

IN THE MEDINA MUNICIPAL COURT  
MEDINA COUNTY, OHIO

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FILED  
MEDINA MUNICIPAL COURT

STATE OF OHIO

Plaintiff

-vs-

CASE NO. 12 TRC 03022

MICHAEL F. HORVATH

Defendant

JUDGMENT ENTRY

This matter is before the Court on the defendant's Motion to Suppress evidence. The Court separated the issues for hearing and held a combined hearing in this and four other cases to consider challenges to the Intoxilyzer 8000 and Intoxilyzer 5000 results.

Two witnesses testified at the hearing: Mary Martin, Program Administrator for Alcohol and Drug Testing, Ohio Department of Health; and Ohio State Patrol Sergeant Jason Bittinger. The Court has assessed the credibility of these witnesses in making its findings of fact.

The Court admitted into evidence the following exhibits, some relevant only to other combined cases:

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|-------------------|---|
| State's Exhibit 1 | Curriculum Vitae of Ms. Mary Martin   |
| State's Exhibit 2 | ODH Packet (14 pages) of Instrument Certification Records for Ohio State Patrol Post 52 (Medina) Intoxilyzer 8000   |
| State's Exhibit 3 | ODH Subject Test Report for Tina Hogue  |
| State's Exhibit 4 | Record of Ohio State Patrol Post 52 (Medina) Intoxilyzer 8000 relating to Jennifer Young test                       |
| State's Exhibit 5 | ODH Packet (14 pages) of Instrument Certification Records for Ohio State Patrol Post 52 (Medina) re: Jennifer Young |
| State's Exhibit 6 | Subject Invalid Test report on Jennifer Young   |

State's Exhibit 7	Subject Test Report on Jennifer Young
State's Exhibit 8	ODH Packet (11 pages) of Instrument Certification Records for Medina Police Department re: Corinne Vandusen test
State's Exhibit 9	ODH Packet (9 pages) of Instrument Certification Records for Ohio State Patrol Post 52 (Medina) re: Charles Kovach test
Defendant's Exhibit A	ODH Subject Test Report for Tina Hogue (Same as State's Exhibit 3)
Defendant's Exhibit B	(09-2009 edition) Bureau of Alcohol/Drug Testing Training Manual Intoxilyzer 8000
Defendant's Exhibit C	Subject Test Report for Defendant Charles Kovach from ODH website
Defendant's Exhibit D	Subject Test Report for Defendant Kovach printed by Intoxilyzer 8000
Defendant's Exhibit E	Subject Test Report for Defendant Jennifer Young printed by Intoxilyzer 8000
Defendant's Exhibit F	Subject Test Report from ODH website for Jennifer Young

The defendant filed a Motion to Suppress (MO) on July 6, 2012. The issues were clarified after a pretrial in a Judgment Entry of August 28, 2012, and for this hearing the only issue is "the authority of the officer to operate the Intoxilyzer 5000." The issue before the Court and the Court's findings of fact and conclusions of law are as stated herein.

*Based upon the analysis herein, the defendant's Motion to Suppress the breath test is denied, and the test result is admitted.*

#### **Findings of Fact and Conclusions of Law**

**"Patrolman Stepka was not authorized to operate the breath testing device and the results of the Intoxilyzer 5000 breath test must be suppressed \* \* \* pursuant to Ohio Administrative Code §3701-53-09, the Ptl. Stepka applied for and received an**

Operator Access Card for the Intoxilyzer 8000 breath testing machine on March 8, 2010. He performed the within breath test on an Intoxilyzer 5000 Machine. Ohio Administrative Code §3701-53-09(D) states:

**'Individuals holding operator access cards issued under this rule shall use only those evidential breath testing instruments for which they have been issued an operator access card.'**

**"Because he performed the breath test on a different instrument, to-wit: an Intoxilyzer 5000, the breath test is invalid and must be suppressed." [MO,pp.1,6].**

OAC 3701-53-07(C): Breath tests used to determine whether a person's breath contains a concentration of alcohol prohibited or defined by sections 4511.19 and/or 1547.11 of the Revised Code, or any other equivalent statute or local ordinance prescribing a defined or prohibited breath alcohol concentration shall be performed by a senior operator or an operator...

