keep their hands on their knees.

8. The Defendant stepped from the SUV and walked to the rear and stood between his SUV and the KHP patrol vehicle. He had a coat on. His gait and walking appear stable and normal, without any leaning, faltering or other problems. His speech is clear and understandable.

His speech is not slurred or mumbled.

9. The Trooper does a pat down of the Defendant for weapons. None was found. The Defendant was told more than once to keep his hands out of his pockets.

10. The Trooper testified that the Defendant was fairly cooperative early on. He noted that some comments by the Defendant about the speeding violation were a little argumentative.

11. The Trooper conducted the Horizontal Gaze Nystagmus (HGN) test. The Trooper testified - and it can be observed on the video - that the Defendant touched the top of the Trooper's pen with his finger. On the video, the Trooper can be observed giving various directions to the Defendant regarding the HGN test. However, there are also comments made by the Trooper to the Defendant about moving or not moving his chin, and whether the Defendant knows what his chin is. It appears that the Trooper did not give a command or two to the Defendant about moving or not moving his chin. This occurred during some vertical movement of the Defendant's head. As the commands switch to horizontal movements, the Trooper initially appeared to fail to tell the Defendant to not move his head, but follow only with his eyes. The Trooper scolds the Defendant and tells him to move only his eyes - without having told him that initially. The Trooper can be heard making various comments about various parts of the test, including nystagmus issues. The comments appear to be judgements or conclusions about the Defendant's performance on the HGN. This is not explained on the recording or during testimony at the hearing.

12. The Trooper, with the Defendant standing near the rear of the SUV, got into his patrol vehicle, backed it up, then moved it a little forward again. There is more space between the vehicles when the Trooper concludes moving his patrol vehicle. He also calls for back-up

officers. It appears that the Trooper was making space between the vehicles in order to do standardized field sobriety testing, but the movement of the patrol vehicle is not explained. The Trooper got out of his patrol vehicle and directed the Defendant to walk to the patrol vehicle. Again, there do not appear to be any problems with the Defendant's gait or walking.

13. Once the Defendant walked from his SUV to the patrol vehicle, the Trooper told the Defendant that he was taking him to Troop B headquarters for more testing. The Trooper also told the Defendant that he believed the Defendant had been drinking. There is verbal resistance as the Defendant told the Trooper he did not want to do any more testing. The Trooper and the Defendant cannot be seen during this exchange. The Trooper testified the Defendant physically resisted the Trooper's request to turn and place his hands on his head. The Trooper pulled out his tazer, activated the switch, but did not use the tazer. It is not clear whether the Defendant thought it was a handgun, rather than the tazer. The Defendant asked the Trooper if he was going to shoot him. The Trooper told the Defendant he is not messing around, and that he will shoot him. The Trooper was still working this stop alone. He testified that his goal was to keep the Defendant separate from the SUV occupants and take the Defendant for more testing.

14. The Trooper testified about officer safety concerns with the Defendant and the SUV occupants. However, the Trooper also testified that he did not want the Defendant to leave. He can be heard on the video telling what appears to be another trooper at Troop B headquarters that the Trooper had to draw on the Defendant because he thought the Defendant was going to run from him.

15. At least two back-up officers arrived. One is observed handling most of the activity with the SUV and its occupants. The other remains at the Trooper's patrol vehicle. At one point,

the Trooper talks to someone on a cell phone about picking up the occupants. The Defendant is at the patrol vehicle with the second, unseen, back-up officer.

16. The Trooper transported the Defendant to Troop B near I-70 and Fairlawn. The location of the stop at I-70 and McVicar to Troop B is not far.

17. The previously unseen officer accompanied the Trooper and the Defendant to Troop B in the patrol vehicle. The Trooper testified that the Defendant was hand-cuffed prior to transport and rode to Troop B in the front seat. Once at Troop B, the Defendant, the Trooper, and the back-up officer enter the Troop B building.

18. Once inside, there is audio of what appears to be the instructional and demonstration phases of two standardized field sobriety tests (SFST's): the walk-and-turn test and the one-legged stand test. There is also audio of the Defendant performing those tests. During the SFST's, the video camera is focused forward. What is seen is the front (hood) of the patrol vehicle, a sign that says "Lieutenant," and the Troop B building.

19. Following the SFST's, the sound recording is very sporadic. It is not clear whether that is intentional or coincidental. At times it appears nothing is being said and there may be nothing to record. At other times the microphone sounds come and go. At still other times, it appears that the microphone is turned off. Some of the context of the sporadic microphone traffic can be followed. It appears that the Defendant has to use the bathroom. The Defendant is told that can happen once some testing is done. There appears to be discussion about the start of the 20-minute observation period. There are statements by the Trooper about blowing enough air for what appears to be the intoxylizer test. There appears to be at least the start of the Defendant being advised of his rights pursuant to *Miranda v. Arizona*. Again, during all of this audio, the

camera is aimed at the Troop B building.

