



**Am. Sub. S.B. 163**  
124th General Assembly  
(As Passed by the General Assembly)

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**Effective date:** \*

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**ACT SUMMARY**

- Prohibits a person from knowingly dropping or throwing any object at or in the path of any vehicle, streetcar, or trackless trolley on a highway or any boat or vessel on any Ohio waters.
- Prohibits a person from knowingly dropping or throwing any object at or in the path of any railroad rail, railroad track, locomotive, or vehicle of a railroad company while such vehicle is on a railroad track.
- Prohibits a person, without privilege to do so, from:
  - (1) Climbing upon or into any train or other vehicle of a railroad company when it is on a railroad track;

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*\* The Legislative Service Commission had not received formal notification of the effective date at the time this analysis was prepared. Additionally, the analysis may not reflect action taken by the Governor.*

(2) Disrupting, delaying, or preventing the operation of any train or other vehicle of a railroad company while it is on a railroad track;

(3) Knowingly entering or remaining on the land or premises of a railroad company.

- Prohibits any person from knowingly damaging, removing, or otherwise impairing the operation of any railroad grade crossing warning signal or other protective device.
- Creates the Highway, Bridge, and Overpass Vandal Fence Task Force to review and evaluate the overall situation regarding objects thrown from highways, bridges, and overpasses, and to report findings and recommendations to a joint House of Representatives and Senate Transportation Committee not later than September 30, 2003.
- Provides that, in any criminal or delinquency prosecution for state OMVI, state OMVUAC, municipal OMVI, state watercraft OMVI or state watercraft OMVUAC, or (after January 1, 2004) municipal watercraft OMVI or "having physical control of a vehicle while under the influence," if it is established by clear and convincing evidence that a law enforcement officer has administered a field sobriety test in substantial compliance with testing standards for any reliable, credible, and generally accepted field sobriety tests in effect when the test was administered, including, but not limited to any testing standards then in effect that were set by the National Highway Traffic Safety Administration: (1) the officer may testify concerning the results of the test, (2) the prosecution may introduce the test results as evidence in the prosecution, and (3) if testimony or evidence presented under (1) or (2) is admissible under the Rules of Evidence, the court must admit it, and the trier of fact must give it whatever weight the trier of fact considers appropriate.
- Makes technical changes to the Watercraft OMVI Implied Consent Law.

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## CONTENT AND OPERATION

### *New prohibition--dropping, throwing, etc., any object from or upon any part of a highway, bridge, overpass, etc.*

#### *Operation of the act*

The act prohibits a person from knowingly, and by any means, dropping or throwing any object at, onto, or in the path of any of the following: (1) any "vehicle," "streetcar," or "trackless trolley" on a "highway," or (2) any boat or "vessel" on any of the "waters in this state" (see below for definitions of the terms in quotation marks).

A violation of the prohibition is the offense of "vehicular vandalism." Generally, vehicular vandalism is a misdemeanor of the first degree. However: (1) if the violation creates a substantive risk of physical harm to any person or the violation causes serious physical harm to property, the offense is a felony of the fourth degree, (2) further, if the violation causes actual physical harm to any person, the offense is a felony of the third degree, and (3) if the violation causes *serious* physical harm to any person, the offense is a felony of the second degree. (R.C. 2909.09(B) and (C).)<sup>1</sup>

The act defines certain terms used in the new offense as follows (R.C. 2909.09(A)):

(1) "Highway" means the entire width between the boundary lines of every way open to the use of the public as a thoroughfare for purposes of vehicular

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<sup>1</sup> The terms "physical harm to persons," "physical harm to property," and "substantial risk" are legal terms defined in R.C. 2901.01.

travel or any lane, road, street, alley, bridge, or overpass. (By reference to R.C. 4511.01.)

(2) "Alley" means a street or highway intended to provide access to the rear or side of lots or buildings in urban districts and not intended for the purpose of through vehicular traffic, and includes any street or highway that has been declared an "alley" by the legislative authority of the municipal corporation in which such street or highway is located. (By reference to R.C. 4511.01.)

