

IN THE MUNICIPAL COURT OF CHILLICOTHE, OHIO

CITY OF CHILLICOTHE,

PLAINTIFF,

CASE NO. TRC 12 01500 A-C

-VS-

JUDGE EDDY

LEO GLATTING,

ENTRY

DEFENDANT.

This case came before the Court for hearing on June 4, 2012, on Defendant's Motion to Suppress filed April 13, 2012. Defendant was present with his attorney James Boulger. The State of Ohio was present and represented by Assistant Law Director Michele Rout.

When filing a motion to suppress, a defendant must state with particularity the grounds upon which the motion is made as well as the relief sought. Crim. R. 47. The parties advised the Court that they wished to present the underlying issue in this case by way of stipulation, with agreement that the Court could consider the testimony provided by the State of Ohio in two separate matters, those being *State v. Dix* (Chillicothe Municipal Court case no. TRC 1200758) and *State v. Smith* (Chillicothe Municipal Court case no. TRC 1102988). The Court considers the Exhibits admitted by way of those hearings to also be before the Court for consideration.

As stated in the stipulations file stamped June 8, 2012, there are two issues before the Court: 1) the admissibility of a document regarding the dry gas canister and 2) if the document is admissible, whether the document constitutes competent evidence to support a finding that the State has complied with the requirement set forth in the Administrative Code challenged in the motion. In the instant case, the parties filed stipulations for the Court's consideration. Based on the stipulations, and the testimony and referenced exhibits from previous hearings in *State v. Smith* and

State v. Dix, the issue currently presented is limited to the admissibility of a one-page document identified as State's Exhibit D in the *Smith* case and as State's Exhibit A in the *Dix* case.

That document is titled "Certificate of Analysis, EBS - Ethanol Breath Standard" with a test date of March 1, 2011; it will hereafter be referred to as "the Document." The Court finds that the Document is admissible. Furthermore, the Court finds that the State has established substantial compliance with OAC 3701-53-04(B).

Michael Quinn, a representative of the Ohio Department of Health (ODH) testified in a hearing on a motion to suppress in *State v. Smith* on February 8, 2012. Judge Thomas Bunch presided over that hearing by assignment. The Document is provided by the manufacturer to show the accuracy of the dry gas. (Smith tran. p. 8) The document is kept in the ordinary course of business for ODH. (Smith tran. pp. 8, 12, 15) Judge Bunch reviewed the original document and determined that it had a raised seal and an ink certification on the back. (Smith tran. p. 8)

The Document admitted as evidence at the *Smith* hearing contains an ink certification on the back which reads as follows: "I certify that this is a true and accurate copy, kept in the ordinary course of business, of the original on file at the Ohio Department of Health." It is signed by Mary K. Martin, dated January 10, 2012, and sworn before Beverly S. Adams.

The Document indicates a BAC figure of 0.100. It further provides that the reference standard is NIST Traceable Standards, with certification traceable to N.I.S.T. NTRM Ethanol standards.

The BAC figure contained on the Document is the target value for the dry gas tank. (Smith tran. p. 13) In this instance, the target value for the dry gas tank is 0.100 as evidenced by inspection of the Document. The Document is the certificate kept to indicate the gas was tested and met NIST

standards by the manufacturer. (Smith tran. p. 15)

Beverly Adams, a management analyst supervisor II with ODH testified in *State v. Dix* on May 7, 2012, in a motion to suppress hearing. Judge Street presided over that hearing. As part of her duties, Ms. Adams is keeper of the records (Dix tran. p. 5), including the records of certification received from Airgas with respect to the dry gas solution or tanks. (Dix tran. p. 6) Ms. Adams went on to testify that certified copies of the Certificate of Analysis for the tanks of dry gas are received with the tanks; a certified copy of the same document is also received by mail. (Dix tran. p. 6) Ms. Adams produced the certified copy of the certificate from Airgas at the May 7, 2012 hearing. (Dix tran. p. 6) A copy of the Document was marked Exhibit A in *Dix*, and introduced by the State. (Dix tran. p. 7) The tanks are purchased from Intoximeters, Inc. (Dix tran. p. 8)

John F. Wyman, Ph. D., also testified in *Smith*.

1. The Certificate of Analysis is admissible for consideration with respect to Defendant's motion to suppress.

"Judicial officials at suppression hearings may rely on hearsay and other evidence to determine whether alcohol test results were obtained in compliance with methods approved by the Director of Health, even though that evidence may not be admissible at trial." *State v. Edwards*, 107 Ohio St.3d 169, 2005-Ohio-6180, 837 N.E.2d 752, paragraph two of the syllabus; *State v. Welch*, 4th Dist. No. 07CA840, 2008-Ohio-675, ¶12.

In *Edwards*, the defendant filed a motion to suppress the results of a breathalyzer test. The state introduced a photocopy of a certificate of approval by the Director of Health of an alcohol solution. The defendant objected to the introduction of the document, asserting that it was not authenticated. The prosecutor then produced a document described as the original test-solution

certificate; that document, however, was also a photocopy. The Supreme Court held that the trial court may rely on hearsay and other evidence at suppression hearings. *Edwards*, 107 Ohio St.3d 169 at ¶14.

