

FILED
CIRCLEVILLE
MUNICIPAL COURT

CIRCLEVILLE MUNICIPAL COURT

2012 JAN 26 PM 2:24

CONNIE DEAL, CLERK
CIRCLEVILLE, OHIO

STATE OF OHIO,
PLAINTIFF,

V.

CASE NO. TRC1100716

HEATHER REID,
DEFENDANT.

DECISION AND ENTRY ON COURT TRIAL**Procedural History**

On 2/06/11, defendant was charged with violating ORC 4511.19 (A)(1)(h) as a result of a breath test of 0.176 on the Intoxilyzer 8000 manufactured by CMI, Inc. She was not charged with Impaired Driving under RC 4511.19(A)(1)(a). On 3/07/11, Defendant filed a seven (7) branch motion to dismiss, suppress evidence, or exclude in limine as appropriate on the basis of the following arguments:

Branch I: No reasonable articulable suspicion of wrongdoing to justify the stop and detention of the defendant;

Branch II: To declare RC 4511.19(E), permitting substantial compliance with Field Sobriety Standards to be acceptable foundation for admission of test results as unconstitutional;

Branch III: To exclude for purposes of probable cause and trial, the results of the Field Sobriety Tests;

Branch IV: To suppress any statements made in violation of *Miranda v.*

Arizona;

Branch V: To suppress all evidence obtained on the basis of no probable cause for the arrest;

Branch VI: To in limine exclude from probable cause and trial consideration the results of the Intoxilyzer 8000;

Branch VII: To grant her ALS appeal or in the alternative, grant her limited driving privileges.

Defendant also filed interrogatories and a request for production of documents to obtain information in regard to this new machine in order to challenge it. On 5/25/11, Defendant specifically, as to the Intoxilyzer 8000 concerns, identified the following: 1) her concern with the denial of confrontation of the ODH person who put the machine into service; 2) her belief that *State v. Vega* (1984), 12 Ohio St.3d 185 should be overturned or distinguished; 3) her due process concerns that ODH should not have unbridled authority to pick an instrument without transparency of the selection processes and that it is a violation of separation of powers to permit the legislative arm of government to dictate to the judicial branch the evidence to be received in any given case; and 4) to find the machine result is not admissible because it cannot meet a *Miller v. Bike Athletic Company* (1998), 80 Ohio St.3d 607 and *Daubert v. Merrell Dow Pharmaceuticals Inc.* (1993), 509 U.S. 579 challenge. The motion addressed the variation between the Intoxilyzer 8000 and the BAC Verifier and further addressed specific concerns and known problems to the Intoxilyzer 8000, including disclosure of the source code.

On April 11, 2011, the court took testimony on Branch VI, the Intoxilyzer 8000 issues, with the other branches bifurcated for a later hearing date. Later, as to Branches I, II, III, IV, V and VII of the motion, the parties agreed that they would be withdrawn and no testimony was taken on those matters. At the April 11 hearing, the State presented one witness, the Program Administrator, Mary Martin, who had been in the position with ODH at that time for three weeks. A technician was present but not called.

After considerable review, the Court entered an opinion, finding that the Intoxilyzer 8000 had not been demonstrated by expert testimony by the Ohio Department of Health to be an accurate and reliable instrument for breath testing in OVI cases and as a consequence, ordered that the test results in the within case were inadmissible for trial purposes until such time as ODH could present testimony of the scientific principles that support its use and insure the accuracy and reliability of the instrument.

On 6/09/11, the State of Ohio filed an appeal to the Fourth District Court of Appeals; however, apparently upon reflection, the State of Ohio concluded that the decision of this Court was an in limine ruling and therefore, was not a final appealable order and on 7/19/11, voluntarily dismissed the appeal.

Thereafter, the State and Defendant prepared to present expert testimony for trial to the court. The Court and counsel were aware of a similar case pending in Athens County, being *State of Ohio v. Nicole Gerome*, Case No. TRC1101909. It was agreed that the experts who testified in the *Gerome* case in the morning of trial in Athens would testify in this case in the afternoon. Unfortunately, the *Gerome* case was continued and took more than one day to complete the testimony. As a result, the parties in this matter stipulated that a transcript of the testimony in the Athens case would be entered into this

case because the same witnesses would be presented for the prosecution and for the defense thereby fulfilling the requirement of this court to present foundational testimony. The matter was set for trial to the court on December 12, 2011 and further stipulated that Defendant, at trial, objected to the introduction of the Intoxilyzer 8000 result of 0.176. The court then proceeded upon the stipulated testimony from the *Gerome* case as the foundational testimony for the Intoxilyzer 8000 and issues this ruling and decision on the merits of the case.

