

IN THE MUNICIPAL COURT OF CHILLCOTHE, OHIO

THE STATE OF OHIO,
Plaintiff,

CASE NO. TRC 12 00758-A,B,C

JOURNAL ENTRY

vs.

LINDSEY K. DIX,
Defendant.

FILED

SEP 19 2012

TINA E. LARGE, CLERK
CHILLCOTHE MUNICIPAL COURT
CHILLCOTHE, OHIO

This matter was heard on May 7, 2012, upon defendant's Motion to Suppress filed February 29, 2012. The state was represented by Assistant Law Director Michele R. Rout. The defendant was present along with her attorney James T. Boulger.

Before the hearing began, the attorneys reached several agreements and stipulations which were noted on the record. The defendant's motion contained several dates that were not accurate. The stipulations, therefore, limited the issues raised in the motion to whether or not State's Exhibit A, a Certificate of Analysis, is admissible.

The state presented the testimony of two people, Beverly Sue Adams, a Management Analyst Supervisor II for the Ohio Department of Health, and John Frederick Wyman, the Chief Toxicologist for the Cuyahoga Medical Examiner's office. Ms. Adams testified that she is a keeper of records for the Department of Health and that the department received Exhibit A from "Airgas." She further indicated that the Department of Health purchases dry gas canisters from a company called Intoximeters. When the canisters arrive at the department of health, they contain a non-certified Certificate of Analysis. The department of health then requests from Intoximeters a certified copy of the certificate. Soon thereafter the department receives a certified copy such as Exhibit A from Airgas. Although not specifically explained, the court assumes that Airgas is the actual manufacturer

of the dry gas canister. Airgas then sells the canisters to Intoximeters who in turn sells them to the Ohio Department of Health. At any rate, Ms. Adams testified that the only knowledge that the Department of Health has about the alcohol concentration in the dry gas canisters and whether or not it is traceable to the national institute of standards and technology comes from the document that was marked Exhibit A in this case.

Exhibit A is not clear on its face as to what is being certified. At the bottom of the exhibit a person's signature appears on a line beside the words "approved by." There is a notary seal and the signature of a notary on the document, but no explanation as to what the notary has notarized. There is also a stamp that says "accredited," but no explanation as to what has been accredited. There is no indication how the alcohol concentration was determined or how it was determined to be traceable to the national institute of standards and technology.

Both sides have filed written arguments setting forth the reasons they are in favor of, or opposed to, the admission of Exhibit A. Essentially, the defendant argues that Exhibit A is hearsay, that there is nothing that authenticates the document, and that it has not been shown to be reliable. The State counters by arguing that the Rules of Evidence do not apply to Motions to Suppress and that even if the Rules of Evidence do apply, Exhibit A is admissible as a business record.

The Ohio Department of Health has promulgated very few rules specifically pertaining to the Intoxilyzer 8000. One of the rules that does apply, however, is OAC 3701-53-04(B), which reads as follows:

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 rule requires that the Intoxilyzer 8000 automatically perform a dry gas control test before and after every subject test. The dry gas control test must be done using a dry gas standard traceable to the national institute of standards and technology. Dry gas control test results are valid if 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. The rule presupposes that the Intoxilyzer 8000 will abort the subject test if the dry gas control result is outside the specified range. The question raised in this motion to suppress is whether the State has offered sufficient evidence to prove that the dry gas standard used in the Intoxilyzer 8000 was traceable to the national institute of standards and technology and what was the alcohol concentration of the dry gas standard.

The Supreme Court of Ohio has held that during suppression hearings, courts "may rely on hearsay and other evidence to determine whether alcohol test results were obtained in compliance with the methods approved by the Director of Health, even though that evidence may not be admissible at trial." *State v. Edwards*, 107 Ohio St.3d 169, 2005-Ohio-6180, paragraph two of the syllabus.

Even if the rules of evidence do not apply to this motion to suppress, the trial judge is still the "gatekeeper" of what evidence is to be admitted at trial. Consequently, a review of whether a document is admissible under the evidentiary rules is helpful. Clearly, Exhibit A is a hearsay document that would not be admissible unless one of the exceptions to the hearsay rule qualifies it. The State argues that it qualifies as a business record under Evidence Rule 803(6) which reads as

follows:

A memorandum, report, record, or data compilation, in any form, of acts, events or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as show by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

The "business records" rule is perhaps the oldest exception to the hearsay prohibition. The exception allows virtually any data compilation by any commercial or charitable entity or enterprise to be admitted, so long as (a) the entity's participants assembled that data, (b) at or near the events it reports, (c) from information that the entity's participants personally observed or received rather than from some outsider's report of those events or conditions, (d) the entity routinely made and retained that data for its own operating purposes, (e) an entity participant with regular access to the data confirms those requirements in testimony subject to cross-examination, and (f) nothing about surrounding circumstances denies its reliability. Markus, Richard M., *Ohio Evidence Rules and Commentary*, (NITA, 1999), p. 119.

