FILED
ATHENS COUNTY MUN. COURT
JUN 29 2011
CLERKS OFFICE
ATHENS COUNTY, OHIO

IN THE ATHENS COUNTY MUNICIPAL COURT
ATHENS OHIO

State of Ohio,

Plaintiff,

v.

Nicole Gerome, Case Number 11TRC01909

Defendant.

State of Ohio,

Plaintiff,

v.

Jamison Wise, Case Number 11TRC00826

Defendant.

State of Ohio ,

Plaintiff,

v.

Kevin Warren, Case Number 11TRC01734

Defendant.

State of Ohio,

Plaintiff,

v.

Nathan Hayes, Case Number 11TRC02434

Defendant. Hearings May 27 and June 24, 2011

Decision June 29, 2011

William A. Grim, Judge

INTRODUCTION:

This matter came on for consideration of Defendant's Motion to Suppress filed April 20, 2011, Defendant's Supplemental Memorandum filed May 23, 2011 and the State of Ohio's Motion in Limine also filed May 23, 2011. The issues raised by these pleadings are:

1. Probable cause for arrest
2. Compliance with Ohio Department of Health (ODH) regulations
3. Admissibility at trial of Intoxilyzer 8000 test results
4. Admissibility at trial of defense evidence challenging the reliability of Intoxilyzer 8000 test results.

The State of Ohio argued that *State v. Vega*, (1984) 12 Ohio St.3d 185 prohibits any evidentiary hearing regarding the Intoxilyzer 8000. The Court finds that such argument is a misreading of *Vega*, as that decision only restricts defense evidence at trial; it does not prohibit a pretrial evidentiary hearing under Evidence Rule 104 to determine relevancy and reliability of anticipated evidence.

The Court held evidentiary hearings on these issues on May 27, 2011 and June 24, 2011. Representing the State of Ohio was Lisa E. Eliason, Athens Chief City Prosecutor; Tracy W. Meek, Athens City Prosecutor; James K. Stanley, Athens City Prosecutor; and, on June 24, 2011, Assistant Attorneys General Matthew J. Donahue and Aaron Haslam. Defense attorneys were K. Robert Toy, Jon Saia, and D. Timothy Huey on behalf of Nicole Gerome; Douglas J. Francis on behalf of Kevin Warren; Kimberlee

J. Francis on behalf of Jamison Wise and Patrick C. McGee on behalf of Nathan Hayes.

This is the second of two decisions in these cases with the first, filed May 25, 2011, discussing the legal rationale for having a full evidentiary hearing. This decision discusses the evidence received and the application of the law to that evidence. Taken together, the two decisions provide a full discussion of the legal and factual issues involved.

Witnesses at these evidentiary hearings were:

Mary Martin, Program Administrator, Ohio Department of Health Alcohol and Drug Testing
David Radomski, Defense Expert from National Patent Analytical Systems
John Fusco, National Patent Analytical Systems
Cleve Johnson, Screening Committee Member
Thomas Workman, Jr., Defense Expert from the University of Massachusetts
Gregory Marquis, Information Technology Specialist, Ohio Department of Health
John Kucmanic, former Chief Toxicologist, Ohio Department of Health Alcohol and Drug Testing
Brian Faulkner, Chief Engineer, CMI, Inc.
Melanie Provenzano, Trooper, Ohio State Highway Patrol
Dr. Alfred Staubus, Defense Expert, Professor Emeritus The Ohio State University

Many exhibits were identified and offered into evidence. The Court excluded those it deemed immaterial or not properly authenticated, but allowed counsel to proffer those exhibits. The State of Ohio has also included material attached to its June 24, 2011 State's Argument that was not offered for evidence and the Court has placed those attachments with the proffered exhibits.

The lead defendant in this matter is Nicole Gerome. The other defendants are joined in this matter for the limited purpose of instrument certification and check under Ohio Administrative Code 3701-53-04(C) and (D) and admissibility issues regarding the Intoxilyzer 8000 under Evidence Rules 402 and 702. Unless otherwise noted, all factual findings regarding probable cause and other ODH regulations compliance refer to the case of Nicole Gerome.

CERTIFICATION DOCUMENTATION:

The State of Ohio has submitted certified copies of the Ohio Department of Health records regarding the three Intoxilyzer 8000 instruments in use in Athens County. These copies are of actual documents, rather than being derived from the ODH web-site, so the Court accepts them as authentic under Evidence Rule 902. These documents, being the first three parts of State's Exhibit A, show the following:

Instrument Serial Number 80-003983 (Ohio Highway Patrol Post 5)

Calibrated by CMI April 21, 2009 and October 6, 2009
Certified by ODH Kucmanic December 20, 2010
Checked when placed in service by ODH Yanni January 25, 2011

Instrument Serial Number 80-004089 (Athens Police Department)

Calibrated by CMI May 15, 2009 and October 14, 2009
Certified by ODH Kucmanic December 28, 2010
Checked when placed in service by ODH Yanni January 25, 2011

Instrument Serial Number 80-003948 (Ohio University Police Department)

Calibrated by CMI April 13, 2009 and October 7, 2009
Certified by ODH Kucmanic December 20, 2010
Checked when placed in service by ODH Yanni January 25, 2011

Pursuant to *State v. Edwards*, (2005) 107 Ohio St.3d 169, a trial court may accept documentation at a pretrial motion hearing to show compliance with testing regulations. In *Edwards*, *supra*, and in *State v. Parlier*, Clermont County Municipal Court Case 2009TRC14102, decided March 5, 2010 regarding the Intoxilyzer 8000 certification, the accepted documentation was not a certified copy. In the present case, the certified documents are self-authenticating under Evidence Rule 902. See also *State v. Allen*, Monroe County Court Case Number 11TRC176AB, decided May 11, 2011. Thus, this foundation is even stronger than that approved by *Edwards*.