Trial Issues Presented

A. Does *State v. Vega*, 12 Ohio St.3d 185 (1984) bar Defendant's challenge to the Intoxilyzer result?

B. Does the Intoxilyzer 8000 meet the *Daubert v. Merrell Dow*

Pharmaceuticals Inc. (1993), 509 U.S. 579 test, to wit:

1. Has the theory or technique upon which it is based been tested?
2. Has it been subjected to peer review?
3. What is the potential rate of error of the theory or technique?
4. Does it have a particular degree of acceptance in the community?

C. Is the defendant guilty of per se OVI?

Analysis and Findings

The State's Evidence

Testimony of Gregory Marquis:

The testimony in *Gerome* presented by the State in support of the Intoxilyzer 8000 came first through Gregory Marquis, an employee of the Ohio Department of Health, who testified that he was an Infrastructure Specialist II, whose responsibilities included providing network communication and connectivity between the various Intoxilyzer 8000 machines in the state and ODH. Mr. Marquis testified that he was

trained in the use of the Intoxilyzer 8000 by CMI, Inc. its manufacturer and distributor in May of 2011. He stated that the individual machines throughout the state could talk to the ODH website and the website could talk to them. (Tr. 10, 11.) The website contains a disclaimer as to the accuracy of the records on the site and it was his personal opinion that the information on the website was not intended for evidentiary use. (Tr. 12). He further stated that the website was for use as a discovery tool to show the communicated data that was received from the field into the ODH servers and displayed on the website. (Tr. 13). He said that the individual machines throughout the state used two different versions of software, (Tr. 14) and changes had been made to increase reliability. (Tr. 14). Mr. Marquis testified to the fact that some software had been "patched" for repair purposes, (Tr. 18) and that he himself did not have the ability to remove information from the website that had been transmitted by the various machines in the state. (Tr. 20). He described the patched records as having been flagged, and not deleted. Considerable testimony was given to this issue of flagging/deletion in the state's presentation and Marquis' testimony on direct exam culminated in the fact that the website is not monitored for quality control, since its content was not evidence.

On cross-examination, Mr. Marquis reiterated that he was told when he was hired by ODH in February, 2011 that the website was not for evidentiary purposes. Mr. Marquis avoided the use of the term "deleted" when it came to changes made on the data entered and categorized it as keeping "correct" information. (Tr. 32). He indicated that "no records have been deleted from the system" yet, he did not or could not explain why some records that once were on the system cannot now be found. (Tr. 33,34). In addition, he could not explain what the software corrections were and whether those

corrections actually fixed the problems. (Tr. 44, 45). He did testify that in moving from COBRA version four to COBRA version five, we expect a lot more reliability of data. (Tr. 63).

In questions by the court to Mr. Marquis relative to the information on the website, the server and the machine, Mr. Marquis testified that there potentially could be fields that have been blotted out because of personal information reasons or for security reasons and that kind of information would not be displayed. In answer to the court's query as to how that information might be obtained, he said through discovery request; however, he later said that "to go through and do the translation between the database into something a normal person would use, for example, Excel, would be excessively impractical, both for an analysis and review of that information because there is so much data and the limitations of Excel would not allow all of the data to be spit out on the computer." (Tr. 79, 83). His testimony was mostly as to the record keeping abilities and communication functions between the Intoxilyzer 8000 and ODH.

Testimony of John Kucmanic:

The State's second witness, John Kucmanic, testified that he no longer worked for ODH, where he had worked for approximately 13 years and was at the time of testimony employed by Cuyahoga County Common Pleas Court Adult Probation Laboratory. At ODH he was a forensic toxicologist, had testified as an expert before in Ohio courts and worked with the Intoxilyzer 8000 in the approval process. He has a BS in biology from Cleveland State University and has attended several non-degree graduate level courses from the same school.

