[Cite as *State v. Henry*, 2010-Ohio-5171.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Appellee

v.

Kristopher Henry

Appellant

Court of Appeals No. WD-09-092

Trial Court No. 09TRC04543

DECISION AND JUDGMENT

Decided: October 22, 2010

* * * * *

Matthew L. Reger, Bowling Green Prosecutor, for appellee.

Terrence R. Rudes, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals his conviction in the Bowling Green Municipal Court for operating a motor vehicle with a prohibited alcohol content in violation of R.C. 4511.19(A)(1)(d). For the reasons that follow, we affirm.

{¶ 2} Shortly before 1:00 a.m. on May 28, 2009, an Ohio State Highway Patrol Trooper observed a car driven by appellant, Kristopher W. Henry, going southbound on

U.S. 23 in Wood County. The trooper followed the car for approximately five miles, during which time the trooper would later testify, he observed appellant's car weaving and on five occasions cross the white line on the right side of he road. The trooper activated his overhead lights and stopped appellant near Risingsun.

{¶ 3} When the trooper advised appellant of the reason for the stop, he noted a moderate odor of an alcoholic beverage on appellant's breath and that appellant had glassy eyes. The trooper requested that appellant accompany him to his patrol car. There appellant told the officer that he was on his way home from a bar when he was stopped. Appellant informed the trooper that he had consumed one or two beers that night. When the trooper inquired as to how long appellant had been at the bar, appellant told him he had arrived there at 7:00 p.m.

{¶ 4} At this point the trooper conducted a horizontal gaze nystagmus test upon which appellant scored four of six clues. A portable breath test registered a result of .089 percent alcohol. On the one leg stand field sobriety test, appellant indicated three of four clues. The trooper arrested appellant for operating a vehicle while impaired and transported him to the Bowling Green Police Department.

{¶ 5} In Bowling Green, the trooper advised appellant of the Ohio informed consent law and its consequences by reading him the back of Bureau of Motor Vehicles form 2255. Appellant then submitted to a breath alcohol test on the Bowling Green Police Department's BAC Datamaster machine. The test showed appellant with a breath

alcohol content of .086 of a gram per 210 liters of breath. Appellant was charged with a violation of R.C. 4511.19(A)(1)(a) and (d) and a marked lane violation.

{¶ 6} Appellant pled not guilty and moved to suppress the results of his breath test on ground that (1) Bowling Green police had failed to maintain calibration records for the BAC Datamaster as required by Ohio Health Department regulations, (2) police failed to advise him of the consequences with respect to his commercial driver's license ("CDL") as required by statute, and (3) testimony as to the results of a portable breath test device should not be permitted to establish probable cause for arrest. Following a hearing, the trial court denied appellant's suppression motion and the matter proceeded to trial.

{¶ 7} Before trial, appellant amended his plea to the marked lanes violation from not guilty to no contest. The court accepted the plea and found appellant guilty of the marked lanes violation. Also prior to trial, the state dismissed the R.C. 4511.19(A)(1)(a) charge.

{¶ 8} The matter then proceeded to trial before a jury on the R.C. 4511.19(A)(1)(d) violation only. After trial, the jury deliberated then found appellant guilty as charged. The court sentenced appellant to 180 days in jail, with 170 suspended; $1,625 fine, with $625 suspended; and a five year license suspension, with three years suspended. From this judgment, appellant brings this appeal. Appellant sets forth the following three assignments of error:

{¶ 9} "Assignment of Error I. The court committed prejudicial error in denying the defendant's motion to suppress.

{¶ 10} "Assignment of Error II. Failure to advise a person with a commercial drivers license (CDL) arrested for operating a vehicle impaired (OVI), as required by statute requires the suppression of the breath test.

{¶ 11} "Assignment of Error III. The court committed prejudicial error in allowing testimony of a portable breath test."