Where the entity prepares and relies on the data for its own operations, the data has sufficient reliability for consideration as admissible hearsay to prove the asserted facts. *Id.* On the other hand, where the data is prepared by another entity altogether, as in this case, it does not have the same reliability. Exhibit A does not qualify as an exception to the hearsay rule as a business record because it is derived from another business than the Ohio Department of Health. To be admissible under the rule, someone from the manufacturer of the canister would need to testify that Exhibit A is a business record from the manufacturer's business. The only people who testified here were from

the Ohio Department of Health. They could not, and did not, testify that it was within the regular course of business for Airgas or Intoximeter to make such a certificate.

The state argues that Exhibit A should be considered a business record based on a line of cases that permits documents created by other entities to become business records of the new entity as adoptive business records. See *State Farm Mutual Automobile Insurance Company v. Anders*, 2012-Ohio-824. In discussing adoptive business records, the Tenth District Court of Appeals recognized “two factors that would allow an incorporated document to be admitted based on the foundational testimony of a witness with firsthand knowledge only of the incorporating business’s record-keeping procedures. Those factors are (1) the incorporating business’s reliance upon the accuracy of the document and (2) the existence of other circumstances indicating the document’s trustworthiness.” *Id.*

It seems apparent that the Ohio Department of Health has relied on this document, so the first factor is probably met. Frankly, this factor trumps all other factors. The Ohio Supreme Court has given the director of health the authority to determine the reliability of breath testing devices, and has held that “an accused may not make a general attack upon the reliability and validity of the breath testing instrument.” *State v. Vega* (1984), 12 Ohio St.3d 185, 190.

In *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, the Ohio Supreme Court decided that the regulations were not substantially complied with when the law enforcement officer failed to add a solid anti-coagulant to a urine sample. The court wrote:

a judicial determination that an alcohol test, although not administered in strict compliance with the alcohol-testing regulations, is reliable and therefore admissible may subvert the rule-making authority and the statutory mandate of the Director of Health. Indeed, the General Assembly instructed the Director of Health--and *not* the judiciary--to ensure the reliability of alcohol-test results by promulgating regulations

precisely because the former possesses the scientific expertise that the latter does not. See R.C. 4511.19(D)(1). Notwithstanding this statutory mandate, however, courts have concluded that the state need not show strict compliance with the regulations prescribed by the Director of Health if a *judge* deems the test results reliable. The problem, of course, is that such an approach is inconsistent with R.C. 4511.19, which provides that *compliance with the regulations*, rather than a judicial determination as to reliability, is the criterion for admissibility. See *Cincinnati v. Sand* (1975), 43 Ohio St.2d 79, 72 O.O.2d 44, 330 N.E.2d 908.

This problem is particularly acute where, as here, the state has failed to proffer evidence that it complied with a particular regulation directly related to blood-alcohol testing. To state it succinctly: A court infringes upon the authority of the Director of Health when it holds that the state need not do that which the director has required. Such an infringement places the court in the position of the Director of Health for the precise purpose of second-guessing whether the regulation with which the state has not complied is necessary to ensure the reliability of the alcohol-test results. This approach further precipitates conflicting decisions from lower courts and impedes the public policy of achieving uniformity and stability in the law. Painter, *Ohio Driving Under the Influence Law* (2003), Section 9.3, 116.

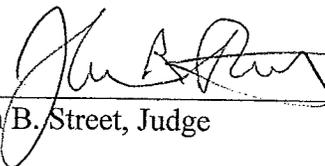
If “a court infringes upon the authority of the Director of Health when it holds that the state need not do that which the director has required,” would a court not also be infringing upon the authority of the Director of Health to hold that the state must do that which the director has not required? Here, the director is apparently satisfied with the Certificate of Analysis received from Airgas. It is not this court’s place to second guess the Director of Health.

As to the second factor, we come back to the reliability or trustworthiness of the document. The testimony at the hearing is that the Ohio Department of Health orders dry gas canisters from Intoximeters and requests a certificate of analysis from Intoximeters but receives a document from Airgas. The document, Exhibit A, does not explain how the alcohol concentration of the dry gas canister was determined, who determined it, or how it was found to be traceable to NIST standards.

Although this court has concerns about the reliability and trustworthiness of the document, apparently the department of health does not. It is the department of health that has been tasked with

determining reliability according to *Burnside*. There has been no showing that the document is not what it purports to be, and it has been accepted by the department. Even though it may not technically be admissible under the rules of evidence, the court finds that it is admissible. The rules of evidence do not apply to motion hearings, and the department is willing to rely on the document. The court will do so also.

The motion to suppress is overruled. This case is set for a pre-trial hearing on Tuesday the 9th day of October, 2012, at 2:00p.m.



John B. Street, Judge

PROOF OF SERVICE

A copy of the foregoing Journal Entry was placed in the Attorney File Folder in the Clerk's office for the following on the 20th day of September, 2012:

Law Director
James T. Boulger



Shirley A. Strouse
Court Recorder, CMC # 2