(3) "Street" means the entire width between the boundary lines of every way open to the use of the public as a thoroughfare for purposes of vehicular travel. (By reference to R.C. 4511.01.)

(4) "Streetcar" means a car, other than a railroad train, for transporting persons or property, operated upon rails principally within a street or highway. (By reference to R.C. 4511.01.)

(5) "Trackless trolley" means every car that collects its power from overhead electric trolley wires and that is not operated upon rails or tracks. (By reference to R.C. 4511.01.)

(6) "Vehicle" means every device, including a motorized bicycle, in, upon, or by which any person or property may be transported or drawn upon a highway, except motorized wheelchairs, devices moved by power collected from overhead electric trolley wires, or used exclusively upon stationary rails or tracks, and devices other than bicycles moved by human power. (By reference to R.C. 4511.01.)

(7) "Vessel" includes every description of watercraft, including nondisplacement craft and seaplanes, used or capable of being used as a means of transportation on water. (By reference to R.C. 1547.01.)

(8) "Waters in this state" means all streams, rivers, lakes, ponds, marshes, watercourses, waterways, and other bodies of water, natural or humanmade, that are situated wholly or partially within Ohio or within its jurisdiction and are used for recreational boating. (By reference to R.C. 1547.01.)

### **New prohibitions relating to railroad property and operations; penalties**

#### **Prohibitions**

The act contains several new prohibitions relating to railroad property and operations. It prohibits any person from engaging in any of the following:

(1) "Railroad vandalism," described as knowingly, and by any means, dropping or throwing any object at, onto, or in the path of, any railroad rail, railroad track, locomotive, engine, railroad car, or other vehicle of a railroad company while such vehicle is on a railroad track (R.C. 2909.10(A)).

(2) "Criminal trespass" on a railroad vehicle, described as without privilege to do so, climbing upon or into any locomotive, engine, railroad car, or other vehicle of a railroad company when it is on a railroad track (R.C. 2909.10(B)).

(3) "Interference with the operation of a train," described as without privilege to do so, disrupting, delaying, or preventing the operation of any train or other vehicle of a railroad company while it is on a railroad track (R.C. 2909.10(C)).

(4) "Criminal trespass" on railroad premises, described as without privilege to do so, knowingly entering or remaining on the land or premises of a railroad company (R.C. 2909.10(D)).

### **Penalties**

Generally, the act establishes railroad vandalism, criminal trespass on a railroad vehicle, and interference with the operation of a train each as a misdemeanor of the first degree. However, if the violation of any of these prohibitions causes serious physical harm to property or creates a substantial risk of physical harm to any person, the violation is a felony of the fourth degree and if such a violation actually causes physical harm to any person, the violation is a felony of the third degree. Finally, if any violation causes *serious* physical harm to any person, the violation is a felony of the second degree. (R.C. 2909.10(E).)

Under the act, whoever violates the prohibition against criminally trespassing on railroad premises is guilty of a misdemeanor of the fourth degree (R.C. 2909.10(F)).

### **New prohibition relating to railroad grade crossing warning signals and other protective devices; penalty**

The act establishes the offense of railroad grade crossing device vandalism, which occurs when a person knowingly defaces, damages, obstructs, removes, or otherwise impairs the operation of any railroad grade crossing warning signal or other protective device, including any gate, bell, light, crossbuck, stop sign, yield sign, advance warning sign, or advance pavement marking (R.C. 2909.101(A)).

Generally, under the act, railroad grade crossing device vandalism is a misdemeanor of the first degree. However, if a violation causes serious physical harm to property or creates a substantial risk of physical harm to any person, the

violation is a felony of the fourth degree and if the violation actually causes physical harm to any person, the violation is a felony of the third degree. Finally, if the violation actually causes *serious* physical harm to any person, railroad grade crossing device vandalism is a felony of the second degree. (R.C. 2909.101(B).)

### **Continuing law**

Continuing law does not include any provisions that prohibit conduct *identical* to the types of conduct prohibited under the act's new offenses. However, a few continuing provisions prohibit conduct that, depending upon the circumstances present, also might be prohibited under one of the act's new offenses. A summary of the relevant existing provisions, none of which are in the act, is set forth in **COMMENT 1**.

