

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

WILLIAM DOUGLAS PARTON,

Defendant-Appellee.

UNPUBLISHED

September 30, 2004

No. 247464

Livingston Circuit Court

LC No. 02-013268-FH

Before: Borrello, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the order declaring a mistrial. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was arrested after an accident, and consented to a breath alcohol test. The first test returned an invalid sample reading. The officer administered the test again, and received positive results. The trial court denied plaintiff's motion to admit the test results, based on the officer's failure to conduct a second fifteen-minute observation period before administering the second test.

The admission of chemical test results is authorized by MCL 257.625a(6). The statute provides that the test results are admissible and shall be considered with other admissible evidence in determining the defendant's innocence or guilt. MCL 257.625a(6)(d). The clear language of the statute precludes a court from imposing additional requirements on the admissibility of such evidence. *People v Wager*, 460 Mich 118, 122-124; 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. *Id.*, *People v Wujkowski*, 230 Mich App 181, 186-187; 583 NW2d 257 (1998).

Administrative rules state that a person may only be administered a breath alcohol analysis after being observed for fifteen minutes by the operator to assure that the person has not placed anything in his or her mouth except for the mouthpiece. 1994 AACS, R 325.2655(1)(e). The administrative rules do not specifically require another fifteen-minute waiting period if the first sample is invalid. The Michigan Breath Test Operator Training Manual, ch 8, pp 8-9 states that when an invalid sample is reported:

The operator should start a new 15-minute observation period and go through the test procedure again. A blood test shall be requested if “INVALID SAMPLE” is detected again. If the subject refuses, seek a warrant. Failure of the subject to provide this test cannot be regarded as a refusal as the subject did provide a sample, even though “INVALID SAMPLE” was indicated, pursuant to implied consent.

In *People v Fosnaugh*, 248 Mich App 444, 455; 639 NW2d 587 (2001), the Court found that the use of the word “should” in the operation manual is permissive and expresses a desire or request, while the word “shall” is unambiguous and creates an imperative obligation. *Id.*, 455. Although a new observation period was not conducted before the second test, the deputy complied with all mandatory administrative procedures, and the evidence was improperly suppressed. *Id.*, 456.

Although *Fosnaugh* concerned a second test administered after an initial valid test result was obtained, both cases concern the proper procedure to follow when an invalid sample is obtained. Defendant is free to argue that the weight of the evidence was affected by the lack of a second waiting period, but the court erred in suppressing the evidence on that basis. *Wager, supra*.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood