CLERMONT COUNTY MUNICIPAL COURT FILED
CLERMONT COUNTY, OHIO

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CLERK OF MUNICIPAL COURT
CLERMONT COUNTY, OHIO

STATE OF OHIO	:	CASE NO. 2010 TR C 18017
Plaintiff	:	JUDGE ZUK
vs.	:	
NICHOLAS A. KORMOS	:	DECISION ON DEFENDANT'S MOTION TO SUPPRESS
Defendant	:	

This cause having been heard on a Motion to Suppress filed on behalf of Defendant by defense counsel Diego Padro. The State of Ohio was represented by Assistant Prosecuting Attorney Lara Molnar.

At an evidentiary hearing on the motion, Trooper Michael A. Shimko, who has been a state trooper both in Florida and Ohio for a period of 14 years, testified that on December 17, 2010 at approximately 3:00 a.m. he stopped the defendant Nicholas Kormos on Mt. Carmel Tobasco Road in Union Township, Clermont County, Ohio after observing his vehicle on Interstate 275. The officer's testimony revealed that he heard the vehicle making sounds as it was on the rumble strips off the side of Interstate 275. Trooper Shimko then followed the vehicle, observed it turn left on SR 125 without making a turn signal, and changed a lane without making a turn signal, turned right onto Mt. Carmel Tobasco Road without making a turn signal. The trooper then activated his lights and the defendant pulled his vehicle over half on the roadway and half onto the grassy berm. Upon having contact with the defendant, the trooper noted a strong odor of alcohol coming from the vehicle, that the defendant's eyes were glassy and bloodshot and that his speech was slurred. The defendant acknowledged that he was coming from Black Fin. After exiting the vehicle and being placed in the rear of the trooper's cruiser,

the trooper noted that the odor of alcohol coming from the defendant was strong, that his speech was slurred. The trooper asked the defendant how much he had had to drink and the defendant indicated that he was not sure.

The trooper then had the defendant perform the Horizontal Gaze Nystagmus Test where he obtained six of six clues, the walk and turn test where he obtained four clues. The Defendant refused to do the test known as the one leg stand. At that point and time, Defendant was placed under arrest. The court reviewed the testimony of the officer, Exhibit No. 1, which was the video of the stop and arrest, form HP 2255, signed by both the defendant and the officer, and Exhibit No. 3 which was the test results from the Intoxilyzer 8000 test for the defendant.

Prior to the commencement of the hearing on the motion to suppress, it was agreed that the motion to suppress would target three areas, namely the issue of probable cause to arrest and bring the defendant in for a test. Secondly, the issue was raised as to whether there was substantial compliance with NHTSA requirements for the field sobriety tests and third whether or not the regulations concerning testing and calibration were followed. The court permitted the parties to submit written memorandum and in the written memorandum filed by the defense an issue was raised that was not directly discussed at the hearing on the motion to suppress. That issue dealt with whether or not Ohio Administrative Code 3701-53-04(B) was complied with. That section of the Administrative Code provides "that instruments listed under (A)(3) of Rule 3701-53-02 of the Administrative Code shall automatically perform a dry gas control test before and after each subject test and instrument certification using a dry gas standard traceable to the National Institute of Standards and Technology (NIST). Dry gas control results are valid when the results are at or within 5/1000 grams per 210 liters of alcohol concentration on the manufacturer's certificate of analysis for that dry gas standard. A dry gas control result which is

outside the range specified in this paragraph will abort the subject test or instrument certification in progress.".

The Intoxilyzer 8000 is the testing device that is referred to under Administrative Code Section 3701-53-02(B).

In looking at the test results in State Exhibit 3, which is attached as an appendix, to this decision, it clearly shows that on December 17, 2010, a dry gas control was done before subject test 1. After subject test 1 and before subject test 2, there was no dry gas control performed. After subject test 2, an additional dry gas control test was performed.

