

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

LANA JEAN PERRY,

Defendant-Appellant.

UNPUBLISHED

November 15, 2002

No. 233392

Kalamazoo Circuit Court

LC No. 00-000226-AR

Before: Griffin, P.J., and Gage and Meter, JJ.

MEMORANDUM.

Defendant appeals by leave granted the circuit court order affirming her conviction for operating a motor vehicle with an unlawful body alcohol content. MCL 257.625(1). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, defendant challenges the admissibility of a breath alcohol test when a successful confirming test was not administered.

The admission of chemical test results is authorized by MCL 257.625a(6). To be admissible, the test results must be relevant and reliable. *People v Wager*, 460 Mich 118, 126; 594 NW2d 487 (1999). Suppression of test results is required only when there is a deviation from the administrative rules that calls into question the accuracy of the test. *People v Wujkowski*, 230 Mich App 181, 186-187; 583 NW2d 257 (1998).

The administration of a second breath test is governed by Administrative Rule 325.2655(1)(f), which provides in part:

A second breath alcohol analysis shall be requested from the person being tested and administered, unless the person refuses to give the second sample or a substance is found in the person's mouth subsequent to the first test that could interfere with the test result. Obtaining the first sample is sufficient to meet the requirements for evidentiary purposes prescribed in section 625c of Act No. 300 of the Public Acts of 1949, as amended, being § 257.625c of the Michigan Compiled Laws. The purpose of obtaining a second sample is to confirm the result of the first sample.

In *People v Fosnaugh*, 248 Mich App 444; 639 NW2d 587 (2001), the first breath test administered showed a blood alcohol level above the legal limit, and a second breath test showed an invalid sample. No additional test was administered. This Court found that the invalid sample message showed that the machine detected the presence of mouth alcohol. The invalid sample did not undermine the machine's accuracy. The first sample was admissible, and the lack of a confirming test is relevant only to the weight of the evidence. The operator was not required to perform an additional test after receiving an invalid sample reading. *Id.*, 454.

In accord with *Fosnaugh, supra*, the invalid sample reading reflected the presence of a foreign substance in defendant's mouth. Administrative Rule 325.2655(1)(f) did not mandate that another test be administered. The absence of a confirming test was relevant to the weight of the evidence, and not its admissibility. *Wujkowski, supra*.

Affirmed.

/s/ Richard Allen Griffin
/s/ Hilda R. Gage
/s/ Patrick M. Meter