

Fairfield Municipal Court  
Fairfield, Ohio

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City of Fairfield : Case No.: 2012 TR/C-00255  
Plaintiff : Judge Joyce A. Campbell  
Vs. :  
James Reid, Jr. : DECISION ON  
Defendant : MOTION TO SUPPRESS

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This matter came before the court for hearing on June 7, 2012 on the Defendant's Motion to Suppress filed on May 31, 2012. The City was represented by Prosecuting Attorney Steve Wolterman. The Defendant was represented by attorney Jeffrey Meadows. The Defendant submits in his Motion to Suppress that the result of his breath alcohol content test should be suppressed based upon several grounds:

1. No lawful cause to arrest for OVI without a warrant.
2. Statements from the Defendant were obtained in violation of his Fifth Amendment and Sixth Amendment rights.
3. The Intoxilyzer 8000 should not be admitted because the Director of Health has failed to determine, or cause to be determined, "techniques and methods" for chemically ascertaining the amount of alcohol in a person's breath as mandated by O.R.C. Section 3701.143.
4. The State has failed to show that it has substantially complied with any of the regulations governing breath testing as set forth in OAC 3701-53-01 through 3701-53-10, including but not limited to proper retention of records, use of an approved instrument, appropriate dry gas controls, use of approved solutions and dry gas, proper certification of the instrument, and proper qualification of the individual who administered the breath test to the Defendant.

Steve Levine →  
Brad Jones →  
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After receiving testimony, exhibits, and written arguments from both parties, the Court took the matter under advisement. The Court now renders the following decision regarding the admissibility of the test result.

### **PROBABLE CAUSE TO ARREST**

On February 5, 2012 at approximately 12:43 a.m. Officer Martin Morgan of the Fairfield Police Department was dispatched to the Gold Star Chili located on Nilles Road in the City of Fairfield for a report, by and employee, of a customer in the drive-thru possibly intoxicated and in need of assistance. Upon his arrival Officer Morgan noticed that the Defendant was in the driver's seat of his vehicle and stopped in the drive-thru with the driver's door open and the car running. It was Officer Morgan's opinion that the vehicle was parked farther away from the drive-thru window than is customary. The Defendant had dried vomit on his face and clothing and blood on his nose and hand. After a brief conversation, during which the Defendant seemed confused, displayed somewhat bloodshot and watery eyes, could not explain his injuries and had difficulty retrieving his wallet, and acknowledged the consumption of alcohol, Officer Morgan suspected that the Defendant was operating a motor vehicle while under the influence of drugs and/or alcohol (OVI). Officer Morgan asked the Defendant to exit his vehicle to perform several field sobriety tests. The Officer noted that the Defendant was very unsteady on his feet upon exiting the vehicle.

The first field sobriety test Officer Morgan administered was the Horizontal Gaze Nystagmus (HGN). Officer Morgan testified that he has received ADAP (alcohol detection, apprehension and prosecution) training in 2000 and update training in 2003. He further testified that he has been trained to perform the HGN test in accordance with the NHTSA manual. Officer Morgan attempted to administer the HGN in compliance with the NHTSA standards. The Defendant was instructed to keep his feet together during the instruction phase and testing phase as demonstrated by Officer Morgan. The Defendant was unable to put or keep his feet together or his arms at his side. Officer Morgan testified that the Defendant could not hold his head still even when holding his cheeks and that at no time could the Defendant follow the tip of Officer Morgan's finger.

Officer Morgan made repeated attempts to explain the test and the Defendant repeatedly stated he understood the instructions. However, due to the Defendant's inability to follow the instructions the test was terminated.

Officer Morgan testified he did not attempt to administer the Walk and Turn or the One Leg Stand tests because of the Defendant's unsteadiness on his feet. Accordingly, Officer Morgan inquired if the Defendant was a high school graduate to which he replied yes. Officer Morgan then asked the Defendant to recite the alphabet beginning at the letter "C" and ending with the letter "P". The Defendant was unable to recite the alphabet as directed and just recited a jumble of letters.

Officer Morgan then explained and twice demonstrated the "finger dexterity" test to the Defendant. The Defendant indicated he understood the directions. The Defendant was unable to perform the test as requested or in sequence. It is noted by the Court that neither the "alphabet" or "finger dexterity" tests are NHSTA standardized field sobriety tests. However, they do provide an officer with an opportunity to observe a defendant perform simple divided attention skill exercises in order to detect the signs of possible impairment from drugs and/or alcohol.

