

IN THE MEDINA MUNICIPAL COURT
MEDINA COUNTY, OHIO

FILED
MEDINA MUNICIPAL COURT

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STATE OF OHIO

Plaintiff

-vs-

CASE NO. 11 TRC 07072

TINA HOGUE

Defendant

JUDGMENT ENTRY

This matter is before the Court on the defendant's Motion to Suppress evidence. The Court separated the issues for hearing and held a combined hearing in this and four other cases to consider only the challenge to the Intoxilyzer 8000 results.

Two witnesses testified at the hearing: Mary Martin, Program Administrator for Alcohol and Drug Testing, Ohio Department of Health; and Ohio State Patrol Sergeant Jason Bittinger. The Court has assessed the credibility of these witnesses in making its findings of fact.

The Court admitted into evidence the following exhibits, some relevant only to other combined cases:

- State's Exhibit 1 Curriculum Vitae of Ms. Mary Martin
- State's Exhibit 2 ODH Packet (14 pages) of Instrument Certification Records for Ohio State Patrol Post 52 (Medina) Intoxilyzer 8000
- State's Exhibit 3 ODH Subject Test Report for Tina Hogue
- State's Exhibit 4 Record of Ohio State Patrol Post 52 (Medina) Intoxilyzer 8000 relating to Jennifer Young test
- State's Exhibit 5 ODH Packet (14 pages) of Instrument Certification Records for Ohio State Patrol Post 52 (Medina) re: Jennifer Young
- State's Exhibit 6 Subject Invalid Test report on Jennifer Young

State's Exhibit 7	Subject Test Report on Jennifer Young
State's Exhibit 8	ODH Packet (11 pages) of Instrument Certification Records for Ohio State Patrol Post 52 (Medina) re: Corinne Vandeußen test
State's Exhibit 9	ODH Packet (9 pages) of Instrument Certification Records for Ohio State Patrol Post 52 (Medina) re: Charles Kovach test
Defendant's Exhibit A	ODH Subject Test Report for Tina Hogue (Same as State's Exhibit 3)
Defendant's Exhibit B	(09-2009 edition) Bureau of Alcohol/Drug Testing Training Manual Intoxilyzer 8000
Defendant's Exhibit C	Subject Test Report for Defendant Charles Kovach from ODH website
Defendant's Exhibit D	Subject Test Report for Defendant Kovach printed by Intoxilyzer 8000
Defendant's Exhibit E	Subject Test Report for Defendant Jennifer Young printed by Intoxilyzer 8000
Defendant's Exhibit F	Subject Test Report from ODH website for Jennifer Young

The defendant filed her original Motion to Suppress on December 29, 2011 (OR) and a Supplemental Motion on January 13, 2012 (SP). The issues before the Court and the Court's findings of fact and conclusions of law are as stated herein. Based upon the analysis herein, the defendant's test result is suppressed.

Findings of Fact and Conclusions of Law

(1) "A qualified operator as defined in OAC 3701-53-07(E) and 3701-53-09(B) and (D)(3) did not perform the breath test as required by OAC 3701-53-07(C)." [OR94].

OAC 3701-53-07(C): Breath tests used to determine whether a person's breath contains a concentration of alcohol prohibited or defined by sections 4511.19 and/or 1547.11 of the Revised Code, or any other equivalent

statute or local ordinance prescribing a defined or prohibited breath alcohol concentration shall be performed by a senior operator or an operator...

OAC 3701-53-07(E): An individual meets the qualifications for an operator's permit by: (1) Being a high school graduate or having passed the "General Education Development Test"; (2) Being a certified law enforcement officer sworn to enforce sections 4511.19 and/or 1547.11 of the Revised Code, or any other equivalent statute or local ordinance prescribing a defined or prohibited breath alcohol concentration, or a certified corrections officer, and; (3) Having demonstrated that he or she can properly operate the evidential breath testing instrument by having successfully completed a basic operator or conversion training course for the type of approved evidential breath testing instrument for which he or she seeks a permit.

OAC 3701-53-09(B): Individuals desiring to function as senior operators or operators using instruments listed under paragraphs (A)(1), (A)(2), and (B) of rule 3701-53-02 of the Administrative Code shall apply to the director of health for permits on forms prescribed and provided by the director of health. A separate application shall be filed for each type of evidential breath testing instrument for which the permit is sought.

The director of health shall issue permits to perform tests to determine the amount of alcohol in a person's breath to individuals who qualify under the applicable provisions of rule 3701-53-07 of the Administrative Code. Individuals holding permits issued under this rule shall use only those evidential breath testing instruments for which they have been issued a permit.

