IN THE MUNICIPAL COURT OF OVERLAND PARK, KANSAS

STATE OF KANSAS,

Plaintiff,

vs. Case No. 200*-025800

JOHN A. DOE,

Defendant.

MOTION TO SUPPRESS

COMES NOW Defendant, John A. Doe, by and through his attorney, Paul D. Cramm, and moves this Court for an order suppressing evidence illegally obtained during the course of the police investigation of the above referenced matter. In support of his motion, the Defendant states and alleges as follows:

FACTUAL BACKGROUND

1. On Friday, December 12, 200*, at 12:31 a.m., Officer Brown of the Overland Park Police Department was dispatched to an auto accident at 7425 Horton in Overland Park, Johnson County, Kansas. Upon arrival at the accident scene at 12:38:30 a.m., Officer Brown made contact with John Doe, who identified himself as the driver of the vehicle involved in the accident. Doe had already exited his vehicle prior to Officer Brown's arrival at the scene and explained to Officer Brown that he was traveling southbound on Horton prior to the collision. Doe stated that he believed he was driving too fast for the icy conditions of the roadway on the night in question and felt his vehicle begin to slide. He explained to Officer Brown that he "over corrected" when he felt his car begin to slide and struck another vehicle parked in the driveway facing Horton Street.

2. The foregoing verbal exchange is documented on Officer Horton's in-car video recording of the incident. Doe's voice is clear and articulate and he is heard speaking at a

distinct pace: neither unusually fast and agitated nor unusually slow and lethargic. Of note, Officer Brown observed no poor balance or coordination on the part of Mr. Doe and further made no observation of slurred speech or difficulty communicating. Officer Brown found no alcoholic beverage containers in Mr. Doe's vehicle. Upon direct inquiry by Officer Brown, Doe denied having consumed any alcohol prior to the accident.

3. Officer Brown reports that Doe's eyes appeared to be bloodshot and watery and further reports that he detected a "moderate" odor of consumed alcohol on Doe's breath while speaking with him. Based on these limited observations, Officer Brown asked if Doe would be willing to submit to a Preliminary Breath Test. Doe agreed and provided a sample of breath at 12:40:45 a.m. that tested positive for alcohol at .08%. Officer Brown stipulates that he administered no Standardized Field Sobriety Testing. Officer Brown then placed Doe under arrest for DUI and escorted him to Shawnee Mission Medical Center where Doe ultimately submitted to a blood draw for further testing.

4. Officer Brown reports that Doe admitted to having consumed alcohol prior to the accident. However, that admission occurred only after Officer Brown had already made the decision to arrest Doe. Specifically, when initially questioned by Officer Brown shortly after 12:38 a.m., Doe denied having consumed any alcohol prior to the accident. At 12:40:45 Doe submitted to the PBT. At 12:42:23, Officer Brown is heard stating to another officer on the scene: "*I'm going to arrest him* (Doe) and take him to the hospital." At 12:44:54, Officer Brown informed Doe of the PBT results and placed Doe under arrest. Only *then* did Doe admit to having consumed alcohol prior to the accident.

ARGUMENTS AND AUTHORITIES

5. Under the Fourth and Fourteenth Amendments to the United States Constitution, a search conducted without a warrant is "*per se* unreasonable... subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514 (1967). Upon the hearing of a motion to suppress evidence, the State bears the burden of proving to the trial court the lawfulness of the search and seizure. *Mincey v. Arizona*, 437, U.S. 385, 390-91, 98 S.Ct. 2408, 2412-13 (1978); *State v. Schur*, 217 Kan. 741, 743, 538 P.2d 689 (1975). See also K.S.A. §22-3216(2); *State v. Houze*, 23 Kan.App. 2d 336, 337, 930 P.2d 620, rev. denied 261 Kan. 1088 (1997).

6. A traffic stop is a seizure within the meaning of the Fourth Amendment, even though the purpose of the stop is limited and the resulting detention quite brief. See *United States v. Bradford*, 423 F.3d 1149, 1156 (10th Cir. 2005). However, an ordinary traffic stop is more analogous to an investigative detention than a custodial arrest. Therefore, analysis of such stops is based upon the principles pertaining to investigative detentions set forth in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). See: *Berkemer v. McCarty*, 468 U.S. 420, 439, 82 L. Ed. 2d 317, 104 S.Ct. 3138 (1984). The United States Supreme Court states that "an investigative detention must last no longer than is necessary to effectuate the purpose of the stop, and the scope of the detention must be carefully tailored to its underlying justification." *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319 (1983). To determine the reasonableness of an investigative detention, courts make a dual inquiry, asking first "whether the officer's action was justified at its inception," and second "whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *United States v. Botero-Ospina*, 71 F.3d 783, 786 (10th Cir. 1995.)