The issue under OAC 3701-53-04(C) and (D) is whether the instruments have been certified by representatives of the Ohio Department of Health and then checked when placed in service. This is an administrative determination; if ODH records show certification and check to their satisfaction, the administrative regulations have been met. This is the reverse side of the separation of powers issue discussed by the Court in the May 25, 2011 preliminary opinion in this case. This Court will not review the propriety of an administrative decision but will make an

independent determination as to courtroom admissibility under the Ohio Evidence Rules.

From the above, the Court finds compliance with OAC 3701-53-04(C) and (D) as to all defendants. Testimony regarding the certification process goes to the weight the Court will give in determining relevance and reliability of the Intoxilyzer 8000. Those issues are discussed later in this decision.

PROBABLE CAUSE AND TESTING REQUIREMENTS:

Defendant's vehicle was stopped by Ohio Highway Patrol Trooper Provenzano on March 16, 2011 at 2:33 a.m. after a radar clock of 65 mph in a 55 mph zone. Trooper Provenzano followed defendant's vehicle for approximately one mile before activating the pursuit lights but observed no other traffic violations or *indicia* of impaired driving. Defendant reacted promptly to the pursuit lights, signaled and pulled off to the berm of the road. As shown on the video, defendant's speech and walking and standing balance appeared to be normal.

Trooper Provenzano noted that defendant's eyes were bloodshot, red and glassy and that she had a strong odor of an alcoholic beverage on her. Upon inquiry, defendant admitted consuming one drink about 11:30 p.m. Defendant later said she drank one shot at that time. Defendant showed four of six possible clues on an HGN test conducted in substantial compliance with NHTSA guidelines. Defendant showed no scorable clues on the One Leg Stand test, although she had a

slight sway. On the Walk and Turn test, she showed two of eight possible clues, which is borderline failing. Although Trooper Provenzano only noted one such clue in her report, the other clue was clearly visible on the video.

On a properly calibrated Alco-Sensor III portable breath test device at 2:44 a.m., defendant blew .145. Operating instructions for such device direct the officer to determine the subject has not ingested any alcohol in the fifteen minutes prior to the test. Trooper Provenzano believed defendant's statement of one drink at 11:30 p.m. met this standard.

Defendant was arrested, handcuffed, and patted down. According to the video at 2:55 a.m., Defendant said she had a cell phone on her and, at 2:58 a.m., said her cell phone was in her pocket. On video, Trooper Provenzano did not remove or inspect the reported cell phone. At the June 24, 2011 hearing, Trooper Provenzano testified that she did not recall if Defendant had a cell phone or Blackberry device. From the above, the court concludes that Defendant's cell phone was not removed from her at the Ohio Highway Patrol post.

Defendant was transported to Ohio Highway Patrol Post 5 where, after proper advice of consequences per BMV Form 2255, she agreed to take an evidential breath test. The testing instrument was an Intoxilyzer 8000, serial number 80-003983. Trooper Provenzano has been trained in its use, having received her operator access card in July 2010. Trooper Provenzano properly followed directions

for this instrument and Defendant tested 0.135 g/210L. The instrument printed the test results on Defense Exhibit 19; the same test is reprinted on Defense Exhibit 5, which comes from the ODH website and contains more operational information transmitted by the instrument. The Court finds compliance with OAC Sections 3701-53-04(B) and 3701-53-09(D).

There were reasonable grounds for the traffic stop for the speeding violation. Although defendant's driving, balance, speech, and reported consumption weigh against a finding of impairment, the totality of the circumstances, including the strong odor of alcohol, HGN, and Walk and Turn and portable breath test results, provided probable cause to believe defendant was operating a vehicle with a prohibited concentration of alcohol in her system.

LACK OF RULES:

Defendant has presented an interesting argument under *State v. Ripple*, (1994) 70 Ohio St.3d 86 as to the lack of rules by the Ohio Department of Health regarding the Intoxilyzer 8000. *Ripple* involved a prosecution for OVI for a *per se* level of drugs. As the Department of Health had not yet promulgated any regulations for the testing of such drugs, the Ohio Supreme Court found noncompliance with the requirement of R.C. §4511.19(D)(1)(b) that samples be analyzed in accordance with ODH rules. The key was that there were no applicable rules promulgated.

This Court does note that there are almost no applicable regulations in OAC Chapter 3701-53, with the key word being almost. OAC 3701-53-02(E) requires breath samples from the instrument (note the singular referring to the only instrument in that category) listed under paragraph (A)(3) of this rule shall be analyzed according to the instrument display for the instrument used. OAC 3701-53-04(B) requires a dry gas control which this instrument is programmed to do on its own. OAC 3701-53-09(D) requires that operators of the Intoxilyzer 8000 have an operator access card, which the instrument automatically requires for access.

