

CIRCLEVILLE MUNICIPAL COURT

2011 JUN -2 PM 2: 39

CONNIE HEAL, CLERK
CIRCLEVILLE, OHIO

STATE OF OHIO,

PLAINTIFF,

V.

CASE NO. TRC1100716

HEATHER REID,

DEFENDANT.

STATE OF OHIO

PLAINTIFF,

V.

CASE NO. TRC1007193

ANDREW WIRTH

DEFENDANT.

STATE OF OHIO

PLAINTIFF,

V.

CASE NO. TRC1005965

STEPHEN DAVIS

DEFENDANT.

DECISION AND ENTRY ON MOTION TO SUPPRESS RESULTS
INTOXILYZER 8000

INTRODUCTION

This matter came on before the court on motion to suppress the chemical tests in each of the above matters on the basis that the Intoxilyzer 8000 manufactured by CMI, Inc. is unreliable and inaccurate as an alcohol breath testing mechanism; that it cannot be shown to have been properly calibrated in accordance with Ohio Department of Health (ODH) standards and that in general, the testing was not done in substantial compliance with ODH regulations

The court took testimony on April 11, 2011 on the matter and the state, represented by Gary D. Kenworthy, City Law Director presented the testimony of Mary Martin, Program Administrator for the Ohio Department Health, Drug and Alcohol Administration in support of the State's position that the Intoxilyzer 8000 is an accurate and reliable piece of equipment. The defense was represented by James R. Kingsley, Attorney at Law, who presented the position that the Intoxilyzer 8000 is not accurate and not a reliable piece of equipment for measuring breath for blood alcohol content

Hearing on these cases was set and rescheduled several times because of the State's inability to obtain the testimony of necessary witnesses from ODH and this matter was eventually heard on April 11, 2011. A briefing schedule was adopted thereafter and the parties both have submitted written memorandums as to their respective positions.

This opinion will address each of the above cases individually where necessary for varying factual considerations and together where possible as to the issues common to all three matters.

FINDINGS OF FACT

Defendant Stephen Davis was arrested by the Pickaway County Sheriff's Office for OVI and given a test at the Sheriff's Office by Officer Daniel Thomas of the Circleville Police Department on the Intoxilyzer 8000, Serial No. 80-004305 and tested .112 and .116 four minutes later (a difference of .004). The Intoxilizer 8000 test report for the machine erroneously reported the test to be for Stephen Smith, rather than Stephen Davis, which was explained as a clerical error, when the initial factual information was entered by the operator. Intoxilyzer Serial No. 80-004305 was later taken out of service and replaced by a new machine at the Sheriff's Office, Serial No. 80-003989., although at the time of the hearing, no one explained that change.

Defendant Andrew Wirth was arrested for OVI by the Ohio Highway Patrol and given a test by the arresting trooper, Jerrold March at the Pickaway County Sheriff's Department on the Intoxilyzer 8000, Serial No. 80-003989 and tested .195 and .180 five minutes later (a difference of .015).

Defendant Heather Reid was arrested by the Circleville City Police Department and given a test at the City Station by the arresting officer, Dale Haning on the Intoxilyzer 8000, Serial No. 80-004617 and tested .195 and .176 four minutes later (a difference of .019)

All three of the above breathalyzer machines were calibrated and certified by John Kucmanic from the Ohio Department of Health when the machines were placed in use. At the time of the hearing, Mr. Kucmanic no longer was employed by ODH and he did not testify. Units numbered 80-004617, 80-80-004305, and 80-003989 were certified accordingly on June 14, 2010, August 5, 2010, and October 28, 2010 respectively. The

State introduced Exhibits A, B, and C, which were the Instrument Certification Reports, the individual Subject Test Reports the Lot or Batch Certificates for the instrument check solutions, the Drygaz Certificates of Analysis, the self diagnostic analysis reports, the Certificates of Calibration by CMI, Inc. and the appropriate Guth Laboratories, Inc. certifications for the temperature tests for the wet simulators, all as they related to each machine.