### **Highway, Bridge, and Overpass Vandal Fence Task Force**

The act creates the Highway, Bridge, and Overpass Vandal Fence Task Force, consisting of the Governor or the Governor's designee, one person appointed by the Director of Transportation, one person appointed by the Director of Public Safety, who must be the Superintendent or a trooper of the State Highway Patrol, one person appointed by the Buckeye State Sheriffs Association, one person appointed by the Ohio Association of Chiefs of Police, one person appointed by the County Engineers Association of Ohio, and three or more members of the public appointed by the Governor. The Governor or his designee is the chairperson of the Task Force. The members must elect a vice-chairperson from among their members and appoint a secretary, who does not need to be a member. Members of the Task Force do not receive a salary, but the three members appointed by the Governor are to be reimbursed for the actual expenses they incur in performing their duties as members.

The Task Force must do all of the following:

(1) Develop an awareness program with local law enforcement officials and the Ohio Department of Transportation relative to the problem of objects thrown from highways, bridges, and overpasses;

(2) Review and evaluate the overall situation regarding objects thrown from highways, bridges, and overpasses, including the types and number of objects thrown yearly, the perpetrators involved, and the locations within Ohio where the throwing has occurred, and any other aspects of this criminal activity the Task Force determines to be relevant and significant;

(3) Facilitate communication between the Ohio Department of Transportation and law enforcement agencies by developing a central computer system to track these incidents;

(4) Examine the value of the improved safety resulting from the installation of vandal fences on all bridges and overpasses on interstate freeways relative to the cost of such installation.

The Task Force must complete its findings and formulate recommendations and report them to a joint House of Representatives and Senate Transportation Committee not later than September 30, 2003. The Joint Committee must consist of eight members, four from the Senate appointed by the Senate's President and four from the House of Representatives appointed by the House's Speaker. After the Task Force presents its report, the Governor may declare the end to the existence of the Task Force or may declare that the Task Force will remain in existence for such additional time as the Governor determines necessary. If the Governor continues the existence of the Task Force, it must examine any issues relating to the throwing of objects from highways, bridges, and overpasses that it chooses to examine, until the Governor declares an end to its existence. (Section 6.)

#### **OMVI field sobriety test standards, etc.**

The act contains provisions relating to the use in court of: (1) the results of *field sobriety tests* administered by a law enforcement officer to a person who allegedly was operating a vehicle while under the influence of alcohol, a drug of abuse, or both or while his or her blood, breath, or urine contained a prohibited concentration of alcohol, and the officer's testimony, and (2) other types of evidence and testimony, in determining whether a person's arrest was supported by probable cause or in determining any other matter.

#### **Continuing law**

#### **State OMVI, state OMVUAC, state watercraft OMVI, state watercraft OMVUAC, and implied consent**

Continuing law prohibits a person of any age from operating a vehicle within Ohio if the person is under the influence of alcohol and/or a drug of abuse or if the person's blood, breath, or urine contains a prohibited concentration of alcohol. It also prohibits a person under 21 years of age from operating a vehicle within Ohio if the person's blood, breath, or urine contains a prohibited concentration of alcohol (this prohibited concentration is lower than the prohibited concentration specified in the prohibition that applies to a person of any age). The offenses that set forth these prohibitions generally are referred to, respectively, as

"state OMVI" and "state OMVUAC" (operating a motor vehicle after underage alcohol consumption) (R.C. 4511.19(A) and (B)). Many Ohio municipal corporations have enacted ordinances that prohibit a person from operating a vehicle while under the influence of alcohol, a drug of abuse, or both, or from operating a vehicle with a prohibited concentration of alcohol in the blood, breath, or urine (hereafter, these ordinances collectively are referred to as "municipal OMVI").

