

Pros

JUN 28 2011

**IN THE WAYNE COUNTY MUNICIPAL COURT  
WOOSTER, OHIO**

**STATE OF OHIO**

Plaintiff

v.

**TIMOTHY MILES**

Defendant

Case No. TRC-11-01-00510

CRB-11-01-00064

Judgment Entry

FILED  
WAYNE COUNTY  
MUNICIPAL COURT  
JUN 28 9 54 AM '11  
TIM NEAL  
CLERK OF COURTS

This matter came on for hearing on June 6, 2011. Present were state of Ohio, Plaintiff, with counsel, Jodie Schumacher, assistant prosecuting attorney, and Timothy Miles, Defendant, with counsel, Bryan Barnard. Based on the evidence presented, the Court makes the following Findings of Fact, Conclusions of Law and Decision:

**FINDINGS OF FACT**

On January 23, 2011, Ohio State Highway Patrol Sergeant Jason Bittinger was on patrol shortly after 6 p.m. on S.R. 226 in Wayne County, Ohio. Sgt. Bittinger noticed a vehicle overtaking him rapidly and traveling left of center. He pulled over and allowed the vehicle to pass him. He observed the vehicle operating erratically. He paced it at 70 m.p.h. in a posted 55 m.p.h. zone and then used his Python radar unit to determine it was traveling at 68 m.p.h. He observed the vehicle change lanes without signaling and passing traffic while still driving erratically. Sgt. Bittinger then activated his overhead lights and was able to get the driver to stop a half mile later.

Upon approaching the vehicle, Sgt. Bittinger made contact with the driver, the Defendant, Timothy Miles. Sgt. Bittinger observed two children, ages 10 and 8 in the

vehicle. He informed the Defendant of the reason for the traffic stop. The Defendant told him he was on his way to drop off the children at their mother's home. Sgt. Bittinger noted a very strong odor of alcohol coming from the Defendant's person. The Defendant presented his license but could not immediately produce his insurance card. Sgt. Bittinger testified the Defendant's speech was slow and slightly slurred and that his eyes were bloodshot and glassy. When the Defendant was taken back to the patrol car, Sgt. Bittinger continued to note a very strong odor of alcohol, even though the Defendant denied any alcohol consumption.

Sgt. Bittinger performed the horizontal gaze nystagmus (HGN) test in front of the patrol car and noted a total of six out of a possible six clues. Because it was too cold to perform any additional tests, the Defendant placed under arrest for driving under the influence of alcohol based on the erratic driving, speeding, strong odor of alcohol, slurred speech, glassy bloodshot eyes and poor performance on the HGN test.

Sgt. Bittinger called for another officer stay with the Defendant's children until their mother could arrive to pick them up. When the second trooper arrived, the Defendant was transported to the patrol post, approximately four miles away.

After arriving at the patrol post, Sgt. Bittinger read the BMV Form 2255 to the Defendant and requested that he give a breath sample and the Defendant agreed to do so. The test was taken on the post's Intoxilyzer 8000, a machine on which Sgt. Bittinger received training and was certified in the summer of 2010.

The Defendant initially did not give a valid breath sample. When valid samples were finally obtained as set forth in state's Exhibit 1, the Defendant's test results from January 23, 2011. The first was 0.193 grams per 210 liters of breath and the second was 0.189 grams per 210 liters of breath. With a Dry Gas Control value of 0.097 and a certification standard deviation of 0.0008, the Defendant's breath alcohol content was

determined to be 0.189 grams of alcohol per 210 liters of breath.

Sgt. Bittinger admitted on cross examination that even though he was certified to use the Intoxilyzer 8000 breath alcohol machine in the summer of 2010, the Defendant's test was the first time he used it in the field. He also admitted that he received an error message on his initial attempt, but that he waited the required 20 minutes before he attempted the Defendant's test when the valid samples were obtained.

John Kucmanic testified he was a forensic toxicologist with the Ohio Department of Health when he certified the Wooster State Highway Patrol Post's Intoxilyzer 8000 unit, Serial Number 80-004076, to be working properly and fit for placement into service as of September 13, 2010. He said he reviewed the software setting, I.P. address, and installed the dry gas tank. He used a certification card to gain access to the machine and found the internal checks made by the machine itself to be properly performed. He testified that state's Exhibits 2, 3 and 4 which were certified documents under seal, demonstrated that applicable Ohio Department of Health regulations were complied with in all respects when the Wooster post's Intoxilyzer 8000 was placed into service.

Mr. Kucmaic admitted on cross examination that he did not test for the machine's potential for ambient failure, which may have been a factor in the instant case.

#### CONCLUSION OF LAW

Sgt. Jason Bittinger had probable cause to place the Defendant under arrest for driving under the influence of alcohol on January 23, 2011. The Defendant was driving erratically, speeding, had red, bloodshot glassy eyes, slurred speech and had a strong odor of alcohol about his person. He performed poorly on the HGN test.

The Defendant's attack on the Wooster Patrol post's Intoxilyzer 8000 is likewise

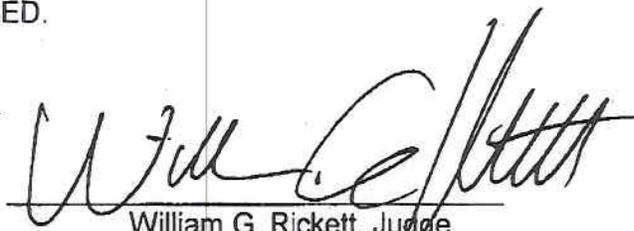
without merit. John Kucmanic, while working as a forensic toxicologist at the Ohio Department of Health, performed the certification report of unit # 80-004076 and found the machine to be in proper working order when it was shipped to the Wooster post on September 13, 2010 (state's Exhibit 2). The wet bath solution test (state's Exhibit 3) and dry gas analysis test (state's Exhibit 4) were likewise found to be within acceptable limits under Ohio Department of Health regulations. The Defendant's test results from January 23, 2011 (state's Exhibit 1) were obtained by Sgt. Bittinger, a certified operator, on a properly operating machine. The Defendant's attempt to attack the reliability of the Intoxilyzer 8000 is therefore not well-taken. State v. Vega (1984) 12 Ohio St. 3d 185.

All remaining matters raised in the Defendant's motion to suppress will be treated as motions in limine and addressed at trial.

**DECISION**

The motion to suppress is denied.

IT IS SO ORDERED.



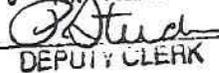
William G. Rickett, Judge  
June 28, 2011

**JOURNALLED**

June 28, 2011

TIM LEAL

BY



DEPUTY CLERK