There are rules although it is debatable how meaningful these rules are. It is troubling that there is no administrative requirement for the operator to follow the procedure set forth in the sixty-four page operator guide promulgated by the Ohio Department of Health. However, this is a separation of powers issue and an administrative decision. So long as ODH has some applicable rule, the requirements of *State v. Ripple*, *supra*, are satisfied.

BREATH TESTING INSTRUMENT BACKGROUND:

The Intoxilyzer 8000 is among the latest generation of breath testing instruments intended to measure the amount of alcohol in the air in a subject's lungs. It has been recognized by the courts for decades that such measurement is possible. *Westerville v. Cunningham*, (1968) 15 Ohio St.2d 121. Several such instruments use the scientific principle of infrared absorption which is a staple of organic che-

mistry to identify organic compounds such as ethanol (the alcohol in beverages). In addition to identifying the presence of ethanol, the instruments are designed to quantify the amount of ethanol in the breath sample and then to calculate that measured quantity to a set standard such as grams by weight per 210 liters of breath.

Infrared technology involves the absorption of electromagnetic radiation by ethanol. Ethanol can be detected and measured by determining the amount of wavelengths of the infrared spectrum absorbed by the distinctive molecular structure of ethanol. When an infrared light passes through a chamber that contains ethanol, some of the light is absorbed. The amount of ethanol in the chamber can be measured by determining the amount of light that passes through the chamber when the air in the chamber contains ethanol and comparing it to the amount of light that passes through that same chamber after the air which contains ethanol is purged from the chamber.

There are four steps any breath testing instrument takes:

1. Recognizing ethanol and distinguishing similar organic compounds;
2. Detecting any outside influence factors such as alcohol in the ambient air, radio frequency interference, and mouth alcohol;
3. Quantifying the amount of alcohol in the chamber sample; and
4. Computing the grams of alcohol per 210 liters of breath by multiplying the size of the chamber by its ratio to 210 liters.

While accepted in principle, there have always been issues as to the reliability or precision of any given instrument or test. Proponents have always acknowledged that there can be outside factors affecting the accuracy of the test, such as radio frequency interference, retained liquid alcohol, and the presence of closely related organic compounds. By various methods, each instrument is designed to detect such outside factors and to report the test as invalid if there is an interferent present. Some detector methods are more precise than others.

HISTORY OF SELECTION:

The history of the selection of the Intoxilyzer 8000 OH-5 model by the Ohio Department of Health is considered only as to weight to be given to the ODH choice. This instrument was in existence and in the field in some jurisdictions when the specifications for a new instrument for Ohio were written. The proposed specifications matched the specifications for this instrument and the proposed specifications eliminated two of the four major manufacturers of breath testing instruments because of components used. The fourth manufacturer, National Patent Analytical Systems (NPAS) declined to participate because it would have required designing an instrument to copy the Intoxilyzer 8000. The citizen committee organized to review proposals thus had only this instrument to review and demonstrations included several failures. The Intoxilyzer 8000 OH-5 was approved by the

Ohio Department of Health and the State of Ohio purchased 700 of these instruments.

OHIO DEPARTMENT OF HEALTH WEBSITE:

The Intoxilyzer 8000 is designed to electronically transmit data from each subject test or instrument test to the Ohio Department of Health central database. As designed and advertised, this would allow public access to a comprehensive unedited history of each instrument and allow contemporaneous monitoring by the Ohio Department of Health.

Mary Martin, Program Administrator for ODH Bureau of Alcohol and Drug Testing, testified that she did not believe anything on the website could be altered or deleted although there could be a several month delay for the instrument information to appear on the website. Ms. Martin also testified that the reason that all three Athens County instruments quit working at about the same time was that each respective memory was full; nobody in Athens County uploaded the information and nobody at the state level exercised their capacity to retrieve the information remotely. At the June 24th hearing, Gregory Marquis, the 8000 program IT specialist, testified that he should have been notified if there were such a problem. He was not and was totally unaware of that situation at the June 24th evidentiary hearing.

The defense presented testimony and documentary evidence regarding the disappearance of two reports that were once on the website but now are not. The first instance involved Instrument #3983, being the same on which defendant Gerome was tested. As shown on Defendant's Exhibit 4, a December 20, 2010 certification report showed a BrAC of 23g/210L. This result is notable in that it is far beyond both human and instrument capacity. A realistic result could be 0.023 or 0.23 g/210L. The second instance was two reports of one Pickaway County subject test in which one report disappeared.

At the June 24th hearing, the State presented evidence to explain the disappearance of data. The Court accepts the technical explanation of a computer glitch in the testimony of witnesses Marquis, Kucmanic, and Faulkner, but is very troubled by the fact that the disappearance of data is by design. When an anomaly such as the above 23 test appears, the CMI software allows it to be replaced with other data. See State's Exhibits E, F, and G. The State's witnesses insisted that the data was not "deleted", just "replaced". The Court concludes that the software in the Intoxilyzer 8000 is designed to hide some inconvenient information. If it is the purpose of ODH to have a comprehensive database, that purpose has not been achieved. Mr. Marquis also testified that the website is not monitored for quality control.

Although the Court does not believe the shortcomings of the database affect the operation of the instruments, the disappearance of data is troubling. At worst, it is evidence of manipulation to hide adverse information. At best, it is evidence that ODH oversight and data collection is a work in progress. In either event, confidence is eroded in ODH's ability to be an impartial overseer of the Intoxilyzer 8000.