21. The Trooper and the Defendant leave the Troop B building, get into the patrol vehicle, and the Defendant is taken to the Shawnee County Detention Center.

22. The Trooper acknowledged that the Defendant did "pretty good" on the SFST's at the Troop B building. The Trooper testified about some general issue regarding the directions and that the Defendant "messed up" counting. There is no video to indicate the issue of the directions. However, the audio recording reflects that during the walk-and-turn test, the Defendant left out the number 5 in counting his steps after the turn, as part of counting the second nine steps. The Trooper's testimony was that there were no "quantifiable clues" on either of the two SFST's performed by the Defendant at Troop B.

23. While the Trooper identified the odors of alcohol and cologne emanating from the SUV, the Trooper did not testify that, once the Defendant left the SUV, the odors of alcohol and cologne were attributable to or came from the Defendant.

24. In response to the State's question, the Trooper testified that he believed the factors for his suspicion that the Defendant was driving under the influence of alcohol were: odor of cologne as a mask of the odor of alcohol; the Defendant's blood shot eyes; the high rate of speed (20 mph over the limit); and confusion about the stop. The Trooper did not state there was an admission to the use of alcohol.

25. On cross-examination, the Trooper acknowledged that he did not have probable cause to arrest based only on the HGN. He identified the totality of the factors present: odor of alcohol; possible masking of the odor of alcohol; blood shot eyes; confusion; and lack of cooperation. Again, the Trooper did not state that there was an admission to the use of alcohol. The Trooper

acknowledged that speeding, by itself, was not an indicator of driving under the influence. The Trooper acknowledged that the odor of alcohol and cologne could have come from the other four SUV occupants. The Trooper also acknowledged that lack of sleep and other factors could cause bloodshot eyes. No clear explanation of "confusion" was provided.

26. The Trooper testified that he had never previously transported DUI suspects from the roadside to Troop B for testing.

### POSITIONS OF THE PARTIES

#### DEFENDANT'S POSITION

The Defendant asserts that the Trooper lacked probable cause to arrest the Defendant. The Defendant cites *City of Norton v. Wonderly*, 38 Kan. App. 2d 797 (2007), as analagous to the facts of the case now before this Court. In *Wonderly*, the officer made certain observations of the driver, decided more investigation was necessary, and transported the driver to the sheriff's office for DUI testing. From its review, the Kansas Court of Appeals found insufficient evidence of probable cause for the officer to arrest based on the information he had at the time of the stop.

The Defendant in this case indicates that at the time the Defendant was arrested, the Trooper knew the following: that the Defendant was speeding; that the odors of alcohol and cologne were emanating from the SUV with four other occupants; and that the Defendant's eyes were bloodshot. The Defendant asserts the Defendant was arrested without probable cause to do so.

The Defendant does not specifically identify when he believes he was arrested in this case. However, with the reference, similarities to *Wonderly*, and argument, this Court believes the Defendant asserts he was arrested at the time the Trooper cuffed him and transported him to

Troop B to do the testing.

THE STATE'S POSITION.

The State responds by asserting that the Defendant was not under arrest at the time he was transported to Troop B. Here the State focuses on the two part test for determining the reasonableness of an investigative detention: whether the officer's actions were justified at the inception; and whether it was reasonably related in scope to the circumstances justifying the stop - or interference - in the first place. The State concludes that officers are permitted to investigate alcohol related offenses as long as they pursue the cause for the stop and investigation.

The State cites and provided a copy of an unpublished opinion, *State v. Barriger*, Case No. 102,741, 239 P.3d 1290 (Kan. Ct. App. October 1, 2010), as the authority for an officer, after detecting indicators of impairment, to move a DUI suspect off the roadway to a nearby lot to conduct field sobriety testing. Such law enforcement action would not convert a temporary seizure into an arrest.

The State also asserts that even if the Defendant had been arrested at the scene of the traffic stop, the Trooper possessed probable cause to arrest. The State cites several cases in support of its position. Further, the State cites a case supporting the finding of probable cause when only one field sobriety test was performed. The State does not believe *Wonderly* is analagous to the case now before the Court.

**ANALYSIS AND DISCUSSION**

There is no challenge to the stop of the Defendant for speeding in this case. The Trooper had the authority to stop the Defendant for speeding. The Trooper observed the Defendant commit a traffic offense. Therefore, the Trooper's actions in stopping the Defendant were

justified. It is what happened during the stop that is at issue in this matter.

