

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio, :  
 :  
 Plaintiff-Appellant, :  
 :  
 v. : No. 12AP-369  
 : (M.C. No. 2011TRC-145779)  
 Floyd T. Castle, Jr., : (ACCELERATED CALENDAR)  
 :  
 Defendant-Appellee. :

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D E C I S I O N

Rendered on December 20, 2012

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*Richard C. Pfeiffer*, City Attorney, *Lara N. Baker*, City  
Prosecutor, and *Orly Ahroni*, for appellant.

*Cleve M. Johnson*, for appellee.

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APPEAL from the Franklin County Municipal Court

BRYANT, J.

{¶1} Plaintiff-appellant, State of Ohio, appeals from the April 24, 2012 judgment entry of the Franklin County Municipal Court granting the motion to suppress of defendant-appellee, Floyd T. Castle, Jr. The state assigns a single error:

THE TRIAL COURT ERRED WHEN IT SUPPRESSED THE RESULTS OF APPELLEE'S BREATH ALCOHOL TEST ADMINISTERED ON A BAC DATAMASTER BASED ON A FINDING THAT THE TROOPER COULD NOT USE A BAC DATAMASTER ONCE HE WAS ISSUED AN OPERATOR ACCESS CARD FOR THE INTOXILYZER 8000.

Because the trial court erred in concluding the trooper, who had been issued an operator access card for the Intoxilyzer 8000, was precluded from using his subsequently granted permit for the BAC DataMaster, we reverse.

### **I. Facts and Procedural History**

{¶2} According to the stipulated facts, Trooper Schack arrested defendant on July 3, 2011 and charged him with operating a vehicle while under the influence of alcohol, drugs of abuse, or both, in violation of R.C. 4511.19(A)(1)(a). Following the arrest, Trooper Schack performed a breath alcohol test on defendant using a BAC DataMaster. At the time he performed the test, Trooper Schack had been issued both a senior operator permit to administer breath alcohol tests using a BAC DataMaster under Ohio Adm.Code 3701-53-09(B) and an operator access card to use an Intoxilyzer 8000 under Ohio Adm.Code 3701-53-09(D). The test produced a result of .140 grams of alcohol per 210 liters of breath and, as a consequence, Trooper Schack also charged defendant with operating a vehicle while having a prohibited breath alcohol concentration in violation of R.C. 4511.19(A)(1)(d).

{¶3} On August 12, 2011, defendant filed a motion to suppress the results of the breath test. After the state filed a memorandum opposing the motion on September 30, 2011 and a supplemental memorandum on February 24, 2012, the trial court granted defendant's motion to suppress on April 24, 2012. The court determined only the limited issue of whether the issuance of an operator access card under Ohio Adm.Code 3701-53-09(D) prohibits the operator from performing breath tests using an instrument for which the operator also has been issued either an operator or senior operator permit under Ohio Adm.Code 3701-53-09(B). Finding defendant's argument persuasive, the court concluded the unambiguous language of the rule precluded Trooper Schack from operating a BAC DataMaster after having received an operator access card for the Intoxilyzer 8000.

### **II. Assignment of Error**

{¶4} The state's single assignment of error contends the trial court misinterpreted the relevant administrative rules and therefore wrongly granted defendant's motion to dismiss.

{¶5} Appellate review of a motion to suppress frequently involves mixed questions of law and fact and is therefore subject to a two-part standard of review. *State v.*

*Humberto*, 196 Ohio App.3d 230, 2011-Ohio-3080, ¶ 46 (10th Dist.). Since the trial court is in the best position to resolve questions of fact and evaluate credibility of witnesses, a reviewing court should not disturb the trial court's findings of fact where competent, credible evidence supports them. *State v. Claytor*, 85 Ohio App.3d 623, 627 (4th Dist.1993). The state's appeal presents no question of fact. Accordingly, we must independently determine as a matter of law, without deference to the trial court's conclusion, whether the trial court's decision meets the appropriate legal standard. *State v. Turner*, 10th Dist. No. 00AP-248 (Dec. 21, 2000), citing *Claytor* at 627.

{¶6} The Ohio General Assembly charged the director of health with determining techniques or methods for chemically analyzing a person's breath to ascertain alcohol content. R.C. 3701.143; *State v. Reedy*, 10th Dist. No. 05AP-501, 2006-Ohio-1212, ¶ 6. Only individuals who have qualified for and to whom the director of health has issued a permit may analyze breath samples for alcohol content using methods the director approved. R.C. 4511.19(D)(1); *Reedy* at ¶ 6. "The regulations set forth at Ohio Adm.Code 3701-53-01 et seq. constitute the approved techniques or methods for chemically analyzing a person's breath." *Reedy* at ¶ 6.

{¶7} The BAC DataMaster and Intoxilyzer 8000 are both breath testing instruments approved for use in determining breath alcohol content under Ohio Adm.Code 3701-53-02(A). In order to operate a BAC DataMaster, an individual must qualify for and receive either a senior operator or operator permit from the director of health. Ohio Adm.Code 3701-53-09(B). Operation of an Intoxilyzer 8000 similarly requires an individual to qualify for and have been issued an operator access card by the director of health. Ohio Adm.Code 3701-53-09(D). The permit and operator access card are not interchangeable, as the operator access card must be physically swiped into a card reader on the Intoxilyzer 8000 in order to enter operator information, whereas the permit is not physically scanned in order to use the BAC DataMaster. The parties do not dispute that Trooper Schack possessed both a valid permit and an operator access card at the time of the arrest.

