

IN THE FRANKLIN COUNTY MUNICIPAL COURT  
COLUMBUS, OHIO

State of Ohio, :  
Plaintiff, :  
vs. : Case No. 2012 TRC 0142616  
Katelyn Honeycutt, :  
Defendant. :

ENTRY

This matter came before the Court for a hearing on the Motion to Dismiss/Motion to Suppress filed by the Defendant.

The hearing was held on September 5, 2012.

Defendant claims that there was no reasonable suspicion for Sergeant Saunders to have stopped her vehicle. Sergeant Saunders testified and the DVD recording of the incident showed that the Defendant's vehicle approached a red traffic signal at the corner of Olentangy River Road and North Broadway in Columbus, Ohio. The Defendant made a momentary but not complete stop beyond the stop bar and then started her right turn onto North Broadway just before the traffic signal turned green. Although a right turn is not prohibited at this intersection, the Defendant stopped beyond the stop bar and did not come to a complete stop before turning right. Based upon this violation of R.C. 4511.13(c)(1)(a) and (b), the Court finds that Sergeant Saunders had reasonable suspicion to stop this vehicle to issue a citation.

Defendant claims that once stopped, Sergeant Saunders had no reasonable suspicion to ask her to exit her vehicle and perform field sobriety tests. Sergeant Saunders testified that upon approaching the vehicle, he saw the Defendant behind the wheel in the driver's seat and noticed she had blood shot, glassy eyes; there was a light odor of an alcoholic beverage coming from the vehicle and that Defendant's passenger appeared to have been drinking. The Trooper also testified that this was around 3:36 a.m. Based upon the early morning hours, the odor of an alcoholic beverage, the appearance of

Defendant's eyes and the traffic violation, the Court finds that there was reasonable suspicion to ask the Defendant to exit her vehicle for further investigation.

Once out of the vehicle, the Sergeant continued to detect a light odor of an alcoholic beverage coming from the Defendant. In addition, the Defendant stated she was coming from Nyoh's, a bar known to the Sergeant, and it was determined that the Defendant was under the legal drinking age of 21. The Defendant also denied consuming any alcoholic beverages. Based upon this continued odor and the fact that the Defendant was under 21 years of age, the Court finds that Sergeant Saunders had reasonable suspicion to ask the Defendant to perform standardized field sobriety tests.

The Court finds that Sergeant Saunders instructed and conducted the Horizontal Gaze Nystagmus (hereinafter "HGN"); Vertical Gaze Nystagmus (hereinafter "VGN"); Walk and Turn and One-Leg Stand in substantial compliance with the National Highway Traffic Safety Administration manual and standards. The Sergeant testified that the Defendant scored 3 of 6 clues on the HGN, zero clues on the VGN, 3 of 8 clues on the Walk and Turn and 1 of 4 clues on the One-Leg Stand. Based upon the number of clues observed by the Sergeant and the fact that it is illegal for a person under the age of 21 to consume any alcohol and then operate a motor vehicle, the Court finds that the Sergeant had probable cause to arrest the Defendant for Operating a Motor Vehicle While Impaired had probable cause to believe that the Defendant had a concentration of at least two-hundredths of one gram by weight of alcohol per two hundred ten liters of her breath.

The Defendant cites *State v. Williams* (Ohio App. 1 Dist., 2011) 2011-Ohio-6032, 968 N.E. 2d 1038 as controlling law. In the *Williams* case, the Court found there was no probable cause to arrest an underage Defendant for Operating a Vehicle after Underage Consumption (hereinafter "OVUAC"). However; in that case, the Officer did not observe the Defendant operate a motor vehicle nor observe any traffic violation. Instead, the Officer encountered a disabled vehicle, around 12:00 noon, on the highway and while securing it, was approached by the Defendant who said the vehicle ran out of gas while he was driving it. The Defendant admitted drinking the night before and had bloodshot eyes. The *Williams* Court cited their previous language in *State v. Carroll*, 1<sup>st</sup> Dist. No. C-080160, 2008-Ohio-6832, 2008 WL 5384282 stating "In *Carroll*, this court discussed the inherent quandry associated with making a probable-cause determination in the case

of underage drinkers, as R.C. 4511.19(B)(3) prohibits driving with a blood alcohol content of .02 or higher, regardless of whether the driver was actually impaired. *Id.* at §5. Because impairment is not an issue, field sobriety tests are not instructive in the case of underage drinkers. Consequently this court held ‘common sense can and should play a role in an arresting officer’s probable-cause determination in an underage DUI case, given that the prohibited per se limit is so minimal’. *Id.* at §8.”

For the above stated reasons and based upon the totality of the circumstances observed by the Sergeant, the Court finds there was probable cause to place the Defendant under arrest for OVI and OVUAC.