### WAS THERE PROBABLE CAUSE TO ARREST THE DEFENDANT?

1. Was the Defendant effectively arrested at the scene of the traffic stop?

Because of the similarities, the Court believes the *Wonderly* case is analagous and helpful in deciding this case. In its discussion in *Wonderly*, the Kansas Court of Appeals identifies two steps involved. First, whether the Defendant was under arrest when he was transported to Troop

B. If so, the second step is to determine whether the Trooper had probable cause to arrest the Defendant.

*Wonderly* cites K.S.A. 22-2202(4), K.S.A. 22-2405(1) and Kansas case law to establish when a person is considered to be under arrest:

“... a person is considered under arrest by a law enforcement officer when the person is physically restrained or otherwise deprived of his or *sic* [her] freedom of action in any significant way or when he or she submits to the officer’s custody for the purpose of answering for the commission of a crime. [Citation omitted.] The test for determining whether a person was placed under arrest ‘is not based on the officer’s subjective belief. Rather, the test is whether ... an arrest has occurred is based on what a reasonable person would believe under the totality of the circumstances surrounding the incident’.[Citation omitted.]” *State v. Hill* 281 Kan. 136, 145, 130 P.3d 1 (2006).

“Courts have ruled in similar cases that when police transport a suspect involuntarily to a law enforcement center to conduct questioning or to further investigate a crime, such action effectively constitutes an arrest.” *City of Norton v. Wonderly*, 38 Kan. App. 2d 797, 804-805, (2007).

In *Wonderly*, the Kansas Court of appeals also reviewed *Dunaway v. New York*, 442 U.S. 200, 60 L.Ed. 2d 824, 99 S. Ct. 2248 (1979), and two Kansas cases citing *Dunaway*, *State v. Weis*, 246 Kan. 694, 792 P. 2d 989 (1990), and *State v. Parks*, 5 Kan. App. 2d 644, 623 P. 2d 516 (1981), to concluded that *Wonderly* was under arrest when the officer transported him - without his consent and in handcuffs - to the sheriff’s office to perform field sobriety tests. The Court of

Appeals noted that regardless of the officer's interests in continuing the investigation, when the officer took Wonderly to the sheriff's office in handcuffs, the officer committed "an act indistinguishable from a traditional arrest." The Kansas Court of Appeals determined that the officer's act violated Wonderly's Fourth Amendment rights unless the officer had probable cause to arrest him for DUI at the scene of the traffic stop. Under the totality of the circumstances, a reasonable person in the defendant's position would believe that he was under arrest.

In the case now before the Court, the Defendant was taken from the scene of the traffic stop to Troop B for the purpose of performing field sobriety tests. It is clear from the definition of arrest in *Hill*, and the application of facts in *Wonderly*, that the Defendant was physically restrained and deprived of his freedom. He told the Trooper several times he did not want to go to Troop B for testing. At one point, because of the Defendant's resistance, the Trooper drew his tazer and informed the Defendant he was not messing around and would shoot him. While the Defendant in this case may have been in the front seat of the patrol vehicle, he was cuffed and another officer accompanied the Trooper in his patrol vehicle to transport the Defendant to Troop B. There is no doubt that a reasonable person in the Defendant's position would believe he was under arrest.

There is no doubt that officers are permitted to investigate concerns of impaired drivers while investigating the traffic stop. Further, there is no doubt that such investigations may be extended as long as it is done properly. Further, officers are not expected to close their eyes to impaired driver information.

The State cites *Barriger* to indicate that it is permissible for an officer to move a DUI suspect a short distance to complete the stop. However, *Barriger* cites *Wonderly*, and appears to

acknowledge the differences in facts of *Barriger* and *Wonderly*. In *Barriger*, no handcuffs were used in relocating to the different location. Also, no weapon was drawn and no physical force was used. While no weapon was drawn in *Wonderly*, he was handcuffed and there was some belligerence and resistance. In the case now before the Court, physical force, handcuffs, and a weapon were all a part of taking the Defendant to Troop B for DUI testing against his will. The distance to Troop B from the scene of the traffic stop was not all that far, but it was a greater distance than the two blocks in *Wonderly*. That distance is not a factor for this Court. The unpublished nature of *Barriger* permits the Court to use the case as persuasive authority. The persuasiveness of *Barriger* supports this Court's belief and finding that the Defendant in this case was effectively under arrest when he was transported to Troop B for field sobriety testing.

The State also cited *United States v. White* 584 F. 3d 935 (10<sup>th</sup> Cir. 2009), regarding the moving of a suspect to a different location. The distance moved in *White* was farther than in this case or in *Wonderly*. However, the Court has already noted that the distance in this case is not an issue for this Court. While the suspects in *White* were directed where to go, there was no physical force or handcuffs used. The suspects were permitted to drive their own vehicle to a location near Alma, Kansas. The issue of being effectively under arrest is quite different for the Defendant in this case.

