

IN THE LICKING COUNTY MUNICIPAL COURT

FILED
LICKING COUNTY
MUNICIPAL COURT

2011 JUL 18 1 A 9 28

State of Ohio,

Plaintiff,

vs.

NEWARK, OHIO
MARCIA J. PHELPS
CLERK
Case No. 11TRCo3195
Judge Michael F. Higgins

Bert Blair,

Defendant.

JUL 19 2011

JUDGMENT ENTRY

This matter came on for the Court's consideration upon the Defendant's Motion to Suppress. The facts gleaned at the Suppression Hearing are as follows. On April 1, 2011 at approximately 1:00 in the morning Sheriff's Deputy Randy Morton observed the Defendant operating a pickup truck on Lake Drive. Deputy Morton testified that the pickup truck was being driven in an erratic manner, crossing the centerline and the fog line of Lake Drive on a number of occasions. Deputy Morton initiated a traffic stop and after approaching the vehicle he noticed a strong odor of an alcoholic beverage coming from the vehicle. Additionally, in speaking with the Defendant he noticed that the Defendant had not only an odor of an alcoholic beverage about his person but he had bloodshot eyes. Upon questioning the Defendant, Mr. Blair, admitted to having consumed six beers.

After receiving the above information Deputy Morton asked the Defendant to perform the standardized field sobriety tests contained in Chapter 8 of the NHTSA Manual. The results of those tests convinced Deputy Morton that the Defendant was indeed operating under the influence of alcohol. On the horizontal gaze nystagmus test the Defendant exhibited four of six possible clues. On the one leg stand test the

Judge
Michael F. Higgins

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David N. Stansbury

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Defendant exhibited four clues including raising his arms for balance, swaying from side to side and putting his foot down on numerous occasions. On the walk and turn test the Defendant also exhibited significant clues which led the deputy to believe that he had failed the test. These clues included stopping on the walk and turn test, raising his arms, making an improper turn, and missing heel to toe.

Deputy Morton also asked the Defendant to perform a non standardized field sobriety test, the so called ABC test. Deputy Morton indicated that the Defendant also failed this test.

The Defendant was transferred to the Hebron Police Department where he agreed to take a BAC DataMaster Test. While at the Hebron Police Department he was read the 2255 Form. It should be noted that the Defendant possesses a commercial driver's license but at the time of his arrest was not operating a commercial vehicle. The Court finds that the officer read to the Defendant all of the required language contained on Form 2255.

THE BAC DATAMASTER TEST

The result of the BAC DataMaster Test which revealed a subject test result of .099 grams of alcohol per 210 liters of breath is suppressed. The cumulative effective of two deficiencies causes the Court to believe the result is unreliable or the testing procedure was not done in compliance with Ohio Department of Health Regulations.

The State introduced into evidence, by means of an evidence packet labeled Plaintiff's Exhibit 3, documents purporting to show that Ohio Department of Health Regulations relating to the BAC DataMaster had been properly followed. This evidence packet contained not only the prior calibration and post calibration test results but also the senior operator's permit of the individual performing this

calibration test and a certified copy of an Ohio Department of Health Simulator Solution Certificate. The problem with the evidence packet is that the dates on the evidence ticket do not correspond to the dates that the subsequent test and prior + post calibration checks were performed. The pretest calibration evidence ticket indicates a date of April 26 when in fact, according to the calibrating officer that test was performed March 26. The post calibration evidence ticket is likewise off but it is inconsistent in the sense that it is not exactly 30 days off as the pretest calibration evidence ticket was. Moreover, all witnesses testified that the arrest made by Deputy Morton was April 1, 2011. Yet the evidence ticket for that test indicates a May 3, 2011 date. The State's calibrating witness attempted to explain these inconsistent dates as being "printer errors" rather than errors in the software of the BAC DataMaster Machine. If the Court was to accept the States premise that these were printer errors it would do so on the basis of blind faith.

There was another problem with the administration of the BAC DataMaster Test. The Court is not satisfied that the 20 minute observation period was met. Deputy Morton testified that he stopped the Defendant at 1:04 a.m. on Lake Drive. He testified that since he had K-9 Units in the back of his cruiser that another deputy was called to the scene to transport the Defendant to the Hebron Police Department which was located approximately 2 or 3 miles away. Deputy Morton said that he handcuffed the Defendant and placed him in the back of Deputy Van Balen's cruiser. Morton stated that he was positive that he handcuffed the Defendant because that is policy. Deputy Morton also indicated that the Defendant was very cooperative. Deputy Van Balen testified that she could not recall if the Defendant was in cuffs or not and that the policy of the Sheriff's Department was that if they were cooperative

then cuffs need not be applied. While there was no testimony that the Defendant placed anything in his mouth the Court finds this contradiction in testimony troubling. More troubling however, is the contradictory testimony of Van Balen and Morton once they arrived at the Hebron Police Department. Deputy Morton could not testify as to how long the Defendant was observed prior to the administration of the BAC DataMaster Test. He did testify that he believed it was greater than 20 minutes. Van Balen testified that the test was given almost immediately after they arrived at the Hebron Police Department giving rise to a strong inference that less than 20 minutes transpired. Because the Court is not satisfied that the 20 minute observation period was followed and further because there appeared to be significant discrepancies on the evidence ticket printouts for not only the calibration tests, but the Defendant's test. The Court chooses to suppress the results of this Defendant's BAC DataMaster Test.

The Defendant also wishes the Court to suppress the test results on the basis of language contained in Ohio Department of Health Regulations relating to the Intoxilyzer 8000. The Defendant asserts that the regulations stand for the proposition that once a police officer is issued an Intoxilyzer 8000 access card he may no longer administer BAC DataMaster Tests irrespective of the fact that that person possesses a senior operators permit. The Court has reviewed the regulations in its entirety and concedes looking at that one sentence alone could lead one to believe that the Defendant's assertions are correct. However, reading the regulations in their entirety leads the reader to a different conclusion. On the basis of this argument the Court rules that possessing an access card issued by the Ohio Department of Health

to administer Intoxilyzer 8000 Tests does not render one holding a senior operators' permit incapable of administering a BAC DataMaster Test.


JUDGE MICHAEL F. HIGGINS

MFH/ch

cc: Robert Caesaric
✓ Amy S. Weeks