Officer Morgan testified that based upon his training and experience, his observations of the Defendant upon his initial contact and the subsequent interaction, the time of night, the location of the Defendant's vehicle, the admission of the consumption of alcohol and the Defendant's confusion and inability to explain the blood and vomit on his person, together with the results of the attempted HGN, alphabet and finger dexterity tests that he believed the Defendant to be appreciably impaired.

In determining whether a police officer had probable cause to arrest an individual for OVI the court must consider whether, at the moment of arrest, the police officer had sufficient information, derived from a reasonably trustworthy source of facts and circumstances, sufficient to cause a prudent person to believe that the suspect was driving under the influence. *Beck v. Ohio* (1964), 379 U.S. 89, 91. In making this determination,

the court will examine the totality of the facts and circumstances surrounding the arrest. See *State v. Miller* (1997) 117 Ohio App. 3d 750, 761; *State v. Brandenburg* (1987), 41 Ohio App. 3d 109, 111.

In the present case the court finds that the totality of facts and circumstances surrounding the Defendant's arrest support a finding of probable cause.

STATEMENTS FROM THE DEFENDANT WERE OBTAINED IN VIOLATION OF HIS FIFTH AMENDMENT AND SIXTH AMENDMENT RIGHTS.

Although this issue was set forth in the Defendant's Motion to Suppress it was neither argued at hearing nor addressed in the Defendant's written argument. Accordingly, it will not be addressed in this decision.

WHETHER THE COURT MUST MAKE A PRELIMINARY ASSESSMENT OF THE SCIENTIFIC ACCURACY AND RELIABILITY OF THE INTOXILYZER 8000.

Criminal Rule 47 provides that a motion must state with particularity the grounds on which it is made. The Defendant's Motion to Suppress does not specifically challenge the basic accuracy and reliability or the underlying scientific validity of the method utilized by the Intoxilyzer 8000. Rather the Defendant asserts that the Director of Health has failed to determine or cause to be determined techniques and methods for breath testing. Prior to addressing the specific issues raised the court believes it is important to address the larger issue of admissibility of the test results within the framework of the court's gatekeeper authority, case law, and Evidence Rules 104(A) and 702.

Evidence Rule 104(A) provides in pertinent part that preliminary questions as to the admissibility of evidence shall be determined by the court. As the gatekeeper the court must allow only reliable evidence to be admitted. The court must perform this function while applying controlling case precedent and applicable law.

The General Assembly has legislatively provided in O.R.C. Section 4511.19 that a court may admit breath tests provided analysis is in accordance with methods approved by the Director of Health. It must be noted that the breath test is not the only evidence on either side of the issue – field sobriety tests, officer observations, video, etc., may be used to in addition to the rebuttable presumption that one is under the influence if there is a specific concentration of alcohol.

The use of the Intoxilyzer 8000 is relatively new in the state of Ohio. The wide acceptance of alcohol breath testing was acknowledged by the Ohio Supreme Court in *Westerville v. Cunningham* (1968), 15 Ohio St. 2d. 121, 123 as the court stated “such tests today are generally recognized as being reasonably reliable on the issue of intoxication when conducted with proper equipment and by competent operators.” Further, as noted by the Supreme Court in *California v. Trombetta*, 467 U.S. 479, 489 (1984) the accuracy of Intoxilyzers has been certified by NHTSA since 1973. In addition to being NHTSA certified the Intoxilyzer 8000 has been reviewed and certified by the Director of ODH. As such the admissibility of the test results from this instrument is no different than any other breath testing instrument that has been approved by ODH.