Mr. Kucmanic testified that he had training on both the Intoxilyzer 5000 and 8000 by the factory representatives from CMI. He testified to the basics of breath testing for the presence of alcohol by describing the very basics of infrared technology. (Tr. 93 and again at 100). In 2000, he accompanied Dean Ward, the then bureau chief for alcohol at ODH to the CMI factory to examine the Intoxilyzer 5000 for watercraft use and tested the instrument before it was used for watercraft purposes in 2002. He said in 2005 or 2006 he and Ward were in a meeting and were shown a demonstration of the Intoxilyzer 8000, evaluated it and approved it. (Tr. 95). His testimony of the accuracy and reliability of the infrared system used by the Intoxilyzer 8000 was that it could be determined by running a known concentration of alcohol through the system and if the machine reads the solution correctly, the machine is reliable and accurate. (Tr. 104).

He testified that the Intoxilyzer 8000 is on the NHTSA approved breath testing list (Tr. 104) and that it had been tested in Spain and that Ohio did testing on it. (Tr. 106). Those tests were described as follows: 1) Radio Frequency Interference (RFI) studies done in Brecksville, Ohio and 2) at other locations across the state by Mr. Kucmanic (Tr. 107).

As to the RFI studies, Mr. Kucmanic stated that he and Mr. Ward took an Intoxilyzer 8000 to Smith Electronic Laboratory, where tests were run on the machine and his analysis of the outcome of the tests was that there "wasn't a significant effect"; that he was "somewhat familiar" with the results of the tests and that those results were used by him in formulating his opinion as to the Intoxilyzer 8000. He further testified that he believed that the instrument was not affected by RFI and that the detector seems to work adequately to protect the instrument. (Tr.109,110). He and a representative from

the lab took the instrument around to various sites in Ohio and the lab representative took readings and the results were that the instrument was well protected and could detect RFI. (Tr. 112). There were other studies done at the ODH lab testing the machine against known concentrations of ethanol and he stated that the "result resembles what the concentration of the solutions we wanted to test and it would produce an accurate and precise result." (Tr. 114). He further stated that subject testing was done at an Ohio Highway Patrol training site as a part of an Alcohol Detection and Prevention (ADAP) training where live subjects were drinking alcohol and being tested. He indicated that he believed the results of those tests fell within a forensically acceptable range, but no documentation of those results existed other than as portrayed in a Power Point presentation that he created from that event. Mr. Kucmanic testified that he did "high point" testing (testing at a high elevation in Ohio); testing under a power line in East Lake, Ohio; in the rain at Lily Hill, Ohio and in multiple locations in Ohio with adverse weather conditions and that the results obtained were within plus or minus 5% and that range is an acceptable reading.(Tr. 116-120)

Mr. Kucmanic testified that he searched the internet for any studies available and was provided studies by the manufacturer as to the Intoxilyzer 8000 and from those determined it to be an acceptable instrument, which produced accurate and reliable results. (Tr. 129). He also stated that he was responsible for certifying the individual machines in the field. (Tr. 134).

On cross examination by attorney Jon Saia, Mr. Kucmanic testified that he assisted in evaluating the Intoxilyzer 8000, both the OH2 and the OH5; that the OH5 version as originally evaluated did not have the same components that it now has and that

in 2002, when the RFI testing was done, the modifications had not been made to make it conform to the specifications requested by the State of Ohio; (Tr. 154, 155); that at a study done at the Marion City Police Department, the Intoxilyzer 8000 as modified did not detect an RFI problem and did provide a readout of a breath alcohol finding; that there were no peer reviewed studies, that is third party analysis done as to RFI detection studies, (Tr.166); that ODH contracted with Smith Electronics to test the OH5 and that there were an unusual number of problems as to ambient failure and diagnostic failure found, "caused by Blackberry phones, 3G networks, and things of that nature." (Tr.167,168); that no testing or studies were done by ODH on the effects of Blackberry phones and 3G or 4G networks on the Intoxilyzer 8000; and that there were ambient failures with the OH5 and all that was done was to change the settings to a higher tolerance to those conditions rather than conduct any studies or testing to determine the cause of the issue (Tr.170). Mr. Kucmaric also testified on cross-examination that there had been different software versions installed from the initial version in 2007 to versions 5, 6 and now 10 with no exact testimony of what version the initial machine had installed in 2007. (Tr. 174). He indicated that software changes could include setting changes, like the ambient threshold and that he did not know if RFI settings could be changed by the manufacturer and he did not know if the manufacturer changed any of those settings in the OH5. (Tr.175).

He could not say what happens when the instrument's memory becomes full as to whether it shuts down or "kicks out" the oldest test, stating "If the memory is full and it kicked the test results, you wouldn't be able to retrieve it." (Tr. 179). After a series of questions regarding whether the software locked out an officer from conducting a third

test on the machine after two ambient or diagnostic failures, Mr. Kucmanic opined that he didn't know if it was possible to have the software do that and when asked if he was aware that former ODH Bureau Chief Dean Ward testified in Clermont County Municipal Court that the software in fact did lock out the officer from a third test, Kucmanic became evasive and said "Mr. Ward had different experience, he ran a test different times than I did. So he had a different opinion." (Tr.182)

On the topic of Kucmanic's obtaining a certification card for access to the machine, he said it was given him by ODH with no process to go through to obtain it, no rules or regulations, nothing in writing and no training. (Tr. 184) He also testified that there were "a number of instruments having dry gas readings that were elevated... so we examined that, we determined there was a group of instruments that were going to be reading high. We didn't want to place them out in the field and have them abort tests and have to be returned. So we called CMI and asked them to come pick up, identify the group, pick them up and go recalibrate them again."

He also testified that he had not read any of the studies or opinions from other states, such as Tennessee or Alaska, where the machines had not been accepted.

Testimony of Brian Faulkner:

The third witness for the State was Brian Faulkner who testified that he was an electrical engineer for CMI for the last 10 years with a bachelor's degree in electrical engineering and thirty hours of graduate courses toward a master's degree in the same field. He also attended the Robert F. Borkenstein School on alcohol, drugs and traffic safety at the University of Indiana at Bloomington. His history at CMI was and still is in

software and hardware development for the Intoxilyzer line of instruments, including the Intoxilyzer 5000 and the 8000. He is now the manager of engineering. (Tr. 216, 217).

In his capacity with CMI, he has developed and written operating software for both the Intoxilyzer 8000 and COBRA communications, the system that communicates between the Intoxilyzer 8000 and the database application. He explained the basics of the Intoxilyzer 8000 operation as follows: an infrared light source is at one end of the sample chamber focused at an infrared detector, which has two filters. These filters filter out specific wavelengths. The instrument takes a measurement of the amount of infrared light that hits the detector with no sample present. When an unknown sample is introduced, the instrument measures the amount of light absorbed by detector as the ethanol absorbs some of the light and calculates the difference between no sample present and the sample present to determine the ethanol concentration. He said that the technology is objectively verifiable by introducing a known concentration of ethanol to determine if the instrument can accurately measure the known quantity of ethanol. (Tr. 221,222). The chamber size of the Intoxilyzer 8000 is 39 to 40 cubic centimeters. When asked if the Intoxilyzer 8000 reliably implements the science behind it, he said, "I believe so," (Tr. 223) based upon the fact that you can verify the instrument by supplying it with a known quantity of alcohol. All machines are run through this process referred to a calibration before leaving the manufacturer. (Tr. 225).

The difference between the Intoxilyzer 5000 and the 8000 is the fact that the 8000 uses a pulsed infrared source with a pyroelectric detector whereas the 5000 uses a steady light source with a selenide detector. The 5000 light source is chopped instead of pulsed. His testimony as to the benefit of the pulsed source with the pyroelectric detector versus a

chopped steady source with a lead selenide detector is that there are less moving parts on the pulsed source to break for mobile application concerns. (Tr. 226).

As to RFI testing, he stated that CMI tests for RFI at its facility and that the instrument either notes a fault to indicate presence of RFI or gives a result that was unaffected by RFI. (Tr. 233). When questioned about the accuracy of the pyroelectric detector use in the Intoxilyzer 8000, he indicated that the testing done by CMI, test houses, state agencies use and established it to be accurate, although there was no testimony as to any specific test house, no specific state agencies, and no paperwork demonstrating the testing done. (Tr. 235)

The Defense Evidence

Defense Witnesses:

The defense presented the testimony of five witnesses, Mary Martin, Program Director for ODH, Dr. Al Staubus, Professor Emeritus Ohio State University, Dave Radomski and John Fusco from National Patent Analytical Systems, the manufacturer of the Datamaster product line, and Thomas Workman, a masters trained electrical engineer and an adjunct professor of law at the University of Massachusetts School of Law teaching scientific evidence. These witnesses spoke to concerns regarding several issues they recognized in the Intoxilyzer 8000.

