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HAMILTON COUNTY MUNICIPAL COURT  
 CRIMINAL DIVISION  
 CINCINNATI, OHIO



of Ohio	:	Case No. 11-TRC-50824
Plaintiff	:	Judge Melissa A. Powers
	:	
	:	
Scott Nicholson	:	<b>MOTION TO SUPPRESS DECISION</b>
Defendant	:	

The issues presented in this Motion to Suppress are:

(1) Whether the photocopies of the original documents used by the Ohio Department of Health for certification results of the Intoxilyzer 8000 (State's Exhibits 3, 4 and 5) may be admitted into evidence during the suppression hearing without the witness that prepared the document being subject to cross-examination?

(2) Whether OAC 3701-53-04(B) requires the automatic dry gas control check to be performed prior to and subsequent to each of the two subject tests?

(3) Whether the Defendant's breath test results, that produced a 0.176 from the Intoxilyzer 8000 at Cincinnati Police District 4, were reliable and accurate, when the instrument aborted numerous tests from multiple subjects including the defendant during month of October 2011?

The State of Ohio submitted copies of the Ohio Department of Health Breath Instrument Data Center website (State's Exhibit 1), Ohio Department of Health Alcohol and Drug Testing Instrument Certification report dated June 6, 2011 (State's Exhibit 2), Ohio Department of Health Alcohol and Drug Testing report of the instrument check solution dated October 26, 2010 (State's Exhibit 3), a certified copy of the Air-gas certificate of analysis of the ethanol breath standard (State's Exhibit 4), and Ohio Department of Health Alcohol and Drug Testing Inspector's Certification Statement dated February 8, 2012 (State's Exhibit 5).

The Defendant submitted copies of the Ohio Department of Health Subject Test Report of an unstable signal, (Defendant's Exhibit 1), from the internet website, Ohio Department of Health Subject Test Report of a BrAC=0.176 g/210L (Defendant's Exhibit 3), Bureau of Alcohol and Drug Testing Intoxilyzer 8000 manual revised 9-2009 (Defendant's exhibit 2), a list of Subject Tests, from instrument serial number 80-004506, taken 9/23/2011 through 11/25/2011 (Defendant's Exhibit 4A), Ohio Department of Health access card information for Cincinnati Police Officer Fox (Defendant's Exhibit 5).

Also jointly submitted were copies of the Ohio Department of Health Alcohol and Drug Testing Report Subject Invalid Test Report (Joint Exhibit 1) and Ohio Department of Health Alcohol and Drug Testing Subject Test Report (Joint Exhibit 2). These documents were generated directly from the Intoxilyzer 8000.

The Court concludes that photocopies of Ohio Department of Health records were properly admitted into evidence State's Exhibits 3, 4, and 5 into evidence without testimony for the sole issue of determining whether the State substantially complied with the Ohio Administrative Code approved methods and procedures. Additionally, the determination of admissibility does not preclude defendant presenting evidence at trial as long as that evidence attacks the weight to be given to the breath test results.

Further the Court interprets OAC 3701-54-04(B) to mandate a dry gas control check prior to and after the first subject test and then prior to and after the second subject test. The purpose of the dry gas control is a check and balance of the accuracy of the each subject test and the breath test result. The breath test result is inadmissible for noncompliance with OAC 3701-54-04(B).

Finally, this Court finds that Trooper Salamon was a qualified operator of the Intoxilyzer 8000, the approved testing procedure was followed even though something went wrong with the defendant's first attempt, that the machine functioned properly by aborting the first test, and that the administration of the Defendant's second attempt of a breath test was proper. The test results are therefore admissible.

#### *Facts*

After being arrested for operating a motor vehicle while under the influence of alcohol, Defendant Scott Nicholson was transported to Cincinnati Police District 4 for a breath test.

