

IN THE COUNTY COURT OF NOBLE COUNTY, OHIO

**FILED**  
MAY 08 2012  
L.C. YOUNG III JUDGE  
NOBLE COUNTY COURT

STATE OF OHIO, :  
Plaintiff :  
vs. :  
TONY D. STARR, Defendant : CASE NO. 12 TR C 15  
CRYSTAL J. HAYES, Defendant : CASE NO. 12 TR C 33  
TROY P. DANFORD, Defendant : CASE NO. 12 TR C 241  
TRAE D. SCHELL, Defendant : CASE NO. 12 TR C 311  
VALERIE A. MORRIS, Defendant : CASE NO. 12 TR C 444  
CARL S. STACK, Defendant : CASE NO. 11 TR C 1387

ENTRY

These matters having come before this court this 1<sup>st</sup> day of May, 2012 upon motion of the defendants for suppression. Present in court were the defendants, excepting Valerie Morris, with counsel Jack Blakeslee. The State was represented by assistant Prosecuting Attorney, Kelly Riddle. The Court was informed that the Defendant, Valerie Morris, had been informed of the hearing and with concurrence of her Attorney chose not to attend. Further, that counsel for the defendant gave the court permission to proceed in her absence. These matters were consolidated as each defendant's motion to suppress contained the three same issues, branches, for suppression, all of which are alleged violation of administrative code sections 3701-53-02, 04, and 07.

The first issue, branch, raised by the defendants was that the "Intoxilyzer 8000" did not perform a dry gas control test after "subject test 1" as required by Adm. Reg. 3710-53-04(B). 3701-53-04(B) states that " Instruments listed under paragraph (A)(3) of rule 3701-53-02 of the Administrative Code shall automatically perform a dry gas control test before and after every subject test and instrument certification using a dry gas standard traceable to the national institute of standards and technology (NIST). Dry gas control results are valid when the results are at or within five one-thousandths (0.005) grams per two hundred ten liters of the alcohol concentration on the manufacturer's certificate of analysis for that dry gas standard. A dry gas control result which is outside the range specified in this paragraph will abort the subject test or instrument certification in progress."

This raises the issue of what is a subject test. The term "subject test 1" or "subject test 2" is not defined in the rule or any statute. The defendant Stack submitted to a breath test that was conducted on the "Intoxilyzer 8000". In accordance with the manual for said instrument, each person that submits to a test on the "Intoxilyzer 8000" will be requested to give two (2) breath samples. At the conclusion of the testing a Subject Test Report is generated by the "Intoxilyzer 8000". That report labeled the two (2) samples provided as "subject test 1" and "subject test 2" respectively. The remainder of the defendants that gave samples the Subject Test Report labeled the two (2) samples provided as "subject sample 1" and "subject sample 2".

Mary Martin, the Director for Alcohol Testing, for the Ohio Department of Health,

testified that the Department of Health considers the completed breath test of an individual a Subject Test. That to make the terminology more consistent, she, with the authority of the Director of Health, ordered the terminology changed from "Subject Test" to "Subject Sample". Further, that at the end of May, this year, a new Operation Manuel for the "Intoxilyzer 8000" will be available and reflect these changes. The defendants contend that these changes could only be done in accordance with chapter 119 of the Ohio Revise Code. (The Court notes that the last amendment to 3701-53 was in 2009.)

3701-53-02(D) provides "Breath samples using instruments listed under paragraph (B) (Intoxilyzer model 8000) of this rule shall be analyzed according to the operational checklist for the instrument being used and checklist forms recording the results of subject tests shall be retained in accordance with paragraph (A) of rule 3701-53-01 of the Administrative Code. The results shall be recorded on forms prescribed by the director of health."

The Operation Manuel for the "Intoxilyzer 8000" is provided by the Bureau of alcohol and Drug Testing, Ohio Department of Health, see Defendants Exhibit "G". Testimony was adduced that the Operation Manuel required that a Dry Gas Control be preformed prior to and subsequent to a subject being tested. There was no testimony that between breath samples that a Dry Gas Control was required, as the manul does not require one.

Therefore, the Court finds that a Subject Test is the complete test of as individual and as

such a Dry Gas Control is not required between breath samples and further that as Rule 3701-53-01 has given the Director of Health the authority to prescribe forms, therefore, it inherently has given the Director the authority to modify them. The defendants first branch to suppress is denied.

The second issue, branch, raised by the defendants was that an instrument check or certification was not preformed when the machine, "Intoxilyzer 8000", was placed in service at the Ohio State Highway Patrol Post in Cambridge, Ohio. 3701-53-04 (D) provides "An instrument check or certification shall be made in accordance with paragraphs (A) and (C) of this rule when a new evidential breath testing instrument is placed in service or when the instrument is returned after service or repairs, before the instrument is used to test subjects."

Craig Yanni, a Drug and Alcohol testing Inspector with the Ohio Department of Health, testified that he preformed two Instrument Certifications on the "Intoxilyzer 8000", Instrument Serial # 80-004377, see State's Exhibits "1" and "2". The first being on March 17, 2011 and the second on September 19, 2011. The first certification was done at his home and from his home he took the "Intoxilyzer 8000" directly to the Ohio State Highway Patrol Post in Cambridge, Ohio, where he preformed a Diagnostic check on the machine, see State's Exhibit "7". The Court notes that the rule is silent as to where the certification is to occur. The second certification was done at the Ohio State Highway Patrol Post in Cambridge, Ohio as was a Diagnostic check, see State's Exhibit "5". The Court notes that all of the defendants in the

matter were cited and preformed breath tests after September 19, 2011. For the forgoing reasons, the defendants second branch to suppress is denied.

The third issue, branch, raised by the defendants is that the bottle of approved solution used to preform the certification of the machine on March 17, 2011 was used more than three months after its date of first use and was not kept under refrigeration when not being used. Craig Yanni testified that he used a new bottle when he did the certification and then discarded it. There being no evidence to the contrary the defendants third branch to suppress is denied.

The fourth issued, branch, raised by the defendants is that the State has failed to retain the results of the breath tests contrary to Adm. Reg. 3701-53-02(E), which provides: Breath samples using the instrument listed under paragraph (A)(3) of this rule shall be analyzed according to the instrument display for the instrument being used. The results of subject tests shall be retained in a manner prescribed by the director of health and shall be retained in accordance with paragraph (A) of rule 3701-53-01 of the Administrative Code. Craig Yanni and Mary Martin both testified that in fact the State retains the records for a minimum of three years and probably for life.

From the questioning of defense counsel, it appears to the Court that the information on the Ohio Department of Health website, over time, has changed, see Defendants Exhibits "C", "D", "E", and "F". Counsel further contends that the information reported there is evidence. Mary Martin testified that a complete arrest file is not on the internet and the internet information

is not intended as evidence, but only as information, and that the full case information is available at their Reynoldsburg Office. The Court can find no requirement that the Department of Health maintain a website or what information is required to be on it. Therefore, the information, if any, that the Department releases is its choice. For the forgoing reasons, the defendants fourth branch to suppress is denied.

  
JUDGE LUCIEN C. YOUNG, JR.

Copy delivered/handed to:

Jack A. Blakeslee, Attorney for Defendant, 421 West Street, P.O. Box 284, Caldwell, OH 43724

Kelly Riddle, Assistant Prosecuting Attorney, 508 North Street, Caldwell, OH 43724