Dr. Staubus testified as to his concern that the volume of the sample and the ethanol reading show a correlation in that in his words, "the longer you blow, the higher you score". A longer blow could result in a 25% to 30% upward variance.

The other concern with the machine was that an operator could see the reading as it occurs and would have the opportunity to end or prolong a sample to achieve a certain score or to make the second test of the machine measure within .02 of the first test to validate the testing procedure.

The defense witnesses also testified as to a concern that the pulse lamp in the Intoxilyzer 8000 is not as sensitive to mouth alcohol as it samples less times than a straight beam through a chop wheel would do in a Datamaster or in the Intoxilyzer 5000. This does not allow the slope detector function to get as sensitive a reading for mouth alcohol as it would if it sampled a greater amount and may not detect mouth alcohol or other contaminants as well as it should.

The other major concern of the defense witnesses involved the possibility that RFI would not be picked up as the machine had not been tested against some of the most common RFI issues, with cell phones, smart phones, PDAs, 3G and 4G networks, being the most common. It was acknowledged by the State in testimony that RFI had been an issue with a Blackberry and the Intoxilyzer 8000 failed to detect RFI at a Marion test site. Mr. Workman's testimony was to the effect that the error range due to RFI can be from .09 to .20. Mr. Kucmanic testified that it would be "impractical" to check all possible frequencies.

Supplemental Filing of NHTSA Testing by the State of Ohio

As a final and additional piece of evidence, the State in the Pickaway County case submitted the testing and findings of NHTSA as to the Intoxilyzer 8000 OH-5, which are attached hereto. These tests were completed on October 21, 2011 at the request of ODH, ostensibly to address the concerns expressed by this court previously in the May, 2011

opinion and opinions of other courts in Ohio at that time. These findings were not presented to the State until December 22 and were quickly presented thereafter to this court through a supplemental filing on December 23, 2011.

The court has reviewed the NHTSA standards for evidential breath testing devices and the testing data itself and finds that this testing addressed the following issues:

- 1) Precision and accuracy at .02, .04, .08 and .16 Breath Alcohol Concentration at grams alcohol per 210 liters of air at 34 degrees Celcius, using known solutions;
- 2) Acetone interference;
- 3) Blank reading;
- 4) Breath sampling efficiency at delivery rates of .2, .33, and .5 liters per second;
- 5) Power test at 108 & 123 volts AC and 11 & 15 volts DC;
- 6) Precision and accuracy at low and high ambient temperatures for devices not be used in protected environments;
- 7) Precision and accuracy after vibration of devices intended for mobile use;
- 8) An inspection for electrical safety.

While the above testing concerns are moving in the right direction, these items tested do not deal with the issues raised and addressed in the testimony of this case. Interestingly, the NHTSA testing could have involved an Alternate Breath Sampling Test as shown in Appendix C. That procedure involved selecting eight human subjects in good health with normal body temperatures, who are divided into two groups of four each. They are given known commodities of alcohol to drink, are tested both on a BrAC instrument and thereafter again from blood samples taken. The results are compared and reported as more fully explained under the protocol set out in the appendix noted to the entire report attached to this opinion.

Conclusions of Law and Decision

To reiterate to some degree what was covered in the previous opinion, in the case of the Intoxilyzer 8000, the Director of Health, by virtue of Ohio Admin. Code 3701-53-02(B)(2) has approved the Intoxilyzer 8000 as one of the acceptable breath testing

instruments. Previously, in *State v. Vega*, 12 Ohio St. 3d 185 (1984), the Ohio Supreme Court in speaking to the use of intoxilyzers in general, said that such tests are generally recognized as being reasonably reliable on the issue of intoxication when conducted with *proper equipment* and by competent operators. The court went on to hold that an accused may not present expert testimony to attack the reliability of intoxilyzers in general. In this court's opinion, *Vega* anticipated that ODH would determine scientifically that a given breath testing device would be "proper equipment".

Vega was decided in 1984 and involved the OVI statute of that time which viewed the chemical test result of .10 or greater as a rebuttable presumption of intoxication as there was no per se limit as exists today. The *Vega* opinion emphasized the fact that the defense still had the right to present evidence of lack of impairment regardless of the test result. Today, the test result obviously plays a greater role in a per se prosecution and there is little to no ability to present evidence in defense, depending upon the facts, if the test is in excess of .08 under ORC 4511.19(A)(1)(d) or .17 under ORC 4511.19(A)(1)(h). *Vega* used the term "proper equipment" in the opinion and it is this court's belief that the instrument in question may be challenged under *Vega* to address the accuracy and reliability when that instrument is new to the prosecution and is appearing for the first time in a court in a given jurisdiction.