7. Where the parties do not dispute the facts and details giving rise to the stop at its inception, the question of law is whether the ultimate scope and duration of the detention, considered in light of the totality of the circumstances, were reasonable. See *United States v. Dennison*, 410 F.3d 1203, 1207 (10th Cir. 2005). Unless the officer has an objectively reasonable suspicion that illegal activity unrelated to the stop has occurred or the driver otherwise consents to the encounter, the resulting detention is reasonable only so long as the officer's subsequent conduct is reasonably related in scope to the circumstances which justified the initial stop. See *United States v. Williams*, 403 F.3d 1203, 1206 (10th Cir. 2005). Once the purpose of the stop is satisfied and any underlying reasonable suspicion dispelled, the driver's detention generally must end without undue delay. See *United States v. Millan-Diaz*, 975 F.2d 720, 721-22 (10th Cir. 1992).

I. STATUTORY PREREQUISITES FOR CHEMICAL TESTING

8. K.S.A. §8-1001 provides in pertinent part:

> "Any person who operates or attempts to operate a vehicle within this state is deemed to have given consent, *subject to the provisions of this act*, to submit to one or more tests of the person's blood, breath, urine or other bodily substance to determine the presence of alcohol or drugs."

Subsection (b) of said statute provides that in order to proceed with testing, the officer must first satisfy two prerequisites. The first prerequisite provides as follows:

> (1) the officer must have "reasonable grounds to believe the person was operating or attempting to operate a vehicle while under the influence of alcohol or drugs, or both, *or* to believe that the person was driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other drugs in such person's system, *or* was under the age of 21 years while having alcohol or other drugs in such person's system."

9. This initial determination establishes 2 different standards for different types of drivers. The first standard – "reasonable grounds to believe the person was operating or

attempting to operate a vehicle *while under the influence of alcohol or drugs*" – applies to non-commercial drivers over the age of 21. The second lower standard – "reasonable grounds to believe the person was operating or attempting to operate a vehicle … *while having alcohol or other drugs in such person's system*" – applies to persons licensed to driver a commercial motor vehicle and persons under the age of 21 years.

10. After determining the appropriate standard and making the foregoing preliminary determination, the officer must then satisfy the *second* prerequisite by determining that one of the following conditions exists:

> "(A) The person has been arrested or otherwise taken into custody for any offense involving operation or attempted operation of a vehicle while under the influence of alcohol or drugs, or both, or for a violation of K.S.A. 8-1567a, and amendments thereto, or involving driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other drugs in such person's system, in violation of a state statute or a city ordinance; ***or***
> (B) the person has been involved in a vehicle accident or collision resulting in property damage or personal injury *other than serious injury*" (Emphasis added)

11. As an alternative to the foregoing 2-part prerequisite for further testing, subsection (b)(2) of K.S.A. §8-1001 allows an officer to require testing "if the person was operating or attempting to operate a vehicle and such vehicle has been involved in an accident or collision resulting in *serious injury or death* of any person and the operator could be cited for any traffic offense, as defined in K.S.A. 8-2117, and amendments thereto. *The traffic offense violation shall constitute probable cause for purposes of paragraph (2).*" (Emphasis added)

12. Thus, only accidents involving "serious injury or death" constitute *per-se* "probable cause" for further testing pursuant to K.S.A. §8-1001. By the specific language of the statute, accidents involving property damage or personal injury "other than serious injury" do *not*

constitute per-se "probable cause" for further testing. For non-commercial drivers over the age of 21, a request for further testing following such an accident that does not result in "serious injury or death" requires an additional finding of reasonable grounds to believe that the person was operating or attempting to operate while under the influence of alcohol or drugs at the time of the accident.

13. Here, the Defendant is an adult driver over 21 years of age and does not hold a commercial driver's license. Moreover, the subject accident did not result in "serious injury or death." Therefore, prior to proceeding with testing pursuant to K.S.A. §8-1001, the officer must first establish "reasonable grounds to believe the person was operating or attempting to operate a vehicle *while under the influence of alcohol or drugs*." Pursuant to the clear and unequivocal foregoing statutory language, this is a higher standard than reasonable grounds to believe merely that the person was operating or attempting to operate a vehicle "*while having alcohol in such person's system*" as applicable to commercial drivers and drivers under the age of 21. Thus, the "reasonable grounds" necessary to support continued detention of the Defendant for administration of chemical testing herein must be premised upon *either* statistically validated cues of impairment demonstrated during proper administration of Standardized Field Sobriety Tests *or* failure of a properly administered Preliminary Breath Test.