I. Substantial Compliance

{¶ 12} "R.C. 4511.19 is a strict liability statute. In R.C. 4511.19(A)(3) [now R.C. 4511.19(A)(1)(d)] the General Assembly defined the point at which an individual can no longer drive without being a substantial danger to himself and others. In determining whether the defendant committed the per se offense, the trier of fact is not required to find that the defendant operated a vehicle while under the influence of alcohol or drugs, but only that the defendant's chemical test reading was at the prescribed level and that the defendant operated a vehicle within the state. The accuracy of the test results is a critical issue in determining a defendant's guilt or innocence." *Defiance v. Kretz* (1991), 60 Ohio St.3d 1, 3.

{¶ 13} Before the results of a breathalyzer test such as those produced by the BAC Datamaster may be introduced into evidence, the state must show that it substantially complied with the rules governing the use of such a device as approved by the Ohio Director of Health and contained in the Ohio Administrative Code. *State v. Mayl*, 106

Ohio St.3d 207, 2005-Ohio-4629, ¶ 48. Ohio Adm. Code 3701-53-04 provides that an evidential breath testing instrument shall be checked no less than every seven days. Such a check shall include a radio frequency interference test and a check against a known value ethyl alcohol solution.

{¶ 14} "An instrument check result is valid when the result of the instrument check is at or within five one-thousandths (0.005) grams per two hundred ten liters of the target value for that approved solution. An instrument check result which is outside the range specified in this paragraph shall be confirmed by the senior operator using another bottle of approved solution. If this instrument check result is also out of range, the instrument shall not be used until the instrument is serviced or repaired." Ohio Adm. Code 3701-53-04(A)(2). The results of such checks must be retained for a minimum period of three years. Ohio Adm. Code 3701-53-04(G); Ohio Adm. Code 3701-53-01(A).

{¶ 15} In the suppression hearing in this matter, the Bowling Green Police officer responsible for maintaining the department's BAC Datamaster presented testimony and documentation that the machine used for appellant's test was checked for accuracy on May 27, 2009, the day before appellant's breath test, and on June 3, 2009, after appellant's breath test. Both tests revealed results within the prescribed tolerances.

{¶ 16} The Bowling Green officer also testified that it was his practice, when a known solution tested out of tolerance, to stop using the solution and make a notation on the back of the solution's certificate that it had been disposed of due to being "no longer

within tolerance." The officer did not retain the printed "evidence slip" from the machine because he did not consider it a "valid" test.

{¶ 17} Appellant characterizes Bowling Green's failure to retain the "evidence slips" as an "intentional destruction of records" and insists that the act of such destruction does not constitute substantial compliance with the health department regulations. The state responds that, at worst, the failure to retain the slips is a de minimus infraction that in no way prejudiced appellant.

{¶ 18} The formulation of what constitutes substantial compliance was articulated in *Mayl*, supra, at ¶ 49:

{¶ 19} "'We are cognizant that if "we were to agree * * * that any deviation whatsoever from the regulation rendered the results of a [test] inadmissible, we would be ignoring the fact that strict compliance is not always realistically or humanly possible." [*State v.*] *Plummer* [1986], 22 Ohio St.3d [292] at 294. Precisely for this reason, we concluded in [*State v*.] *Steele* [(1977), 52 Ohio St.2d 187] that rigid compliance with the Department of Health regulations is not necessary for test results to be admissible. [Id.] at 187, (holding that the failure to observe a driver for a "few seconds" during the 20-minute observation period did not render the test results inadmissible). To avoid usurping a function that the General Assembly has assigned to the Director of Health, however, we must limit the substantial-compliance standard set forth in *Plummer* to excusing only errors that are clearly de minimis. Consistent with this limitation, we have characterized those errors that are excusable under the substantial-compliance standard as 'minor

procedural deviations.'" *State v. Homan* (2000), 89 Ohio St.3d 421, 426, 2000-Ohio-212.' [*State v.*] *Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 34."

{¶ 20} Ohio Adm. Code 3701-53-04 makes no distinction between valid or invalid instrument checks. Consequently, an instrument check that shows a known solution is out of tolerance is one of those documents that should be retained, pursuant to Ohio Adm. Code 3701-53-01(A). Having said that, it is also clear that the practice employed in Bowling Green of noting the date a known solution goes out of tolerance on the back of the solution's certificate provides a defendant with sufficient substitute notice of the event. The practice, then, constitutes a minor procedural deviation and suffices as substantial compliance with the health code.