Continuing law prohibits a person from operating or being in physical control of any vessel underway or from manipulating any water skis or similar device on Ohio waters if the person is under the influence of alcohol and/or a drug of abuse or if the person's blood, breath, or urine contains a prohibited concentration of alcohol. A violation of this prohibition is generally referred to as "state watercraft OMVI" or "state watercraft OMVUAC" (R.C. 1547.11(A)). Ohio municipal corporations also have enacted ordinances substantially equivalent to state watercraft OMVI and state watercraft OMVUAC (municipal watercraft OMVI).

Continuing law specifies that any person who operates a vehicle, vessel, water skis, or similar device is deemed to have given consent to chemical tests of the person's blood, breath, or urine for the purpose of determining its alcohol, drug, or alcohol and drug content *if the person is arrested for committing state OMVI or watercraft OMVI, state OMVUAC or watercraft OMVUAC, or municipal OMVI or (after January 1, 2004) municipal watercraft OMVI*. The chemical tests are administered at the request of a police officer *having reasonable grounds to believe the person operated a vehicle, vessel, water skis, or similar device while committing one of these offenses*. (R.C. 4511.191(A) and 1547.111(A).)

The Revised Code does not address the manner in which a law enforcement officer is to establish: (1) the grounds for arresting a person for any of these offenses, or (2) the reasonable grounds to believe a person committed any of these offenses that are necessary to request that the person take a chemical test of the person's blood, breath, or urine. It appears that, in practice, the grounds for the arrest and the reasonable grounds for requesting the person to take the test are established by the officer's observation of the way in which the person was operating the vehicle or vessel or used the water skis or similar device and of the person's physical appearance and demeanor, and through the officer's administration to the person of *field sobriety tests*. The Revised Code does not address field sobriety tests.

Existing law prescribes a written warning that must be given to a person who is arrested for any of these offenses and who is requested to submit to a chemical test (R.C. 4511.191(C) and 1547.111(C)). It also addresses the administration of the chemical tests and permits a person tested to obtain the



results of the test and to take his or her own tests (R.C. 4511.19(D)(1) and (3) and 1547.11(D)(1) and (3)). Existing law further provides sanctions in specified circumstances for a person so arrested who either refuses upon request to submit to a chemical test or who submits to a test and is found to have a prohibited concentration of alcohol in his or her blood, breath or urine (R.C. 4511.191(D) to (N) and 1547.111(D) to (I)). Finally, it provides for the use in court of the results of any chemical analysis of the blood, urine, breath, or other bodily substance of a person so arrested that is withdrawn within two hours of the time of the alleged violation (R.C. 4511.19(D)(1) and (2) and 1547.11(D)(1)).

In August 2000, the Supreme Court restricted the use of the results of field sobriety tests in court proceedings. It held that, in order for the results of a field sobriety test to serve as evidence of probable cause to arrest, the involved law enforcement officer must have administered the test in strict compliance with standardized testing procedures (see **COMMENT 2**). *State v. Homan* (2000), 89 Ohio St.3d 421, reconsid. denied (2000), 90 Ohio St.3d 1431.

### **Operation of the act**

The act provides that, in any criminal prosecution or juvenile court proceeding for state OMVI, state OMVUAC, municipal OMVI, state watercraft OMVI, state watercraft OMVUAC, or (after January 1, 2004) municipal watercraft OMVI or "having physical control of a vehicle while under the influence (after January 1, 2004)," if a law enforcement officer has administered a field sobriety test to the operator of the vehicle, vessel, water skis, or similar device 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 of the United States Department of Transportation (the NHTSA) (see **COMMENT 5**), all of the following apply: (1) the officer may testify concerning the results of the field sobriety test, (2) the prosecution may introduce the results of the field sobriety test as evidence in any proceedings in the criminal prosecution or juvenile court proceeding, and (3) if testimony is presented or evidence is introduced under the provisions described in clauses (1) and (2) and the testimony or evidence is admissible under the Rules of Evidence, the court must admit the testimony or evidence, and the trier of fact must give it whatever weight the trier of fact considers to be appropriate (see **COMMENT 5**).