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Trooper Salamon administered a breath test on the Intoxilyzer 8000. In the first attempt, subject test 1 resulted in a .162 by weight of alcohol per 210 liters of breath. The duration of the air sample was 4330. Then the machine, after two air blanks but prior to the Defendant's second test, aborted the test at 02:45 because of an unstable signal. Since an error occurred, the entire test was invalidated. (Joint Ex 1)

Approximately one minute later, the Trooper began a second breath test of the defendant on the Intoxilyzer 8000. After two sample attempts made by the defendant, the first breath sample registered at 0.176 by weight of alcohol per 210 liters of breath. The duration of the breath sample was 5220. After ten sample attempts made by the defendant, the second subject test registered .181 by weight of alcohol per 210 liters of breath. The duration of the Defendant's air sample was 7580. (Joint Ex 2 and Defendant's Ex 3)

Cincinnati Police Officer Fox testified that as the administrator officer of the Traffic Unit his duties include performing as a liaison between the Cincinnati Police Department and the Ohio Department of Health in regards to the Intoxilyzer 8000. On a weekly basis, Officer Fox reviews and uploads the breath tests results on the Ohio Department of Health website. He also checks the breath machine to make sure it is plugged in and working properly as well as assuring the necessary supplies of mouth pieces, test forms are sufficient at the testing sites.

During September 2011 and November 2011, Officer Fox noticed more than usual aborted tests or using his terminology, "exceptions" that occurred with the Intoxilyzer 8000.

Specifically, a significant number of subject tests during this period were aborted for interferent detected and ambient fails. As per the manual, when two or more interferent detected, and when two more ambient fails occurred, Officer Fox called the Ohio Department of Health representative to determine the course of action to perform. No further action was taken and the machine was not taken out of service. No one from the Department of Health physically came to CPD District 4 to inspect, test or otherwise check the machine. The machine remained in use.

*Question presented*

Whether the photocopies of the original documents used by the Ohio Department of Health for certification results of the Intoxilyzer 8000 (State's Exhibits 3, 4 and 5) may be admitted into evidence during the suppression hearing without the witness that prepared the document being subject to cross-examination?

*Analysis and Findings*

In *State v. French (1995)*, 72 Ohio St.3d 446, 650 N.E.2d 887, a motion to suppress is the proper vehicle for raising constitutional challenges based on the exclusionary rule. An important characteristic of the motion to suppress is the finality that attaches so that the ruling of the court at the suppression hearing prevails at trial. Nevertheless, using the rules of evidence, the defendant is not precluded from challenging the competency, admissibility, relevancy,

authenticity, and credibility of the breath tests or using expert testimony regarding the weight to be given to the evidence at trial.

In the case at bar, the State presented photocopies of the original documents and the defendant did not raise any genuine issue regarding the authenticity of the copies. Pursuant to *State v. Edwards*, (2005) 107 Ohio St.3d 169, a trial court may accept documentation at a pretrial motion hearing to show substantial compliance with testing methods approved by the Director of Health. In *Edwards*, regarding the Intoxilyzer 8000 certification, the accepted documentation was a photocopy of the original and not a certified copy. For solely the purpose of determining the issues of whether there was substantial compliance with the approved Ohio Department of Health regulations and methods at a pretrial motion, hearsay evidence and photocopies of document were admitted.

As in *Edwards*, the Court admits the ODH Inspector's Certification statement (St.'s Ex 5), Certificate of Analysis (St.'s Ex. 4), and the ODH Instrument Check Solution Certificate (St.'s Ex. 3) even though that evidence may not be admissible at trial unless the person who prepared the document testifies.

Further, the Defendant raised the issue that the State's exhibits, particularly State's Ex 5, is a testimonial statement triggering an analysis as described in *Crawford v. Washington (2004)*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177. Specifically, the Defendant argues that the State's failure to call the representative of the Director of Health, Michael Quinn, who prepared State's

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Ex 5 in anticipation of pre-trial motion to suppress hearing, violates the Defendant's Right of Confrontation through cross-examination. The State argued that if the Defendant wanted to cross-examine the witness, he had the opportunity to subpoena the witnesses himself.

To the extent that the Defendant had the subpoena power to bring the witnesses himself, the United States Supreme Court found that the defendant's subpoena power is no substitute for the right of confrontation. *Melendez-Diaz v Massachusetts (2009)*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314. The "Confrontation Clause imposes a burden on the prosecution to present witnesses, not on the defendant to bring adverse witnesses into court." *Id.* Therefore the State's argument is without merit.