{¶ 21} Accordingly, appellant's first assignment of error is not well-taken.

II. CDL Warnings

{¶ 22} R.C. 4506.17(A) provides:

{¶ 23} "(A) Any person who holds a commercial driver's license or operates a commercial motor vehicle requiring a commercial driver's license within this state shall be deemed to have given consent to a test or tests of the person's * * * breath, * * * for the purpose of determining the person's alcohol concentration * * *."

{¶ 24} R.C. 4606.17(C) states:

{¶ 25} "(C) A person requested to submit to a test under division (A) of this section shall be advised by the peace officer requesting the test that a refusal to submit to the test will result in the person immediately being placed out-of-service for a period of

twenty-four hours and being disqualified from operating a commercial motor vehicle for a period of not less than one year, and that the person is required to surrender the person's commercial driver's license to the peace officer."

{¶ 26} If one refuses to submit to a test, or the test discloses a blood or breath alcohol concentration of .04 percent, R.C. 4506.17(D) directs the peace officer conducting the test to demand surrender of that person's CDL. The officer is instructed to forward the CDL with a sworn statement of the refusal or prohibited alcohol content to the registrar of motor vehicles. The registrar is then directed to disqualify the CDL holder from driving a commercial vehicle for one year for a first incident or, after one or more previous incidents, "* * * for life or such lesser period as prescribed by rule by the registrar." R.C. 4506.17(E). If a driver is disqualified from holding a CDL, the registrar must immediately notify him or her of the length of the disqualification and advise the driver of the right to request a hearing on the disqualification. R.C. 4506.17(L).

{¶ 27} Appellant was not in a commercial vehicle when arrested. Neither was he advised of the consequences of refusing an alcohol test or unlawful result upon his CDL as required by R.C. 4506.17. Instead, he was read the implied consent warnings mandated by R.C. 4511.192 as stated in the upper portion of BMV form 2255.[1] Appellant insists that such warnings are insufficient and, absent proper statutory notice, the resultant test should be suppressed.

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[1]BMV form 2255 also has an R.C. 4506.17 warning statement to be read "in addition to the above to an offender driving a commercial vehicle," but the arresting officer testified he only read the R.C. 4511.192 warning to appellant.

{¶ 28} Appellee responds that the R.C. 4506.17 warnings only apply when the CDL holder is actually driving a commercial vehicle when stopped. Alternatively, the state argues, even if the R.C. 4506.17 warnings are required of a CDL holder operating his or her personal vehicle, failure to read the warnings does not warrant suppression of the test results. Any remedy flowing from a failure to read the R.C. 4506.17 warnings relates only to the license suspension process, the state insists, and does not involve the criminal proceeding. Moreover, the state maintains, citing *State v. French* (1995), 72 Ohio St.3d 446, 449, suppression is not appropriate because the exclusionary rule only applies to evidence obtained in violation of the constitution, not evidence obtained in violation of a statute.

{¶ 29} In fairness to the highway patrol trooper in this matter, he followed the instructions printed on BMV form 2255, which indicated that the R.C. 4506.17 warnings be read only when the suspect is driving a commercial vehicle. This instruction is not in conformity with the statute. R.C. 4506.17(C) directs that the warnings be issued to, "[a] person requested to submit to a test under division (A) of this section * * *." R.C. 4506.17(A) defines the persons that may be requested to submit to at test as, "[a]ny person who holds a commercial driver's license or operates a commercial motor vehicle requiring a commercial driver's license * * *." By the plain language of the statute, any person holding a CDL should be informed of the R.C. 4506.17 warnings prior to breath testing.

{¶ 30} R.C. 4506.17, like R.C. 4511.191, is an implied consent statute and is essentially civil and administrative in nature. It is, therefore, collateral to any criminal proceeding that may be instituted under R.C. 4511.19. *State v. Tramonte* (Aug. 27, 1993), 6th Dist No. 92-OT-050. With respect to the admissibility of chemical tests in a criminal proceeding, we have held:

{¶ 31} "While the failure to inform a defendant of the consequences of refusal to submit to testing may well preclude the suspension of his license pursuant to R.C. 4511.191 and .193, there is no provision in R.C. 4511.19 that requires compliance with implied consent procedures as a condition of the admissibility of chemical test results in a DUI prosecution." Id.; accord, *State v. O'Neill* (2000), 140 Ohio App.3d 48, 57.