14. The Kansas Supreme Court addressed the foregoing statutory requirements in *State v. Jones*, 279 Kan.71, 106 P.3d 1 (2005). There, law enforcement had been dispatched to the scene of an accident and made contact with the driver of the vehicle who had suffered minor injuries in the accident. The driver refused treatment at the scene. The driver stated that he did not remember exactly what happened to cause him to have the accident, however, he did state he felt very tired before the accident occurred. The arresting officer conducted no field sobriety

testing other than a preliminary breath test (PBT). Based on the results of the PBT, the officer arrested the driver and transported him to the local hospital where the driver submitted to a blood test.

15. Due to issues involving "consent" that have since been addressed by subsequent amendment to K.S.A. §8-1001, the Supreme Court found that the results of the PBT test were inadmissible as and for "probable cause" to request additional testing. In its analysis, the Court confirmed the above-referenced two-part prerequisite for chemical testing set forth in K.S.A. §8-1001. The Court stated:

> "[w]e also observe that without the PBT results, the State did not meet the predicates from 8-1001 that would permit the subsequent blood test. The *State met the requirement of a vehicle accident resulting in personal injury but failed to meet the other*, i.e., the officer had no reasonable grounds to believe the person was operating or attempting to operate a vehicle while under the influence of alcohol or drugs, or both." *Id.* at 279 Kan. 82.

Thus, the Court confirmed that the mere occurrence of an accident that does not result in serious injury or death does *not* provide sufficient "reasonable grounds" in and of itself for further testing pursuant to K.S.A. §8-1001.

II. THE PRELIMINARY BREATH TEST IN THE CASE AT BAR IS INADMISSIBLE

16. K.A.R. 28-32-7 establishes that only the following brand and model Preliminary Breath Testing Devices are approved for use by Kansas law enforcement agencies: (1) Alcometer S-D2; (2) Alco-sensor; (3) Alco-sensor III; (4) Alco-sensor, pass-warn-fail; and (5) Alcotest. Moreover, K.A.R. 28-32-7 provides that said Preliminary Breath Testing devices: "… *shall be operated according to the manufacturers' written directions*" and also provides that training of preliminary breath test operators "*shall strictly adhere to the operational instructions supplied by the manufacturer*."

17. All of the foregoing approved Preliminary Breath Testing devices include as part of the manufacturer's operational instructions adherence to an observation/deprivation period prior to testing to ensure that the device is registering "deep lung air" as opposed to residual mouth alcohol. To wit: the written instructions for the Alco-Sensor III specifically state:

> "[i]f you are using the Alco-Sensor III for evidence, the waiting period between arrest and testing should conform to your local jurisdiction rulings, *generally 15-20 minutes*. If the unit is being used for screening, a 15 minute waiting period should be sufficient to rid the alimentary tract of any residual alcohol. Here again, if regulations call for a minimum waiting period, observe it." (Emphasis added) *Alco-Sensor III Manual, P. 2.*

18. Moreover, a footnote to that portion of the manual states specifically: "[i]f the test result is positive, wait 2 to 5 minutes and take a second test. A similar result indicates true blood alcohol level. *A much lower result strongly suggests mouth alcohol was present at the time of the first test*." (Emphasis added).

19. Similarly, the manufacturer's protocol for operation of the S-D2 addresses the issue of invalid test results due to the presence of mouth alcohol by requiring the operator of the device to "ensure that a delay of about ***20 minutes*** has elapsed since the subject took anything by mouth, even medicines that may contain alcohol" and further provides "do not even allow the subject a glass of water prior to the test…" (Emphasis added.) *S-D2 Operator's Manual, P. 8.*

20. Finally, the manufacturer's protocol for operation of the Alcotest addresses the issue of invalid test results due to the presence of mouth alcohol by advising the operator of the device that:

> "[t]here must be an interval of *at least 15 minutes* after alcohol has been taken into the mouth. Such residues may be left by aromatic drinks (eg. Fruit juices), alcoholic mouth sprays, medicines and drops, as well as by burping and vomiting. Rinsing out the mouth with water or non-alcoholic drinks do not substitute for an interval." *Alcotest Instructional Manual,* P. 10

21. It is well-accepted that observation of the foregoing deprivation periods as instructed by the manufacturers of the various PBT devices listed in K.A.R. 28-32-7 is a prerequisite to admissibility of said test results. In the unpublished opinion *Jamison v. KDOR*, 113 P.3d 834 (2005), the Kansas Supreme Court acknowledged that "[t]he Kansas Legislature has specifically found that for breath test results to be reliable, the testing equipment and the operator of the equipment must be certified, and the testing procedures must be in accord with Kansas Department of Health and Environment requirements." In *State v. Jones*, supra., one of the stipulated facts upon which the case was originally submitted for district court review was that "Officer Windholz properly conducted his 15 minute derivation period and properly conducted the [PBT] on defendant." 279 Kan. at 72. In *City of Norton v. Wonderly*, 38 Kan. App. 2d. 797, 172 P.3d 1205 (200*) the Kansas court of Appeals incorporated in its factual background that "[f]rom his training and experience, [Officer] Morel knew *the PBT required a 15-minute alcohol deprivation period* prior to administering the test. However, Morel admitted that he did not wait 15 minutes before administering the PBT." 38 Kan. App. 2d. at 800. Based on this admission, the *Wonderly* Court ultimately held that the results of the PBT were inadmissible.

22. In the case at bar, Officer Brown asked Mr. Doe to submit to Preliminary Breath Testing after *less than **3** minutes* of 1 on 1 observation. Specifically, Brown arrived at the scene and initiated 1 on 1 contact with Doe at exactly 12:38:30 a.m. Brown administered the P.B.T test at 12:40:45 a.m., *after only 2 minutes and 15 seconds of observation/deprivation*. Because Officer Brown failed to observe the minimum manufacturer's 15 minute observation/deprivation protocol as required by K.A.R. 28-32-7, and further failed to administer a second test following the initial positive result, the result of the P.B.T. should not be considered in determining the

"probable cause" necessary to support continued detention of the Defendant for Intoxilyzer testing.

III. ABSENT THE PBT RESULT, OFFICER BROWN LACKED BOTH REASNONABLE GROUNDS TO REQUEST FURTHER TESTING AND PROBABLE CAUSE TO ARREST.

23. The Kansas Court of Appeals and the Kansas Supreme Court have both held that the quantum of evidence necessary for a valid finding of "probable cause" in the criminal context is the same standard necessary for a finding of "reasonable grounds" in the administrative arena. See: *Angle v. Kansas Dept. of Revenue,* 12 Kan.App.2d 756, 766-67, 758 P.2d 226 (1988), *rev. denied* 243 Kan. 777 (1988); *Sullivan v. Kansas Dept. of Revenue,* 15 Kan.App.2d 705, 707, 815 P.2d 566 (1991); *State v. Jones,* 279 Kan. at 75, 106 P.3d 1 (2005); *Butcher v. Kansas Dept. of Revenue,* 34 Kan.App.2d 826, 830, 124 P.3d 1078 (2005).

24. "Probable cause is the reasonable belief that a specific crime has been or is being committed and that the defendant committed the crime." *State v. Hill,* 281 Kan. 136, 146, 130 P.3d 1 (2006). A court evaluates "the totality of the circumstances ... from the standpoint of an objectively reasonable police officer." 281 Kan. at 146, 130 P.3d 1. Probable cause for an arrest is a higher standard than reasonable suspicion for a stop. See *State v. Ingram,* 279 Kan. 745, 752-53, 113 P.3d 228 (2005). 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 Dodge City v. Norton,* 262 Kan. 199, 203-04 (1997). "In a DUI case, the answer to the probable cause to arrest question depends on the officer's factual basis for concluding that defendant was *intoxicated* at the time of arrest." *State v. Chacon-Bringuez,* 28 Kan.App.2d 625, 633, 18 P.3d 970, *rev. denied* 271 Kan. 1038 (2001) (citing *City of Dodge City v. Norton,* supra.). An officer's reasonable conclusion that a driver is *intoxicated* requires greater and more reliable

evidence than that necessary to support a reasonable conclusion that the driver merely "had alcohol in their system" at the time of the arrest.