Upon the state receiving the issue that was raised in the written memorandum filed by the defense, the state requested in writing that they have the opportunity to present evidence on that issue since they were unaware that that particular issue was being raised at the time of the hearing. The court reviewed that written request, granted the request to permit receiving of additional evidence and Mary Martin of the Ohio Department of Health Bureau of Alcohol and Drug Testing did in fact testify concerning those requirements. Quite frankly her testimony was not of much help to the court except that there was some confusion as to what was meant by the Ohio Administrative Code and that in all likelihood it was going to be changed.

The court then permitted counsel to submit supplemental memorandums and the matter is now ripe for decision.

As to the first issue raised by the defense in the Motion to Suppress, the court finds based upon the facts previously set forth that Trooper Shimko, who is a very experienced state trooper, heard the vehicle operating on rumble strips, observed three moving violations and had a reasonable articulable suspicion that there would be some activity which was contrary to law and was justified in stopping the vehicle. Further, his observations of the defendant including a

strong odor of alcohol, bloodshot eyes, slurred speech and the performance on the field sobriety test together with the review of the video tape which buttresses the officers rendition of the facts, clearly give rise to probable cause to arrest the defendant and take him to the patrol post for a blood alcohol test.

The second issue raised was whether or not the officer performed the field sobriety test in substantial compliance with the NHTSA requirements. Again, reviewing the testimony and the observations made by the court in viewing the video tape, the court finds that the officer performed the field sobriety tests in substantial compliance of NHTS requirements meeting the requirements of *State v. Schmitt*, 101 Ohio St.3d 79, 2004-Ohio-37, *State v. Deutsch*, 2008-Ohio-5658, *State v. Plunkett*, 208 Ohio-1104. Accordingly, the court finds that there was in-fact substantial compliance and that portion of the Motion to Suppress is overruled.

The last issue raised by the defense, in its post first hearing memorandum is much more problematic. The court notes that on other occasions judges of this court have dealt with issues with respect to the Intoxilyzer 8000; *State v. Horton*, 2009 TRC 9738, *State v. Fintak* 2009 TRC 8424. The issue raised in this case deals with the same administrative code section but raises an entirely different issue. Clearly in looking at state's Exhibit No. 3, there was no dry gas control test run between subject test 1 and subject test 2. The State of Ohio urges an interpretation that would indicate that the designation of a subject test on the test results page is not really a subject test and that the term "subject test" should refer to each individual rather than each test administered to the individual. The language of Administrative Code 3701-53-04 does not lend itself to that interpretation because it requires that the instrument "shall automatically perform a dry gas control test before and after every subject test and instrument certification." The language of the administrative code leaves nothing to the imagination. The court is required to

give common words their common meaning and shall is of course mandatory. In this specific case, the court finds that there was no dry gas control test performed before and after every subject test as it applies and set forth on State's Exhibit 3. The court finds that the failure to run the dry gas control test between subject test 1 and subject test 2 is directly contrary to 3701-53-04(B) of the Ohio Administrative Code and therefore in this particular case this test concerning this defendant is not in substantial compliance and therefore the motion to suppress the test results of the Intoxilyzer 8000 is hereby granted.

The court notes that the motion in this case is different than the motions filed in the Circleville Municipal Court and the Athens Municipal Court which resulted in Circleville finding that the Intoxilyzer 8000 was not shown to be accurate and reliable and that that court would not accept those test results and the ruling in the Athens County Municipal Court indicating that Intoxilyzer 8000 evidence would be admissible but subject to defense expert testimony to explain the relevant vulnerability of the Intoxilyzer 8000. This court is cognizant of decisions from Tennessee, Florida, Kentucky, Arizona and Minnesota which find that the Intoxilyzer 8000 is not a reliable breath testing advice. The court wishes to make it clear that the decision in this case does not go to that extent but deals with the limited failure to comply with one aspect of the Ohio Administrative Code which renders this particular test result inadmissible.

SO ORDERED.

Judge W. Kenneth Zuk
Clermont County Municipal Court

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon Lara Molnar by hand delivery and upon Diego Padro, Luftman, Heck & Associates, LLP, 810 Sycamore St., 3rd Floor, Cincinnati, Ohio 45202 by regular U.S. mail service on this 3rd day of August, 2011.

Wendy L. Garrett
Administrative Assistant to Judge W. Kenneth Zuk