Even though the legislature has given ODH the power to select the methods and equipment to be used in alcohol breath testing, there is a tacit inference or expectation that ODH does some testing and review to which it can testify to demonstrate to the courts and the public that there is a scientific standard to which a particular piece of equipment has been compared and evaluated.

Based upon the above reasoning of *Vega*, the court finds that *Vega* does not bar a challenge to the Intoxilyzer 8000 or any other instrument new to the prosecution in an OVI case. The court has a duty to hear testimony as to the accuracy and reliability of the instrument and if the court finds the instrument to be accurate and reliable, the court in the future does not need to hear further evidence in each case of the instrument's capabilities.

Even if the court has made a finding that a given instrument is accurate and reliable, this court is also of the opinion that *Vega* does not bar a challenge in any case to a specific, articulable, factually driven scenario surrounding a particular instrument and may hear that challenge if it is accurately explained in the motion to suppress and is more than a shotgun attack on the general accuracy and reliability of the instrument itself.

As noted in the previous opinion in this matter, before a court can take judicial notice of the accuracy and reliability of even a radar speed testing device, the court is called upon to take testimony from an expert as to the scientific principles that support the use of the radar and make findings as to the accuracy and reliability of that radar equipment. *State v. Starks*, 2011-Ohio-2344, Ct. Apps. 12th District CA.2010-09-087. This court did so in *State v. Caldwell* (2008), 150 Ohio Misc. 2d 42 as required before taking judicial notice of the accuracy and reliability of the radar device. Speed cases are minor misdemeanors and have no jail ramifications. There would seem to be no reason to take a lesser approach to the Intoxilyzer 8000 and the court should be able to hear an expert testify as to the scientific principles that support the use of the Intoxilyzer and the reliability and accuracy of the equipment before admitting the results of a test with a new machine under the evidentiary rules of Ohio.

As was also said in the previous opinion in this case, Evid. R. 702 is the gate through which this evidence must pass. That rule, as relevant herein, requires that the theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts or principles; that the design of the procedure, test, or experiment reliably implements the theory; and that the particular procedure, test or experiment was conducted in a way that will yield an accurate result. With the above in mind, the court will now review the evidence presented.

The data communication issues between each instrument and the ODH data base although troubling and interesting, are not as concerning as the accuracy and validity of the instrument in general. In ruling on the instrument challenge, in considering *Miller and Daubert*, and examining Evid. Rule 702(C) as the standard, the court finds the following:

As to the theory upon which the procedure is based being objectively verifiable or being validly derived from widely accepted knowledge, fact, or principles, the court finds that clearly infrared spectrometry is a valid method of testing substances in the field of organic chemistry and is based upon widely accepted knowledge and principles.

As to the design of the procedure, test or experiment reliably implementing that theory, it would appear that the design of the instrument is generally recognized to identify ethanol as an organic compound.

As to the particular procedure, test or experiment being conducted in a way that will yield an accurate result, the court finds that there are too many questions with RFI, sample size of the chamber, volume of the sample tested, possible operator manipulation of the results, possible CMI modifications of the software without the knowledge of ODI and slope detector inadequacy to permit the court to say that the instrument is accurate and reliable.

At a time when scientific testing can readily determine the accuracy and validity of many tools and processes, it would seem that both CMI and ODH should be happy to run independent testing with known and respectable laboratories to determine the

accuracy and reliability of the equipment. It would seem that running standardized tests to compare an alcohol breath testing instrument with blood testing would be easily accomplished and would go a long way to determine the accuracy and reliability of the instrument. It would also seem that the legislature, in entrusting the selection and approval of breath testing devices to ODH, assumed and expected that ODH would in fact be the appropriate agency to create, implement and oversee scientific testing of a particular instrument *before* purchasing, let alone distributing the equipment. If there was no such expectation, the entire matter could have been merely farmed out to any purchasing agency for the state.

