

IN THE CAMBRIDGE MUNICIPAL COURT

Cambridge, Ohio CAMBRIDGE MUNICIPAL COURT
CAMBRIDGE, OHIO

State of Ohio,
Plaintiff

2012 JUL -3 A 11: 42

vs

LAURIE ENDLY
CLERK OF COURT

James Quinn	Case No. 12TRC00652
Seth Robinson	12TRC02377
Kevin Hickman	12TRC01684
Trent Millhon	12TRC01460
William McCracken	12TRC00591
Douglas Lauderman	12TRC01190
Christopher Barlow	12TRC00173
Melissa Eldridge	11TRC07382
Jarrold Jakubisin	11TRC07222
Tammy Bales	12TRC00409
Ronald Johnson,	12TRC00058

Defendants

ENTRY

This matter came before the court the 24th day of May, 2012, for evidentiary hearing on Defendants' consolidated *Motions to Suppress Evidence* and *Motions in Limine*. Based upon the evidence adduced through sworn testimony and exhibits duly admitted, the court finds all Defendant's *Motions in Limine* not to be well-taken and they are hereby **DENIED**. However, the court further finds that Defendants' Tammy Bales(12TRC00409) and Jarrold Jakubisin (11TRC07222) *Motions to Suppress Evidence* are well-taken and they are hereby **GRANTED**. All remaining Defendants' *Motions to Suppress* are **DENIED**.

Each of the named defendants were arrested for alleged violations of R.C. 4511.19 and submitted to BAC testing at the Cambridge Post of the Ohio Highway Patrol. The device used to administer the BAC tests of each defendant was the Intoxilyzer 8000 instrument serial number 80-004377 or 80-004171.

ALCOHOL-DRUG '12 JUL06PM01:11

Defendants seek to suppress and/or limit the use of the test results upon several grounds. Defendants argue

1) defendants' 6th Amendment rights to confrontation were violated when the State of Ohio failed to present testimony from a person with knowledge of the manufacturer calibration of the Intoxilyzer 8000 testing instruments used to administer the tests to Defendants.

2) there is insufficient evidence of the general scientific reliability of the Intoxilyzer 8000, thus preventing evidence of the test results from meeting general admissibility requirements under *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)

3) test results were obtained from defendants in violation of operational standards in that there was a failure to remove Intoxilyzer 8000 Instrument No. 80-004377 from service after the same error code was displayed two consecutive times on the same subject test

4) test results were obtained from defendants in violation of Ohio Administrative Code §3701-53-04 in that the Intoxilyzer 8000 does not perform a dry gas control test before and after each subject test.

Sixth Amendment "Confrontation Clause"

In a line of cases beginning in 2004, the U.S. Supreme Court has set forth standards for the admissibility of affidavits or forensic evidence reports used in criminal prosecutions. The court has generally held that a violation of a defendant's 6th amendment right to confrontation occurs when "testimonial" evidence is presented through a report or affidavit without an opportunity to cross examine the preparer of the report or affidavit. A statement is "testimonial" when the out of court statement is prepared and made under circumstances which would lead an objective witness to reasonably to believe that the statement would be available for use at a later trial. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), *Bullcoming v. New Mexico* 564 U.S. ___, 131 S.Ct 2705(2011)

This analysis has been further refined in the court's most recent decision on this issue. In *Williams v. Illinois*, the court has significantly departed from its prior holdings and has now adopted a "targeted individual" test in order to determine whether the 6th Amendment is implicated in the admissibility of a report or affidavit.

According to the holding in *Williams*, the trial court is required to determine, through the use of an objective test, whether the report containing testimonial evidence was prepared with the specific intention to be used as evidence against the defendant. If so, the right to confrontation would be violated if the preparer of the report was not subject to cross-examination. If not, there was no right of confrontation involved. *Id.* 566 U.S. ____ (Decided June 18, 2012)

Since the CMI certificates of calibration of the Intoxilyzer 8000 testing instruments at issue (State's Exhibit 18) were not prepared in contemplation of the specific prosecution of these defendants, and since the persons directly responsible for the care and maintenance of the testing instruments as well as the persons who administered the specific tests to defendants were available for cross-examination, Defendant's 6th Amendment rights to confrontation have not been violated.

Intoxilyzer 8000 - General Scientific Reliability

Defendants, through their *Motions in Limine*, seek to exclude all evidence of test results obtained from the Intoxilyzer 8000, arguing that the State has failed to present evidence sufficient to establish the general scientific reliability of the testing instrument.

The standards for admissibility of scientific evidence require the court to function as a "gatekeeper", not for the court to act as the trier-of-fact. This gatekeeper function is satisfied by providing sufficient evidence that a scientific procedure or test meets the requirements of Evidence Rule 702(C). The proponent of the evidence is not required to demonstrate that the science is infallible, but

rather that it meets a threshold sufficiently reliable to assist the trier-of- fact when judging its credibility.

