

onto Oakwood without stopping for the stop sign. Upon pulling the defendant over, the officer noticed a strong odor of alcohol emanating from the defendant, the defendant had no idea why he was being stopped, and the defendant had a hard time standing upon exiting his vehicle. The defendant admitted to having consumed "2 beers" and his speech was slurred.

The officer administered the horizontal gaze nystagmus (HGN) test, the one leg stand test and the walk and turn test. He described in detail how he administered these tests and he delineated the specific reasons why he concluded that the defendant failed them. He placed the defendant under arrest and transported him to the police station. Officer Wallace administered the Intoxilizer 8000 breath test, which produced a reading of .155.

Analysis

Based upon the facts as set forth above, the Court is satisfied that the officer had a reasonable, articulable suspicion that the defendant was impaired which would justify subjecting him to field sobriety tests.

The motion alleges in para. 7 that the field sobriety tests "were not administered in strict compliance with standardized testing procedures." This is a general claim that does not take issue with any specific test or any specific aspect of any test.

It is well settled that when a motion to suppress raises only general claims, the burden imposed upon the state is fairly slight. The state is only required to demonstrate, in general terms, that it substantially complied with the regulations. Unless the defendant raises a specific issue in a motion, specific evidence is not required. *State v. Johnson (2000), 137 Ohio App.3d 847.*

First, the court notes that strict compliance with administrative regulations is not required. See R.C. 4511.19(D)(4)(b). Second, even though specific evidence was not required because of the general nature of the challenge, the state did present specific evidence that showed that the officer did substantially comply with the NHTSA requirements and his training when he administered the field sobriety tests. No further discussion need be had

because counsel raised no specific objections to the manner in which these tests were conducted.

Based upon the defendant's erratic driving, the time of the stop, the odor of alcohol, the defendant's admissions, the defendant's slurred speech, the defendant's lack of coordination, and his failure to pass any of the field sobriety tests, this Court is satisfied that the officer had probable cause to arrest the defendant for operating his vehicle while under the influence.

The defendant next raises specific challenges with regard to the breath test that Officer Wallace administered to the defendant. Once a defendant raises issues with sufficient particularity in a motion to suppress, the burden shifts to the prosecution to show substantial compliance, but only to the extent that the defendant takes issue with the legality of the test. *State v. Shelby* (Feb. 28, 1995), Scioto App. No. 94CA2247, unreported, 1995 WL 84579.

In *Johnson*, the defendant alleged that the RFI check was not conducted pursuant to specific Ohio Administrative Code sections. Based upon the evidence presented, the Court found that the RFI check was done properly. On appeal, the defendant argued that the court erred because there was no testimony that the hand held radio used in the test was the type normally used by that department. The Court disagreed.

We find that the evidence produced at the hearing addressed the issue of the RFI testing to the degree of specificity required by the motion to suppress. The city was not required to specifically show that the hand-held radio was the type normally used by the law enforcement agency, because this specific requirement was not raised in detail in the motion to suppress.

Here, the motion to suppress is confusing because it references "calibrations" and issues relating to calibrations. It also references RFI surveys and avers that these surveys were not conducted properly.

The Intoxilizer 8000 is the machine at issue here. It is calibrated by its manufacturer. And radio frequency interference is not an issue with this machine, hence, RFI surveys are not performed on it.

It appears that counsel may be confusing the Intoxilizer 8000 with the BAC Datamaster. Nonetheless, the State addressed each of the points raised in the motion that dealt with the breath test administered here.

The allegations contained in para. numbers 4,5 and 6 are not supported by the evidence. The officer did advise the defendant of the consequences of taking/refusing a breath test and the defendant consented to same.

The allegations contained in para. numbers 8 through 16 are not supported by the evidence. Atty. Mary Martin, the program administrator for alcohol and drug testing at the Ohio Department of Health, testified about the Intoxilizer 8000. She described the "certification" process (as opposed to the calibration process for the BAC Datamaster) in detail and concluded that the Intoxilizer 8000 had been properly certified and was in good working order at the time the defendant's breath test was taken. Offered into evidence, without objection, are all of the records dealing with the tests and certifications showing that the machine was working properly on October 19, 2011 (before the defendant's test), on February 17, 2012 (after the defendant's test) and again on May 31, 2012. These records show that the solutions used in the machine were all good and that the internal checks of the machine were all good on those dates when the machine was certified to be in good working order.

State's exhibit 16 is the test report, generated by the Intoxilizer 8000, of the defendant's breath test. Atty. Martin testified that had the Intoxilizer 8000 not worked properly, the report would have indicated the problem and no breath alcohol reading would have occurred. Here the machine worked properly and recorded the defendant's breath alcohol level at .155.

Defense counsel made much of the fact that software changes were made to the Intoxilizer 8000 in 2007, 2008 and 2010. He argues that the machine somehow changed with each software addition and that the "new machine" had to be approved by the ODH following each such event. This allegation was not

raised in the defendant's motion, however, the court allowed counsel to inquire of Atty. Martin on this issue. The court is satisfied that the Ohio Department of Health approved the Intoxilizer 8000 for use in this State and that software changes do not affect that determination.

Counsel also challenged the use of the term "subject test" as it relates to OAC Section 3701-53-04(B). This code section requires a dry gas control test to be performed before and after every subject test.

The court notes, again, that this issue was not specifically raised in the motion. However, the court allowed counsel to inquire about it.

The evidence adduced showed that a breath test consists of a person blowing twice into the Intoxilizer 8000. The lower of the two readings produced is the one used to charge a person with OVI.

Counsel contended that Sec. 3701-53-04(B) requires a dry gas control test to be performed in between the two blows or samples. His interpretation of this section is that each blow/sample is a "subject test."

Counsel's interpretation of this section was not only refuted by Atty. Martin and Officer Wallace, but also by case law. Counsel provided this court with two trial court opinions, one of which was reversed on appeal, and the other this court finds unpersuasive.

In *Cincinnati v. Nicholson*, 2013-Ohio-708 (which reversed the trial court case provided by defense counsel), the Court agreed with the reasoning set forth in *State v. Kormos*, 2012-Ohio-3128, which looked to the common meaning of the term "subject." Looking to the definition in *Webster's Third New International Dictionary* 2275 (1993), the court reasoned that the term "subject" meant "one that is placed under the authority, dominion, control, or influence of someone or something *** an individual whose reactions or responses are studied."

Applying this definition, that Court concluded that a "subject test" is a breath test that is comprised of two different breath samples from one person. Subject sample 1 and subject sample 2 are nothing more than consecutive breath samples taken during the same "subject test." See *Kormos, supra*.

This Court finds the reasoning in *Nicholson* and *Kormos* to be persuasive and in accord with the testimony of Atty. Martin on this issue. Hence, counsel's argument that a dry gas test should have been performed on the Intoxilizer 8000 between each of the defendant's breath samples is erroneous.

Last, the Court finds counsel's claim that Officer Wallace was not qualified to perform the breath test because his certification was not offered into evidence, unpersuasive. The officer's testimony that he was, indeed, certified, coupled with the admission into evidence of the card that he received upon certification and without which he could not operate the Intoxilizer, is sufficient.

Wherefore, the motion to suppress is denied.

IT IS SO ORDERED.

3.19.13

Date


Hof. Elizabeth A. Kobly

cc: Atty. Lanzo and Atty. Ally