The act specifies that the above-described provision does not limit or preclude a court, in its determination of whether the arrest of a person was supported by probable cause or its determination of any other matter in a criminal

prosecution or juvenile court proceeding of a type described in that provision, from considering evidence or testimony that is not otherwise disallowed by the provisions described in the preceding paragraph. (R.C. 1547.11(E), 4511.19(D)(4), and 4511.194(C).)

The act also makes technical changes to the Watercraft OMVI Law and Watercraft OMVI Implied Consent Law. For the version of the sections in effect prior to January 1, 2004, the act makes those laws more closely parallel the version of OMVI Implied Consent Law in effect until January 1, 2004. For the version in effect on and after January 1, 2004, the act amends the Watercraft OMVI Implied Consent Law to ensure consistent terminology regarding the manipulation of water skis, aquaplanes, and similar devices. (R.C. 1547.111.)

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## COMMENT

1. The following provisions of continuing law, none of which are in the act, prohibit conduct that, depending upon the circumstances present, also might be prohibited under the act's new offense of vehicular vandalism:

(A) R.C. 4511.74(A) prohibits a person from *placing or knowingly dropping upon* any part of a highway, lane, road, street, or alley any tacks, bottles, wire, glass, nails, or other articles which may damage or injure any person, vehicle, streetcar, trackless trolley, or animal traveling along or upon such highway, except such substances that may be placed upon the roadway by proper authority for the repair or construction thereof. It also prohibits a person from *placing* any obstruction in or upon a highway without proper authority. R.C. 4511.99(D) provides that a violation of this prohibition generally is a minor misdemeanor, but that: (i) it is a misdemeanor of the fourth degree if, within one year of the offense, the offender once previously has been convicted of a violation of this prohibition or any other listed violation, and (ii) it is a misdemeanor of the third degree if, within one year of the offense, the offender two or more times previously has been convicted of a violation of this prohibition or any other listed violation.

(B) R.C. 4511.74(B) prohibits a person, *with intent to cause physical harm to a person or a vehicle*, from *placing or knowingly dropping upon* any part of a highway, lane, road, street, or alley any tacks, bottles, wire, glass, nails, or other articles which may damage or injure any person, vehicle, streetcar, trackless trolley, or animal traveling along or upon such highway, except such substances that may be placed upon the roadway by proper authority for the repair or construction thereof. R.C. 4511.99(J) provides that a violation of this prohibition is a misdemeanor of the first degree.

(C) R.C. 2903.11(A) prohibits a person from *knowingly causing serious physical harm to another or to another's unborn*, and from *knowingly causing or attempting to cause physical harm to another or to another's unborn by means of a deadly weapon* or dangerous ordnance. Under R.C. 2903.11(D), a violation of this prohibition is the offense of "felonious assault." Felonious assault generally is a felony of the second degree, but if the victim of the offense is a peace officer, the offense is a felony of the first degree, and if the victim of the offense is a peace officer and the victim suffered serious physical harm as a result of the commission of the offense, the offense is a felony of the first degree and the court must impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(D) R.C. 2903.12 prohibits a person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, from *knowingly causing serious physical harm to another or to another's unborn* and from *knowingly causing or attempting to cause physical harm to another or to another's unborn by means of a deadly weapon* or dangerous ordnance. A violation of this prohibition is the offense of "aggravated assault." Aggravated assault generally is a felony of the fourth degree, but if the victim of the offense is a peace officer, the offense is a felony of the third degree, and if the victim of the offense is a peace officer and the victim suffered serious physical harm as a result of the commission of the offense, the offense is a felony of the third degree and the court must impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree.

(E) R.C. 2903.13 prohibits a person from *knowingly causing or attempting to cause physical harm to another or to another's unborn*, and from *recklessly causing serious physical harm to another or to another's unborn*. A violation of this prohibition is the offense of "assault." Assault generally is a misdemeanor of the first degree, but if the victim of the offense is a peace officer, a firefighter, or a person performing emergency medical service, while in the performance of their official duties, the offense is a felony of the fourth degree, and if the victim of the offense is a peace officer and the victim suffered serious physical harm as a result of the commission of the offense, the offense is a felony of the fourth degree and the court must impose as a mandatory prison term one of the prison terms prescribed for a felony of the fourth degree that is at least 12 months in duration. In other specified circumstances, generally related to the status of the victim but generally not relevant to the act, assault is classified as a felony of the third, fourth, or fifth degree.

