

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

CITY OF CINCINNATI,	:	APPEAL NO. C-080175
Plaintiff-Appellee,	:	TRIAL NO. C-07TRC-28812(B)
vs.	:	<i>JUDGMENT ENTRY.</i>
SHEILA M. GEMPERLE,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar. This judgment entry is not an opinion of the court.¹

Defendant-appellant Sheila M. Gemperle was charged with driving under the influence of alcohol² and with speeding.³ Raising a single assignment of error, Gemperle now challenges the Hamilton County Municipal Court’s denial of her motion to suppress breathalyzer test results. She claims that because the calibration solution for the breathalyzer machine had not been properly refrigerated while being transported to the test site, the test results had not been obtained in substantial compliance with the Ohio Department of Health regulations.

After the trial court denied the motion to suppress, Gemperle entered a plea of no contest to operating a motor vehicle with an impermissible concentration of alcohol per 210 liters of her breath.⁴ In exchange for her plea, the city dismissed the two remaining

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

² See R.C. 4511.19(A)(1)(a) and 4511.19(A)(1)(h).

³ See R.C. 4511.21.

⁴ See 4511.19(A)(1)(h).

charges. The trial court found Gemperle guilty on the breath-test charge and imposed sentence.

Both parties agree that this appeal raises the same issue previously decided by this court in *Cincinnati v. Agin*.⁵ In that case, we held that the four-hour period that the calibration solution had been out of refrigeration while being transported and used was reasonable and “demonstrated at least substantial compliance with Ohio Adm.Code 3701-53-04(C).”⁶ The Ohio Supreme Court has recently declined to review the *Agin* decision, noting that it did not involve any substantial constitutional question.⁷ The assignment of error is overruled on the authority of *Agin*.

Therefore, the trial court’s judgment is affirmed.

Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

SUNDERMANN, P.J., PAINTER and CUNNINGHAM, JJ.

To the Clerk:

Enter upon the Journal of the Court on March 4, 2009

per order of the Court _____.
Presiding Judge

⁵ (Sept. 10, 2008), 1st Dist. No. C-070885.

⁶ Id.

⁷ *Cincinnati v. Agin*, ___ Ohio St.3d ___, 2009-Ohio-278, 900 N.E.2d 199.