

[Cite as *State v. Derov*, 121 Ohio St.3d 269, 2009-Ohio-1111.]

THE STATE OF OHIO, APPELLANT, v. DEROV, APPELLEE.

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Judgment of the court of appeals reversed in part and appeal dismissed in part as improvidently accepted — Notice of certified conflict dismissed for want of a conflict.

(Nos. 2008-0853 and 2008-0858 — Submitted February 4, 2009 — Decided March 18, 2009.)

APPEAL from and CERTIFIED by the Court of Appeals for Mahoning County,
No. 07 MA 71, 176 Ohio App.3d 43, 2008-Ohio-1672.

{¶ 1} The record in the trial court concerning the portable breathalyzer test used in this case is not sufficient to support either the statements in the opinion of the court of appeals regarding the use of the portable breathalyzer and the value of its test results or the judgment that the trial court should not have considered the results of the portable breath test. Accordingly, that portion of the judgment of the court of appeals is reversed, and the cause is remanded to the court of appeals for further proceedings.

{¶ 2} In view of the foregoing disposition of appellant's Proposition of Law No. II, the notice of certified conflict is dismissed for want of a conflict.

{¶ 3} Sua sponte, the appeal is dismissed as to appellant's Proposition of Law Nos. I and III as having been improvidently accepted.

{¶ 4} The opinion of the court of appeals may not be cited as authority except by the parties inter se.

MOYER, C.J., and LUNDBERG STRATTON, O'CONNOR, O'DONNELL, and CUPP, JJ., concur.

SUPREME COURT OF OHIO

PFEIFER and LANZINGER, JJ., dissent in part and would dismiss the cause as having been improvidently accepted.

Paul J. Gains, Mahoning County Prosecuting Attorney, and Ralph M. Rivera, Assistant Prosecuting Attorney, for appellant.

Robert C. Kokor, for appellee.

Lamkin, Van Eman, Trimble, Beals & Dougherty, L.L.C., and Timothy L. Van Eman, urging reversal for amicus curiae Mothers Against Drunk Driving.

Joseph R. Macejko, Youngstown City Prosecutor, urging reversal for amicus curiae city of Youngstown.

Richard Cordray, Attorney General, Benjamin C. Mizer, Solicitor General, and Jason Patrick Small, Deputy Solicitor, urging reversal for amicus curiae Ohio Attorney General.

Timothy Huey; and Atway & Cochran, L.L.C., and Scott R. Cochran, urging affirmance for amicus curiae Ohio Association of Criminal Defense Lawyers.