This is especially troubling because there is some relevant information that is only available through the ODH website. The test report printout at the testing site does not include the volume of breath or duration of blow, but that data is transmitted from the instrument to the central database. It is important that data be accurate and unchanged. Until the software is changed to eliminate the replacement feature, courts can never be sure we are looking at original data on the website.

SOURCE CODE:

The defense has demanded the source code for the Intoxilyzer 8000. A source code is the software programming that enables an instrument to analyze and report a result. Mary Martin, Program Administrator, testified that the State of Ohio did not have the source code for this instrument. In the ODH certification of this instrument, access to the source code was apparently not deemed necessary. The instrument was able to be tested with both a known control solution and in side by side comparisons with a live subject and other models of instruments. Both as a

discovery issue and as an issue of exculpatory evidence under *Brady v. Maryland*, (1963) 373 U.S. 83, the State of Ohio cannot be compelled to produce evidence it does not have.

Although this Court is aware that several courts in Florida have ordered CMI to release the source code, CMI has resisted on the basis that it is proprietary information and not relevant. That was also the position stated at this hearing by Brian Faulkner, Chief Engineer at CMI. The Court is not yet persuaded that the source code is material to the present determination or to the guilt or innocence of an accused. Therefore, Defendant's Motion for Source Code is denied.

MECHANICS OF THE INTOXILYZER 8000:

The Intoxilyzer 8000 uses infrared spectroscopy as its technology. This is a technology that has been recognized in industry and research for decades. It has been used for breath testing instruments since the 1980s. Both CMI and NPAS use this technology as does, in part, a third manufacturer, Drabold.

This technology is the same as that used by the Intoxilyzer 5000, also manufactured by CMI, which was in the generation of evidential breath testing instruments used previously. The Intoxilyzer 8000 was introduced in response to law enforcement agencies' desire for an instrument more portable than the desktop 5000 or BAC Datamaster but more precise than the handheld portable breath testing devices.

The Intoxilyzer 8000 is on both the National Highway Traffic Safety Administration Conforming Products List and on the Ohio Department of Health list of approved instruments in OAC 3701-53-02(A)(3). There are two models of the Intoxilyzer 8000 currently in use in Ohio: the OH-2 model used by the Division of Watercraft and the OH-5 model used for land enforcement. They have the same internal analytical components but different user features. For purposes of considering strengths and weaknesses, the models present the same issues.

The operation of the Intoxilyzer 8000 is set forth in the sixty-four page operator guide issued by the Ohio Department of Health Bureau of Alcohol and Drug Testing (revised 9-2009) which is in evidence as the fourth part of State's Exhibit A. In summary, the guide directs operators to turn on the instrument, enter the operator, subject, and arrest data and then follow the prompts from the instrument display.

The instrument performs several self-checks regarding air blanks, diagnostics, and dry gas controls. Beginning at page 37 of the guide, operators are instructed to discontinue use and notify the ODH Bureau of Alcohol and Drug Testing if the instrument shows consecutive identical failures of these checks. However, the instrument itself does not enforce this by shutting down until the technicians can examine and resolve the problem. Therefore, as a practical matter, these particular intended self-checks are optional with the operator.

There are other self-checks that are enforced by the instrument aborting the subject test upon detection of *indicia* of mouth alcohol, radio frequency interference, and deficient sample. This instrument also requires two subject samples that are within .02 agreement of each other to be a valid test. The Intoxilyzer 8000 then prints the lower score of the two samples as the evidential test score.

INTOXILYZER 5000 AND INTOXILYZER 8000 DIFFERENCES

To achieve portability, it was necessary to reduce the size of the instrument from that of the Intoxilyzer 5000. In such downsizing, different components were used in the 8000. There is a different light source, a different detector, and different filters. In the opinion of defense witnesses, that is a step down from the precision of the Intoxilyzer 5000. Witnesses called by the State of Ohio disagreed, although acknowledging the differences. Brian Faulkner testified that the 8000 was designed for portability and to eliminate moving parts and that there were no upgrades regarding precision issues other than the double sampling.

The 8000 uses a pulsed light source which measures at four points per second. The 5000 used a steady state beam with a mechanical chopping wheel measuring at 40 points per second. The 8000 uses a pyroelectric detector instead of a lead selenide detector. The 8000 uses a smaller sample chamber and a less precise airflow measuring pressure device. There is no change, better or worse, in

radio frequency interference detection components. The underlying analysis technology of infrared spectroscopy remains the same.

From the operator's viewpoint, there are changes in procedure from the Intoxilyzer 5000 or BAC Datamaster. Generally speaking, the process is more automatic and guided by the instrument display and less prone to inadvertent operator error. Most operator and subject data is scanned by optical readers and the instrument enforces the time requirements and performs interim self-checks. Following the test, the instrument prints the result and related forms and temporarily stores the test information for later uploading to the ODH central database.

VULNERABILITIES OF THE INTOXILYZER 8000:

There is no such thing as a perfect person, a perfect machine, or a perfect computer operating system. All have limitations or vulnerabilities. Defendant has presented evidence of several vulnerabilities and the Court understands and accepts two and possibly three as material to admissibility and to guilt or innocence.