The State's sole witness, Mary Martin testified that she is the Program Administrator for Drug and Alcohol Administration for ODH. She is a licensed attorney in Ohio, who has been trained on the Intoxilyzer 8000 and its certification by ODH personnel. She further testified that she did not take a written examination for her certification and was given her certification card by ODH's director. She now certifies the machines annually and testified that the machine does its own self check before and after each test to determine that it is working correctly. She also stated that ODH does not possess the source code and that she does not know the patent number of the equipment. She could not testify as to who actually made the decision to purchase the Intoxilyzer 8000; who made up the governor's committee that originally reviewed the equipment; or what that committee's recommendation was to the Director of ODH as to the Intoxilyzer 8000.

Ms. Martin testified that any errors in the machine would be transmitted to ODH either weekly or bi-weekly by the operators in the field and that errors would result in an invalid test, including machine shut-down with a Radio Frequency Interference (RFI). She further testified that "If it (the machine in use) is working, it is in proper working order." Operators are instructed that if two of the same errors occur, the machine should

be turned off and ODH should be called. She also stated that she had no records of any malfunctions of any of the machines involved in this hearing and that any repairs or problems with a machine could be found on the ODH website.

This court went to the website and reviewed all three machines considered in this matter and found that at least one of those machines, Sheriff's Department Serial No. 80-004305 was taken out of service and replaced with Serial No. 80-003989. There is no discussion of why 80-004305 was taken out of service and replaced and apparently ODH did not remember replacing the unit.

BACKGROUND OF BREATH TESTING DEVICES

Breath testing equipment has been used by law enforcement in Ohio for decades. The most recent use has been with the BAC Datamaster and to a lesser extent, the Intoxilyzer 5000. In 2009, the Ohio Department of Health approved the Intoxilyzer 8000 and purchased approximately 700 units. Some other states have purchased the same unit and the largest controversy has been the failure of the manufacturer, CMI, Inc. to release the source code for the machine's software. The source code is generally speaking, in its most simplistic terms, the initial computer programming language of the software that runs a particular project. Knowledge of the source code would permit someone knowledgeable of programming to know how particular software does what it says it does or can do.

The defense bar has argued that the source code must be released so that defendants can understand the accuracy and reliability factors of the machine. CMI, Inc. has argued in refusing to release the source code that the information is a trade secret, proprietary in nature, and cannot be released for competition concerns.

Ohio is not the only state to deal with the Intoxilyzer 8000. Tennessee has reviewed the instrument through the agency given the authority to choose and approve breath testing devices, the Tennessee Department of Investigation. That agency conducted testing on three different devices and failed to approve the Intoxilyzer 8000 by saying that it “failed to yield satisfactory results on all accuracy, precision, and performance tests”.

Florida has a history with the machine dating back to 2005 and after considerable litigation, the Florida Supreme Court had the opportunity to reverse two district courts of appeal, the second and third, which had ordered CMI, Inc. to turn over the source code. CMI, Inc. did not do so and appealed the decision to the Florida Supreme Court. That court did not choose to hear the cases and CMI, Inc. currently is under an order by the courts of appeal to turn over the source code for the machines.

Florida assigns the responsibility to oversee the machine to the Florida Department of Law Enforcement (FDLE) in a similar manor as does Ohio to the Department of Health and currently, FDLE is not privy to the source code in Florida any more than ODH is privy to it in Ohio.

Ohio assigns the responsibility of machine selection and approval to the Director of the Ohio Department of Health (ODH). Ohio’s statute, Revised Code Section 3701.143, is as follows:

For purposes of sections 1547.11, 4511.19 and 4511.194 of the Revised Code, the director of health shall determine, or cause to be determined, techniques or methods for chemically analyzing a person’s whole blood, blood serum or plasma, urine, other bodily substance, metabolite of a controlled substance, or combination of them in the person’s whole blood, blood serum, or plasma, urine, breath or other bodily substance. The director shall approve satisfactory techniques or methods, ascertain the qualifications of individuals to conduct such analyses, and issue permits to qualified persons authorizing

them to conduct such analyses. Such permits shall be subject to termination or revocation at the discretion of the director.

