

IN THE COUNTY COURT OF NOBLE COUNTY, OHIO

STATE OF OHIO,  
Plaintiff

CASE NO: 11 TR C 176AB

V.

GAIL A. ALLEN,  
Defendant

FILED  
MAY 11 2011  
L.C. YOUNG, III JUDGE  
NOBLE COUNTY COURT

AND

STATE OF OHIO,  
Plaintiff

CASE NO: 11 TR C 80AB

V.

MATTHEW J. WATSON,  
Defendant

FILED  
MAY 11 2011  
L.C. YOUNG, III JUDGE  
NOBLE COUNTY COURT  
JUDGE LUCIEN C. YOUNG, III

ENTRY

This matter having come before the court this 5<sup>th</sup> day of May, 2011. Present in court were the defendants, Gail A. Allen and Matthew J. Watson, represented by Attorney Jack A. Blakeslee. The State of Ohio was present through Assistant Prosecuting Attorney, Kelly Riddle. The matters were joined for hearing upon both defendants Motions for Suppression, the motions and facts being identical.

The first issue raised by the defendants was an objection to any testimony being introduced by Mary Martin, a representative of the Ohio Department of Health. The defendants contended that Mary Martin was an expert witness and that the State had failed to comply with

Criminal Rule 16 (K) in that the State had failed to provide a written report as required. The State contended that Mary Martin was a representative of the Ohio Department of Health and was not testifying as an expert witness. The court notes that this matter is a Suppression Hearing and that Criminal Rule 16 (K) requires that the reports raised by the defendants are to be provided to the defendant no later than twenty-one days prior to trial. The twenty-one days has not yet expired, although the trial dates have been continued. On this basis alone the defendants objection must fail.

Section 3701.14.3. of the Ohio Revised Code provides that "For purposes of sections 1547.11, 4511.19, and 4511.194 [4511.19.4] 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 Section 3701.143 is set forth in Ohio Administrative Code Sections 3701-53-01 through 3701-53-10. By Section 3701-53-02(A)(3) of the Ohio Administrative Code, the Director of the Ohio Department of Health has approved the Intoxilyzer Model 8000 (OH-5) as an evidential breath testing instrument. Section 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". Section 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". The original certification of the Intoxilyzer 8000 was the subject upon which Mary Martin was to testify. Mary Martin was testifying as a representative of the Ohio Department of Health and on this basis the defendants objection to her testimony as an expert witness must fail. Based upon the foregoing Mary Martin was permitted to testify.

Mary Martin testified that she was the Program Administrator of the Drug and Alcohol Testing for the Ohio Department of Health. She further testified that the certifications for all Intoxilyzers Model 8000 were kept in the ordinary course of business at their office in Reynoldsburg, Ohio. The State attempted to introduce State's Exhibit 1, a certified copy of the instrument certification, as required by Administrative Code Section 3701-53-04(D). The defendants objected upon the basis that the report was testimonial and required an opportunity for cross-examination by the accused. Further, that Mary Martin was not the individual that performed the initial certification, that being John Kucmanic, who is no longer employed by the Ohio Department of Health. Testimony was introduced as to the manner in which State's Exhibit 1 was created. She testified that once the start button is pushed the internal sequence in the

Intoxilyzer 8000 is followed and at the conclusion a report is generated. That report is kept at the office of the Ohio Department of Health in Reynoldsburg, Ohio. This court finds that in THE STATE OF OHIO v. CRAGER, 116 Ohio St. 3d 369; 2007 Ohio 68402007 Ohio 6840; the Ohio Supreme Court held that Records of scientific tests are business records and not "testimonial" under Crawford v. Washington (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177. The Court further held that A criminal defendant's constitutional right to confrontation is not violated when a qualified expert DNA analyst testifies at trial in place of the DNA analyst who actually conducted the testing. The court further noted that autopsy reports are admissible.

This court finds that the report that was created by the Intoxilyzer 800, at the initial certification, was a business record and non-testimonial, and therefore admissible. The defendants objections were overruled and State's Exhibit 1 was admitted.

Mary Martin, testifying from State's Exhibit 1, testified as to the manner in which the Intoxilyzer 8000 was certified. She testified that first a dry gas control is run; then a simulator is connected to the Intoxilyzer; five (5) wet bath solutions are run; and last, another dry gas control is run. She further testified that the initial certification of the Intoxilyzer 8000, at the Cambridge Post of the Ohio State Highway Patrol, Instrument Serial Number 80-003951, was done in this manner. State's Exhibits 3, 4 and 5 were admitted, which were certified copies of the dry gas solution certificate, the wet bath solution and the initial start up internal diagnostic test. She further testified that all tests were done within +/- .005 of the target values of both the dry gas control and the wet bath solution.