(F) R.C. 2903.14 prohibits a person from *negligently, by means of a deadly weapon* or dangerous ordnance, *causing physical harm to another or to another's*

*unborn*. A violation of this prohibition is the offense of "negligent assault," a misdemeanor of the third degree.

(G) R.C. 2909.06 prohibits a person from *causing, or creating a substantial risk of physical harm to any property of another* without the other person's consent, either *knowingly, by any means*, or recklessly, by means of fire, explosion, flood, poison gas, poison, radioactive material, caustic or corrosive material, or other inherently dangerous agency or substance. A violation of this prohibition is the offense of "criminal damaging or endangering." Criminal damaging or endangering generally is a misdemeanor of the second degree, but: (i) if the violation creates a risk of physical harm to any person, the offense is a misdemeanor of the first degree, (ii) if the property involved in the violation is an aircraft, an aircraft engine, propeller, appliance, spare part, or any other equipment or implement used or intended to be used in the operation of an aircraft and if the violation creates a risk of physical harm to any person, the offense is a felony of the fifth degree, and (iii) if the property involved in the violation is an aircraft, an aircraft engine, propeller, appliance, spare part, or any other equipment or implement used or intended to be used in the operation of an aircraft and if the violation creates a substantial risk of physical harm to any person or if the property involved in the violation is an occupied aircraft, the offense is a felony of the fourth degree.

(H) R.C. 2909.07 prohibits a person from engaging in any of a list of specified activities that cause certain types of property damage. One of the prohibited activities is relevant to this discussion--it prohibits a person, without privilege to do so, from *knowingly* moving, defacing, *damaging*, destroying or otherwise improperly tampering with *the property of another*. A violation of this prohibition, or any of the other prohibitions contained in the section, is the offense of "criminal mischief." Criminal mischief generally is a misdemeanor of the third degree, but: (i) if the violation creates a risk of physical harm to any person, the offense is a misdemeanor of the first degree, (ii) if the property involved in the violation is an aircraft, an aircraft engine, propeller, appliance, spare part, fuel, lubricant, hydraulic fluid, any other equipment, implement, or material used or intended to be used in the operation of an aircraft, or any cargo carried or intended to be carried in an aircraft and if the violation creates a risk of physical harm to any person, the offense is a felony of the fifth degree, and (iii) if the property involved in the violation is an aircraft, an aircraft engine, propeller, appliance, spare part, fuel, lubricant, hydraulic fluid, any other equipment, implement, or material used or intended to be used in the operation of an aircraft, or any cargo carried or intended to be carried in an aircraft and if the violation creates a substantial risk of physical harm to any person or if the property involved in the violation is an occupied aircraft, the offense is a felony of the fourth degree.

2. In *State v. Homan* (2000), 89 Ohio St.3d 421, reconsid. denied (2000), 90 Ohio St.3d 1431, the Supreme Court restricted the use of the results of field sobriety tests in court proceedings. In the case before it, a law enforcement officer had observed a vehicle drive left of center two times and stopped the vehicle. When the officer approached the vehicle, he smelled a strong odor of alcohol on the driver's breath and observed her eyes to be red and glassy. The officer administered three field sobriety tests to the driver, but, in administering two of the tests, he admittedly at times deviated from established testing procedures. Based upon the results of the tests, the driver's demeanor, and the driver's admission that she had consumed three beers, the officer arrested the driver for state OMVI and two other violations. Prior to trial, the driver argued in a motion that: (a) because the officer did not administer the field sobriety tests in strict compliance with standardized methods and procedures, the results of the tests were unreliable and could not serve as the basis for probable cause to arrest, and (b) therefore, the evidence gathered as a result of the vehicle stop, arrest, and subsequent detention had to be suppressed. The trial court denied the motion and, at trial, the driver was convicted of state OMVI (the other charges also were resolved). Upon appeal, the court of appeals affirmed the conviction. It agreed with the driver that, because the officer did not strictly comply with standardized testing procedures in administering two of the field sobriety tests, the tests could not form the basis for probable cause to arrest, but it concluded that, even with the suppression of the two tests, there remained sufficient evidence upon which the officer could have relied in arresting the driver.