RFI

The most important vulnerability is radio frequency interference (RFI) being undetected. Evidential breath testing instruments have always used devices to detect frequencies by police radios and such equipment. However, in the last decade, there has been a proliferation of portable digital assistants, smartphones, and other portable electronic devices that emit radio frequencies. Such frequencies can

interfere in the operation of other electronic devices, such as an airplane's navigation system or, as unintentionally demonstrated, this courtroom's recording system. This is true if the device is turned on, even when not in use.

It is agreed by all that evidential breath testing machines cannot be shielded from radio frequencies but such frequencies can be detected and the instrument programmed to abort the test upon recognizing the interference. The Intoxilyzer 8000 does have such an RFI detector, but it has never been tested at frequencies used by smartphones and similar devices. This is surprising, given that, according to Mary Martin, former bureau chief of ODH Alcohol and Drug Testing Dean Ward acknowledged RFI by a Blackberry device. John Kucmanic testified that the Intoxilyzer 8000 failed to detect RFI at a Marion test site.

Thomas Workman, who has testified in Florida and Arizona as an expert witness regarding the Intoxilyzer 8000, testified that modern cell phones will interfere at frequencies not detected by the Intoxilyzer 8000 and the result of such interference is to scramble the electronics. Such scrambling has produced inapplicable error codes and test scores unrelated to actual ethanol content. Depending on which component is being scrambled by RFI, the error range can be from .09 to .20. The response of the State of Ohio Department of Health through John Kucmanic was that ODH checked eight frequencies and that it was "impractical" to check all possible frequencies. Brian Faulkner testified that CMI tested for RFI

over a wide range of frequencies but he did not testify that CMI used smartphones, PDAs, or frequencies used by those.

Breath Volume

The second vulnerability deals with the volume of the subject's breath blown into the instrument. This manifests itself in two situations. The first is the relationship between volume and the resulting test score; the second is the opportunity for an operator to manipulate the test score. This Court is aware of two Florida court decisions that have also recognized this problem. As noted in *State v. Briggs*, Second Judicial Circuit Case 2006-CT-2638, decided August 20, 2007, and quoting *State v. Hoover*, Fourteenth Judicial Circuit Case 2003-1754 CTMA:

> Rules that permit a test operator to have the subject blow into the machine as long as he [the operator], in his undirected discretion wishes, with attendant variation in test results, is insufficient to create a scientifically reliable test.

The Intoxilyzer 8000 uses a small sample chamber which requires relatively little breath as a sample. The instrument measures the 1.1 liters necessary and then the display indicates the sample necessary for an accurate reading has been received. See page forty of the study guide in State Exhibit A. The instructions note that when the progress bar reaches 100%, the subject sample is complete. However, the 8000 does not record the measurement of the alcohol until the subject stops

blowing. Thus, the instrument does not enforce the operator guide directions and an operator can choose to prolong the breath sample.

In the first situation, studies by Dr. Staubus and others referred to in his testimony show a direct correlation between volume and ethanol reading. "The longer you blow, the higher your score" was the testimony. As shown in Defendant's Exhibit 22, a longer duration can show an upward variation of 30%. Other studies noted by Dr. Staubus showed an average upward variation of 25%. For example, on average, a shorter duration sample could show 0.68 and a longer duration sample could show 0.85 with the same alcohol content. Therefore, test scores within 25% of the applicable *per se* limit should be examined on the ODH website for volume of breath. Scores much outside that range, such as a .135, are probably not mitigated by the volume of the sample.

In the second situation, the instrument displays the rising numbers as the breath sample is given. The operator can choose to end or prolong a sample to achieve a certain score. One of the programmed safeguards of the Intoxilyzer 8000 is that the two subject samples must be within 0.02 agreement of each other for the instrument to record either score as valid. An operator watching the score on the second sample can stop the sample when it is within that 0.02 range of the first sample.

Mouth Alcohol

A third possible vulnerability of the Intoxilyzer 8000 is its reduced capacity to detect a sample that includes moisture. The theory behind all breath testing instruments requires measurement of deep lung air rather than air from the mouth or other moist tissues that would include liquid ethanol at a higher concentration than breath. All such instruments look at the slope of the sample; it should start low and gradually rise to a plateau. If the score starts high or if there is a temporary spike, that is an indication of a reading of something other than deep lung air such as mouth alcohol or Gastroesophageal Reflux Disease (GERD). By the pulse lamp creating only four measures per second as opposed to the forty per second of the Intoxilyzer 5000, there are fewer data points to recognize any spikes.

Although a vulnerability, existence of a problem should be negated by the instrument requirement of an 0.02 agreement between samples so long as there is no indication of operator manipulation in the second sample as discussed in the previous section.

THE GATEKEEPER FUNCTION:

The Court has some doubts about the precision of the Intoxilyzer 8000. Such doubts are those of a potential trier of fact considering whether the evidence is proof beyond a reasonable doubt. This, however, is not the standard to determine the admissibility of evidence. Just as a witness may be competent but not

necessarily credible, a test may meet threshold standards of admissibility without necessarily being persuasive. An Evidence Rule 702 inquiry is concerned with the propriety of the method rather than the correctness of the conclusion. It is the function of the trier of fact to weigh the evidence to determine the correctness of the conclusion.