2. Was there probable cause to arrest the Defendant at the scene of the traffic stop?

Having made the determination that the Defendant was effectively under arrest when transported to Troop B, the next step is to determine whether there was probable cause to arrest the Defendant for DUI. Again, *Wonderly* provides direction.

“Probable cause for an arrest is a higher standard than reasonable suspicion for a stop

[Citation omitted.] Probable cause to arrest is that quantum of evidence that would lead a reasonably prudent police officer to believe that guilt is more than a mere possibility. *City of Norton*, 262 Kan. 199, 203-04, 936 P. 2d 1356 (1997.)” *City of Norton v. Wonderly*, 38 Kan. App. 2d at 808.

The information that the Trooper had at the time he effectively arrested the Defendant is: (1) a speeding violation; (2) a collective odor of alcohol and cologne emanating from five occupants of the SUV; (3) the Defendant’s bloodshot eyes; (4) confusion; (5) resistance; (6) some discussion that the Defendant might not test zero on an alcohol test; and (7) the Trooper’s assertion that the Defendant failed the HGN test. On the other side of this evaluation, the Trooper also acknowledged that the Defendant appropriately stopped his SUV when the Trooper was behind him. He did not fumble in getting his license and other information for the Trooper. His speech was not slurred or mumbled. His balance and walking appeared to be normal.

In reviewing the seven items listed above, along with the Findings of Fact and the video in this case, the Court believes that the real information the Trooper possessed at the scene of the traffic stop - what *Wonderly* described as “admissible evidence”- was the following: (1) speeding; (3) bloodshot eyes; (5) resistance; and (6) that the Defendant might not test zero on a breath test.

The remaining items (2), (4) and (7) were either unclear or not admissible evidence. Item (2), the collective odors of alcohol and cologne were never attributed directly to the Defendant. Item (4), confusion, was not discernable from the video, nor adequately explained at the hearing. Item (7), the HGN, is knowledge that the Trooper would be able to use as reasonable suspicion, but not probable cause for arrest in this case based on the lack of direction in doing the HGN test

and the Trooper's intent to obtain more testing to make his determination.

As to the Trooper's reliance on the HGN test, the State argues by analogy that an officer's use of the HGN test in the field even though it is inadmissible at a hearing or trial (without expert testimony) is the same as an officer's use of a PBT in the field even though it is similarly not admissible at a trial. The difficulty is that the Trooper apparently had not yet made up his mind that the Defendant should be arrested for DUI. He may have believed that the Defendant had consumed alcohol, but he indicated he wanted the additional testing to determine whether he should be arrested. The Trooper's testimony about his use and/or intent relating to the HGN appears to be inconsistent. Finally, as may have already been discussed above, and as noted in *Wonderly*, the fact the Trooper felt it necessary to continue his investigation at Troop B before formally arresting the Defendant for DUI supports the Court's conclusion that there was not yet probable cause to arrest the Defendant.

### **CONCLUSION**

Based on this discussion and the totality of the circumstances of the stop and what the Trooper knew and did at the stop, the Court finds that there was no probable cause to arrest the Defendant at the scene of the traffic stop. The Defendant was arrested without probable cause. The evidence obtained from the Defendant at Troop B violated his Fourth Amendment rights and must be suppressed.

### **ORDER AND NOTICE OF FURTHER HEARING**

Based on the above Findings of Fact, Analysis and Discussion and Conclusion in this matter, the Court orders the suppression of any DUI testing done at Troop B Headquarters. This

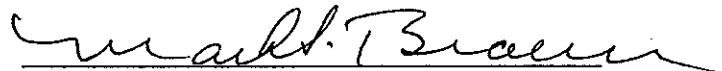
includes the Walk-and-Turn and One-Legged-Stand tests, as well as the intoxylizer breath test. Because of the alternative charging in the Complaint, the State may still proceed to trial in this case on the alternative charge relating to DUI (second), being under the influence of alcohol or drugs to a degree that renders the Defendant incapable of safely driving a motor vehicle.

This Memorandum Decision and Order shall serve as the Court's decision and order, no further journal entry being required.

**Therefore the matter is set for a standard DUI docket for scheduling of the trial.**

**That date is the 23rd day of February, 2011, at 8:00 A.M.**

Dated this 16<sup>th</sup> day of February, 2011.



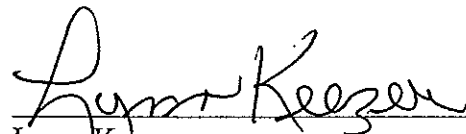
Mark S. Braun  
District Judge

CERTIFICATE OF MAILING

I hereby certify that a copy of the above and foregoing **MEMORANDUM  
DECISION AND ORDER** was mailed, hand delivered, or placed in the pick-up bin at  
the Clerk's office this 10<sup>th</sup> day of February, 2011, to the following:

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