



IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

STATE OF OHIO,

2012 MAY 11 A CASE NO. CR 556308

Plaintiff,

GERALD D. FIERST
CLERK OF COURT JUDGE BRENDAN J. SHEEHAN
CUYAHOGA COUNTY

v.

PAULETTE WELCH,

Defendant.

**OPINION AND JUDGMENT
ENTRY**

I. ISSUES PRESENTED.

This matter is before the Court on Defendant's Motion to Suppress the results of a breath alcohol test. The Court held an extensive evidentiary hearing on the matter with supplemental briefs filed by both parties.

This case arose on or about November 6, 2011 when Defendant Paulette Welch was involved in motor vehicle collision. The responding officers of the Rocky River Police Department took Welch into custody on suspicion of driving under the influence of alcohol after she failed field sobriety tests. At the police station, they conducted a breath alcohol test using the department's Intoxilyzer 8000 equipment. Defendant seeks to exclude evidence of the breath alcohol test on the grounds that the equipment is allegedly unreliable and that the test was not performed in accordance with applicable regulations.

II. STATUTES AND RULES CONCERNING THE INTOXILYZER 8000

The Ohio General Assembly has legislatively provided for the admission of breath alcohol tests in R.C. 4511.19(D)(1)(b) if analyzed in accordance with methods approved by the Director of Health. The subject equipment, the Intoxilyzer model 8000, is an approved method of

testing breath alcohol pursuant to Ohio Adm. Code 3701-53-02(A)(3). Breath samples using the Intoxilyzer 8000 must be analyzed according to the instrument display for the instrument being used pursuant to Ohio Adm. Code 3701-53-02.

Additionally, Intoxilyzer 8000 checks and controls must conform to the following standards: "[The instrument] 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." Ohio Adm. Code 3701-53-04.

III. RELIABILITY OF THE INTOXILYZER 8000.

Pursuant to R.C. 4511.19, a court "may admit evidence on the concentration of alcohol, drugs of abuse, controlled substances, metabolites of a controlled substance, or a combination of them in the defendant's whole blood, blood serum or plasma, breath, urine, or other bodily substance at the time of the alleged violation as shown by chemical analysis of the substance withdrawn within three hours of the time of the alleged violation." (Emphasis supplied).

The effect of this statute was examined in *State v. Vega*, 12 Ohio St.3d 185, 188-189, 465 N.E.2d 1303, 1306 - 1307 (Ohio 1984) ("*Vega*") wherein the court stated:

Professor McCormick, in addressing statutes similar to R.C. 4511.19, has explained as follows at pages 511 and 513:

"The subjects of standards of proof and testing are now largely controlled by statute[s] * * *. In the process, most of *the original questions as to the general reliability of the tests* and the relation

between blood-alcohol levels and driver impairment *have been answered*, expressly or impliedly, by the legislatures.”

“Under [such] * * * statutes, the questions of relevancy, and to a large extent of weight, of the evidence, *have thus been legislatively resolved*. The presumptions have been upheld by the courts * * * and the prescription for test procedures adopted by the state health agency has been taken as acceptance of the general reliability of such procedures in showing blood-alcohol content.” (Footnotes omitted.) (Emphasis added.)

Appellee's position simply fails to afford the legislative determination that intoxilyzer tests are proper detective devices the respect it deserves. As McCormick so recognized, legislatures, by enacting statutes such as R.C. 4511.19, have legislatively resolved the questions of the reliability and relevancy of intoxilyzer tests. And, as Judge Stephenson stated in *State v. Brockway* (1981), 2 Ohio App.3d 227, 232, 441 N.E.2d 602:

“ * * * [The judiciary must recognize] the necessary legislative determination that breath tests, properly conducted, are reliable irrespective that not all experts wholly agree and that the common law foundational evidence has, for admissibility, been replaced by statute and rule; and that the legislative delegation was to the Director of Health, not the court, the discretionary authority for adoption of appropriate tests and procedures, including breath test devices.”

Id.

The holding in *Vega* has been applied to preclude defendants from generally challenging the reliability of breath alcohol instruments. *State v. Edwards*, 107 Ohio St.3d 169, 176, 837 N.E.2d 752, 758 (Ohio 2005); *City of Lakewood v. Horvath*, 8th Dist. Case No. 75135, 1999 WL 1000521 (1999).

In the absence of an enabling statute, admissibility of breath alcohol test results would be subject to Evid. R. 702 which provides in pertinent part:

(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony

is reliable only if all of the following apply:

- (1) 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;
- (2) The design of the procedure, test, or experiment reliably implements the theory;
- (3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

The test for admissibility of scientific or technical information under Evid. R. 702 was explained at length in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579, 113 S.Ct. 2786 (1993). In *Daubert*, the Court explained that a trial court must determine if the reasoning or methodology underlying the testimony is scientifically valid. As the Court stated:

“Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry.” Green 645. See also C. Hempel, *Philosophy of Natural Science* 49 (1966) (“[T]he statements constituting a scientific explanation must be capable of empirical test”); K. Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* 37 (5th ed. 1989) (“[T]he criterion of the scientific status of a theory is its falsifiability, or refutability, or testability”) (emphasis deleted).

Id. at 593, 113 S.Ct. at 2796-97.