25. The Kansas Court of Appeals recently addressed the issue of "probable cause" to arrest and "reasonable grounds" to request testing in the context of DUI in *State v. Pollman*, 41 Kan. App. 2d 20, 204 P.3d 630 (200*). There, the defendant was traveling by motorcycle with his wife. Law enforcement initiated a traffic stop of the defendant's wife based on her alleged failure to signal a lane change. Defendant Pollman parked approximately one car length from his wife and the officer to wait during the citation process. The officer told Pollman that he was not being stopped and instructed him to be on his way. He refused to leave, prompting the arrival of a back-up officer. The backing officer testified that he was able to detect an odor of alcohol on Pollman's breath and further testified that Pollman admitted to having consumed alcohol prior to the traffic stop. Other than the odor of alcohol and the admission of prior consumption, the backing officer found Pollman to be coherent and cooperative and noted no other indicators of alcohol impairment.

26. After releasing Pollman's wife, the original officer contacted Pollman to discuss the possibility of future charges for obstruction of justice if Pollman again elected to disregard an officer's direction to leave the scene of a traffic stop. During this contact, the original officer also noted the odor of alcohol and Pollman again admitted to prior consumption. The officer then administered a PBT test which was positive for alcohol at .11%. The officer also administered field sobriety tests and arrested Pollman for DUI. Pollman ultimately submitted to a blood test which confirmed a blood alcohol concentration of .10%

27. Pollman filed a Motion to Suppress Evidence, arguing that the State failed to provide sufficient foundation for admission of the PBT which comprised part of the totality of

circumstances establishing probable cause to arrest Pollman for DUI. The District Court denied this motion, prompting Pollman's appeal. The Court of Appeals reversed the District Court's decision as to the PBT test and found that the State had not established adequate foundation pursuant to K.S.R. 21-32-7 for admissibility of said test. The Court held:

> "…we conclude (as did our court in *Leffel*) that " [b]ecause the State in this case failed to offer evidence at the trial court level that the defendant's preliminary breath test was conducted on a device approved by the [KDHE], the defendant's preliminary breath test result was not admissible evidence."
> 41 Kan.App.2d at 29, citing *Leffel v. Kansas Dept. of Revenue,* 36 Kan.App.2d 244, 138 P.3d 784 (2006).

28. The Court then considered whether the totality of the circumstances in the absence of the PBT result provided sufficient "probable cause" to justify Pollman's arrest. Based on *Angle v. Kansas Dept. of Revenue,* supra., *Sullivan v. Kansas Dept. of Revenue,* supra., *State v. Jones,* supra., and *Butcher v. Kansas Dept. of Revenue supra.,* this analysis also necessarily addressed the issue of whether the officer had sufficient "reasonable grounds" to request further testing pursuant to K.S.A. §8-1001.

29. Preliminarily, the Court noted that although the arresting officer did conduct field sobriety testing of Pollman, *the State inexplicably presented absolutely no evidence whatsoever of said field sobriety testing*. The Court stated: "[a]s a consequence, in our reassessment of the totality of circumstances which undergird the district court's probable cause finding, we also will not consider what, if any, effect the field sobriety test results had in the district court's finding of probable cause for arrest." 41 Kan.App.2d at 29. (Emphasis added).

30. Thus, in the absence of an admissible PBT result and in the absence of any evidence related to field sobriety testing, the Court was limited to analysis of the following factors:

> "First, Pollman's refusal to follow lawful requests to leave the area of his wife's traffic stop may have indicated impaired judgment because of intoxication; second, Pollman admitted he had consumed a few beers; third, Officer Walline smelled the odor of alcohol on Pollman's breath, which occurred after Walline had observed Pollman driving his motorcycle." 41 Kan.App.2d at 30.

31. Following extensive evaluation of the foregoing factors, the Court held there was insufficient evidence to satisfy the "probable cause" standard, stating: "In summary, we hold the totality of circumstances in the present case did not warrant a reasonably prudent police officer to believe that guilt was more than a mere possibility. See *Norton,* 262 Kan. at 203-04, 936 P.2d 1356." 41 Kan.App.2d at 32. The Court continued:

> "Accordingly, because the officer did not have probable cause to arrest Pollman for DUI, the district court erred in not suppressing the incriminating evidence of the blood alcohol test. *Moreover, given that the blood alcohol test result was essential to a conviction under K.S.A.2005 Supp. 8-1567(a)(2),(f), we reverse Pollman's conviction and vacate his sentence*." 41 Kan.App.2d at 32

32. In its analysis, the Court referred to the recent and distinctly analogous case *City of Norton v. Wonderly*, 38 Kan.App.2d 797, 172 P.3d 1205 (2007), rev denied 286 Kan. 1176 (200*). In *Wonderly*, a police dispatcher was called by a motorist and his passenger to report a pickup truck that was "swerving, spinning its tires and traveling at a high rate of speed." 38 Kan.App.2d at 799. Based upon a vehicle description which included a license plate number, law enforcement located the vehicle and followed it for less than a mile without observing any traffic violations. The officer activated his emergency equipment and the driver, Joshua Wonderly, stopped at the side of the road. Wonderly exited his vehicle and approached the officer, who yelled at him to return to his vehicle. Wonderly continued to walk toward the officer but ultimately returned to his truck after the officer yelled at him again.