There is no OAC 3701-53-09(D)(3) as referenced in the defendant's motion.

However, there is a subsection "D."

3701-53-09(D): Individuals desiring to function as operators using instruments listed under paragraph (A)(3) of rule 3701-53-02 of the Administrative Code shall apply to the director of health for operator access cards on forms prescribed and provided by the director of health. The director of health shall issue operator access cards to perform tests to determine the amount of alcohol in a person's breath to individuals who qualify under the applicable provisions of rule 3701-53-07 of the Administrative Code. 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.

Ohio State Patrol Sergeant Jason Bittinger conducted the defendant's breath test. Sgt. Bittinger has an operator access card issued by the Ohio Department of Health pursuant

do OAC 3701-53-09(D), indentified as ODH Certification #12536 (Defendant's Exhibit A; State's Exhibit 3), and a Senior Operator's Permit issued pursuant to OAC 3701-53-09(B).

The defendant asserts that since the testing officer possessed both a senior operator's permit and an operator access card, the language in the respective OAC sections of "shall use only those evidential breath testing instruments for which they have been issued a permit..." and "shall use only those evidential breath testing instruments for which they have been issued an operator access card...." prevents the officer from using the Intoxilyzer 8000 because he holds a senior operator's permit. Of course, the converse of this argument is that the officer cannot perform a test on a machine requiring a permit because he has an operator access card. The essential defense argument is that a dual certified officer is disqualified from operating any machine. This is an absurd result.

The regulations provide a process to ensure that only qualified individuals conduct breath tests on approved evidential breath testing instruments. An individual holding both certifications is, therefore, qualified to operate any approved instrument under the respective permit or card for the instrument being used.

The Ohio Department of Health provides "conversion training" through a one-day course to educate and qualify existing operators and senior operators to receive an operator access card for the Intoxilyzer 8000 after successfully passing a test at the end of this course.

The issuance of an operator access card is a discretionary decision by the Director of the Ohio Department of Health. Sgt. Bittinger was issued the operator access card.

OAC 3701-53-09(D) requires ODH to issue operator access cards "to individuals who qualify under the applicable provisions of rule 3701-53-07...." Unfortunately, or perhaps "unbelievably," or perhaps "incredibly," the ODH regulations have no "specific applicable provisions" in 3701-53-07 for qualifications for operator access cards. The only standards are for senior operators and operators.

The Ohio Supreme Court requires strict compliance with R.C. § 3701.143 which mandates that the director of ODH shall ascertain the qualifications of individuals to conduct breath tests. *State v. Ripple*, 70 Ohio St.3d 86 (1994).

The director is not permitted unlimited discretion to issue operator access cards. The qualifications must be established first. Without qualifications, there is no basis for issuance of the operator access cards.

Because there are no standards, there is also no basis for the ODH Director to exercise discretion to issue an operator access card. For this reason, only, the Court holds that the defendant's test was not performed by a qualified operator, and the result is suppressed.

(2) "The machine or instrument analyzing the alleged alcohol and/or drug level was not authorized pursuant to OAC 3701-53-02." [OR¶5]

OAC 3701-53-02: (A) The instruments listed in this paragraph are approved as evidential breath testing instruments for use in determining whether a person's breath contains a concentration of alcohol prohibited or defined by sections 4511.19, and/or 1547.11 of the Revised Code, or any other equivalent statute or local ordinance prescribing a defined or prohibited breath-alcohol concentration. The approved evidential breath testing instruments are:

- (1) BAC DataMaster, BAC DataMaster K, BAC DataMaster cdm;
- (2) Intoxilyzer model 5000 series 66, 68 and 68 EN; and
- (3) Intoxilyzer model 8000 (OH-5).

Sgt. Bittinger conducted the defendant's breath test using an Intoxilyzer model 8000 (Defendant's Exhibit A; State's Exhibit 3).

The Court holds that this is an approved instrument.

(3) "Defendant's breath sample was not analyzed according to the operational checklist for the instrument used and checklist forms recording the results were not retained as required by OAC 3701-53-02(C) and OAC 3701-53-01(A)." [OR¶6]

OAC 3701-53-01: (A) Tests to determine the concentration of alcohol may be applied to blood, breath, urine, or other bodily substances. Results shall be expressed as equivalent to:

- (1) Grams by weight of alcohol per one hundred milliliters of whole blood, blood serum or plasma (grams per cent by weight);
- (2) Grams by weight of alcohol per two hundred ten liters of deep lung breath;
- (3) Grams by weight of alcohol per one hundred milliliters of urine (grams per cent by weight);
- (4) Nanograms by weight of a controlled substances or a metabolite or a controlled substance per milliliter of blood, urine, or other bodily substance.

