IN THE PAINESVILLE MUNICIPAL COURT

PAINESVILLE MUNICIPAL COURT

LAKE COUNTY, OHIO

2012 JUN -1 P 3:24

THE STATE OF OHIO,	)	CASE NO. 11 TRC 4827
Plaintiff	)	
		JUDGE MICHAEL A. CICCONETTI
-vs-	)	
		JUDGMENT ENTRY
BRANDY COLLAZO,	)	
Defendant	)	

NICHOLAS CINDRIC CLERK OF COURT

This matter came before the Court on the 15th day of May 2012, upon defendant's Motion to Suppress. For good cause shown, the Court is of the opinion that the Motion is well taken and ought to be granted for the following reasons:

In her motion, the Defendant raised challenges to the breath test evidence the State of Ohio seeks to use against the accused at trial. An oral argument was held regarding the issues raised.

One of the issues raised in Defendant's motions was whether the Intoxilyzer 8000 met the established standards of scientific accuracy and reliability required for admissibility. Defendant asserted that the device had not been shown to be accurate and reliable and submitted that the results should be inadmissible unless the State produced evidence that convinced the Court that the testing met general standards of accuracy and reliability. Other issues related to the breath test included compliance with the Ohio Department of Health Rules and procedures as well as the adequacy of those rules and procedures.

It was the State's position that it did not have to submit evidence of the scientific accuracy and reliability of the machine and, moreover, that if the State shows compliance with the ODH rules this Court is required to admit the breath test results. The State relies upon R.C. 3701.143 and OAC 3701-53-02 (A)(3) as support for its position. Counsel for Defendant presented argument contrary to this point, most of which was included in Defendant's motions.

The Court found the Defendant's argument more persuasive and so ruled from the bench.

Written Ruling on Motion:

Having reviewed the relevant court decisions, the Defendant's motions, and the arguments of the parties the Court finds the defendant's arguments and citations persuasive and hereby grants the motion and holds that the results of the Intoxilyzer 8000 will not be admissible at trial in this case.

The State argues that the revised code and the administrative code are controlling and if the State shows compliance with the ODH rules this court is required to admit the breath test results. Under the State's theory the trial courts in Ohio are not to have the gatekeeping authority regarding issues related to scientific accuracy and/or reliability of breath testing devices. This Court disagrees with the State on these points. The Court relies upon the permissive language of R.C. 4511.19 that states:

> The court **may admit** evidence on the concentration of alcohol, drugs of abuse, or a combination of them as described in this division when a person submits to a blood, breath, urine, or other bodily substance test at the request of a law enforcement officer under section 4511.191 of the Revised Code... or a blood or urine sample is obtained pursuant to a search warrant ... Id.

With this permissive language, the Court "may", but is not required, to admit the evidence and, accordingly, decides not to admit the breath test.

Trial courts have the authority to act as "gatekeepers" relative to scientific evidence. Evidence Rule 702 guides the courts in this function. See *Miller v. Bike Athletic Company* (1998), 80 Ohio St.3d 607, decided after *State v. Vega* (1984) 12 Ohio St.3d 185.

The State's argument is anchored on R.C. 3701.143 and OAC 3701-53-02 (A)(3), however, the Court believes the legislature's use of the word "may" in R.C. 4511.19 rather than shall is a distinction that is very important and, indeed, may be critical to the whether the statute comports with or is in conflict with the Ohio Constitution. Section 5(B) of Article IV of the Ohio Constitution provides, in pertinent part, "The Supreme Court shall prescribe rules governing practice and procedure in all courts of the state ***. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

The Ohio Supreme Court has promulgated the Rules of Evidence. Rule 104 requires trial judges to determine questions of admissibility of evidence. Rule 702 governs determinations related to the admissibility of scientific evidence. Breath test results are scientific evidence. Thus the statutes the State relies upon do not and cannot eliminate a trial court's gatekeeping authority.

Upon agreement of the parties, and approval of the Court, in lieu of an evidentiary hearing, the parties submitted case law, including municipal court decisions, in favor of their respective arguments. In the instant case, the defense made clear though its motions that it was challenging the accuracy and reliability of the Intoxilyzer 8000 breath testing device and cited Evidence Rule 702 in doing so. The Intoxilyzer 8000 is a new device that does not appear to have been shown to be accurate and reliable in the courts in Ohio.

This Court relies upon *Nutter v. Concord Twp.* (June 30, 1993) Lake App. No. 92-L-118, 1993 WL 256808, which states in pertinent part, "While unpublished opinions from another judicial district may not constitute binding authority, they are commonly cited as persuasive authority and the analysis therein may be adopted by any court where there is no binding authority to the contrary."

After reviewing all of the cases and decisions submitted by the parties, this Court finds that the State has not persuasively shown the reliability of the Intoxilyzer 8000. Rather, this Court finds *State v. Reid,* Circleville Municipal Court Case No. TRC1100716, decided June 2, 2011 and January 26, 2012 to be the most persuasive and determinative. Therefore, this Court finds the Intoxilyzer 8000 does not meet the standards for admission into evidence.

In so ruling, this Court also relies upon *City of Lebanon v. McFarland,* Lebanon Municipal Court Case No. TRC 1102982, decided January 30, 2012, *State v. Wallace,* Mason Municipal Court Case No. 11 TRC 01388, decided September 1, 2011, *State v. Kormos,* Clermont County Municipal Court Case No. 2010 TRC 18017, decided August 31, 2011, *State v. Dugan,* Butler County Area III Case No. 11 TRC 01119, decided March 20, 2012, and decisions of several other states to preclude the use of the Intoxilyzer 8000.

THEREFORE, IT IS THE ORDER OF THIS COURT that the result of the breath test produced by the Intoxilyzer 8000 is hereby suppressed and cannot be introduced at trial.

IT IS SO ORDERED.

MICHAEL A. CICCONETTI, JUDGE
Painesville Municipal Court

cc: Prosecutor, Joe Gurley
Attorney for Brandy Collazo, Joe Hada
Defendant, Brandy Collazo