{¶ 32} This reasoning applies to the implied consent warnings contained in R.C. 4506.17 as well. While failure to inform a defendant possessing a commercial driver's license that the consequences of refusing to submit to testing may impact the suspension of his CDL in the administrative proceeding, there is no statutory requirement that requires compliance with implied consent procedures as a prerequisite to the admissibility of the test in a criminal proceeding. Accordingly, appellant's second assignment of error is not well-taken.

III. Portable Breath Test

{¶ 33} In his final assignment of error, appellant insists that the trial court erred in admitting the results of the portable breathalyzer test ("PBT") performed on appellant in the field. According to appellant, such tests have been held in many appellate districts to

be inadmissible, even for purposes of establishing probable cause for arrest. Appellant concedes that when this court addressed the issue in *State v. Masters*, 6th Dist. No. WD-06-045, 2007-Ohio-7100, at ¶ 16, we held, "* * * although a portable breath test may not be accurate enough for a per se violation as under R.C. 4511.19(A)(1)(d), * * * an officer is entitled to consider [its results] in weighing whether there exists probable cause to arrest." Accord, *State v. Coats*, 4th Dist. No. 01CA21, 2002-Ohio-2160.

{¶ 34} We recognize that the appellate districts are not in agreement on the PBT issue and, were the question a determinative issue in this matter, we would be pleased to certify a conflict. It is not a determinative issue here, however.

{¶ 35} Appellant has directed our attention to no authority from any district that holds that the mere mention of portable breathalyzer test results during a suppression hearing mandates that the court ignore other evidence by which an officer may establish probable cause to arrest. *State v. Smith*, 11th Dist. No. 2006-P-0101, 2008-Ohio-3251 (Without consideration of PBT results, field sobriety tests results provided probable cause to arrest.); *State v. Jividen*, 3d Dist. No. 9-05-29, 2006-Ohio-2782, ¶ 17 (There was sufficient evidence to show probable cause to arrest without PBT results.); *State v. Ferguson*, 3d Dist. No. 4-01-34, 2002-Ohio-1763 (Red eyes, slurred speech, swaying from side to side was sufficient to provide probable cause to arrest, even without PBT results.); *State v. Keith*, 5th Dist. No. 02CA01, 2003-Ohio-2354, ¶ 12 (Probable cause to arrest may be established without any field sobriety tests, including the PBT.); *State v. Durenwald*, 163 Ohio App.3d 361, 2005-Ohio-4867, ¶ 42 (PBT inadmissible at trial,

whether the results or refusal to submit.); *Cleveland v. Sanders*, 8th Dist. No. 83073, 2004-Ohio-4473, ¶ 25 (Results of PBT alone are not sufficient to establish probable cause to arrest.); *State v. Delarosa*, 11th Dist. No. 2003-P-0129, 2005-Ohio-3399, ¶ 59 (Trooper's observations established reasonable suspicion without consideration of PBT results.)

{¶ 36} We reiterate our position that the result of a portable breathalyzer test is information that an officer may consider in the totality of the circumstances to determine probable cause to arrest. Nevertheless, in this matter the trooper noted appellant's car weaving, that appellant had a moderate odor of alcohol on his breath, glassy eyes and performed poorly on two field sobriety tests. These circumstances, without the portable breathalyzer test results, are sufficient to determine probable cause to arrest appellant for an OVI violation. As a result, appellant could not have been prejudiced by the introduction of the PBT results at the suppression hearing.

{¶ 37} Accordingly, appellant's third assignment of error is not well-taken.

{¶ 38} On consideration whereof, the judgment of the Bowling Green Municipal Court is affirmed. It is ordered that appellant pay court costs of this appeal, pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.	_______________________ JUDGE
Arlene Singer, J.	
Thomas J. Osowik, P.J. CONCUR.	_______________________ JUDGE
	_______________________ JUDGE

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