The results of the tests shall be retained for not less than three years.

OAC 3701-53-02(C): Breath samples of deep lung (alveolar) air shall be analyzed for purposes of determining whether a person has a prohibited breath alcohol concentration with instruments approved under paragraphs (A) and (B) of this rule.

(D) Breath samples using instruments listed under paragraphs (A)(1), (A)(2) and (B) of this rule shall be analyzed according to the operational checklist for the instrument being used and checklist forms recording the results of subject tests shall be retained in accordance with paragraph (A) of rule 3701-53-01 of the Administrative Code. The results shall be recorded on forms prescribed by the director of health.

(E) Breath samples using the instrument listed under paragraph (A)(3) [Intoxilyzer 8000] of this rule shall be analyzed according to the instrument display for the instrument being used. The results of subject tests shall be retained in a manner prescribed by the director of health and shall be retained in accordance with paragraph (A) of rule 3701-53-01 of the Administrative Code.

The testimony and regulations clearly establish that there are no checklists for the Intoxilyzer 8000 because the operator follows the prompts on the instrument display. Accordingly, there are no "checklist forms" to be retained. The Court will not apply regulations for different breath testing instruments to the Intoxilyzer 8000.

The ODH has lost from its computer system the records of this defendant's test. Only the "Subject Test Report" (Defendant's Exhibit A; State's Exhibit 3) and Instrument Certification Reports and supporting documents (State's Exhibit 5) are available.

The ODH retains all certification paperwork for each machine in separate paper and electronic files. These are scanned and placed on the ODH website to be kept indefinitely.

The Subject Test Reports information retained by ODH are not exact matches to this defendant's report in Defendant's Exhibit A (State's Exhibit 3). The ODH records include other information, such as "sample volume, tank pressure and duration of blows" not contained in the exhibits printed by the Intoxilyzer 8000 at the time of the defendant's test.

ODH receives a data stream and inserts information into a spreadsheet-like database using a template on its website which is automatically filled in. The information contained at ODH and available on its website is different from that on the printed exhibit and from the electronic and paper files maintained by ODH.

Since the approval of the Intoxilyzer 8000, the ODH database system has been changed. When the Intoxilyzer 8000 was approved, the ODH used software version 7 and now it uses version 11.

At some point after the defendant's test and a software change in the fall of 2011, the defendant's information was deleted from the ODH database. The Court finds that this is inadvertent.

The information which was deleted from the ODH website is exemplified by Defendant's Exhibit C (relating to a companion case) which is inserted on the next page in its entirety.

Ohio Department of Health
Bureau of Alcohol and Drug Testing
Subject Test Report: Prepared on 9/24/2012 1:26:08 PM

Subject Information			
TEST DATE 4/28/2012	STATE OH	NAME KOVACH, CHARLES	AGE / SEX 32 / M
CITY MEDINA		ZIP CODE 44266	

Arrest Information		
ARRESTING OFFICER SMITH, SCOTT	AGENCY BRUNSWICK POLICE DEPARTMENT	IMPLIED CONSENT WARNING Y
TESTING OFFICER PAGE, JONATHAN	AGENCY BRUNSWICK POLICE DEPARTMENT	ODH CERTIFICATION # 11161
TIME OF VIOLATION 02:28	TIME FIRST OBSERVED 02:28	TIME OF TEST 02:53:14

Test Information			
INSTRUMENT SERIAL # 80-004850	TEST SITE # 5201	DATE OF LAST CERTIFICATION 8/17/2011	CERTIFICATION SOLUTION # ODH-0017
CERTIFICATION BOTTLE # 0829	TARGET VALUE 0.089 g/210L	CERTIFICATION AVERAGE 0.0972	CERTIFICATION STANDARD DEVIATION 0.0008
Test	SCAC (g/210L)	Time	
Air Blank	0.000	03:03	
Diagnostic	VAC/DK	03:03	
Air Blank	0.000	03:04	
Dry Gas Control	0.102	03:04	
Atmos. Pressure	881	03:04	
Tank Pressure	598	03:04	
Air Blank	0.000	03:05	
Subject Sample 1	0.111	03:06	DRY GAS STANDARD
Breath Volume	1.328	03:05	LOT # 11370100G1
Sample Duration	6000	03:06	TANK # 028
Sample Attempts	1	03:06	TARGET: 0.100 g/210L
Air Blank	0.000	03:08	EXPIRATION: 6/17/2013
Air Blank	0.000	03:09	
Subject Sample 2	0.103	03:09	
Breath Volume	1.433	03:09	
Sample Duration	6100	03:09	
Sample Attempts	6	03:09	
Air Blank	0.000	03:11	
Dry Gas Control	0.102	03:11	
Atmos. Pressure	982	03:11	
Tank Pressure	864	03:11	
Air Blank	0.000	03:11	