In the case before this Court, there is no evidence that the Document has been altered from the original certificate. *Edwards*, 107 Ohio St.3d 169 at ¶18. There was no evidence submitted that the Document was otherwise unreliable. *Edwards*, 107 Ohio St.3d 169 at ¶18. In fact, Judge Bunch found the Document “inherently reliable.” (Smith tran. p. 19) The Document reviewed by Judge Bunch in *Smith* contained a raised seal and an ink certification on the back. (Smith tran. p. 8) Moreover, Dr. Wyman testified that it is common practice to rely on documents that express values in compliance with established standards in various scientific settings. (Dix tran. pp. 26-27)

The Court, therefore, finds that the Certificate of Analysis at issue herein is admissible for the Court’s consideration regarding Defendant’s motion to suppress.

2. The State has established substantial compliance with OAC 3701-53-04(B).

The Ohio Administrative Code sets forth certain regulations that must be adhered to for purposes of ensuring that breath testing instruments are performing properly. In this case, the Court must address compliance with OAC 3701-53-04(B), which reads as follows:

“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 (0.0005) 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.”

Unquestionably, this provision addresses a procedure applicable to the Intoxilyzer 8000, which is the instrument used in Defendant's case. Furthermore, Defendant's motion to suppress does not challenge whether a dry gas control test was conducted before and after Defendant's test. Rather, Defendant challenges whether the instrument check performed at the time of the instrument certification used a dry gas standard traceable to the NIST.

As noted previously herein, the Document is admissible regarding Defendant's Motion to Suppress and is admitted for consideration by the Court.

The testimony of Mr. Quinn in *Smith* establishes that the BAC figure displayed on the Certificate of Analysis is the "target value" used during the instrument certification process. (Smith tran. p. 13) In this instance, the target value is 0.100. The Document is the certificate kept to indicate the gas was tested and met NIST standards by the manufacturer. (Smith tran. p. 15)

So long as the dry gas control results are at or within .005 grams per two hundred ten liters of the alcohol concentration on the manufacturer's certificate of analysis for that dry gas standard, the dry gas control results are valid. OAC 3701-53-04(B).

Exhibit B in *Smith* (which was part of Exhibit B in *Dix*) is an Instrument Certification Report. Exhibit B reads that the dry gas standard came from a specific lot number, which matches that contained within the Document. It also reads that the target value for the dry gas standard is 0.100 g/210L. The 0.100 matches that contained within the Document.

Mr. Quinn testified that the 0.100 contained in the Document is the target value.

The Instrument Certification Report (i.e., Exhibit B) shows a dry gas control test was performed at the beginning of the certification process and at the end. The results were 0.099 and 0.100, respectively. Those results are within 0.005 g/210L of the dry gas standard of 0.100 for the dry gas

standard in this case; they are within the range established in OAC 3701-53-04(B).

As stated by the Supreme Court of Ohio, the Ohio Director of Health is tasked with prescribing the regulations to ensure the validity of alcohol test results. *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, 833 N.E.2d 1216, ¶49 (citations omitted). R.C. 3701.143. The evidence before the Court indicates that the State has substantially complied with the regulation challenged by Defendant's motion.

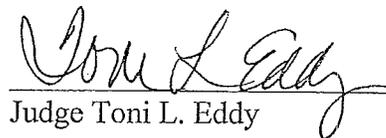
Finally, the Court notes that Defendant's motion and argument seek to challenge the actual *procedures* established by the Director of Health for ensuring calibration of the Intoxilyzer 8000. Those procedures, however, are not subject to review by this Court. Rather, the issue that may be reviewed is limited to *compliance* with the regulations established by the Director of Health. See *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶32, citing *Cincinnati v. Sand*, 43 Ohio St.2d 79, 330 N.E.2d 908 (1975). There is no evidence that the State failed to substantially to comply with OAC 3701-53-04(B).

The Court therefore finds that the State has established substantial compliance with OAC 3701-53-04(B).

DECISION:

Defendant's Motion to Suppress is overruled. The State has established substantial compliance with OAC 3701-53-04(B). This matter shall be scheduled for pretrial pursuant to separate notice. The Clerk is directed to provide a copy of this Decision to counsel for the parties in this case.

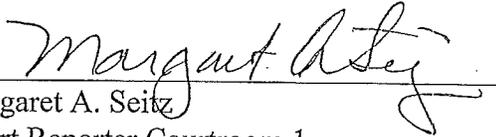
SO ORDERED.



Judge Toni L. Eddy

CERTIFICATE OF SERVICE

A copy of the foregoing Entry was served on all parties of record by placing a copy in the Attorney File Folder in the Clerk's office or mailing a copy by ordinary first class mail postage prepaid on Sept 25, 2012.



Margaret A. Seitz
Court Reporter Courtroom 1