Dr. John Wyman, an expert toxicologist, testified that the Intoxilyzer 8000 uses “highly precise” infrared technology to detect the presence of alcohol in a sample of the test subject’s breath. He further testified that he was personally familiar with both the underlying technology and scientific principles upon which the Intoxilyzer 8000 is based, has reviewed scientific literature concerning the device and has personally experimented with the device.

Neither Dr. Wyman’s qualifications as an expert, nor his opinions concerning the general scientific principles employed by the Intoxilyzer 8000 were rebutted by the defendants. This unrebutted expert testimony was sufficient to establish that 1) the theory upon which the Intoxilyzer 8000 is based is derived from widely accepted knowledge, 2) that the design of the instrument reliably implements the theory and 3) a test, if properly conducted, is capable of achieving an accurate result. See *State v. Gerome* Case No.11TRC01909 Athens County Municipal Court (decided June 29, 2011).

Therefore, the State has demonstrated the degree of general reliability required for this court to admit the results of tests administered through the use of the Intoxilyzer 8000. Defendants are still permitted, however, to attack the credibility and weight of this evidence at trial pursuant to the holding in *State v. French*, 72 Ohio St.3d 446 (1995).

Compliance with Operational Manual Instructions

Evidence was presented at hearing which demonstrated that Intoxilyzer 8000 Instrument No. 80-004377 had shown two consecutive error codes in the same subject test on March 18, 2011, April 20, 2011 and January 28, 2012, but had not been removed from service. Defendants argue that this violation of operational standards warrants suppression of the test results.

Sworn testimony of Mary Martin indicated that the training provided to operators of the test instrument included instructions to contact the Ohio Department of Health if two consecutive error codes on the same subject test occurred. Operators were also trained not to use the machine until they received further direction.

While the evidence is clear that the machines were not taken out of service after showing the error codes, there is nothing in the regulations which require that specific action. Additionally no evidence was presented which would lead this court to conclude that the events which transpired would have any effect at all on other tests conducted using the same instrument.

For these reasons, the issues raised by defendants about compliance with operational training go to the weight and not the admissibility of the evidence. No suppression of the evidence on this basis is warranted.

Substantial Compliance with Ohio Administrative Code §3701-53-04

Prior to the admissibility of Defendants' individual tests results, the State is required to demonstrate substantial compliance with the Ohio Department of Health regulations.

OAC §3701-53-04(B) provides that the instrument "shall automatically perform a dry gas control test before and after each subject test and instrument certification using a dry gas traceable to the national institute of standards and technology (NIST)."

State's Exhibits 1 and 19 clearly demonstrate that Defendants Tammy Bales and Jerrad Jakubisin were subject to two "tests", and that no dry gas control check was performed between the two tests administered to each defendant. The state argues that these two tests administered to each defendant were not really "tests" at

all, but merely “samples”. The State urges the court to interpret the regulation to mean that the dry gas control check between the two “samples” of each defendant was not required by the regulation. Defendants argue that the court should apply the plain and unambiguous meaning of the regulation.

Since courts are bound to give words their plain and ordinary meaning and possess no authority to construe words unless they are ambiguous, this court finds that the use of subject “test” in both the regulation and the two exhibits compels this court to afford it its plain meaning. Both the **Ohio Department of Health Alcohol and Drug Testing Subject Test Report** form promulgated by the Ohio Department of Health and the regulation promulgated by the Ohio Department of Health use the identical terminology. This court will not construe either the exhibits or the regulation to mean anything other than what they plainly say.

Therefore, the results of the tests of Defendants Tammy Bales and Jerrad Jakubisin are suppressed due to the state’s failure to demonstrate compliance with OAC §3701-53-04(B).

Mary Martin testified that once the inconsistency between the language used on the **Ohio Department of Health Alcohol and Drug Testing Subject Test Report** form and the language used in OAC §3701-53-04(B) was discovered, the form was changed to reflect that each subject provided two “samples” for analysis. These modified forms were used for the tests administered to the remaining defendants. See State’s Exhibit 19.

Ms. Martin further testified that computer software was available to run a dry gas control check between each subject sample, but the decision was made not to purchase it. No evidence was presented from which the court could conclude that the Ohio Department of Health decision not to require a dry gas control check between the two subject samples which now comprise the subject “test” would result in any error in the tests administered to the remaining defendants.

Using the same rationale as above, the court applies the plain meaning of the terminology used on both the **Ohio Department of Health Alcohol and Drug Testing Subject Test Report** form and contained within the regulation, and finds that the regulation does not require a dry gas control check between subject samples. There is no violation of OAC §3701-53-04(B) in the tests administered to the remaining defendants.



Judge Teresa L. Liston, ret.
By assignment pursuant to Sup.R. 17(A)

Copies:

William H. Ferguson, Esq.
Attorney for Plaintiff

Jack A. Blakeslee, Esq.
Donald D. Brown, Esq.
Lindsey K. Donahue, Esq.
Andrew J. Warhola, Esq.
Attorneys for Defendants