The Defendant moves for the suppression of the results of her breath test because Sergeant Saunders, Detective Neff and Detective Winger each possess both a permit to operate a BAC DataMaster and an operator access card to use an Intoxilyzer model 8000.

O.A.C. 3701-53-02 states:

(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).

(B) The instruments listed in this paragraph are approved as additional evidential breath testing instruments for use in determining whether a person’s breath contains a concentration of alcohol prohibited or defined by section 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 instrument is:

- (1) Intoxilyzer model 8000 (OH-2)

OAC 3701-53-09 states in pertinent part:

(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. (Emphasis added)

...

- (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. (Emphasis added)
- (E) Operator access cards issued under paragraph (D) of this rule shall not expire unless revoked by the director under rule 3701-53-10 of the Administrative Code. To retain an operator access card under paragraph (D) of this rule the individual shall present evidence satisfactory to the director that he or she continues to meet the qualifications established by the applicable provisions of rules 3701-53-07 and 3701-53-08 of the Administrative Code for issuance of the operator access card sought.

The Defendant claims that the wording of the rule disqualifies anyone from operating a BAC DataMaster if they hold an operator access card. The Defendant cites *Ohio v. Castle* (April 24, 2012), Franklin County Municipal Ct. Case No. 2011 TRC 145779, to support her position.

This Court respectfully disagrees with that decision. As stated in *State v. Hudepohl* 166 Ohio Misc.2d 1, 2011 Ohio 6917, 961 N.E. 2d 276, "there are two possible interpretations when construing these paragraphs together. The first option would be to read a disqualification under Paragraph (B) for a BAC Datamaster permit holder to operate an Intoxilyzer 8000 and, under Paragraph (D), a disqualification of an Intoxilyzer 8000 operator-access-card holder to operate a BAC Datamaster." The second option

would be to read that one who holds a permit to operate a BAC Datamaster cannot use that permit to operate an Intoxilyzer 8000 and, the holder of an access card to operate an Intoxilyzer 8000 cannot use that access card to operate a BAC Datamaster. This Court chooses to interpret the plain language of the rule as stated in the second option.

As stated in *Hudepohl* “a dual certified operator...would be disqualified from operating either instrument. Such a result is absurd and contrary to the fair, impartial, speedy and sure administration of justice. *State v. Brodie*, 165 Ohio App. 3d 668, 2006-Ohio 982, 847 N.E. 2d 1268.”

For this reason, the Court overrules Defendant’s Motion to Suppress based upon the officers each holding operator permits and access cards.

Finally, Defendant seeks to have the results of her breath test suppressed because the State failed to present evidence that Detectives Neff and Winger renewed their operator or senior operator permits in compliance with OAC 3701-53-09(F).

O.A.C. 3701-53-09(F) states:

(F) To qualify for renewal of a permit under paragraph (A) or (B) of this rule:

- (1) A permit holder shall present evidence satisfactory to the director that he or she continues to meet the qualifications established by the applicable provisions of rule 3701-53-07 of the Administrative Code for issuance of the type of permit sought.
- (2) If the individual seeking a renewal permit currently holds a laboratory technician or laboratory director permit, the permit holder shall meet the requirements of paragraph (A) of this rule.
- (3) If the individual seeking a renewal permit currently holds an operator or senior operator permit, the permit holder shall have completed satisfactorily an in-service course for the applicable type of evidential breath testing instrument which meets the requirements of paragraph (B) of this rule, which includes review of self-study materials furnished by the director.

Although the Defendant cites *State v O'Dell* (April 12, 2011) Franklin County Municipal Court Case No. 2010 TRC 193606 in support of her argument, this Court respectfully disagrees.

The Court finds that the State must prove that the officers substantially complied with the Ohio Department of Health regulations. *State v. Dumitrescu*, 10<sup>th</sup> Dist. No. 09AP-659, 2009-Ohio-6850. Here, the State showed that all three officers successfully completed proficiency examinations and demonstrated that they can properly operate the

breath testing instrument or can properly care for, maintain, perform instrument checks upon and operate the breath testing instrument as required by O.A.C 3701-53-07(D)(3) and (E)(3) and O.A.C. 3701-53-09(A)(1)(b). None of these officers had their operator permit or senior operator permit revoked, suspended or denied by the director of health under O.A.C. 3701-53-10. These three officers all had their permits successfully renewed and were valid at the times relevant in this case. See also *State v. Gonzalez* (July 20, 2011) Franklin County Municipal Court Case No. 2011 TRC 124754.

For the above stated reasons, Defendant's Motion to Suppress based upon non-compliance with O.A.C. 3701-53-09(F) is hereby overruled.

The Court hereby directs the Municipal Court Clerk to serve upon all parties notice of this judgment and its date of entry upon the journal.

Date: October 1, 2012  
CEG/pds

  
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JUDGE CARRIE E. GLAEDEN

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