

IN THE MUNICIPAL COURT

HURON, OHIO

FILED AND
JOURNALIZED

JAN - 6 2012

CITY OF HURON
MUNICIPAL COURT

STATE OF OHIO,

Plaintiff,

CASE: TRC 1101428 AB

-VS-

WILLIAM J. OCHESKE,

Defendant.

JUDGMENT ENTRY

This matter came before the Court on Defendant's Motion to Suppress Breath Test, filed on October 17, 2011. A hearing was held on November 22, 2011. The State of Ohio was represented by the Huron City Prosecuting Attorney, Laura Alkire. Defendant was represented by attorney Terrence Rudes. After receiving testimony and evidence, the Court took the matter under advisement. The Court permitted the parties to submit post hearing briefs. The State filed its brief on December 12, 2011. The Defendant filed his brief on December 15, 2011. The Court renders the following decision regarding the admissibility of the test results.

On August 20, 2011, the Defendant was stopped by Officer Clayman of the Huron Police Department as the Defendant approached a non-function traffic light. As a result of this stop, the Defendant was placed under arrest and charged with driving under the influence pursuant to Huron Codified Ordinance 333.01 and for duties upon approaching ambiguous or non-working traffic signal, pursuant to Huron Codified Ordinance 313.09. The officer transported Defendant to the Huron Police Department where the Defendant voluntarily gave a sample of his breath using the Intoxilyzer 8000 (OH-5) machine. The Prosecutor intended on introducing the test results at trial.

Prosecutor at the hearing provided two witnesses, Mary Martin, the Program Administrator for Drug and Alcohol Testing under the Ohio Department of Health, and Huron Police Officer Ryan Boesch who conducted the testing of the Defendant using the Intoxilyzer 8000. Defendant did not have a witness at the hearing.

Defendant's first argument in Section A of his Motion to Suppress, challenges that the test failed to meet the requirements of the Ohio Revised Code and the Ohio Administrative Code. Specifically, the Defendant challenges that the test was not performed within the three hour time limitation of R.C. §4511.19(D)(1)(b). Relevant to this issue was the testimony of Huron Police Officer Ryan Boesch who conducted the testing involving the Defendant. Officer Boesch stated under oath that the testing was conducted within the three hour period discussed above. Furthermore, the introduction of Joint Exhibit A shows that the time of the violation (02:38 a.m.) and the time of the test (03:09 a.m.) was within the parameters of R.C. §4511.19(D)(1)(b). The State did provide testimony from Officer Boesch and evidence from the exhibits that the Intoxilyzer 8000 was properly working at the time the test was conducted on the Defendant. State's Exhibit 10 showed that Officer Boesch is properly certified to operate the Intoxilyzer 8000.

Defendant's remaining arguments in Section B of his Motion to Suppress relates to issues involving the State's failure to adhere to the requirements of the Ohio Administrative Code. The State in response provided the testimony of Mary Martin. She discussed the State's Exhibits 1 through 9, which are as follows:

1. Ohio Department of Health; Bureau of Alcohol and Drug Testing: Instrument Certification Report.;
2. Ohio Department of Health; Bureau of Alcohol and Drug Testing: Approval of Instrument Check Solution (Wet Batch);
3. Calgaz, Certificate of Analysis; EBS- Ethanol Breath Standard;
4. Certificate of Calibration; Intoxilyzer 8000 serial number 80-004536, dated 9-11-09;
5. Diagnostic of Intoxilyzer 8000 serial number 80-004536 dated 5-14-2010, placed in service by Frank Nedveski;
6. Ohio Department of Health; Bureau of Alcohol and Drug Testing: Instrument Certification Report, for Intoxilyzer 8000 serial number 80-004536 dated 07-08-2011;
7. Ohio Department of Health; Bureau of Alcohol and Drug Testing: Approval of Instrument Check Solution (Wet Batch) dated 10-26-2010;
8. Certificate of Analysis EBS-Ethanol Breath Standard (Dry Gas) dated 5-17-2011;
9. Diagnostic of Intoxilyzer 8000 serial number 80-004536 dated 7-11-2011, placed in service by Frank Nedveski.

These exhibits were admitted into evidence. The following paragraphs specifically address the arguments presented in Section B. of the Defendant's Motion to Suppress.

In Paragraph B1, the Defendant argued that the evidence of the breath test had to be suppressed as there was no evidence that the O.A.C. Rule 3701-53-06 (written procedural manual) was located in the area where the analytical test was performed as in compliance with O.A.C. Rule 3701-53-01(B). The Court agrees with the Defendant that there was no testimony regarding the location of a manual at the hearing. O.A.C. Rule 3701-53-01(B) reads as follows:

[a]t least one copy of the written procedure manual required by paragraph (D) of rule 3701-53-06 of the Administrative Code for performing blood, urine, or other bodily substance tests shall be on file in the area where the analytical tests are performed.

Breath tests are excluded from this regulation. O.A.C. Rule 3701-53-01(B) was amended on January 8, 2009, when the requirement for a manual for the breath-testing instrument was removed. Thus, the manual for the breath machine is no longer required to be in the area where the breath tests are performed. *Cleveland v. Hunter* 2009-Ohio-1239 (Ohio App. 8 Dist.).

In Paragraph B2, Defendant maintains that test was not a deep lung air test as required by O.A.C. Ruled 3701-53-02(D). It is assumed that the Defendant meant section (C) of O.A.C. Rule 3701-53-02. A similar argument was addressed in *State v. Cook*, 2006-Ohio-6062 (Ohio App. 6 Dist.) paragraph 36. In *Cook*, the court concluded that

[w]here, ..., the testing officer waits the mandatory time period before administering the breath test, observes the suspect during that time period, and receives no indication that the breath testing device was malfunctioning, the trial court does not err in concluding that the state substantially complied with the ODH regulation requiring testing of deep lung breath.

Id. at paragraph 39. Testimony of Officer Boesch and the evidence introduced show that the time period for waiting before administering the test was followed. The testimony also shows that there were no error indicators present on the Intoxilyzer 8000 at the time Defendant was tested.

Based on *Cook*, supra, the State substantially complied with the regulations relating to the deep lung breath test.

In Paragraph B 3, Defendant alleged test was not reported on forms prescribed by the director of health pursuant to O.A.C. Rule 3701-53-02(D). Joint Exhibit A was the form used to record Defendant's test results. The form's heading indicates that it is from the Ohio Department of Health. Mary Martin testified that the forms in question were approved by the Director of Health. The Court concludes that the State substantially complied with the pertinent rules and regulations.

In Paragraph B 4, Defendant claims that the test results have not been retained in a manner prescribed by the Director of Health. The Director of Health did not promulgate a rule for the retention of such records. Defendant further alleged that not all breath test results have been retained for the three year period required by O.A.C. 3701-53-01. Testimony revealed that the forms in question were indeed retained for the three year period as required. Taking into consideration the testimony of Mary Martin and Officer Boesch, the Court concludes that the State substantially complied with the regulations.

In Paragraphs B 5, through 10, the Defendant challenges the breath test on the grounds that the test failed to meet the requirements of O.A.C. 3701-53-03(A); 3701-53-04(B)(C); and , (E). These arguments will be addressed together. R.C. §3701.143 states that:

For purposes of sections 1547.11, 4511.19, and 4511.194 of the Revised Code, the director of health shall determine, or cause to be determined, techniques or methods for chemically analyzing a person's whole blood, blood serum or plasma, urine, breath, or other bodily substance in order to ascertain the amount of alcohol, a drug of abuse, controlled substance, metabolite of a controlled substance, or combination of them in the person's whole blood, blood serum or plasma, urine, breath, or other bodily substance. The director shall approve satisfactory techniques or methods, ascertain the qualifications of individuals to conduct such analyses, and issue permits to qualified persons authorizing them to perform such analyses. Such permits shall be subject to termination or revocation at the discretion of the director.

The manner in which the Director of the Ohio Department of Health complies with R.C. §3701.143 is set forth in Ohio Administrative Code Rules 3701-53-01 through 3701-53-10. Pursuant to Rule 3701-53-02(A)(3) of the Administrative Code, the Director of the Ohio Department of Health has approved the Intoxilyzer 8000 as an evidential breath testing instrument. O.A.C. Rule 3701-53-04(D) provides that "an instrument check or certification shall be made in accordance with paragraphs (A) and (C) of this rule when a new evidential breath testing instrument is placed in service or when the instrument is returned after service or repairs, before the instrument is used to test subjects". O.A.C. Rule 3701-53-04(C) requires that:

Representatives of the director shall perform an instrument certification on approved evidential breath testing instruments listed under paragraph (A) (3) of rule 3701-53-02 of the Administrative Code using a solution containing ethyl alcohol approved by the director of health according to the instrument display for the instrument being certified. An instrument shall be certified no less frequently than once every calendar year or when the dry gas standard on the instrument is replaced, whichever comes first. Instrument certifications are valid when the certification results are at or within five one-thousandths grams per two hundred ten liters of the target value for that approved solution. Instruments with certification results outside the range specified in this paragraph will

require the instrument be removed from service until the instrument is serviced or repaired. Certification results shall be retained in a manner prescribed by the director of health.

Pursuant to O.A.C. Rule 3701-53-04(B), the Intoxilyzer 8000:

shall automatically perform a dry gas control test before and after every 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 five one-thousandths (0.005) grams per two hundred ten liters of the 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.

Joint Exhibit A along with the testimony of Officer Boesch indicates that the proper dry gas control test pursuant to O.A.C. 3701-53-04(B) was performed both before and after the testing of the Defendant. The testimony of Mary Martin revealed that the Intoxilyzer 8000 instrument for the Huron Police Department was certified on April 28, 2010. The Intoxilyzer 8000 instrument contains a dry gas tank which is used for the purpose of certification and control tests. The dry gas used in the certification process was manufactured by Calgaz.

