

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE CITY OF NORTHVILLE,

Plaintiff-Appellant,

AND WAYNE COUNTY PROSECUTOR,

Amicus Curiae,

v

RICHARD J. ANDREASON,

Defendant-Appellee.

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UNPUBLISHED

November 21, 1997

No. 198474

Wayne Circuit Court

LC No. 96-626413-AV

Before: MacKenzie, P.J., and Sawyer and Neff, JJ.

PER CURIAM.

The people appeal by leave granted a circuit court order affirming the district court's suppression of the results of two Breathalyzer tests given to defendant. We affirm.

I

Defendant was arrested by Northville Police Officer Justin Krueger and taken to the Northville police station for a breathalyzer test. Defendant submitted to two separate tests, each of which revealed a blood alcohol level of 0.17 percent. Defendant was charged with operating a vehicle under the influence of liquor, MCL 257.625(1); MSA 9.2325(1).

Defendant filed a motion to suppress the breathalyzer test results, challenging the foundation for their admission. Specifically, defendant alleged that the proper procedure for administering the test was not followed because the breathalyzer operator, Krueger, did not "observe" defendant for fifteen minutes prior to the test, as required by administrative rule 325.2655(1)(e).<sup>1</sup> The district court granted defendant's motion to suppress and the circuit court affirmed.. Plaintiff appeals.

## II

Breathalyzer test results are admissible as evidence if the prosecution meets four foundational requirements: (1) the operator administering the test is qualified; (2) the proper method or procedure was followed in administering the test; (3) the test was performed within a reasonable time after the arrest; and (4) the testing device was reliable. *People v Schwab*, 173 Mich App 101, 103; 433 NW2d 824 (1987). Failure to meet any of these requirements will preclude the use of the test results. *People v Boughner*, 209 Mich App 397, 398-399; 531 NW2d 746 (1995); *People v Tipolt*, 198 Mich App 44, 46; 497 NW2d 198 (1993).<sup>2</sup> The decision whether a sufficient foundation has been laid for the admission of the evidence is left to the discretion of the trial court. *People v Presesnik*, 219 Mich App 173, 178; 555 NW2d 505 (1996). Absent an abuse of this discretion, we will not disturb the trial court's ruling.

## III

In the present case, Krueger testified that he observed defendant for at least fifteen minutes before administering the breathalyzer test, although at times defendant was only in his peripheral vision. When defendant had to use a restroom, Krueger accompanied defendant, stood two or three feet from defendant, and looked at the profile of defendant's face. While walking to and from the restroom Krueger at times observed only defendant's profile. Krueger admitted that he did not stare fixedly at defendant's mouth for fifteen minutes, but that he did not think that defendant regurgitated.

Apparently satisfied that Krueger's observation of defendant during the trip to the bathroom was sufficient under the administrative rule, the district court focused on the fact that for several periods during the observation period, defendant's face was entirely hidden from Krueger's view. The court determined that, although Krueger visually observed defendant for a majority of the period and could either see him with his peripheral vision or hear him during the remainder of the required observation period, Krueger's observation was insufficient to permit him to detect whether defendant furtively placed something in his mouth or silently regurgitated stomach contents into his mouth. The court also noted that immediately prior to taking the test defendant stated, "I don't feel so good. I can feel something coming up. Hope it's not alcohol" and then had a "wet cough." The court concluded that Krueger did not comply with the administrative rule, and thus suppressed the test results. The circuit court affirmed the district court's order.

## IV

We have carefully reviewed the videotape of defendant and Krueger in the twenty minutes before the breathalyzer test was administered. The videotape reveals that defendant had his back to Krueger for a two-minute period of time immediately prior to the test, during which Krueger prepared the machine and defendant reviewed and signed a written inventory of his personal property. During this time, Krueger did not "observe" defendant as required by administrative rule 325.2655(1)(e)<sup>3</sup>. We find, as did the district court, that plaintiff did not meet its burden to prove that the breathalyzer test was administered in the proper manner. Because the foundation for the admission of the breathalyzer tests results was not established, the trial court properly suppressed the results of the breathalyzer test.

Affirmed.

/s/ Barbara B. MacKenzie

/s/ David H. Sawyer

/s/ Janet T. Neff

<sup>1</sup> This administrative rule provides:

A person may be administered a breath alcohol analysis on an evidential breath alcohol test instrument only after being observed for 15 minutes by the operator before collection of the breath sample, during which period the person shall not have smoked, regurgitated, or placed anything in his or her mouth, except for the mouthpiece associated with the performance of the test. [1994 AACS, R 3256.2655(1)(e).]

<sup>2</sup> The Wayne County Prosecutor, as amicus curiae, urges this Court to hold that the violation of the administrative rule here is insufficient to warrant suppression of the breathalyzer test results. We disagree. The violation at issue here -- the failure to observe defendant for the fifteen minutes before administering the breathalyzer test -- goes to the very purpose of the administrative rules; that is, to ensure the accuracy of the chemical test:

“Although the exclusion of evidence is not necessarily the appropriate remedy for every violation of an administrative rule, when the administrative rules concerning the administration of Breathalyzer tests have not been complied with, the accuracy of those tests is sufficiently questionable so as to preclude the test results from being admitted into evidence.” [*People v Tipolt*, 198 Mich App 44, 46; 497 NW2d 198 (1993).]

<sup>3</sup> We express no opinion as to whether the remainder of Krueger’s actions were sufficient to comply with the administrative rule’s requirement that defendant be “observed for 15 minutes.”