

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ANTHONY MICHAEL WEST,

Defendant-Appellee.

UNPUBLISHED

March 26, 1999

No. 207894

Ottawa Circuit Court

LC No. 97-020722 AR

Before: O'Connell, P.J., and Jansen and Collins, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the circuit court's order affirming the decision of the district court and granting defendant's motion to suppress Breathalyzer test results. We reverse and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was arrested for operating a motor vehicle under the influence of alcohol/unlawful blood alcohol content, MCL 257.625(1); MSA 9.2325(1). Defendant was told that he had one hour in which to contact an attorney and decide whether he would take a Breathalyzer test. While defendant made telephone calls, Officer Wright, the arresting officer/test administrator, worked on paperwork and observed him from a distance of twenty to thirty feet. When Wright finished his paperwork he began a fifteen minute observation of defendant. Such an observation period is required before a Breathalyzer test can be performed, and is designed to ensure that the suspect does not place anything into his mouth or engage in any action, such as regurgitation, that could affect the accuracy of the test results. 1994 AACS, R 325.2655(1)(e) (Rule 5(1)(e)). At the end of the period, Wright and defendant proceeded to the testing room. Wright turned his back on defendant for a few seconds to retrieve defendant's driver's license. The Breathalyzer tests given to defendant produced results of .16 BAC and .15 BAC.

Defendant moved to suppress the results, arguing that Wright had not observed him for fifteen continuous minutes as required by Rule 5(1)(e). Defendant acknowledged that he did not put anything into his mouth prior to taking the tests, and that he was not claiming that the results were inaccurate due to any action on his part. The district court granted the motion, finding that Wright's observation of defendant from a vantage point some twenty to thirty feet away was not sufficient, and that the observation had not been continuous for fifteen minutes. The circuit court affirmed the district court's

decision, determining that strict compliance with Rule 5(1)(e) was required. We review a trial court's findings of fact regarding a motion to suppress for clear error, and the ultimate decision de novo. *People v Darwich*, 226 Mich App 635, 637; 575 NW2d 44 (1997).

In order for the results of a chemical test of blood to be admitted into evidence, four foundational requirements must be met: (1) it must be shown that the operator was qualified; (2) it must be shown that the proper procedure or method was used when the test was administered; (3) it must be shown that the test was performed within a reasonable time after the arrest; and (4) it must be shown that the testing device was reliable. *People v Schwab*, 173 Mich App 101, 103; 433 NW2d 824 (1988).

Plaintiff argues that the circuit court erred by affirming the district court's decision granting defendant's motion to suppress the Breathalyzer test results. We agree and reverse. In *People v Wujkowski*, 230 Mich App 181; 583 NW2d 257 (1998), we held that a violation of Rule 5(1)(e) does not automatically require suppression of Breathalyzer test results. A violation of the rule that does not affect the accuracy of the test does not warrant suppression of the test results. *Wujkowski, supra* at 187. Here, Wright observed defendant from a distance of twenty to thirty feet for most of the fifteen-minute period. Rule 5(1)(e) does not specify at what distance the observer must be from the suspect. The record does not indicate that Wright could not observe defendant from this vantage point. As Wright and defendant proceeded to the testing room, Wright's observation was interrupted for several seconds while he retrieved defendant's driver's license. Defendant acknowledged that he did not put anything into his mouth during the time Wright's observation was interrupted. Nothing on the record indicates that defendant did anything during the fifteen-minute period, including the brief period in which Wright's attention was diverted, that would call into question the accuracy of the Breathalyzer test results. The hypertechnical violation of Rule 5(1)(e) was harmless error and did not require suppression of the test results in this case. *Wujkowski, supra* at 188.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Jeffrey G. Collins