33. Upon contacting Wonderly, the officer observed that Wonderly's eyes appeared to be bloodshot and also detected an odor of alcohol coming from the truck. Wonderly

cooperated by producing his driver's license, and he walked normally back to the officer's car. Once seated in the patrol car, the officer noticed alcohol on Wonderly's breath and upon inquiry, Wonderly admitted to having "some drinks at a local bar earlier that evening and one or two drinks at a bar in Lenora, Kansas." 38 Kan.App.2d at 800. The officer described Wonderly's speech as "fair" but "not particularly slurred." 38 Kan.App.2d at 800.

34. The arresting officer asked Wonderly if he would submit to a preliminary breath test (PBT), and then informed Wonderly of the statutory advisories. From his training and experience, the officer knew the PBT required a 15-minute alcohol deprivation period prior to administering the test. *However, the arresting officer admitted that he did not wait 15 minutes before administering the PBT*. The results of the test indicated that the alcohol concentration in Wonderly's breath was greater than .08.

35. Due to weather conditions, the arresting officer decided that Wonderly should perform field sobriety tests *at the sheriff's office*. The officer did not "formally" place Wonderly under arrest, but he also did not give Wonderly the option to perform the field sobriety tests elsewhere. The arresting officer testified that they arrived at the sheriff's office in approximately 2 minutes. Once there, Wonderly submitted to Standardized Field Sobriety Tests. Wonderly technically "failed" the Walk and Turn Test, but demonstrated <u>no</u> indicators of impairment whatsoever on the One Leg Stand Test. The arresting officer testified that based on everything he had observed at the traffic stop and at the sheriff's office, he concluded that Wonderly was impaired to the extent that he could not safely drive a vehicle. Wonderly ultimately submitted to Intoxilyzer testing which indicated a breath alcohol concentration of .174%.

36. Just as in *Pollman*, the district court suppressed the incriminating result of the PBT administered to Wonderly based on the officers admitted failure to comply with K.A.R. 28-

32-7. However, the district court found there was sufficient evidence, *independent of the PBT results*, to provide "reasonable grounds" to require that Wonderly submit to further testing. The district court also determined there was probable cause at the scene of the traffic stop to arrest Wonderly for DUI. Thus, the district court ruled that the evidence obtained from Wonderly at the sheriff's office, including the results of the Intoxilyzer test, could be admitted at trial.

37. The Court of Appeals sustained the District Court's suppression of the PBT. However, the Court also determined that Wonderly's inconsistent performance on field sobriety tests should not be considered in the review of whether probable cause existed to arrest Wonderly for DUI. As summarized by the Court:

> "… prior to Wonderly's arrest, the admissible evidence showed that Wonderly initially disobeyed an order to get back into his truck, he had bloodshot eyes, the smell of alcohol was on his breath, and he admitted to drinking earlier that evening. Additionally, [Officer] Morel knew that a motorist had called law enforcement earlier that night and accused Wonderly of driving his truck in a reckless manner." 38 Kan.App.2d at 808, 172 P.3d 1205.

38. By contrast to the foregoing indicators of impairment, the Court noted that "the evidence also indicated that Morel did not see Wonderly commit any traffic infractions while he followed Wonderly for 3 minutes. Wonderly pulled his truck over in a normal manner when Morel turned on the emergency lights, he did not fumble for his driver's license, and he had no problems getting out of his truck and walking to Morel's patrol car. Wonderly's speech was 'fair' and 'not particularly slurred.'" Id. The Court of Appeals concluded that the officer had arrested Wonderly without probable cause and, as a result, suppressed the incriminating evidence and reversed Wonderly's conviction. 38 Kan.App.2d at 809. Specifically, the Court stated:

> "We conclude the district court *erred* in finding there was probable cause at the scene of the traffic stop to arrest Wonderly for DUI. Although Morel had reasonable suspicion for a stop, the limited evidence Morel had gathered at the scene of the traffic stop was insufficient to support probable cause for an arrest." 38 Kan.App.2d at 808-09. (Emphasis added).

