

IN THE HOCKING COUNTY MUNICIPAL COURT, LOGAN, OHIO

CITY OF LOGAN

Plaintiff

vs.

STEPHANIE COLE

Defendant

Case No.: TRC 1001631

JUDGMENT ENTRY

FILED

MAR 24 2011

**HOCKING COUNTY
MUNICIPAL COURT**

This matter came on for hearing on February 8, 2011 as to defendant's motion to dismiss.

Defendant claims that the results of the test should be suppressed because the mandatory 20 minute observation period was not observed and the breath machine was not properly calibrated. Because the period was observed and the breath test device was properly calibrated, the motion is overruled.

On June 27, 2010, Patrolman Josh Mowery of the Logan Police, saw a vehicle driven by defendant Stephanie Cole fail to use a turn signal when leaving TJ's Carry Out to go out on East Front Street. Mowery executed a traffic stop and saw signs of possible impairment. After having Ms. Cole perform some field sobriety tests, Mowery arrested her for OVI.

After arrest, Ms. Cole was taken to the Logan Police Station for a chemical test of her breath. Upon her arrival, Ms. Cole was asked to submit to the test and she agreed. The test was conducted on an Intoxilyzer 8000 breath alcohol instrument. During the testing, the Intoxilyzer 8000 registered an "ambient fail." Officer Mowery's training informed him that if the Intoxilyzer suffered two ambient failures in a row then the device was to be taken out of service. The problem cleared up and the testing procedure restarted. The defendant tested at .115 grams of alcohol per 210 liters of breath. She was charged with OVI and OVI per se violations of City of Logan Ord. 73.01 (a) (1), 73.01 (a) (4) and failing to use turn signal, Logan Ord. 72.16.

At the hearing, the city put on the testimony of John Kucmanic. Mr. Kucmanic is a toxicologist with the Ohio Department of Health (ODOH). He has been employed by ODOH for

12 years. Mr. Kumanic stated that the Intoxilyzer 8000 is approved by the Department of Health for the testing of breath in OVI cases. He also said that he was involved in the approval of the Intoxilyzer 8000.

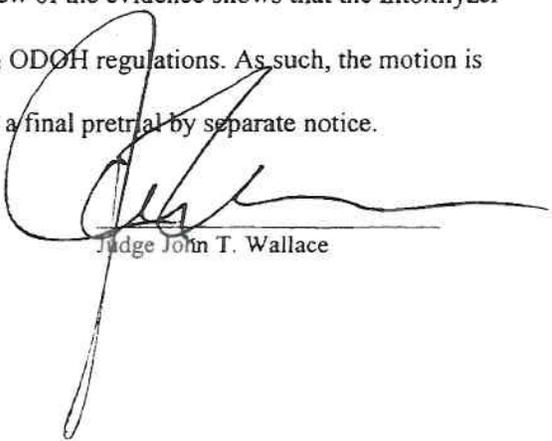
The Intoxilyzer 8000 is a new device. At this point, there is some controversy as to whether it is reliable. The normal course of action as to a new piece of equipment such as this would be to present evidence as to reliability to myself and the other trial court judges of this state. This is the course of action which was envisioned by the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579 (1993). However, in State v. Vega, 12 Ohio St. 3d 185 (1984), the Ohio Supreme Court held that O.R.C. Sect. 4511.19 contains a legislative determination that certain breath testing devices are generally reliable. The Vega court held that O.R.C. Sect. 4511.19 delegated to the Director of the Ohio Department of Health the authority to determine the alcohol tests and procedures which are generally reliable. The Vega court thus took the courts of this state out of these determinations and held that the accused may not make a general attack on the reliability and validity of a breath testing instruments approved by ODOH. As such, this court cannot look at the general reliability of breath testing machines in general or the Intoxilyzer 8000 in particular. Therefore, the analysis in this case will be directed towards the question of whether there is substantial compliance with ODOH regulations. State v. Luke, 2006 Ohio 2306, 10th District COA.

As to specific device used in this case, Mr. Kumanic certified an Intoxilyzer 8000 for the Logan Police Department on June 4, 2010. The serial number for the Intoxilyzer 8000 is 80-004605. The certification was done by means of dry gas tank. The dry gas used in this certification was from lot number 611422, tank number 09118 (state's exhibit 7). The dry gas was manufactured by Calgaz (state's exhibit 8). All certificates necessary to outline the process of approval were introduced by the state through Mr. Kucmanic's testimony. (State's exhibit 6,7,8,9,10,11 and 12).

For the results of the breathalyzer test in this case to be admitted into evidence, the state must prove that it substantially complied with the standards set by the Ohio Department of Health. State v. Burnside, 100 Ohio St. 3d 152, 2003-Ohio-5372 (2003). Once the State has met its burden and shown substantial compliance with ODOH regulations, the defendant must show that she was prejudiced by any departure from complete technical compliance with ODOH standards.

The Intoxilyzer 8000 is the subject of a number of regulations in the Ohio Administrative Code. These include authorization as a breath alcohol test instrument under OAC Sect. 3701-53-02 (a) (3). Unlike earlier breathalyzers, there is no need for weekly calibration with liquid solutions. Under OAC Sect. 3701-53-04 (b), the Intoxilyzer 8000 automatically performs a dry gas control test before and after every test of a subject. The evidence showed that this occurred in this case. The only other Ohio case as to the Intoxilyzer 8000 of which I am aware is State v. Parlier, 2009 TRC14102 (Muni. Ct Clermont Cty, March 5, 2010). In this case, Judge Shriver, found, on similar evidence, that substantial compliance with ODOH regulations had been shown.

The major objection to the test in this case is that the city did not wait 20 minutes before testing the defendant. A review of the evidence reveals that the observation period as to the defendant started at 8:01 p.m. and defendant was tested starting at 8:36 p.m. The objection as to the observation period is overruled. Further review of the evidence shows that the Intoxilyzer 8000 was properly calibrated in accordance with ODOH regulations. As such, the motion is denied and overruled. This matter will be set for a final pretrial by separate notice.



Judge John T. Wallace

Copy to:
Law Director
Attorney Kline