In examining the criteria of Evidence Rule 702(C), the Court finds as follows:

(1) **The theory upon which the procedure is based is objectively verifiable or is validly derived from widely accepted knowledge, facts or principles:** The science of organic chemistry is based on widely accepted knowledge and principles.

(2) **The design of the procedure, test or experiment reliably implements the theory:** Infrared spectrometry is a recognized procedure to identify an organic compound such as ethanol.

(3) **The particular procedure, test or experiment was conducted in a way that will yield an accurate result**: In the absence of certain facts, the Intoxilyzer 8000 is capable of producing an accurate result. In the presence of certain facts, it is capable of producing an inaccurate result.

As a gatekeeper, the Court finds that the Intoxilyzer 8000 meets Evidence Rule 702 threshold requirements for admissibility. The capacity of the instrument for inaccurate results goes to the weight, not the admissibility, of the evidence. The Court therefore finds that the Intoxilyzer 8000 meets the threshold standards for evidence to be considered. This is not to say that the Intoxilyzer 8000 is relia-

ble; such determination is to be made by the trier of fact at trial after considering all relevant evidence.

CONTRARY EVIDENCE:

This Court has learned much about the Intoxilyzer 8000 through these hearings. Counsel are commended for the thorough presentation of relevant evidence necessary for an informed decision. This is the design of our adversarial system. It would have been unfair to consider only the defense evidence or only the prosecution evidence in this admissibility determination; it would also have been impossible to make an informed decision.

Yet it is the State of Ohio's position that the trier of fact at trial should only hear the prosecution evidence regarding the evidential breath test and not the defense evidence that attempts to diminish the weight to be given to that evidence. This Court finds the issue to be analogous to that decided by the United State Supreme Court in *Crane v. Kentucky*, 476 U.S. 683 (1986).

Crane involved a confession that the trial court determined, at a pretrial hearing, to be admissible as voluntarily given. The defense was denied the opportunity to present evidence to the jury as to the coerciveness of the circumstances. The defense intent was not an attempted re-litigation of the admissibility of the confession, but rather an attempt to diminish the weight to be given by the jury to

the confession. The issue was whether the trial court's admissibility determination foreclosed contrary evidence.

In a unanimous decision, the *Crane* opinion syllabus held:

> The exclusion of the testimony about the circumstances of his confession deprived petitioner of his fundamental constitutional right – whether under the Due Process Clause of the Fourteenth Amendment or under the Compulsory Process or Confrontation Clauses of the Sixth Amendment – to a fair opportunity to present a defense. Evidence about the manner in which a confession was secured, in addition to bearing on its voluntariness, often bears on its credibility, a matter that is exclusively for the jury to assess. The physical and psychological environment that yielded a confession is not only relevant to the legal question of voluntariness but can also be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence ...

The Court noted that every jurisdiction other than Kentucky recognized the right of the defense to present testimony going to the weight of the admitted prosecution evidence. Since then, the Ohio Supreme Court, in *State v. Loza*, (1994) 71 Ohio St.3d 61, reaffirmed that principle although distinguishing *Crane* on the facts.

Therefore, the lesson from *Crane* is clear: a determination of admissibility cannot foreclose contrary defense evidence designed to challenge the weight to be given to the admitted evidence. This lesson applies to OVI cases as noted in *State v. French*, (1995) 72 Ohio St.3d 446 at page 451:

> The chemical test result is admissible at trial without the state's demonstrating that the bodily substance was withdrawn within two hours of the time of the alleged violation, that the bodily substance was analyzed with methods approved by the Director of Health, and

> that the analysis was conducted by a qualified individual holding a permit issued by the Director of Health pursuant to R.C. 3701.143 (*Defiance v. Kretz*, [1991], 60 Ohio St.3d 1, 573 N.W.2d 32, approved; *Cincinnati v. Sand*, [1975], 43 Ohio St.2d 79, 70 O.O.2d 44, 330 N.E.2d 908, modified.) This does not mean, however, that the defendant may not challenge the chemical test results at trial under the Rules of Evidence. Evidentiary objections challenging the competency, admissibility, relevancy, authenticity, and credibility of the chemical test results may still be raised.

Citing *French*, the Fourth District Court of Appeals, in *City of Wellston v. Brown*, 2005-Ohio-532 (Jackson County), held as follows:

> Tamara Brown appeals her convictions for driving under the influence of alcohol and underage consumption of alcohol. Brown contends that the trial court erred in excluding her expert testimony, which challenged the credibility of the breath-alcohol test results. ...
>
> We agree that the court erred in excluding her expert testimony. The expert opined that the results of the breath-alcohol test were unreliable because the testing officer failed to wait twenty minutes after receiving two inconclusive samples. The court excluded this testimony on the grounds that it should have been offered during the suppression hearing since it related solely to the admissibility of the results. However, under *State v. French*, 72 Ohio St. 3d 446, 1995-Ohio-32, 650 N.E.2d 887, a defendant can challenge the reliability of breath-alcohol test results at trial under the Rules of Evidence. Therefore, the trial court abused its discretion by not allowing the expert testimony regarding the credibility of the results. *Id.* at pp. 532 and 533.

Since the Fourth District has most recently chosen to follow *French* rather than their 1981 decision in *State v. Brockway*, 2 Ohio App.3d 227, this Court shall also follow the Ohio Supreme Court directive in *French*.