On appeal, the Supreme Court held that, *in order for the results of a field sobriety test to serve as evidence of probable cause to arrest, the involved law enforcement officer must have administered the test in strict compliance with standardized testing procedures.* The Court, citing a NHTSA study and the opinions of experts on the subject, stated that, when field sobriety testing is conducted in a manner that departs from established methods and procedures, the results are inherently unreliable.

But the Court also agreed with the court of appeals *that the totality of facts and circumstances surrounding the driver's arrest in the case supported a finding of probable cause.* It stated that, in determining whether a law enforcement officer who arrests a person for OMVI had probable cause to make the arrest, it will examine the "totality" of facts and circumstances surrounding the arrest and consider whether, at the moment of arrest, the officer had sufficient information, derived from a reasonably trustworthy source of facts and circumstances, sufficient to cause a prudent person to believe that the suspect was driving under the influence. It also stated that, while field sobriety tests must be administered in strict compliance with standardized procedures, probable cause to arrest does not necessarily have to be based upon a suspect's poor performance on the tests;

rather, *the totality of the facts and circumstances can support a finding of probable cause to arrest even if no field sobriety tests were administered or if test results must be excluded for lack of strict compliance.*

The Court, in its decision, did not cite any Constitutional provision or any Rule of Evidence as the basis of the decision.

3. According to the Supreme Court (*Homan, supra*, at 424, note 4), the "NHTSA has been a leader in the study and development of field sobriety testing policy and procedure" and has developed standardized field sobriety test manuals that "form the basis for manuals used by state law enforcement agencies across the country." The NHTSA has developed a Desk Book, which states that (<http://www.nhtsa.dot.gov/people/injury/enforce/DESKBK.html>):

(t)he Standardized Field Sobriety Test (SFST) is a battery of three tests administered and evaluated in a standardized manner to obtain validated indicators of impairment and establish probable cause for arrest. These tests were developed as a result of research sponsored by the National Highway Traffic Safety Administration (NHTSA) and conducted by the Southern California Research Institute. A formal program of training was developed and is available through NHTSA to help police officers become more skillful at detecting DWI suspects, describing the behavior of these suspects, and presenting effective testimony in court. Formal administration and accreditation of the program is provided through IACP. The three tests of the SFST are:

- the horizontal gaze nystagmus (HGN)
- the walk-and-turn
- the one-leg stand.

4. Article II, section 39 of the Ohio Constitution states that "(l)aws may be passed for the regulation of the use of expert witnesses and expert testimony in criminal trials and proceedings."

5. Beginning January 1, 2004, the Traffic Law also prohibits a person being in *physical control* of a vehicle, streetcar, or trackless trolley while under the influence of alcohol, a drug of abuse, or a combination of them or while the person's whole blood, blood serum or plasma, breath, or urine contains a



prohibited concentration of alcohol. "Physical control" means being in the driver's position of the front seat of a vehicle or in the driver's position of a streetcar or trackless trolley and having possession of the vehicle's, streetcar's, or trackless trolley's ignition key or other ignition device. A person who violates this prohibition is guilty of having physical control of a vehicle while under the influence. (R.C. 4511.194.) The Implied Consent Law is expanded to also apply to this new offense (R.C. 4511.191 to 4511.193). The act's provision on field sobriety tests will apply to this offense as well.

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## HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	09-25-01	p. 902
Reported, S. Judiciary on Criminal Justice	10-17-01	p. 988
Passed Senate (32-0)	10-17-01	p. 991
Reported, H. Transportation & Public Safety	12-04-02	pp. 2200-2364
Passed House (94-0)	12-06-02	pp. 2334-2364
Concurrence (31-0)	12-10-02	p. 2336

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