39. The foregoing decisions are consistent with that of *State v. Jones*, supra. There, the Supreme Court held that in the absence of the PBT test (which was held to be inadmissible), there was insufficient evidence to provide the requisite "reasonable grounds" for further testing or "probable cause" for arrest. The *Jones* Court noted that the arresting officer's 'reasonable grounds to believe' were based *entirely upon the PBT*, which the Court ruled to be inadmissible. The Court stated: "The officer had performed no field sobriety tests and had made no observations suggesting alcohol use such as Jones' physical characteristics or confession to alcohol consumption." 279 Kan. at 81. As set forth supra, *Jones* is distinctly analogous to the facts of the case at bar, as *Jones* specifically involved an investigation into a single car accident resulting in injury "other than serious injury or death." Thus, the Court's decision to suppress the evidence at issue incorporated the arresting officer's awareness of the accident as the initial basis for law enforcement contact.

40. In *Pollman*, *Wonderly* and *Jones* the Kansas Court of Appeals consistently ruled that odor of alcohol, red bloodshot watery eyes, and admission of alcohol consumption by a driver will not provide "reasonable grounds" for further testing or "probable cause" to arrest when unaccompanied by failure of properly administered Standardized Field Sobriety Tests or failure of a properly administered Preliminary Breath Test. As set forth in *Jones*, this rule applies equally to cases where non-commercial drivers over the age of 21 are involved in accidents "other than accidents involving serious injury or death."

41. In the case at bar, Officer Brown reports that he detected a "moderate" odor of consumed alcohol on Doe's breath while speaking with him and further reports that Doe's eyes appeared to be bloodshot and watery. However, the foregoing observations constitute the sum total of Officer Brown's observations suggesting prior alcohol consumption. Moreover, said

observations do not suggest alcohol impairment or "intoxication" as required by *State v. Chacon-Bringuez* supra., and *City of Dodge City v. Norton*, supra.

42. Specifically, Officer Brown observed no "poor balance or coordination" on the part of Mr. Doe and further made no observation of "slurred speech" or "difficulty communicating." As evidenced by the field video of this event, Doe's voice is clear and articulate and he is heard speaking at a distinct pace: neither unusually fast and agitated nor unusually slow and lethargic. Officer Brown found no alcoholic beverage containers in Mr. Doe's vehicle. Although Officer Brown reports that Doe admitted to having consumed alcohol prior to the accident, Doe made this admission *only after Brown had already made the decision to arrest him*. Thus, the Court cannot consider this admission in it's determination of "reasonable grounds" to request further testing or "probable cause" to arrest. However, even if this admission *were* available for the Court's determination, said admission would not satisfy the requisite evidentiary standard as set forth in *Pollman, Wonderly* and *Jones*, supra.

43. Finally, Officer Brown stipulates that he administered no Standardized Field Sobriety Testing whatsoever prior to arresting Doe. Because Officer Brown elected to proceed with PBT testing only in this case – and said PBT result is unquestionably inadmissible for purposes of this Court's probable cause determination – there is simply no additional evidence to support a finding of "reasonable grounds" for further testing or "probable cause" to arrest.

IV. *CITY OF NORTON V. WARD* IS NOT ANALOGOUS TO THE CASE AT BAR.

44. The Defendant anticipates that the City may attempt to argue that the case at bar should be decided pursuant to and consistent with the outcome in the recent unpublished decision in *City of Norton v. Ward*, 177 P.3d 1011 (Kan. App. 200*). There, Defendant Ward was involved in a single car accident that resulted in his vehicle turning on its side. Defendant Ward

climbed out of the vehicle and went to a friend's house in the area. A passerby reported to the police that someone had fled from the accident scene on foot. Norton Police Officer Pat Morel arrived at the scene at about 6:52 a.m. A few minutes later, Ward returned to the scene on foot.

45. Ward told Officer Morel that he was the driver of the vehicle and explained that he had walked to a friend's house to report the accident. During this conversation, Officer Morel reported that he smelled a strong odor of alcohol and saw that Ward's eyes were bloodshot. *Officer Morel confirmed by examining Ward's driver's license that he was 20 years old*. Upon inquiry, Ward admitted to having consumed alcohol prior to the accident and also told Officer Morel that the accident occurred when he became angry and he tried to turn the corner "a little too fast."