{¶8} The state asserts the trial court erred in concluding Ohio Adm.Code 3701-53-09(D) unambiguously prevents a person to whom the director of health has issued an operator access card and a permit from using those breath testing instruments that

require an operator permit. Ohio Adm.Code 3701-53-09(D) provides, in pertinent part, that "[i]ndividuals 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." Similarly, Ohio Adm.Code 3701-53-09(B) provides, in pertinent part, "[i]ndividuals holding permits issued under this rule shall use only those evidential breath testing instruments for which they have been issued a permit."

{¶9} We apply rules of statutory construction when ascertaining the meaning of administrative rules and regulations having the effect of legislative enactment. *Reedy* at ¶ 10, citing *State ex rel. R. Bauer & Sons Roofing & Siding, Inc. v. Indus. Comm.*, 84 Ohio St.3d 62, 66 (1998); *Youngstown Sheet & Tube Co. v. Lindley*, 38 Ohio St.3d 232, 234 (1988), quoting *Kroger Grocery & Baking Co. v. Glander*, 149 Ohio St. 120, 125 (1948) (noting "[a]n administrative rule, '\* \* \* issued pursuant to statutory authority, has the force and effect of law unless it is unreasonable or is in clear conflict with statutory enactment governing the same subject matter' ").

{¶10} A court's paramount concern in ascertaining the meaning of a statute is legislative intent. *State v. Jackson*, 102 Ohio St.3d 380, 385, 2004-Ohio-3206, ¶ 34, citing *State ex rel. Asberry v. Payne*, 82 Ohio St.3d 44, 47 (1998). "All statutes relating to the same general subject matter must be read *in pari materia*, and in construing these statutes *in pari materia*, this court must give them a reasonable construction so as to give proper force and effect to each and all of the statutes." *State ex rel. Herman v. Klopfleisch*, 72 Ohio St.3d 581, 585 (1995), citing *United Tel. Co. of Ohio v. Limbach*, 71 Ohio St.3d 369, 372 (1994); *State ex rel. Cordray v. Midway Motor Sales, Inc.*, 122 Ohio St.3d 234, 2009-Ohio-2610, ¶ 25 (noting statutory provisions bearing on the same subject matter should be construed harmoniously unless they are irreconcilable); *State ex rel. Cincinnati Post v. Cincinnati*, 76 Ohio St.3d 540, 543 (1996), citing R.C. 1.47(C) (observing that reviewing courts also must construe statutes so as to avoid unreasonable or absurd results). "In reviewing a statute, a court cannot pick out one sentence and disassociate it from the context, but must look to the four corners of the enactment to determine the intent of the enacting body." *State v. Wilson*, 77 Ohio St.3d 334, 336 (1997), citing *MacDonald v. Bernard*, 1 Ohio St.3d 85, 89 (1982).

{¶11} Since Ohio Adm.Code 3701-53-09(B) and (D) address the same subject matter, we read them in pari materia. We acknowledge that the two rules facially appear to be unambiguous. The difficulty with defendant's argument lies in the result it produces. An operator such as Trooper Schack would be unable to operate either machine, being excluded from each because he held a permit or card for the other. Moreover, in reading the two provisions as conflicting, defendant's argument disregarded the evident purpose of the regulations: to allow individuals to use instruments for which the director of health determined they were qualified under Ohio Adm.Code 3701-53-07. As a result of defendant's interpretation of the rules, the trial court concluded that even though Trooper Schack had been issued a permit to use a BAC DataMaster after he was issued an operator access card, Trooper Schack could not use a BAC DataMaster. Indeed, were defendant's argument correct, the director of health would have had no reason to issue a BAC DataMaster permit to the trooper. Cf. *Salem v. Koncelik*, 164 Ohio App.3d 597, 2005-Ohio-5537, ¶ 16 (10th Dist.), citing *Hamilton Cty. Bd. of Mental Retardation & Dev. Disabilities v. Professionals Guild of Ohio*, 46 Ohio St.3d 147 (1989) (pointing out that courts must give considerable deference to an administrative agency's interpretation of its own administrative rules).

{¶12} Such a construction of the statute renders meaningless the decision of the director of health to issue 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 the operator access card.

### III. Disposition

{¶13} The trial court thus erred in granting defendant's motion to suppress on the basis that Trooper Schack could not perform a breath alcohol test using a BAC DataMaster for which he possessed a valid permit. Defendant points to no court that reached a different result; those courts that previously addressed this issue reached the same conclusion. See *State v. Nethers*, 5th Dist. No. 12-CA-30, 2012-Ohio-5198, ¶ 14-17;

*State v. Hudepohl*, 166 Ohio Misc.2d 1, 2011-Ohio-6917, ¶ 9-14. Accordingly, we sustain the state's single assignment of error, reverse the judgment of the Franklin County Municipal Court, and remand for proceedings consistent with this judgment.

*Judgment reversed  
and case remanded.*

KLATT and FRENCH, JJ., concur.

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