Both parties cite *Daubert v. Merrill Dow Pharmaceuticals*, (1993) 509 U.S. 579 and this Court finds that case instructive and controlling both on Evidence Rule 702 standards and regarding the admissibility of contrary evidence. As to the admissibility of contrary evidence after admitting the offered scientific testimony, the Supreme Court stated:

> Vigorous cross examination, presentation of contrary evidence, and careful instructions on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. See *Rock v. Arkansas*, 483 U.S. 44, 61 (1987). *Id.* At 596.

Several other states' courts are in accord with the *French* holding that challenges to the credibility of the chemical test may be raised at trial. See *State v. Lowther*, (1987) 740 P.2d 251 citing the Hawaii Supreme Court case of *State v. Tengan*, (1984) 691 P.2d 365; *Cooley v. Anchorage*, (1982) 649 P.2d 251 citing the Alaska Supreme Court case of *Keel v. State* (1980) 609 P.2d 555; *Houser v. State*, (Florida Supreme Court, 1985) 474 So.2d 1193.

The recent United States Supreme Court opinion of *Bullcoming v. New Mexico*, Case 09-10876, decided June 23, 2011, is not directly on point. That case dealt with the necessity for the correct witness to appear at trial regarding a blood alcohol test laboratory report. Of persuasive value is that Court's rejection of the prosecution argument that anyone can testify about results since those results were produced by a machine. *Bullcoming* is an affirmation that the adversarial system survives in the

machine age. Since an accused may not confront the Intoxilyzer 8000 by cross examination of the machine itself, due process requires the admission of relevant contrary evidence.

RELEVANCE OF CONTRARY EVIDENCE

The admission of contrary evidence, however, is limited by considerations of relevancy. Relevancy is defined in Evidence Rule 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." As applied to an OVI *per se* case, contrary evidence must tend to make the test result less probable of the person's alcohol level at the time of operation.

As noted earlier in this opinion, the vulnerabilities of the Intoxilyzer 8000 are related to the circumstances of the individual test; the circumstances are fact specific. In order for a particular vulnerability to be relevant, there must be some testimony as to the underlying fact that would trigger that vulnerability.

For example, before a defense expert could testify as to the propensity of the Intoxilyzer 8000 to give a higher reading depending on the volume of breath, there must be evidence that the subject provided more than the minimum volume of breath necessary for the sample. Similarly, before a defense expert could testify as to the propensity of the Intoxilyzer 8000 to miss detection of cell phone radio frequency interference, there must be some evidence that there was a cell phone present and

turned on at the time of the test. In both situations, if the vulnerability has a finite margin of error, a test score above that margin of error would make the vulnerability irrelevant.

Some interpret *Vega* to prohibit any challenge based on the instrument itself. The Court disagrees with that interpretation. If a witness is blind in his right eye, is it not a proper challenge as to whether he is able to see? Is it not so relevant in every case this witness testifies? This is not a general attack; it is an attack based on the facts of each case that could recur in other cases. The partial disability is relevant in every case in which this witness testifies. Similarly, system vulnerabilities of the Intoxilyzer 8000 are relevant whenever the underlying triggering facts are in evidence.

The State of Ohio has cited the case of *State v. Luke*, 2006-Ohio-2306 (10th District Ct. Appeals). The facts alleged certain reliability problems with the breath testing instrument at the time. The holding of *Luke* is twofold: (1) a reliability challenge is not a proper Motion to Suppress issue for matters not required by OAC regulations; (2) such matters may be raised at trial to go to the weight of the evidence.

Beginning at page 10, *Luke* explained this second point:

> {¶25} For this reason, we agree with appellant's position that the trial court erred in applying the *Daubert* case to appellee's motion to suppress the BAC Datamaster results. This does not mean, however, that appellee has no avenue of attack as to the specific results of his test. It is important to note that the *Vega* court said, "[t]here is no question that the accused may also attack the reliability of the specific testing procedure and the qualifications of the operator. * * * Defense

expert testimony as to testing procedures at trial going to weight rather than admissibility is allowed." *Vega*, *supra*, at 189.

{¶26} In accord with this notion, the court has held that, though a defendant may not mount a challenge to the general accuracy and reliability of the breath testing machine in question, he "may endeavor to show something went wrong with his test and that, as a consequence, the result was at variance with what the approved testing process should have produced." *Columbus v. Day*, (1985) 24 Ohio App.3d 173, 174, 24 OBR 263, 493 N.E.2d 1002. See, also, *Whitehall v. Weese*, (Oct. 17, 1995) 10th Dist. No. 95APC02-169.

{¶27} This court was squarely presented with the question of the appropriate manner and timing of such an attack in the case of *Columbus v. Caynor*, (1996) 111 Ohio App.3d 394, 676 N.E.2d 540. ...

{¶29} In the case of *State v. Edwards*, 107 Ohio St.3d 169, 2005-Ohio-6180, 837 N.E.2d 752, the Supreme Court of Ohio approved of this court's holding in *Caynor*. In doing so, the court stated, "a defendant at trial may challenge breath-test results on grounds other than that the results were illegally obtained because they were obtained in noncompliance with the [Department of Health] director's rules. For example, a defendant may argue at trial that the particular device failed to operate properly at the time of testing." *Id.* At ¶19.