OAC 3701-53-07(E): An individual meets the qualifications for an operator's permit by: (1) Being a high school graduate or having passed the "General Education Development Test"; (2) Being a certified law enforcement officer sworn to enforce sections 4511.19 and/or 1547.11 of the Revised Code, or any other equivalent statute or local ordinance prescribing a defined or prohibited breath alcohol concentration, or a certified corrections officer, and; (3) Having demonstrated that he or she can properly operate the evidential breath testing instrument by having successfully completed a basic operator or conversion training course for the type of approved evidential breath testing instrument for which he or she seeks a permit.

OAC 3701-53-09(B): Individuals desiring to function as senior operators or operators using instruments listed under paragraphs (A)(1), (A)(2), and (B) of rule 3701-53-02 of the Administrative Code shall apply to the director of health for permits on forms prescribed and provided by the director of health. A separate application shall be filed for each type of evidential breath testing instrument for which the permit is sought.

The director of health shall issue permits to perform tests to determine the amount of alcohol in a person's breath to individuals who qualify under the applicable provisions of rule 3701-53-07 of the Administrative Code. Individuals holding permits issued under this rule shall use only those evidential breath testing instruments for which they have been issued a permit.

OAC 3701-53-09(D): Individuals desiring to function as operators using instruments listed under paragraph (A)(3) of rule 3701-53-02 of the Administrative Code shall apply to the director of health for operator access cards on forms prescribed and provided by the director of health. The director

of health shall issue operator access cards to perform tests to determine the amount of alcohol in a person's breath to individuals who qualify under the applicable provisions of rule 3701-53-07 of the Administrative Code. Individuals holding operator access cards issued under this rule shall use only those evidential breath testing instruments for which they have been issued an operator access card.

The parties agreed that Hinckley Township Officer David Stepka conducted the defendant's breath test on May 25, 2012, on an Intoxilyzer 5000, at the Hinckley Township Police Department. Officer Stepka had an operator access card for the Intoxilyzer 8000 issued by the Ohio Department of Health pursuant to OAC 3701-53-09(D), identified as ODH Access Card #11187 and an Operator's Permit to operate the Intoxilyzer 5000 issued pursuant to OAC 3701-53-09(B).

The defendant asserts that since the testing officer possessed both an operator's permit and an operator access card, the language in the respective OAC sections of "shall use only those evidential breath testing instruments for which they have been issued a permit..." and "shall use only those evidential breath testing instruments for which they have been issued an operator access card...." prevents the officer from using the Intoxilyzer 8000 because he holds a senior operator's permit. Of course, the converse of this argument is that the officer cannot perform a test on a machine requiring a permit because he has an operator access card. The essential defense argument is that a dual certified officer is disqualified from operating any machine. This is an absurd result. *State of Ohio v. Nethers*, 2012-Ohio-5198; 2012 Ohio App. LEXIS 4545 (5<sup>th</sup> Dist. App., Nov. 5, 2012); *State of Ohio v. Carmony*, 2013-Ohio-235; 2013 Ohio App. LEXIS 177(5<sup>th</sup> Dist. App., Jan. 14, 2013).

In support of his position, the defendant cited *State of Ohio v. Castle*, 168 Ohio Misc.2d 6; 2012-Ohio-1937; 2012 Ohio Misc. LEXIS 55 (April 25, 2012). That decision was reversed by the Franklin County Court of appeals. *State of Ohio v. Castle*, 2012-Ohio-6028; 2012 Ohio App. LEXIS 5238 (10<sup>th</sup> Dist App., Dec. 20, 2012) which stated:

“[\*P12] Such a construction of the statute renders meaningless the decision of the director of health to issue [\*\*9] permits and produces an absurd result by denying qualified individuals the ability to use an instrument for which they possess a use permit. To not only achieve the administrative purpose of the rules in ensuring only qualified individuals are permitted to operate the various breath-testing machines, but also harmonize the two rules, requires *Ohio Adm. Code 3701-53-09(b) and (D)* each be construed to allow individuals holding both a permit and an operator access card to use the instrument for which they are qualified under either the permit or operator access card.”

The regulations provide a process to ensure that only qualified individuals conduct breath tests on approved evidential breath testing instruments. An individual holding both certifications is, therefore, qualified to operate any approved instrument under the respective permit or card for the instrument being used.

  
DALE H. CHASE,  
JUDGE