The Intoxilyzer 8000 used at the Huron Police Department is identified by serial number 80-004536. In certifying the Intoxilyzer 8000 #80-004536, Director Representative John Kucmanic used dry gas from Lot #620081, tank #09131. (State's Exhibit 1). Calgaz provided a certificate of analysis to the Department of Health regarding this dry gas, indicating its ethanol content and target values. (State's Exhibit 3). The Certificate of Analysis also indicated that the certification is "traceable to N.I.S.T. RGM ethanol standards." Mary Martin testified that the certifications for all Intoxilyzer Model 8000 are kept in the ordinary course of business at their office in Reynoldsburg, Ohio. She testified as to the manner in which the Intoxilyzer 8000 was certified. She testified that the first dry gas control is run; then a simulator is connected to the Intoxilyzer; five wet bath solutions are run and two dry gas control tests are performed. The certification of the Intoxilyzer 8000 Intoxilyzer #80-004536 located at the Huron Police Department was done in this manner according to her testimony.

Testimony and evidence presented on behalf of the State of Ohio shows that the State substantially complied with O.A.C. Rule 3701-53-04(C) and (E). The solution used in the Intoxilyzer 8000 had not expired when the tests were performed on the Defendant. The test results are within the range as represented in O.A.C. Rule 3701-53-04(B).

Officer Ryan Boesch testified he performed the breath test using the Intoxilyzer 8000 on the Defendant. State's Exhibit 10 is the Card issued by the Ohio Department of Health authorizing Officer Boesch to operate the Intoxilyzer 8000. Officer Boesch advised as to the testing procedures performed on the Defendant. He stated that the Intoxilyzer was used in accordance with the training he received on the use of the device. During the test he noted no errors or indications that the Intoxilyzer was not operating properly. The testimony revealed that the test sample given by the Defendant was sufficient to give an acceptable reading from the device

In paragraph B11, Defendant argues that the instrument checks, controls, certification, calibration checks and records of service and repairs have not been retained in accordance with

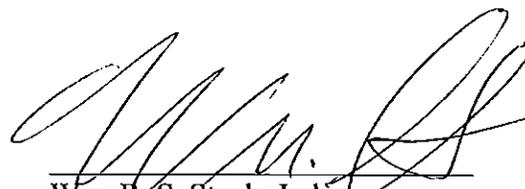
O.A.C. 3701-53-01(A). The testimony shows that this rule was properly followed as discussed above.

In Paragraph B12, Defendant in his final argument claims that Defendant's breath sample was unconstitutionally obtained and that the implied consent warnings were not properly addressed and conveyed by to the Defendant. R.C. 4511.191. Defendant's Motion fails to state with particularity the manner in which the implied consent warning was not improper. Defendant's post hearing brief references that he was not notified of the consequences refusing to take the test or testing over the limit, which could result in a lifetime disqualification of the Defendant's commercial driver license. This issue was addressed in Defendant's Memorandum on Appeal of ALS Suspension filed on September 30, 2011. In response, this Court ordered that the administrative license suspension be lifted from the Defendant. That decision was based on a discrepancy between the BMV 2255 form and R.C. 4506.17(C) pertaining to the notification to be given to a defendant. Officer Clayman did properly follow BMV form 2255 but the form itself did not properly follow R.C. 4506.17(C). This issue was not specifically addressed in Defendant's Motion to Suppress but only in the post hearing brief. Furthermore, the matter was addressed in the Defendant's Memorandum on Appeal of ALS Suspension filed on September 30, 2011.

In order for the results of a breathalyzer test to be admitted into evidence, the State must demonstrate that it substantially complied with the method approved by the Ohio Department of Health for administration of the test. *Defiance v. Kretz*, 60 Ohio St. 3d 1, 3, 573 N.E.2d 32 (1991); *State v. Plummer*, 22 Ohio St. 3d 292, 294, 490 N.E.2d 902 (1986); *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, paragraph 24. The methods approved by the Department of Health are set forth in the Ohio Administrative Code. After the State has demonstrated substantial compliance with the applicable regulations, the burden shifts to the defendant to show that he or she was prejudiced by anything less than the complete technical compliance with the regulations. *Id.*; *State v. Cook* 2006-Ohio-6062, (Ohio App. 6 Dist.)

Considering the evidence contained in the Joint and State's exhibits admitted into evidence, as well as the testimony of Mary Martin and Officer Ryan Boesch, the Court finds that the State has demonstrated substantial compliance with Department of Health regulations contained in the Ohio Administrative Code. The Defendant's breath test result is admissible. Accordingly, the Defendant's Motion to Suppress is not well-taken and is overruled.

IT IS SO ORDERED.



Wm. R. S. Steuk, Judge