

IN THE FRANKLIN COUNTY MUNICIPAL COURT
COLUMBUS, OHIO

City of Worthington,
Plaintiff,

vs.

Dale M. Cook,
Defendant.

Case No. 2011 TRC 188259

FILED

Franklin County Municipal Court

MAY 30 2012

LORI M. TYACK, CLERK

By _____
Deputy Clerk

ENTRY AND ORDER

In this case, Defendant has filed a motion to suppress the results of a breath test administered to him following his arrest for OVI.

The parties appeared before the court on May 14, 2012 and stipulated to the following facts:

1. Defendant Dale M. Cook was arrested on November 20, 2011 by Officer Jon Gebhart of the Worthington Police Department and was charged with operation while under the influence of alcohol or drug of abuse (OVI), in violation of Worthington City Ordinance 333.01(A)(1).
2. Mr. Cook submitted to a chemical test of his breath on a BAC DataMaster breath testing device which yielded a result of .136 of a gram by weight of alcohol per two hundred ten liters of his breath.
3. Mr. Cook was then cited with a violation of Worthington City Ordinance 333.01(A)(1)(d) for operation with a specified concentration of alcohol or drug in certain bodily substances (OVI-per se).
4. Officer Gebhart has a senior operator permit to operate the BAC DataMaster which was issued to him by the Ohio Director of Health (the Director) on January 12, 2011 which had not expired at the time the breath test was administered to Mr. Cook.
5. Subsequent to the issuance of that senior operator permit to Officer Gebhart on January 12, 2012 a new senior operator permit was issued to him upon the expiration of his previous permit. It is permit #81155-F6.
6. The BAC DataMaster is one of the evidential breath testing instruments approved by the Director.
7. Officer Gebhart was issued operator access card #16503-0-2 to operate the Intoxilyzer model 8000 on September 15, 2011. This card has no expiration date.

8. The Intoxilyzer model 8000 is an evidential breath testing instrument approved by the Director.

This case arises because of poor drafting of administrative regulations promulgated by the Director. These regulations, pertinent to the issue before the court, appear at OAC 3701-53-09-(B) and 3701-53-09(D). Those two sections read as follows:

OAC 3701-53-09(B): Individuals holding permits issued under this rule shall use only those breath testing instruments for which they have been issued a permit.

OAC 3701-53-09(D): 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.

On the face of these two regulations, the contention of Defendant seems to be well-founded. According to the plain language, those with a permit can't use a machine requiring an operator access card (or any other machine for which they do not have a permit) and those with an operator access card can't use a machine requiring a permit.

The court is aware of R.C. 3701.143 by which the General Assembly conferred upon the Ohio Director of Health, among other things, the authority to "issue permits to qualified persons authorizing them to perform such analyses", including breath analysis, for purposes of OVI cases. The very same statute also includes the following: "Such permits shall be subject to termination or revocation at the discretion of the director."

Ironies abound. The General Assembly authorized the Ohio Director of Health to issue permits; it makes no mention of "operator access cards." Nonetheless, the Director has chosen to issue "operator access cards" rather than permits to those who are qualified to operate the Intoxilyzer 8000 machines. This may arguably be an act beyond the authority granted the Director by the General Assembly.

An affidavit attached to Defendant's Response Memorandum is from attorney Cleve Johnson, who served on an Impaired Driving Task Force as a representative of the Ohio State Bar Association. Based on the discussions of the task force, Mr. Johnson concludes that the intent of O.A.C. 3701-53-09(D) was to prevent those issued an operator access card from operating the older breath-testing machines that require permits. This may very well have been the thrust of the discussions, but the Director missed the opportunity to adopt this position when drafting the regulation, by adding some language which would result in the automatic termination of permits held by those to whom "operator access cards" are issued, which clearly would be within the statutory authority granted by the General Assembly in R.C. 3701.143.

Finally, in the ultimate irony, as demonstrated by the stipulated facts in this case, the Director not only failed to terminate or revoke Officer Gebhart's permit to operate the BAC DataMaster when he issued Officer Gebhart an operator access card on September 15, 2011, the Director went on to issue a new permit to Officer Gebhart to operate the BAC DataMaster when his previous permit expired and after Officer Gebhart was issued an operator access card. It is ironic that the Director would issue a permit that he intended Officer Gebhart to be prohibited from using, if the argument of Defendant were correct.

The General Assembly has authorized the admission of the breath test results obtained in an OVI case in the following words:

R.C. 4511.19(D)(1)(b): In any criminal prosecution or juvenile court proceedings for a violation of division (A) or (B) of this section or for an equivalent offense that is vehicle-related, the court may admit evidence on the concentration of alcohol, drugs of abuse, controlled substances, metabolites of a controlled substance, or a combination of them in the defendant's whole blood, blood serum or plasma, breath, urine, or other bodily substance at the time of the alleged violation as shown by chemical analysis of the substance withdrawn within three hours of the time of the alleged violation. The three-hour time limit specified in this division regarding the admission of evidence does not extend or affect the two-hour time limit specified in division (A) of section 4511.192 of the Revised Code as the maximum period of time during which a person may consent to a chemical test or tests as described in that section. 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. Only a physician, a registered nurse, an emergency medical technician-intermediate, an emergency medical technician-paramedic, or a qualified technician, chemist, or phlebotomist shall withdraw a blood sample for the purpose of determining the alcohol, drug, controlled substance, metabolite of a controlled substance, or combination content of the whole blood, blood serum, or blood plasma. This limitation does not apply to the taking of breath or urine specimens. A person authorized to withdraw blood under this division may refuse to withdraw blood under this division, if in that person's opinion, the physical welfare of the person would be endangered by the withdrawing of blood.

The bodily substance withdrawn under division (D)(1)(b) of this section shall be analyzed in accordance with methods approved by the director of health by an individual possessing a valid permit issued by the director pursuant to section 3701.143 of the Revised Code.

The court notes that there is no mention of "operator access cards" in this statute. The General Assembly has further authorized the Director to determine methods of analysis of bodily substances and the qualifications of those permitted to perform such analyses in R.C. 3701.143, which reads as follows:

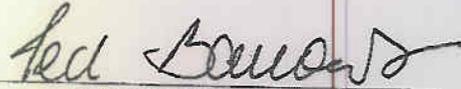
For purposes of sections 1547.11, 4511.19, and 4511.194 of the Revised Code, the director of health shall determine, or cause to be determined, techniques or methods for chemically analyzing a person's whole blood, blood serum or plasma, urine, breath, or other bodily substance in order to ascertain 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 court notes, once again, that there is no mention in this statute of "operator access cards", merely of "permits".

It is evident from the stipulated facts that Officer Gebhart possessed a valid permit issued by the Director on November 20, 2011 to operate the BAC DataMaster machine used to analyze Mr. Cook's breath alcohol concentration. The General Assembly has spoken. Whether the Director has exceeded his authority or is guilty of sloppy drafting is irrelevant to the court's determination.

The motion to suppress is denied.

5/29/12
DATE


JUDGE TED BARROWS

Copies to:
Jarrod Skinner
Orly Ahroni
Assistant City Prosecutors
375 S. High Street, 7th Floor
Columbus, Ohio 43215
Attorneys for Plaintiff

Jessica G. Fallon, Esq.
Saia & Piatt, Inc.
713 S. Front Street
Columbus, Ohio 43206
Attorney for Defendant