In *Crawford*, a statement of an unavailable witness was admitted into evidence at the trial. The United States Supreme Court concluded that a testimonial statement could not be admitted at trial without the defendant's the opportunity to cross examine the witness. The bedrock of criminal procedure is found in the Sixth Amendment Confrontation Clause that provides the in all criminal prosecutions, the "accused shall enjoy the right... to be confronted, with the witnesses against him."

Looking for further guidance on whether *Crawford* applies to this issue raised by the defendant, this court relied on *Crane v. Kentucky (1986)*, 476 U.S. 683. In *Crane*, at the pre-trial motion to suppress hearing, the trial court admitted a confession without the witness being subject to cross examination and determined the confession voluntary. However during trial

when the defendant was denied the opportunity to cross examine the witness on the coercive circumstances in which the confession was obtained, the Defendant's Sixth Amendment rights were violated. The United States Supreme Court found that the "exclusion of the testimony about the circumstances of his confession deprived the petitioner of his fundamental right" ...under the Compulsory Process or Confrontation Clause of the Sixth Amendment...to a fair opportunity to present a defense." The defendant should have been permitted to present evidence as to the weight of the confession.

This Court finds that although this evidence is admissible in the pre-trial hearing without the witness testifying, the accused still has the right of confrontation, not to admissibility of the documents, but as to its weight. It therefore follows then that the defendant's Sixth Amendment Right of Confrontation was not violated since he may present evidence to the contrary at trial. The scope of the cross examination however is limited in which the defendant may not challenge the admissibility of the test result at trial by arguing the state failed to substantially comply with the ODH rules.

Therefore, acceptance of the State's Ex. 3, 4, and 5 into evidence without testimony at the pre-trial hearing does not violated the Defendant's Sixth Amendment rights. In accordance therefore, the Court finds that the determination of admissibility does not preclude evidence presented by the defense to the contrary, as long as that evidence attacks the weight to be given to the breath test results in the trial. Finality attaches to the ruling on substantial compliance of the methods approved by the Ohio Department of Health

Since *Vega*, the Ohio Supreme Court has held that the admissibility of test results turns on substantial compliance with ODH regulations. The legislature gave the Director of the Ohio Department Health, rather than the courts, the authority to determine which tests and procedures are reliable and therefore admissible. Challenges to the state's compliance with these regulations must be made in a pre-trial motion to suppress or those challenges are waived. *State v. French*, (1995) 72 Ohio St.3d 446, 650 N.E.2d 887.

Wherefore, using the documents admitted into evidence, the Court finds substantial compliance:

- (1) that a qualified representative performed the instrument check and within the acceptable time frame in compliance with OAC 3701-53-04 (C);
- (2) that the instrument was certified using an instrument check solution containing ethyl alcohol approved by the Director of Health in compliance with OAC 3701-53-04(C);
- (3) the dry gas standard was traceable to the national institute of standards and technology in compliance with OAC 3701-53-04 (B);
- (4) that the dry gas control results were valid and within one-thousandths (+/- 0.005) grams per two hundred ten liter of the alcohol concentration on the manufacturer's certificate of analysis for that dry gas standard;
- (5) that the subject tests forms recording the results were retained as required by OAC 3701-53-02 (E) and OAC 3701-53-01(A); and

(6) that the instrument check solution was not used more than three months after its date of first use or after the manufacturer's expiration date on the approved solution certificate in compliance with OAC 3701-53-04 (E).

Accordingly, the defendant's breath test result is admissible.

*Question presented*

Whether OAC 3701-53-04(B) requires the automatic dry gas control check to be performed prior to and subsequent to each subject test?

*Analysis and Findings*

The Intoxilyzer 8000 requires two subject tests that within .02 agreement of each other to be a valid test. The lower of the two scores is the evidentiary test score. The OAC 3701-54-04(B) provides that the instrument "shall automatically perform a dry gas control test before and after each subject test and instrument certification using a dry gas traceable to the national institute of standards and technology (NIST)". The dry gas control checks the accuracy of the instrument before and after the subject test.