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.

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 the prosecution and there is little to no ability to present evidence, depending upon the facts, if the test is in excess of .08 or .17. *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* as to whether the equipment is proper. It is one thing to attack generally the theory behind all breath testing machines and quite another matter to attack a particular machine when the agency adopting that machine cannot explain how that machine works and why it should be considered accurate and reliable.

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. Evid. R. 702 is the gate through which this evidence must pass.

After **Vega**, as pointed out in defendants' brief in this matter, **State v. French**, (1995) 72 Ohio St.3d 446 and **State v. Edwards**, (2005) 107 Ohio St. 3d 169 were decided in the Ohio Supreme Court at which time the court indicated that a defendant at trial may challenge breath test results on grounds other than that the results were illegally obtained because they were obtained in noncompliance with the director's rules. For example, a defendant may argue at trial that the particular device failed to operate properly at the time of testing. The inference in these two cases is that evidence of a particular machine's operational abilities would be admissible as relevant in an OVI case.

Looming in the background of this case consideration is **Daubert v. Merrill Dow Pharmaceuticals** (1993) 509 U.S. 579 which made the courts, the gatekeepers of scientific evidence. In **Daubert**, the US Supreme Court indicated that the courts' responsibility in reviewing evidence of a scientific nature is to make a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology can be applied to the facts in issue.

In the case at hand, the court heard testimony about a breath testing device which has heretofore not been used and has no substantial track record in Ohio or Pickaway County. ODH did not, could not, or would not testify as to why it believes the Intoxilyzer 8000 is a reliable machine for testing breath in OVI cases. It would seem that

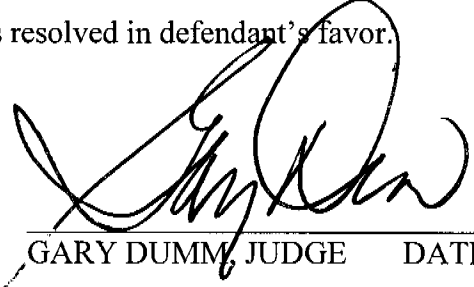
if the Department of Health has been given the task of approving breath testing devices by the legislature, someone of scientific credentialing should at a minimum be able to explain to the people and the courts of Ohio why that person believes a particular piece of equipment is reliable and accurate before the results of that machine are used to convict and punish. The court has an obligation as a gatekeeper of evidentiary concerns to make its own assessment of the accuracy and reliability of the Intoxilyzer 8000 and this court has heard no evidence from ODH to lead it to believe that the machine is accurate and reliable. At a minimum, the court should be able to hear that evidence once, so that it can take judicial notice of the accuracy and reliability of the machine thereafter. As Dale Carnegie once said, “Neither you nor I , nor Einstein nor the Supreme Court of the United States is brilliant enough to reach an intelligent decision on any problem without first getting the facts.”

Before a court can take judicial notice of the accuracy and reliability of 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 evidentiary rules of Ohio.

Having heard the testimony presented in the above cases, the court finds that the Intoxilyzer 8000 has 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. This is not an indictment of all breath testing devices, but rather is a focus on one particular piece of equipment, the Intoxilyzer 8000.

The court therefore orders that the test results in the within cases are held inadmissible for trial purposes and until such time as ODH can present testimony of the scientific principles that support its use and insure the accuracy and reliability of the instrument, all future tests on the Intoxilyzer 8000 will be inadmissible.

In addition to the above, the machine used in Mr. Davis' case, Serial No. 80-004305, which was replaced without explanation by ODH is additionally ordered inadmissible for trial purposes on the basis that it cannot be shown to be reliable, since it was removed and replaced for an unknown reason and any question regarding the machine's proper functioning at the time is resolved in defendant's favor.


GARY DUMM, JUDGE DATE 6/2/21
1438 hrs.

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

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