On January 8, 2009 the Ohio Department of Health (“ODH”) formally amended Ohio Administrative Code Section (“OAC”) 3701.53 and approved the Intoxilyzer 8000 breath testing instrument. Without question there is controversy as to its reliability. Historically, new equipment such as the Intoxilyzer 8000 would be vetted by the presentation of evidence as to its reliability. This is exactly what was envisioned by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993). However, in *State v. Vega*, 12 Ohio St. 3d 185 (1984), the Ohio Supreme Court held that O.R.C. Section 4511.19 contains a legislative determination that certain breath testing devices are generally reliable. The *Vega* court held that O.R.C. Section 4511.19 delegates to the Director of the ODH the authority to determine the alcohol tests and procedures. Breath tests analyzed in accordance with methods approved by the Director of Health, precludes a “general attack upon the reliability and validity of the breath testing instrument”. *Vega* at 190. While it is noted that *Vega* did not involve a per

se violation, since *Vega*, Ohio courts have repeatedly held, that “the admissibility of test results to establish alcoholic concentrations under O.R.C. 4511.19 turns on substantial compliance with ODH regulations”. See *Columbus v. Aleshire*, 187 Ohio App. 3d 660, *State v. Luke*, 2006 Ohio 2306, 10<sup>th</sup> Dist. COA.

Evidence Rule 702 and *Daubert* have not changed the *Vega* rule according to the overwhelming weight of authority. The Intoxilyzer 8000 has been approved by the ODH in OAC 3701-53-02. There is a detailed process for including an instrument as an approved instrument in the OAC. The procedure for adoption, amendment or rescission of the rules is set forth in O.R.C. 119.03. The procedure includes public notice and hearing and periodic review of the rules. There is ample opportunity for vetting the general reliability of an instrument such as the Intoxilyzer 8000.

Ohio Revised Code Section 3701.143 authorizes the Director of Health to determine suitable methods for breath alcohol analysis. By virtue of the relevant OAC section the Intoxilyzer 8000 has been approved as one of several breath testing instruments. In the present case there has been no assertion that the Director exceeded his scope of authority or that there was an abuse of discretion in approving the Intoxilyzer 8000 or that there was a failure to abide by the rules set forth in Chapter 119 of the ORC.

Accordingly, the court finds that a defendant may not make a general attack on the reliability and validity of a breath testing instrument approved by the ODH once it has been established that the proper procedure for its approval was followed. However, this does not mean that the test results in any individual case can not be challenged. The breath test result obtained in compliance with the requirements of the OAC is a rebuttable presumption. If a defendant sets forth sufficient evidence, as to a specific instrument, to shift the burden of proof back to the State, the State must counter the specific objection. Case specific challenges as to the weight of the evidence are permissible provided there is compliance with Criminal Rule 16(K) and the Rules of Evidence. See *State v. French*, (1995) 72 Ohio St. 3d 446; *City of Wellston v. Brown*, 2005-Ohio-532(Jackson County).

THE INTOXILYZER 8000 SHOULD NOT BE ADMITTED BECAUSE THE DIRECTOR OF HEALTH HAS FAILED TO DETERMINE, OR CAUSE TO BE DETERMINED, "TECHNIQUES AND METHODS" FOR CHEMICALLY ASCERTAINING THE AMOUNT OF ALCOHOL IN A PERSON'S BREATH AS MANDATED BY O.R.C. SECTION 3701.143.

The Defendant's major basis for suppression is the argument that the techniques and methods for breath testing have not been determined by the Director of Health as evidenced by their not being set forth in either the Ohio Revised Code or the Ohio Administrative Code. The court can find no such mandate that the techniques and methods be reflected in either the ORC or OAC. Further, Ms. Mary Martin, Program Administrator for the ODH Department of Health Bureau of Alcohol and Drug Testing, testified at the hearing that the Director of Health has determined that the approved technique and method for breath testing is infrared spectroscopy ("IR"). She further testified that the OAC goes further than just listing the method or technique but specifically names the machines to be used, including the Intoxilyzer 8000, all of which utilize the approved method or technique of IR. The fact that each of the approved machines listed utilize IR further supports the position that the Director of Health has fulfilled the duty of determining the techniques or methods to be used for breath-alcohol testing.

The Defendant concedes that IR is one of the two reliable methods for testing breath alcohol. However, he asserts that because the IR method is not specifically stated in the OAC the results must be suppressed. The court is unable to find that although the Director of Health was aware of the IR technology utilized by the machine and approved a machine that utilizes IR technology that somehow the ODH Director did not approve the method used by the machine.