BrAC = 0.103 g/210L



Information concerning the atmospheric pressure and the tank pressure, before and after the test, and the breath volume, sample duration, and sample attempts for each "subject test" ["subject sample"] are no longer available for this defendant's test.

The Court finds that the defendant is unable to raise challenges to the accuracy and reliability of this specific test because this information was deleted.

The Court finds that the ODH has substantially complied with the requirement to retain the results of tests "for not less than three years." (OAC 3701-53-01(A))

The Court finds that the ODH has substantially complied with the requirement to retain the results of subject tests "in a manner prescribed by the director" (OAC 3701-53-02(E)); that the "manner prescribed" is the various software versions maintaining the ODH database; and the results so retained include information not included in the printed "Subject Test Report" prepared by the Intoxilyzer 8000 at the time and location of the defendant's test.

The Court finds that the defendant has demonstrated prejudice specific to her test result because this information is no longer available to allow her to challenge her specific test.

For this reason, the Court holds that the defendant's test result is suppressed.

(4) "Defendant's breath sample was not analyzed in accordance with OAC 3701-53-04(B) which states in plain language that all instruments listed in OAC 3701-53-02(A)(3) (The Intoxilyzer 8000) must perform a dry gas control before and after every subject test. (emphasis in original) a. Here, the machine did not perform a dry gas control test before and after each subject test." [OR¶7] and restated in [SP¶33-36]

The defendant referenced what was identified at the hearing as Defendant's Exhibit A (State's Exhibit 3) the Subject Test Report of November 20, 2011 recording the results of the defendant's breath test. This exhibit is inserted on the next page in its entirety:

Essentially, this is an argument over nomenclature. Defendant's Exhibit A is captioned "Subject Test Report" and delineates the defendant's name under "Subject Information." The exhibit has a section for "Arrest Information" and, finally, for "Test Information."

The exhibit records within the "Test Information" section a "Dry Gas Control" at 01:13, a "Subject Test 1" at 01:17, a Subject Test 2" at 01:21, and a "Dry Gas Control" at 01:21.

OAC 3701-53-04(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.

Because this was a combined hearing with four other cases, the Court finds that the ODH has changed the form captioned "Subject Test Report" so as to now refer to "Subject Sample 1" and "Subject Sample 2." See, e.g., Defendant's Exhibit D (Charles Kovach Subject Test Report) and Defendant's Exhibit E (Jennifer Young Subject Test Report).

Defendant contends that the OAC requirement of "a dry gas control test before and after every subject test" means after each time a subject blows into the machine there must be a dry gas control test, since each blow on the defendant's report was identified as a "Subject Test."

The State of Ohio essentially argues that the "subject" is the person being tested, and the test is the complete record detailed on the Subject Test Report.

Mary Matalin and Sgt. Bittinger established that the form captioned "Subject Test Report" is printed by the Intoxilyzer 8000 upon completion of the breath testing sequence.

The change on that document in the Test Information section from "Subject Test" to "Subject Sample" occurred December 9, 2011 as a result of a software change/update by the ODH.

The ODH maintains that the entire document is the "Subject Test Report." This is corroborated by the Intoxilyzer 8000 Manual (Revised 9-2009) (Defendant's Exhibit B) which refers to "Data Entry/Subject Test" (pg. 17-35), "Testing Sequence/Subject Test" (pg. 36-49).

Martin explained that the change on the form was to avoid confusion since the intent was to require the dry gas control before and after the person being tested had submitted the required breath samples.

This Court finds that there is only one "subject" being tested and therefore, "the items listed in the 'Subject Test Report' form, including 'Subject Test 1' and 'Subject Test 2,' are simply recurring components of the same breathalyzer test, where one subject blows twice before reaching the end result." *State v. Kormos*, 2012-Ohio-3128, 2012 Ohio App. LEXIS 2755 (12TH App. Dist.), ¶16.

The Court holds that the requirement for a dry gas control before and after each subject test has been met.



DALE H. CHASE,
JUDGE