Of specific importance to examining a testing instrument, the court ordinarily should consider the known or potential rate of error and the existence and maintenance of standards controlling the technique's operation. *Id.* at 594, 113 S.Ct. at 2797.

Ordinarily, individual trial courts would conduct *Daubert* hearings on the validity and reliability of the Intoxilyzer 8000 results until sufficient precedent existed to support broad (if not uniform) acceptance. The legislature, however, delegated examination of the validity and

reliability of widely used forensic testing, including breath alcohol testing equipment, to the Director of Health. The effect of this delegation is to centralize and expedite use of methodologies to promote public safety. Challenges to specific technology need not be made in dozens, or hundreds, of cases across the state. Instead, the decision of the Director of Health may be challenged in a single action presenting all of the scientific evidence against a specific type of evidence as an abuse of discretion. To date, the Director of Health's decision to adopt the Intoxilyzer 8000 and to promulgate regulations for its use have not been challenged successfully.

Thus, the effect of the R.C. 4511.19, the applicable regulations and *Vega* is to limit challenges to admissibility of test results in the trial court to issues other than general reliability of the instrument.

IV. EVIDENCE PRESENTED.

Defendant first maintains that the Intoxilyzer 8000 is unreliable because its method of measurement may lead to higher alcohol readings from metabolic alcohols, disparate air volume/breath rates and the potential inclusion of stomach contents for individuals with gastric reflux disorder. Defendant also argues that the apparatus is unreliable because there have been periodic improvements to the operating software and a new version of the Intoxilyzer 8000 instrument is scheduled for release.

Defendant introduced evidence challenging the Intoxilyzer 8000's reliability through the testimony of Dr. Staubus, an expert on various breath alcohol testing instruments. While Dr. Staubus clearly understands the mechanics of breath alcohol instruments, he offered only anecdotal evidence of potential errors in test results. For example, Dr. Staubus personally drank to excess and tested his own blood alcohol using the Intoxilyzer 8000 to demonstrate the effect

of varying breath rates. He rinsed his mouth with mouthwash prior to testing his breath to simulate the results on individuals with gastric reflux disorder.

As interesting as Dr. Staubus' efforts might be, they do not qualify as scientific procedures, tests, or experiments admissible under Evid.R. 702. Absent from Dr. Staubus' tests were protocols to ensure the validity and reliability of his procedures. No control subjects were used, no duplicate testing was performed, no reasonably large number of test subjects was employed. The information presented does not rise to the level of scientific study demonstrating unreliability of the Intoxilyzer 8000 generally or as applied in the individual case at bar. Therefore, even if Dr. Staubus' testimony could be used to challenge the general reliability of the Intoxilyzer 8000 in contravention of *Vega*, the proffered evidence fails to qualify as a scientific study sufficient to do so.

The Court is similarly not persuaded that updates to the Intoxilyzer 8000 software and an impending newer model Intoxilyzer invalidate the current instrument. Following that line of thought to its logical end, no technology could ever be used in a courtroom because all of it, even the proverbial mousetrap, is subject to continued revision over the course of time.

The only argument presented by the defendant that is properly before the Court is that the breath alcohol test was performed improperly. Defendant contends that the police violated test protocol by failing to run a dry gas control test after the first breath sample. The sequence of sample testing performed on Welch was: dry gas control sample—breath sample—breath sample—dry gas control sample. Defendant construes the test protocol to require the following sequence: dry gas control sample—breath sample—*dry gas control sample*—breath sample—dry gas control sample.

Defendant bases this argument on Ohio Adm. Code 3701-53-04 which requires, in part, that the instrument "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)."

Defendant's argument rests on the distinction, or lack thereof, between a "subject test" and a "breath sample". Defendant equates the two concepts and, therefore, construes the test protocol to require an additional dry gas control sample between breath samples.

A plain reading of the applicable regulations shows that "subject test" and "breath sample" are not interchangeable terms. *See generally* Ohio Adm. Code 3701-53-01, 02, 04. A "subject test" is the entire procedure performed on an individual. A "breath sample" is a sample of "deep lung (alveolar) air". Ohio Adm. Code 3701-53-02. A "subject test" may be comprised of more than one "breath sample".

Further, Dr. Wyman testified on behalf of the State of Ohio in this regard. While Dr. Wyman's expertise with the Intoxilyzer 8000 did not rise to the level of Dr. Staubus' experience with the instrument, Dr. Wyman testified about proper scientific protocol. As he explained, the dry gas sample is a control sample of known composition that verifies the instrument's accuracy. Dry gas control samples are analyzed at the beginning and end of each test sequence to document proper operation. Similarly, the second breath sample acts as a check of the instrument's accuracy as well. Only one sample's result, the lower of the two, is used as the subject test result. The other sample serves merely to demonstrate that the apparatus is functioning properly.


Based on the evidence presented, the Court finds no irregularity in the breath alcohol test performed on Welch.

ACCORDINGLY, DEFENDANT'S MOTION TO SUPPRESS IS DENIED.

TRIAL TO COMMENCE AS SCHEDULED ON MAY 21, 2012.

IT IS SO ORDERED.

Dated: 5/15/12


JUDGE BRENDAN J. SHEEHAN

CERTIFICATE OF SERVICE

A copy of the foregoing was sent by regular mail and fax to the following this 15th day of May, 2012:

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