46. Officer Morel also asked Ward if he would submit to a preliminary breath test (PBT). Ward agreed after Officer Morel had read a three-part notice regarding the PBT. Officer Morel waited until the test results showed an alcohol concentration of .08, and then he shut off the unit. *Just as in the case at bar, Officer Morel conducted no other field sobriety tests*. Morel eventually transported Ward to the sheriff's office for Intoxilyzer testing. The breath test showed an alcohol concentration of .174.

47. Ward filed a motion to suppress the breath alcohol test results and other inculpatory evidence. In particular, he based his motion on the grounds that Officer Morel lacked a reasonable basis to request breath alcohol testing under K.S.A.2005 Supp. 8-1001(b); improperly seized "deep lung air" during that testing; improperly advised him regarding implied consent advisories; illegally obtained incriminating statements from him; and arrested him without probable cause. The district court denied said motion, resulting in Ward's appeal.

48. On appeal, Ward argued that the PBT test should be inadmissible based on *State v. Jones*, supra., wherein the Supreme Court held that because a PBT test requires the production of "deep lung air" said test is a "search" within the meaning of the 4th Amendment of the Constitution. However, the *Ward* Court noted that in response to this holding, the legislature soon incorporated PBT's into the implied consent provisions of K.S.A. §8-1001 (2005 Supp.).

49. Ward also argued on appeal that the inculpatory statements made at the scene of the accident were subject to suppression pursuant to Miranda. The Court found that *State v. Price*, 233 Kan. 706, 664 P.2d 869 (1983) was controlling and provides that during the investigation of an automobile accident, "… many general on-the-scene investigatory questions may be asked of the driver without advising the driver of the *Miranda* warnings."

50. Of note to this Court's decision in the case at bar, other than the issues raised in *State v. Jones*, supra., and subsequently addressed by post-*Jones* amendment of K.S.A. §8-1001, Ward raised no issues whatsoever regarding whether or not Officer Morel complied with the requirements of K.A.R. 28-32-7 in the administration of the PBT. Moreover, Ward involved a driver under the age of 21. Thus, K.S.A. §8-1001(b)(1) required Officer Morel only to have reasonable grounds to believe that Ward was operating or attempting to operate a motor vehicle "*while having alcohol or other drugs in such person's system*" as a prerequisite to further testing. Thus, the underlying factual issues presented in *Ward* and the issues raised and ultimately considered on appeal are not analogous to the case at bar.

SUMMARY

51. Because the subject accident in the case at bar did not result in "serious injury or death" the accident cannot in and of itself constitute valid "reasonable grounds" for further testing pursuant to K.S.A. §8-1001 or "probable cause" for arrest. In addition to the mere

occurrence of the accident, the state must also establish that Officer Brown had independent and valid "reasonable grounds" to believe that Mr. Doe was operating the vehicle "while *under the influence* of alcohol." This finding necessarily requires a greater quantum of evidence than that necessary to establish merely that Mr. Doe may have had alcohol in his system, which applies only to commercial drivers and drivers under the age of 21.

52. Because Officer Brown failed to comply with K.A.R. 28-32-7, the Preliminary Breath Test result herein is ***inadmissible*** as and for a determination of "probable cause" to arrest or "reasonable grounds" to request further testing pursuant to K.S.A. §8-1001. As set forth *supra*., Officer Brown elected not to administer any Standardized Field Sobriety Tests whatsoever. Thus, in the absence of an admissible PBT reading, and in the abject absence of Standardized Field Sobriety Testing, there is simply insufficient evidence to support a finding of "probable cause" to arrest or "reasonable grounds" to request further testing pursuant to K.S.A. §8-1001. Therefore, any and all results of additional chemical testing should be suppressed herein as evidence obtained without sufficient, valid probable cause.

WHEREFORE, for the above and foregoing reasons, the Defendant respectfully requests that this Court issue an order suppressing all illegally obtained evidence from these proceedings.

Respectfully submitted,

BY _____

Paul D. Cramm #19543
100 East Park, Suite 210
Olathe, Kansas 66061
Telephone: 913-322-3265
Facsimile: 913-322-4371
Attorney for Defendant

NOTICE OF HEARING

Take notice that the above motion will be called up for hearing before the Overland Park Municipal Court on Wednesday, July 1, 200* at 8:00 a.m. of said day.

CERTIFICATE OF SERVICE

I certify that on this 17th day of June, 200* a copy of the above and foregoing was hand delivered to the Office of the Municipal Prosecutor for the City of Overland Park: 12400 Foster, Overland Park, KS 66213.

BY _____
Paul D. Cramm, #19543
Attorney for Defendant