JURY INSTRUCTION:

It is the intention of this Court to provide a more appropriate jury instruction in OVI *per se* cases. Currently, OJI CR 711.19(A)(b)-(h) at page 459 provides no standard instruction regarding consideration of an evidential chemical test. Upon request, the Court will draft an instruction similar to OJI CR 409.21 as it regards expert testimony, advising that the jury should consider the test result, giving its reliability such weight as they deem proper.

CONSTITUTIONAL ISSUES:

In its May 24, 2011 preliminary opinion in this case, the Court noted that there are two important underlying issues that have not been resolved by *State v. Vega*, *supra*, or any subsequent Ohio Supreme Court cases. These issues are:

1. How is the legislative assignment of admissibility determination in R.C. §4511.19(D)(1)(b) not in violation of the separation of powers provision in the Ohio Constitution? Is it because the statutory language subjugates it to the Rules of Evidence?

2. What is the rationale for extending the *Vega* principle from a presumption of impairment to a *per se* violation? Is it because the test itself is not the violation and all other relevant evidence is admissible?

This Court finds R.C. §4511.19(D)(1)(b) to be constitutional in that the explicit language "the court may admit" subjugates the statute to the Ohio Rules of Evidence. The statute is finely crafted to encourage but not mandate admission of such evidence. This is the approach taken by the Washington Supreme Court in reviewing the constitutionality of a similar OVI statute. In *City of Fircrest v. Jensen*, (2006) 158 Wn.2d 384, that Supreme Court noted:

> The legislature has made clear its intention to make BAC test results fully admissible once the State has met its *prima facie* burden. No reason exists to not follow this intent. The act does not state such tests must be admitted if a *prima facie* burden is met' it states that such tests are *admissible*. The statute is permissive, not mandatory and can be harmonized with the rules of evidence. There is nothing in the bill, either implicit or explicit, indicating a trial court could not use its discretion to exclude the test results under the rules of evidence. The legislature is not invading the prerogative of the courts

> nor is it threatening judicial independence. SHB 3055 does not violate the separation of powers doctrine. *Id* at 399.

This Court also finds that the *Vega* decision applies to OVI *per se* cases so long as it is recognized that the test result is not conclusive proof of breath alcohol content at the time of operation, but merely some evidence thereof. The defense has a due process right, under *Crane v. Kentucky*, *supra*, to present relevant contrary evidence. To interpret *Vega* otherwise is to create a conclusive presumption prohibited by the United State Supreme Court in *Sandstrom v. Montana*, (1979) 442 U.S. 510.

As noted by the Ohio Supreme Court in *State v. Tanner*, (1984) 15 Ohio St.3d 1, it was never the Ohio Supreme Court's intention to create a conclusive presumption in a *per se* case. At page 6 of that opinion, the Court held:

> There is thus no presumption of guilt. [Citations omitted] (in contrast to other jurisdictions, Ohio's driving while intoxicated statutes is less dependent on chemical testing).

Those who find an evidential breath test result to be conclusive are ignoring both the United States Supreme Court holdings of *Sandstrom*, *Crane*, and *Daubert* and the Ohio Supreme Court holdings of *Tanner*, *French* and *Edwards*. This Court chooses not to ignore such powerful and persuasive precedent. All relevant defense evidence is admissible in OVI *per se* cases.

SUMMARY:

1. There were reasonable grounds for the traffic stop and probable cause for the arrest of Ms. Gerome.

2. All applicable administrative regulations of OAC Chapter 3701-53 were met and the sample was taken within three hours of operation.

3. The test results from the Intoxilyzer 8000 meet threshold standards for admissibility under the Ohio Evidence Rules.

4. The test result from an evidential breath test is circumstantial evidence of the breath alcohol content at the time of operation. Such evidence is not conclusive and is not the only evidence that is relevant.

5. The Intoxilyzer 8000 has vulnerabilities. With specific fact situations, defense expert testimony is admissible to explain such relevant vulnerability.

6. An appropriate jury instruction should be given regarding the jury's function to weigh the evidence of the breath test.

7. R.C. §4511.19(D)(1)(b) is constitutional as construed as being limited by the Ohio Rules of Evidence.

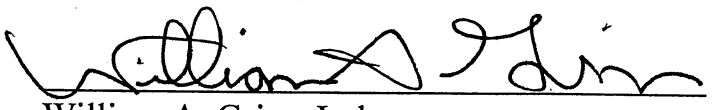
8. So long as *State v. Vega* is interpreted to allow all relevant defense evidence regarding an evidential breath test, its holding passes federal constitutional standards of avoiding a conclusive presumption.

DECISION:

Defendant's Motion to Suppress is denied. The test results from the Intoxilyzer 8000 are admissible under Evidence Rule 702.

The State of Ohio's Motion In Limine is denied. The defense may present all relevant evidence, including applicable instrument vulnerabilities, going to the weight to be given to the test results from the Intoxilyzer 8000.

For all four named cases, these matters are set for final pretrial hearings July 26, 2011 at 8:00 a.m. and for jury trials July 28, 2011 at 8:30 a.m.



William A. Grim, Judge

xc:
Lisa A. Eliason
Tracy W. Meek
James K. Stanley
Matthew J. Donahue
Aaron Haslam
K. Robert Toy
Jon Saia
D. Timothy Huey
Douglas J. Francis
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Patrick C. McGee