

FILED

MUNICIPAL COURT
CLERMONT COUNTY, OHIO

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STATE OF OHIO,
Plaintiff

:

TIMOTHY D. RUDD
CLERK OF MUNICIPAL COURT
CLERMONT COUNTY, OHIO
CASE NO. 2009TRC14102

vs.

:

JUDGMENT ENTRY

MICHAEL PARLIER,
Defendant

:

:

The defendant's Motion to Suppress came on for consideration by the Court. The State was represented by Christopher Feldhaus. The defendant was represented by attorney Mark Wieczorek.

The Court finds, for the reasons set forth in the written decision of this Court, that the Motion to Suppress is not well-taken.

WHEREFORE, IT IS ORDERED, that the defendant's Motion to Suppress is hereby overruled.

Date: March 5, 2010


James A. Shriver, Judge

MUNICIPAL COURT
CLERMONT COUNTY, OHIO

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STATE OF OHIO,
Plaintiff

CASE NO. 2009 TRC 14102

TIMOTHY R. JUDG
MUNICIPAL COURT
CLERMONT COUNTY, OHIO

vs.

DECISION ON MOTION TO
SUPPRESS

MICHAEL PARLIER,
Defendant

This matter came before the court for hearing on the defendant's Motion to Suppress filed on November 30, 2009. The State was represented by Assistant Clermont County Prosecuting Attorney Christopher Feldhaus. The defendant was represented by attorney Mark Wieczorek. The defendant submits that the result of his breath alcohol content test should be suppressed based upon the State's failure to prove substantial compliance with Ohio Department of Health Regulations. After receiving testimony and exhibits, the Court took the matter under advisement. The defendant filed a written closing argument on December 31, 2009. The State filed its written closing argument on February 10, 2010. The Court now renders the following decision regarding the admissibility of the test results.

The defendant, Michael Parlier, was pulled over for speeding around 2:45 a.m. on July 26, 2009. After having contact with the defendant and observing his demeanor, Ohio State Highway Patrol Trooper Michael Shimko believed he was also in violation of R.C. 4511.19(A)(1)(a) and placed him under arrest. The defendant was taken to the Batavia Post of the Ohio State Highway Patrol where he agreed to submit to a breathalyzer test. The test was

conducted on an Intoxilyzer 8000 machine. The defendant's breath test revealed a breath alcohol content of .161 gram by weight of alcohol per 210 liters of breath. He was charged additionally with a violation of R.C. § 4511.19(A)(1)(d).

Dean Ward, a bureau chief with the Ohio Department of Health, testified at the suppression hearing. Bureau Chief Ward is responsible for evaluating instrumentation such as the Intoxilyzer 8000 before the Department of Health authorizes it for use within the State. His duties include visiting the manufacturers of such instruments to ensure that the instruments are designed in such a way that they can be used in Ohio. Bureau Chief Ward then attends hearings concerning the approval of such instruments for use. Representatives of the Director of Health, comprised of Bureau Chief Ward and his staff, are responsible for certification of each individual Intoxilyzer 8000 instrument before it can be placed into service by a law enforcement agency.

On June 8, 2009, he certified an Intoxilyzer 8000 instrument for the Batavia Post of the Ohio State Highway Patrol before it was placed into service. The Intoxilyzer 8000 instrument contains a dry gas tank which is used for the purpose of certification and control tests. Ward testified that prior to buying dry gas tanks from a manufacturer for use in the certification process, the Department of Health reviews the manufacturer's records to see how the manufacturer operates. The dry gas used in the certification process was manufactured by Calgaz. The Intoxilyzer 8000 used at the Batavia Post of the Ohio State Highway Patrol is identified by the serial number 80-004139. In certifying the Intoxilyzer 8000 with the serial number 80-004139, Dean Ward used dry gas from Lot No. 585219, tank number 09011. Calgaz provided a certificate of analysis to the Department of Health regarding this dry gas, indicating its ethanol content and target value. (State's Exhibit 10.) The certificate of analysis also indicated

that the certification is “traceable to N.I.S.T. RGM ethanol standards.” Dean Ward keeps the certificates supplied by dry gas manufacturers in his files at his office in Reynoldsburg, Ohio. The certificate of analysis was signed by Terry Abbott, presumably a representative of the manufacturer. Terry Abbott was not present at the suppression hearing. Defendant submits that the certificate of analysis should not be considered when ruling on the motion to suppress since it has not been properly authenticated.

In order for the results of a breathalyzer test to be admitted into evidence, the state must demonstrate that it substantially complied with the method approved by the Ohio Department of Health for administration of the test. Defiance v. Kretz (1991), 60 Ohio St.3d 1, 3, 573 N.E.2d 32; State v. Plummer (1986), 22 Ohio St.3d 292, 294, 490 N.E.2d 902; State v. Burnside, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶24. The methods approved by the Department of Health are set forth in the Ohio Administrative Code. After the state has demonstrated substantial compliance with the pertinent regulations, the burden shifts to the defendant to show that he was prejudiced by anything less than complete technical compliance with the regulations. Id.; State v. Way, Butler App. No. CA2008-04-098, 2009-Ohio-96, ¶7; State v. Plunkett, Warren App. No. CA2007-01-012, 2008-Ohio-1014, ¶11.

