

IN THE CANTON MUNICIPAL COURT
STARK COUNTY, OHIOCANTON MUNICIPAL COURT
CRIMINAL DIVISION

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STATE OF OHIO,

CASE NO. 11 TRC 09164

Plaintiff,

vs.

JUDGMENT ENTRY

ERIN M. DAVIES,

Defendant.

This matter came on for hearing on defendant's motion to suppress evidence. Defendant asserts that the breath test performed in the instant action did not comply with OAC 3701-53-04 as the Intoxilyzer 8000 machine did not perform a dry gas control test before and after each test sample.

The State called as its witness Mary Martin, Program Administrator of drug and alcohol testing for the Ohio Department of Health. Ms. Martin testified regarding the subject test of Erin Davies, which test was performed on November 24, 2011. (Plaintiff's Exhibit 1) Ms. Martin testified the subject test consists of the two breath samples and a dry gas control test run prior to the first sample and following the second sample. The subject test must have two breath samples in order to have a valid test. Ms. Martin distinguished the term subject test from the subject samples.

Ms. Martin testified that the dry gas control tests are run before and after each "subject test." The term subject

test is not defined in the Ohio Administrative Code or by statute. Ms. Martin testified that the Ohio Department of Health considers the subject test to be all of the information contained in the subject test report.

(Plaintiff's Exhibit 1) She considers the subject samples to be one part of the test, not the entire subject test. She further testified that the Ohio Department of Health will define subject test in the future, but as of this date, had not yet done so. She further testified that no Intoxilyzer 8000 in the State of Ohio performs a dry gas control between sample one and sample two of the test.

Ms. Martin testified that the instrument used to test Ms. Davis was certified on May 4, 2011, by the Ohio Department of Health. (Plaintiff's Exhibit 3) The certification is for one year. The dry gas lot used in this subject test was 10610100G1. (Plaintiff's Exhibits 1, 2 and 3) The dry gas expiration date was 03-02-2013.

(Plaintiff's Exhibits 1 and 3) The target value for this lot was 0.100g/210L. (Plaintiff's Exhibits 1 and 3) In the subject test for Ms. Davies, the dry gas control result was 0.102 prior to the subject sample one test result.

(Plaintiff's Exhibit 1) Subject sample one test result was 0.108. (Plaintiff's Exhibit 1) A subject sample two test result was 0.106. (Plaintiff's Exhibit 1) Following subject sample two, another dry gas control test was run

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with a result of 0.101. (Plaintiff's Exhibit 1) The dry gas control results were within the range of five one-thousandths (0.005) grams per two hundred ten liters of the alcohol concentration as required in OAC 3701-53-04.

ORC 3701.143 Analyzing blood, urine, breath or other bodily substance to determine alcohol or drug of abuse content provides:

“. . . 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”

OAC 3701-53-04 Instrument checks, controls and certifications provides:

“(B) 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.”

The Court finds that the Director of Health has the authority to determine methods for chemically testing a

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person's breath to determine the amount of alcohol in a person's breath pursuant to ORC 3701.143. The Director of Health has certified the Intoxilyzer 8000 for purposes of analyzing breath alcohol content.

The Court finds that, based upon the testimony presented at the suppression hearing, the State has established the dry gas control test was performed in compliance with OAC 3701-53-04(B). The test was administered in substantial compliance with the regulations prescribed by the Department of Health.

For the foregoing reasons, defendant's motion to suppress is denied.

Date: March 12, 2012


JUDGE MARY A. FALVEY
CANTON MUNICIPAL COURT

cc: Prosecutor Katie Erchick
Kenneth Crislip, Attorney for Defendant

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GENERAL DIVISION

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