The Defendant also argues in his written closing argument that because the Director of Health has identified specific techniques and methods to be used in analyzing blood and urine, the absence of such specific language in regard to breath testing indicates a failure to determine the approved technique or method. This assertion fails to

recognize that breath testing is very different than the testing of blood or urine. Blood and urine are almost always tested and analyzed by sending a sample to a laboratory, which are often not under the control of the ODH. The OAC specifically states what methods are to be used by the lab but it is up to the lab which instruments are utilized. In contrast, the OAC identifies the specific instruments to be used in breath testing. Moreover, with regard to the Intoxilyzer 8000 the machine is approved, maintained, and owned by the ODH.

THE STATE HAS FAILED TO SHOW THAT IT HAS SUBSTANTIALLY COMPLIED WITH ANY OF THE REGULATIONS GOVERNING BREATH TESTING AS SET FORTH IN OAC 3701-53-01 THROUGH 3701-53-10, INCLUDING BUT NOT LIMITED TO PROPER RETENTION OF RECORDS, USE OF AN APPROVED INSTRUMENT, APPROPRIATE DRY GAS CONTROLS, USE OF APPROVED SOLUTIONS AND DRY GAS, PROPER CERTIFICATION OF THE INSTRUMENT, AND PROPER QUALIFICATION OF THE INDIVIDUAL WHO ADMINISTERED THE BREATH TEST TO THE DEFENDANT.

### **1. Proper Retention of Records**

Defendant asserts that there has not been a proper retention of records as a result of the deletion of information on the ODH online database. Upon cross examination Ms. Martin testified that the ODH does not delete records, but that information has been removed from public access. While the court finds this removal of information that may assist a Defendant in addressing potential vulnerabilities of a specific machine, such as breath volume, rather disconcerting, it is neither improper nor illegal, as there is no mandate that such information be posted on a public website. Moreover, Ms. Martin testified, without contradiction, that said records are available to interested parties via a public records request or a subpoena directed to the ODH. However, there was no explanation given why the ODH would create a situation where it will undoubtedly be bombarded with such requests requiring extensive manpower. Ms. Martin further testified that OAC Section 3701-53-01(A) authorizes the ODH to destroy or delete records after a period of three years from the date of the test but that ODH is not only complying with this mandate but is retaining the records indefinitely.

## **2. Alteration Of The Source Code**

There has been suggestion by the Defendant that the ODH has the ability to alter the software or the source code for the instrument in order to modify or “conceal” information and that production of the source code is necessary for the admissibility of the test results.

A source code is the software programming that enables an instrument to analyze and report the result. There is no evidence that the ODH has the source code for the Intoxilyzer 8000. It can be concluded that the ODH did not feel it was necessary for testing and approval of the instrument. Accordingly, pursuant to *Brady v. Maryland*, (1963) 373 U.S. 83, the ODH cannot be compelled to produce said source code.

Further, with regard to changes, Ms. Martin testified that while she is able to alter the source code there is a process through which that is done that would likely take six to nine months to complete. Once the change is suggested, it must be presented to the manufacturer, the changes must be made, the new source code must be reviewed and approved, and the software must be updated on each individual machine. Thus, the approval of the source code is a function of the approval of the instrument by the ODH. Additionally, this court is aware that several courts in Florida have ordered the manufacturer CMI to provide the source code. CMI has refused claiming it is proprietary information and not relevant. This issue was not directly addressed either in Defendant’s Motion or at the hearing. Accordingly, it will not be addressed further in this Decision.

## **3. Use Of Approved Instrument**

The Defendant argues that the City failed to demonstrate that an approved breath testing instrument was used in this case. Officer Morgan testified that the instrument was an Intoxilyzer 8000, serial number 800-004017. Ms. Martin testified that the Intoxilyzer 8000 at issue is an approved instrument as set forth in the OAC. There is no evidence that it is not an approved instrument.

#### **4. Appropriate Dry Gas Controls**

The Defendant asserts that there was no substantial compliance with the ODH regulations for the performance of the dry gas control. Specifically, that a dry gas control was not performed before and after every subject test. See *State v. Kormos*, 2012-Ohio 3128 controlling case law held that there is no requirement that a dry gas control be performed between each breath sample.