The Intoxilyzer 8000 is authorized as a breath alcohol test instrument in the State of Ohio pursuant to OAC §3701-53-02(A)(3). Pursuant to OAC §3701-53-04(B), the Intoxilyzer 8000 “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).” The defendant contends that the State has failed to demonstrate substantial compliance with this provision since State’s Exhibit 10, the certificate of analysis,

was not properly authenticated.

A similar issue arose in the case of State v. Edwards, 107 Ohio St.3d 169, 2005-Ohio-6180, 837 N.E.2d 752, with respect to a certificate of approval for an alcohol solution used for “calibration” purposes (sometimes referred to as a batch and bottle certificate). The certificate in question was identified by a trooper as the photocopy of a certificate issued by the Director of Health. The copy did not contain a seal, and there was no statement that the signature on the certificate was genuine. The defendant addressed in length the issue of whether the certificate of approval had been properly authenticated. The Supreme Court of Ohio, however, held that it did not need to resolve the issue of authentication, because “judicial officials at suppression hearings ‘may rely on hearsay and other evidence, even though that evidence would not be admissible at trial.’ ” Id. at ¶14, quoting Maumee v. Weisner (1999), 87 Ohio St.3d 295, 298, 720 N.E.2d 507, and United States v. Raddatz (1980), 447 U.S. 667, 679, 100 S.Ct. 2406, 65 L.Ed.2d 242. The Supreme Court of Ohio found this precedent to be in accord with Evid.R. 101(C)(1) and Evid.R. 104. Evid.R. 101(C) provides as follows: “These rules (other than with respect to privileges) do not apply in the following situations: (1) *Admissibility determinations*. Determinations prerequisite to rulings on the admissibility of evidence when the issue is to be determined by the court under Evid.R. 104.” Evid. R. 104(A) provides in pertinent part that “[p]reliminary questions concerning...the admissibility of evidence shall be determined by the court...In making its determination it is not bound by the rules of evidence except those with respect to privileges.” In light of these authorities, the Supreme Court held that “the magistrate was not precluded from considering the test-solution certificate in photocopy form at the suppression hearing to determine whether the state’s chemical results complied with the director’s regulation even if the

Rules of Evidence governing authentication and hearsay would preclude admission of the certificate at trial.” Edwards at ¶15.

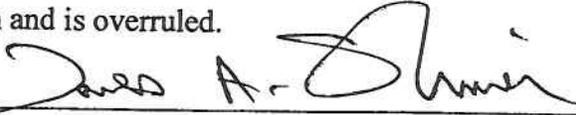
In State v. Stoner, Ottawa App. No. OT-05-042, 2006-Ohio-2122, the defendant claimed on appeal that the trial court committed error by denying suppression of the breath test. The batch and bottle certificate did not contain a seal nor did it contain a statement certifying the director’s signature as genuine. There was no certification from an authorized person at the Department of Health that the copy was correct. The Sixth District Court of Appeals held that the batch and bottle certificate was admissible on the motion to suppress even though the rules on authentication and hearsay would prevent their introduction at trial based on the Edwards holding. The Sixth District Court of Appeals reiterated its Stoner holding in State v. Cook, Wood App. No. WD-04-029, 2006-Ohio-6062.

In light of Edwards and its progeny, this Court concludes that the certificate of analysis can be considered for the purpose of the defendant’s suppression motion regardless of whether the certificate of analysis was properly authenticated. The Court finds no reason to treat the certificate of analysis in this case any differently than the batch and bottle certificates at issue in Edward, Stoner, and Cook.

Considering the evidence contained in State’s Exhibit 10, as well as the testimony of Dean Ward, the Court finds that the dry gas tank installed on the Intoxilyzer 8000 used at the Batavia Post of the Ohio State Highway Patrol had a dry gas standard traceable to the national institute of standards and technology (NIST). The Court further finds that the State has demonstrated substantial compliance with Department of Health regulations contained in the Ohio Administrative Code. The defendant’s breath test result is admissible. Accordingly, the

defendant's motion to suppress is not well-taken and is overruled.

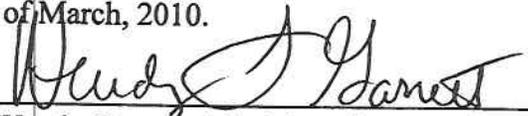
Date: March 5, 2010



James A. Shriver, Judge

CERTIFICATE OF SERVICE

I hereby certify that true copies of the Decision on Motion to Suppress and Judgment Entry were served by hand delivery upon Clermont County Assistant Prosecutor, Christopher Feldhaus, and upon counsel for defendant, Mark Wiczorek, 1014 Vine Street, Suite 2525, Cincinnati, Ohio 45202, on this the 5th day of March, 2010.



Wendy Garrett, Administrative Assistant