The last issue raised by the defendants Motions to Suppress was that a dry gas control test was not run in compliance with Section 3701-53-04(B), which provides that "instruments listed under paragraph (A)(3) of rule 3701-53-02 of the Administrative Code 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".

Mary Martin testified that the meaning to the Ohio Department of Health of the term Subject Test was the complete test of a subject. State's Exhibit 2, the breath test of Gail Allen, has printed upon it the terms Subject Test 1 and Subject Test 2. The defendants contend that Subject Test 1 and Subject Test 2 are what are contemplated by Section 3701-53-04(B). Mary Martin testified that of the some 13,000 tests that have been conducted in the State of Ohio using the Intoxilyzer 8000, no instrument performs a dry gas control between Subject Test 1 and Subject Test 2 as on the Subject Test Report. She further testified that the Ohio Department of Health is in the process of correcting this confusion by changing the term on the Subject Test 1 and Subject Test 2 to that of Subject Sample 1 and Subject Sample 2. The court notes that the term Subject Test is not defined by Rule or Statute.

The Ohio General Assembly has charged the Director of the Ohio Department of Health to determine, or cause to be determined, techniques or methods for chemically analyzing a person's breath in order to ascertain the amount of alcohol in the person's breath. R.C. 3701.143. The regulations set forth at Ohio Admin. Code 3701:53-01 et seq. constitute the approved techniques or methods for chemically analyzing a person's breath. Breath samples must be analyzed for alcohol content in accordance with methods approved by the Director of Health by an individual possessing a valid permit issued by the Director pursuant to R.C. 3701.143. R.C. 4511.19(D)(1).

In determining whether the State complied with Ohio Admin. Code 3701:53-02, courts are aided by rules of statutory construction, which apply to administrative rules and regulations having the effect of legislative enactment. An 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. Courts are required to give considerable deference to an administrative agency's interpretation of its own rules and regulations

The foremost consideration in determining the meaning of a statute is legislative intent. To determine the legislative intent, a court first reviews the statutory language, according the words used their usual, normal, or customary meaning. When plain and unambiguous statutory language conveys a clear and definite meaning, there is no need for courts to apply rules of statutory interpretation; a court must give effect to the words used. Courts may not ignore plain and unambiguous statutory language.

Courts owe deference to an agency's rule making authority. Legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to a statute. It is axiomatic that administrative rules are valid unless they are unreasonable, or in clear conflict with the statutory intent of the legislation governing the subject matter. When the potential for conflict arises, the proper subject for determination is whether the rule contravenes an express provision of the statute. A rule which is unreasonable, arbitrary, discriminatory, or in conflict with law is invalid and unconstitutional because it surpasses administrative powers and constitutes a legislative function. A rule that bears no reasonable relation to the legislative purposes of the authorizing statute improperly declares policy.

In promulgating regulations pursuant to R.C. 3701.143, it must be presumed that the Ohio Director of Health acts upon adequate investigation and in full awareness of the perceived

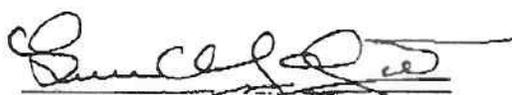
problems. Lower courts are directed to defer to the Department's authority and not to substitute the court's judgment for that of the Director of Health. Rules issued by administrative agencies pursuant to statutory authority have the force and effect of law. Citations omitted.

From the evidence adduced, the court finds that the term Subject Test, as contained in the body of State's Exhibit 1, is a term created by the software company and is not intended to have a statutory or a rule meaning. The defendants Motions to Suppress must be denied.

The court finds that on December 7, 2010 the Intoxilyzer Model 8000, located at the Ohio State Highway Patrol Post in Guernsey County, Ohio, Instrument Serial Number 80-003951, was certified in substantial compliance (See State v. Burnside, 100 Ohio St.3d 152) with the Ohio Administrative Code Section 3701-53-01 through 3701-53-10.

The court further finds that the term Subject Test as contained in State's Exhibit 1 is not a statutory or regulatory term, but a term of the software company.

For the foregoing reasons, the defendants Motions for Suppression are hereby denied.

  
Judge Lucien C. Young, III

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