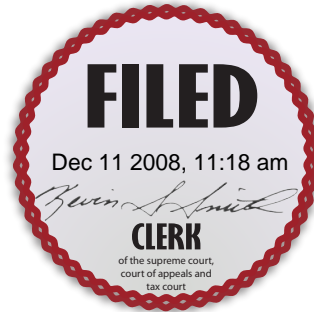


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

STATE OF INDIANA,)
)
 Appellant-Plaintiff,)
)
 vs.) No. 79A05-0804-CR-218
)
 JASON CIOCH,)
)
 Appellee-Defendant.)

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Michael A. Morrissey, Judge
Cause No. 79D06-0712-CM-2168

December 11, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

The State brings this interlocutory appeal following the trial court's suppression of evidence of the result of a breathalyzer test. On appeal, the State raises a single issue, which we restate as whether the trial court abused its discretion when it suppressed the breathalyzer test result printout because it contained an incorrect time of day. Concluding that the State has failed to meet its burden of establishing the foundation for admitting the evidence, we affirm.

Facts and Procedural History

On November 10, 2007, Purdue University Police officers stopped Jason Cioch for a traffic violation. Having probable cause to suspect that Cioch was operating his vehicle while intoxicated, the officers transported him for an alcohol concentration equivalency breath test. Darren Chin, a certified breath test operator, administered the breath test using a B.A.C. DataMaster instrument ("DataMaster"). Prior to administering the breath test, Chin noticed that the time on the DataMaster had not been adjusted for the recent change to Daylight Savings Time and therefore was off by one hour. Chin testified at the suppression hearing that he does not have the ability to change the time on the DataMaster. Chin contacted several other local law enforcement agencies in an unsuccessful attempt to locate a breath test instrument with the correct time. Chin then administered the test and Officer Neal noted in his Incident/Investigation Report the actual time of the breath test as well as the difference between the actual time and the evidence ticket. Both the time noted on the evidence ticket and the actual time of the breath test were within three hours after officers stopped Cioch.

Because the breath test showed Cioch had a breath alcohol concentration equivalent to .08 gram of alcohol per 210 liters of breath, the State charged him with operating while intoxicated in a manner that endangers a person, a Class A misdemeanor, and operating while intoxicated with an alcohol concentration equivalent to at least .08 gram of alcohol but less than .15 gram of alcohol per 210 liters of breath, a Class C misdemeanor. Cioch moved to suppress the evidence of the breath test, and the trial court granted the motion. The State now appeals.

Discussion and Decision

The admissibility of evidence is within the sound discretion of the trial court, and we will not reverse its decision absent a showing of abuse of discretion. Gibson v. State, 777 N.E.2d 87, 89 (Ind. Ct. App. 2002). The State, as the offering party, bears the burden of establishing the foundation for admitting the breath test. State v. Johanson, 695 N.E.2d 965, 967 (Ind. Ct. App. 1998). Results of a breath test are not admissible if the test operator, the test equipment, or the techniques used in the test have not been approved by the director of the State Department of Toxicology. Ind. Code § 9-30-6-5(d). Therefore, the State must set forth the proper procedure and show that the operator followed such procedure. Johanson, 695 N.E.2d at 967.

Chin performed the breath test on a DataMaster. The Indiana Administrative Code sets forth the procedures that must be followed in order to comply with State Department of Toxicology rules. Once the subject has delivered a breath sample, the procedures require the operator to “remove the evidence ticket or report sheet from the printer and check the report printed on the evidence ticket or report sheet for the

numerical ethanol subject sample and correct date and time.” 260 Ind. Admin. Code 1.1-4-8 (“Procedures”). The statute and regulations regarding the administration and admission of breath tests “clearly contemplate strict compliance[,] and there is no indication that this requirement can be circumvented by the introduction of inherently less reliable evidence.” Johanson, 695 N.E.2d at 967.

The State argues that the procedures only require the operator to check the evidence ticket for the correct date and time and are silent as to what course of action the operator should take in the event the date and/or time is wrong, thus allowing the operator to notate the correct time. Cioch on the other hand argues that the operator must strictly comply with the procedures and that the procedures do not authorize the use of outside evidence to support the printed evidence ticket.

In Johanson, we considered a similar situation where the evidence ticket failed to display either the breath alcohol concentration (“BAC”) or the time of the test. The breath test operator then manually entered the BAC, copying it from the breath test instrument’s screen, and time on the evidence ticket. Id. at 966. This court affirmed the suppression of the evidence ticket by the trial court, holding that while the procedures for administering the breath test required the operator to check the print record, they did not include consideration of any other evidence in correcting the print record. Id. at 967. Similarly here, while the procedures require the operator to check the evidence ticket to confirm the BAC and the correct date and time, they are silent as to what steps should be taken in the event an incorrect date or time appears on the evidence ticket.

The State attempts to distinguish this court's decision in Johanson by arguing that nothing about the timestamp affects the accuracy of the breath alcohol concentration analysis. A certified breath test operator is authorized to make adjustments to the breath test instrument so long as they are not related to the calibration of the instrument. 260 Ind. Admin. Code 1.1-2-3. However, Chin testified at the suppression hearing that he does not have the ability to change the timestamp on the instrument. Based on this, we can reasonably conclude that the timestamp must, in some way, affect the calibration of the machine.¹ Additionally, because of the statutorily created presumption that a defendant's BAC at the time of the offense was the same as at the time of testing so long as the breath test was conducted within three hours of the offense, see Ind. Code § 9-30-6-15, an accurate time-stamp is a critical piece of information on the breath test evidence ticket. Under either of these theories, our decision in Johanson applies to this case.

The statute and regulations regarding the administration of the breath test and the admissibility of its results do not expressly contemplate the use of outside evidence to supplement the evidence ticket. The evidence ticket here contains inaccurate information regarding the time of the test. Because the State's outside evidence cannot be used to cure the deficiency, the evidence ticket is not the result of approved techniques for administering the test nor is it an accurate record of the test. Therefore, the trial court did not abuse its discretion in suppressing use of the evidence ticket at trial.

¹ Although we can think of other reasons why the State Department of Toxicology might want to lock out operators from altering the timestamp on the instrument, the State bears the burden of presenting such arguments to establish the admissibility of the evidence. The State has not presented any such arguments. Therefore, we are left to presume that the timestamp bears some relation to the accuracy of the BAC analysis.

Conclusion

The trial court did not abuse its discretion in suppressing the use of the breath test evidence ticket at trial.

Affirmed.

NAJAM, J., and MAY, J., concur.