#### **5. Use Of Approved Solutions And Dry Gas**

The Defendant argues that there was a failure to use an approved solution and dry gas thus necessitating the suppression of the breath test. The OAC requires that the dry gas must be traceable to the National Institute of Standards and Technology (“N.I.S.T.”). State’ Exhibit 3 is the Certificate of Analysis for the dry gas, lot number 1172887, used during the certification process on the Intoxilyzer 8000 on which the Defendant’s test was performed. State’s Exhibit 3 indicates “Certification traceable to N.I.S.T. RGM ethanol standards”. The Defendant’s assertion that because the propriety name for the product “GAZ” appears on the document it is not in compliance lacks merit.

The bath solution utilized in the Intoxilyzer 8000 certification process must also be approved by the Director of Health. State’s Exhibit 4 is the ODH Approval of Instrument Check Solution for Lot or Batch Number ODH-0018. State’s Exhibit 2 indicates that the instrument certification for this instrument was performed using solution from this lot or batch number ODH-0018, the same solution approved by the Director in State’s Exhibit 4. Accordingly, the court finds both the dry gas and the bath solution substantially comply with the OAC regulations.

#### **6. Proper Certification Of The Instrument**

The Defendant takes the position that the test results must be excluded because the instrument at issue has not been subjected to an annual certification in 2012 as required by OAC 3701-53-04(C). At the hearing on this matter Ms. Martin testified as to the process through and by which the ODH certifies an Intoxilyzer 8000 prior to its being

placed into service at its assigned location, in this case the Fairfield Police Department. Ms. Martin testified as to the specifics of the certification protocol. In this case that certification protocol was conducted by Michael Quinn. Although Mr. Quinn did not testify State's Exhibit 2, which is the Instrument Certification Report for the instrument at issue, serial number 800-00417, indicates that the certification process was properly performed. The instrument was certified to be in proper working order on October 24, 2011. State's Exhibit 5. It was placed into service on October 25, 2011. State's Exhibit 6. Ms. Martin further testified that State's Exhibit 2 would not be issued without the proper instrument certification procedures being followed. Additionally, there is no requirement that the 2012 annual certification be conducted prior to the end of this year. Moreover, it would be logical and well within the requirements that such certification be performed in October of 2012.

#### **7. Proper Qualification To Administer The Breath Test**

The Defendant asserts that Officer Morgan was not properly qualified to administer the breath test to the Defendant. In breath testing, a sample is collected and analyzed in an approved instrument whose operator must be qualified in accordance with OAC 3701-53-07 (C) to (E).

Officer Morgan testified that upon arresting the Defendant and observing the Defendant for the requisite twenty minutes a breath test was administered using the Intoxilyzer 8000 at the Fairfield Police Department. Officer Morgan further testified that he had been trained and certified as a law enforcement officer, that he has been trained in the administration of breath tests using the Intoxilyzer 8000, and that he was issued an operator access card authorizing him to access and administer tests on this specific instrument. Officer Morgan's operator access card issued by the Director of the ODH was valid on February 5, 2012, the date of the Defendant's arrest. Additionally, Officer Morgan's operator access card has not been revoked by the Director. Accordingly, the court finds that Officer Morgan has been properly qualified to administer breath tests on the Intoxilyzer 8000.

In his supplemental written closing argument the Defendant cites *State v. Moore*, 12TRC01842, dated August 17, 2012 from the Athens Municipal Court. However, the case cited is neither controlling case law nor was the specific issue raised in that case presented in the Defendant's Motion or addressed at the hearing in this case. There is no evidence before this court that the Director failed to establish qualifications prior to issuing Officer Morgan an operator access card nor is there any evidence before the court that there is a legal requirement that qualifications be set forth in the OAC. Accordingly, the court defers a decision on this specific issue until such time as it is properly brought before this court.

**CONCLUSION**

Upon consideration of the foregoing, the Court finds that the Defendant's Motion to Suppress is not well taken and is overruled. The City established probable cause for the arrest and demonstrated substantial compliance with the ODH regulations contained in the OAC.

**Dated September 27 2012**

**ENTER**

  
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**Joyce A. Campbell, Judge**

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Decision was forwarded to Steve Wolterman, Prosecutor for the City of Fairfield, c/o 675 Nilles Road, Fairfield, Ohio 45014 and to Jeffrey C. Meadows, Attorney for the Defendant, 8310 Princeton-Glendale Road, West Chester, Ohio 45069, by ordinary U. S. mail this 27<sup>th</sup> day of September, 2012.

  
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**Administrative Assistant**