Defendant argues for the Court to read OAC 3701-54-04(B) as mandating the Intoxilyzer 8000 breath testing instrument to perform a dry gas control test before and after each subject test.

In essence, Defendant asserts that it is mandated that the instrument performs three, possibly four dry gas control checks, since there are two subject test samples taken. Defendant's argument follows then that it is required for the accuracy of the breath test result to perform either a dry gas control before and after each subject test ( four dry gas control checks) or before and after the subject test 1 and then after the subject test 2 (three dry gas control checks).

On the other hand, the State submits that the meaning of the language of "before and after" a subject's test requires to view the entire test result as a single breath test and therefore the operation of the instrument "as is" is proper.

This Court disagrees with the State. It is well established that in a charge of violating 4511.19(A)(1)(d), the accuracy of the chemical test results is a critical issue in determining the defendant's guilt or innocence. In per se violations, the breath test results play a significant role in a prosecution and the defendant has a limited ability to present evidence in defense at trial. The Ohio Department of Health selected the methods and equipment to be used in alcohol breath testing. It set forth an Administrative Code providing specific methods and procedures to ensure accuracy of the results. For a breath test result to be admissible, the alcohol test must substantially comply with the requirements of the administrative rules.

The Court notes that in Joint Ex 1 and 2 which are the printouts of the test results from the Intoxilyzer 8000 instrument itself, the terminology used is "Subject Test 1" and "Subject Test 2". This same terminology was originally used on the ODH website Subject Test Reports as well

and also can be found in the Form section of the manual. However, after the defense bar began raising this issue in jurisdictions throughout the State of Ohio, the terminology was changed on the ODH website for the Test Reports to "Subject Sample" for both breath tests and makes no reference to sample 1 or sample 2. This court finds that this action severely affects the credibility of the Ohio Department of Health and whoever had access to changing these forms in direct response to the defense challenges. This Court will use the original terminology of Subject Test 1 and Subject Test 2 for the basis of analysis.

*Mary said "no."*  
*Tr. 8*  
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In reviewing the Ohio Department of Health manual, it provides that the dry gas control verifies the accuracy of the instrument before and after each subject test. The instrument is equipped with a keyboard that has customized option menus. A Keyboard Options Menu provides for diagnostic and set up functions and a testing sequence. An operator can make selections on the keyboard. There is no reasonable explanation that the instrument cannot perform a dry gas control before and after each subject test. Further, no testimony was presented the instrument is incapable of performing the dry gas control before and after each subject test sample.

The Court therefore interprets OAC 3701-54-04(B) to mandate a dry gas control check prior to and after the first subject test and then prior to and after the second subject test. The Court finds that the purpose of the dry gas control is a check and balance of the accuracy of the each subject test and the breath test result. This court further concludes that the failure to perform

a dry gas control before and after each subject tests constitutes a lack of substantial compliance with the Ohio Administrative Code.

The breath test result is inadmissible for noncompliance with OAC 3701-54-04(B).

#### *Question presented*

Whether the Defendant's breath test results, that produced a 0.176 from the Intoxilyzer 8000 at Cincinnati Police District 4, were reliable and accurate when the instrument aborted numerous tests from multiple subjects including the defendant during month of October 2011?

#### *Analysis and Findings*

In *State v. Vega (1984)*, 12 Ohio St.3d 185, 465 N.E.2d 1303, the Ohio Supreme Court held that breath tests are admitted "if analyzed in accordance with the methods approved by the Director of Health," and the accused "may not make a general attack on the reliability and validity of the breath testing instrument." Since *Vega*, the Ohio Supreme Court has held that the admissibility of test results to establish alcoholic concentration under 4511.19 turns on substantial compliance with ODH regulations. The legislature gave the Director of Health, rather than the courts, the authority to determine which tests and procedures are generally reliable. The legislative mandate recognized in *Vega* precludes any analysis pursuant to *Daubert v. Merrill Dow Pharmaceuticals, Inc. (1993)*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469. See *French*.