In addition, having spent the money on the machines, ODH is now facing the challenge of explaining why any of their reviews or testing subsequent to purchase of the instrument should not be considered suspect since ODH has a clear current interest in justifying the continued use of the instrument

Daubert v. Merrill Dow Pharmaceuticals Inc., supra and *Miller v. Bike Athletic Co.* supra, permit this court to review the scientific evidence and have provided guidance in that review by permitting the court to look at whether the theory or techniques under review have been tested; whether they have been subjected to peer review; the potential rate of error for the theory or technique; and whether those theories or techniques have a particular degree of acceptance in the community. Under this guidance, the court finds that the Intoxilyzer 8000 has not been sufficiently scientifically tested; has not been subjected to peer review; has no known potential rate of error and clearly has no particular degree of acceptance at this time.

This ruling does not prohibit independent laboratory testing to address the issues raised in this case, ie. questions regarding RFI, sample size of the chamber, volume of the sample tested, possible operator manipulation of the results, possible CMI modifications of the software without the knowledge of ODH and slope detector inadequacy to permit the court to say that the instrument is accurate and reliable. If this testing is not done independently of CMI and ODH, all municipal courts in Ohio will be dealing with these challenges for years to come. Testing the instrument against blood alcohol test results, which is the gold standard for measuring blood alcohol against BAC tests from the instrument with a reasonable sample size in an RFI series of presences and the acquisition from CMI of a commitment not to modify software to increase or decrease standard testing parameters without notice to ODH and the public in general would greatly increase the acceptance of the instrument if not outright close a major door to concerns on the general testing procedure.

This particular case involves the single charge that the defendant operated a motor vehicle with a prohibited blood alcohol concentration of more than .17 under RC 4511.19(A)(1)(h) based upon a reading from the Intoxilyzer 8000 at .176. The testimony in this case from the experts presented make it difficult, if not impossible to determine whether the test was actually over the limit, given the accuracy and reliability issues addressed in the testimony.

As an aside, the defense also had a pending motion to compel discovery based upon the failure of ODH to provide considerable documentation regarding the Intoxilyzer 8000 in this case including disclosure of the source code which is made available for the BAC Verifier. The Court finds this motion to be moot in light of the stipulated

testimony. However, the court is troubled by the fact that there seems to be no desire on the behalf of ODH to address the issues raised by the defense in regard to accuracy and reliability of the Intoxilyzer 8000 or to demonstrate that ODH does not lack internal data surrounding the instrument. In addition, the less than candid answers to the questions regarding the data base, the ability of CMI to enter and alter the machines without knowledge or documentation, lack of explanation of newer versions of software, missing information and unexplained inconsistent results clearly cast doubts on ODH's transparency as to the Intoxilyzer 8000. The interrogatory questions and the request for production of documents were pertinent to *Daubert* issues. Had they been responded to, they would have assisted the Court in this decision. The State of Ohio cannot expect this Court to find the Intoxilyzer 8000 reliable when the State refuses to address known problems and explain why those problems can be ignored.

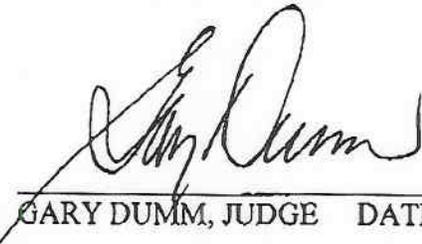
Based on the above, the court does grant the motion of the defense to exclude the Intoxilyzer 8000 results from trial in this matter and the results are hereby excluded.

Verdict

On 2/06/11 at 0337 hours, Defendant was driving southbound on South Court Street. She failed to dim her headlights for the officer approaching in the opposite direction; otherwise, there is no evidence of impaired driving. The Court need not address whether or not there was sufficient evidence to convict Defendant upon an (A)(1)(a) impaired charge due to contested field sobriety tests, because she was not charged with impaired driving. She was charged only with a per se violation.

Without the test result, the court finds the defendant **NOT GUILTY** of the offense of operating a motor vehicle over the prohibited blood alcohol level of .17 under RC 4511.19(A)(h) and defendant is hereby discharged.

This is a final appealable order and the clerk shall so advise the parties.

 1/26/2012

GARY DUMM, JUDGE DATE

cc: Gary D. Kenworthy, Esq. City Law Director City of Circleville for the State
James R. Kingsley, Esq. for the Defense

ENTRYmotionsuppressoviINTOX8000finalappealorder3Reid