Nevertheless, in a recent decision issued by Circleville, Ohio Municipal Court, *State v. Reid*, (Jan. 26, 2012), the court determined that the Intoxilyzer 8000 could be challenged to address the accuracy and reliability when the instrument is appearing for the first time in a court in a given jurisdiction. It reasoned that there is an expectation that the ODH performed some testing to demonstrate that the instrument was evaluated to a scientific standard. Like speed detection devices, before a court can take judicial notice of the reliability and accuracy of the instrument, an expert should testify as to the scientific principles that support a finding reliability and accuracy of the equipment to preclude a general attack as in *Vega*. The Court in *Reid* stated, that "there are too many questions with the RFI, sample size of the chamber, volume of the sample tested, possible operator manipulation of the results, possible CMI modifications of the software with the knowledge of the ODH, and slope detector inadequacy to permit the court to say that the instrument is accurate and reliable".

It should be noted at the outset, that this Court agrees with the reasoning used in *Reid* and is troubled by the many variables presented with the Intoxilyzer 8000. As in *Reid*, this Court has an expectation that the ODH did perform scientific testing of the Intoxilyzer 8000 and should be required to demonstrate to the Court and the public that there is a scientific standard of reliability and accuracy. This is particularly significant since the Intoxilyzer 8000 is using a new method of requiring two separate breath test given to produce one score.

In contrast to *Reid*, the Defendant here introduced evidence of other subjects' tests to attack the weight to be given to his test result. He asserted that he was not making an attack on the general reliability of the Intoxilyzer 8000. Rather, the Defendant argued that the machine was not properly working during his test since so many aborted tests occurred during a one month period. He also challenged the accuracy of his result when the machine, in the defendant's first attempt, aborted the test for an Unstable Signal. He claimed that the aborted test was further evidence the machine was not working properly to produce an accurate result.

Defendant's Exhibit 4 provides that on October 1, 2011 an individual's breath test was aborted six times in total: twice for invalid sample, twice for Interferent Detected, once for Purge Fail and once for Unstable Signal. The next time the same instrument was used was for the Defendant's test in the case at bar. On October 6, 2011, Defendant's first breath test was aborted for Unstable Signal. In the second attempt, ten breath samples were given by the Defendant to produce the result of .0176. The following day, another person's test was aborted for RFI. Three more individuals who tested on the same instrument in the subsequent two weeks were aborted for RFI. Then on October 27 and October 29, 2011 two consecutive individuals' tests were aborted seven separate times for Ambient Fails. The instrument was not removed, placed out of service, and no inspection was performed by the Department of Health at any point in time during the month of October 2011.

Here, the Defendant, raised genuine concerns with his specific test, and further demonstrated, with the used of other tests, the questionable accuracy of instrument itself when so

many errors occurred in a short period of time without any action by the ODH. Yet, this type of evidence has been consistently construed by Ohio courts to constitute a general attack on the reliability of the instrument and not upon the specific testing procedures or qualifications of the operator as *Vega* allows. *Vega* has not been distinguished from application to the Intoxilyzer 8000 and this Court is bound to follow its precedent.

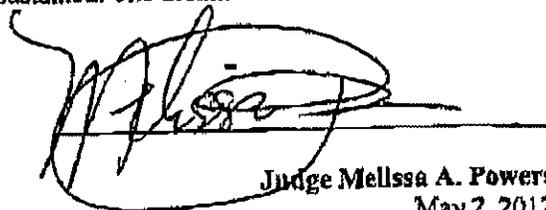
In light of *Vega*, this Court therefore finds that Trooper Salamon was a qualified operator of the Intoxilyzer 8000, the approved testing procedure was followed even though something went wrong with the defendant's first attempt, that the machine functioned properly by aborting the first test, and that the administration of the Defendant's second attempt of a breath test was proper.

The test results are therefore admissible.

The Court further finds that the evidence presented by the Defendant regarding the accuracy and reliability of his test result goes to weight and not admissibility. The determination of admissibility does not foreclose contrary evidence designed to challenge the weight to be given to the evidence. The defendant can use the other test results to challenge the Defendant's test at trial under the Rules of Evidence.

**Conclusion**

For the reasons stated in this decision, the first and third questions presented are overruled. The second question presented is sustained. The breath test result is inadmissible.



Judge Melissa A. Powers  
May 2, 2012