

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

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| STATE OF OHIO, | : | O P I N I O N |
| Plaintiff-Appellant, | : | |
| - vs - | : | CASE NO. 2012-P-0030 |
| CAYCE R. ROUSE, | : | |
| Defendant-Appellee. | : | |

Criminal Appeal from the Portage County Municipal Court, Ravenna Division, Case No. R 2011 TRC 7113.

Judgment: Reversed and remanded.

Victor V. Viglucci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellant).

Brian L. Coffman, 159 South Main Street, Suite 808, Akron, OH 44308, and *Dan J. Weisenberger*, 121 East Main Street, Ravenna, OH 44266 (For Defendant-Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, the state of Ohio, appeals from the judgment of the Portage County Municipal Court, Ravenna Division, granting the motion to suppress the results of the Intoxilyzer 8000 breath test of appellee, Cayce R. Rouse. At issue is whether the state is required to first produce evidence of a breath test machine’s general reliability as a precondition for admitting breath test results. For the reasons discussed below, we reverse the decision of the trial court and remand the matter for further proceedings.

{¶2} On June 5, 2011, at approximately 2:30 a.m., appellee was stopped and cited for operating a vehicle while intoxicated (“OVI”), in violation of R.C. 4511.19(A)(1)(a) and (A)(1)(d), each misdemeanors of the first degree. Appellee was also cited for lanes of travel, in violation of R.C. 4511.25, a minor misdemeanor. Appellee filed a boilerplate motion to suppress evidence. Later, she filed a motion in limine seeking the exclusion of the results of the breath test based upon the general inaccuracy and unreliability of the Intoxilyzer 8000. In support, appellee relied on a recent decision of the Portage County Municipal Court, *State v. Johnson*, Portage M.C. No. R2011TRC4090.

{¶3} In *Johnson*, the court required the state to produce evidence of the general reliability of the Intoxilyzer 8000. When the state declined to go forward, pursuant to the Ohio Supreme Court’s decision in *State v. Vega*, 12 Ohio St.3d 185 (1984), the court granted the defendant’s motion to suppress. Pursuant to *Johnson*, appellee requested that the court exclude her breath alcohol results if the state declined to produce expert testimony regarding the general reliability of the Intoxilyzer 8000.

{¶4} On March 26, 2012, the matter came on for hearing. At the hearing, the state, relying on *Vega*, maintained appellee could not challenge the general scientific reliability of the Intoxilyzer 8000. The state asserted *Vega* upheld the statutory presumption of reliability accorded the breath tests machines, including the Intoxilyzer 8000. In light of this precedent, the state refused to produce any witnesses regarding the general reliability of the device.

{¶5} The court, following its ruling in *Johnson*, ruled the state’s failure to produce any evidence regarding the reliability of the Intoxilyzer 8000 rendered the

breath results inadmissible. The court consequently granted appellee's motion. This appeal followed.

{¶6} The state asserts two assignments of error for our review; its first assigned error provides:

{¶7} "The relief sought and obtained from Rouse's March 5, 2012 Motion establishes the trial court's March 26, 2012 decision was a ruling on a motion to suppress and therefore automatically appealable by the State."

{¶8} Under this assignment of error, the state contends the underlying order granting appellee's motion to suppress is an appealable order pursuant to Crim.R. 12(K) and R.C. 2945.67(A).

{¶9} We acknowledge that the issue of the reliability of the Intoxilyzer 8000 was raised in a motion in limine filed subsequent to appellee's motion to suppress. A ruling pursuant to a motion in limine is generally considered a tentative and interlocutory ruling to which finality does not attach. See *e.g. State v. Grubb*, 28 Ohio St.3d 199, 201-202. Nevertheless, "[t]he determination of whether a motion is a 'motion to suppress' or a 'motion in limine' does not depend on what it is labeled, it depends on the type of relief it seeks to obtain." *State v. Davidson*, 17 Ohio St.3d 132, 135 (1985).

{¶10} In this case, the motion seeking the exclusion of the results of the Intoxilyzer 8000 requested an order deeming the device unreliable and inadmissible. It therefore sought a judgment that would permanently preclude the state from using the Intoxilyzer 8000's test results at trial. Nothing in the motion indicates the ruling appellee sought was tentative or merely precautionary.

{¶11} Moreover, at the hearing, the court clearly construed the argument regarding the device's reliability as an adjunct argument to appellee's motion to suppress. In its judgment, the court expressly stated that the matter was before it on appellee's motion to suppress which, pursuant to *Johnson, supra*, the court sustained. Appellee did not object to the court's ruling and does not dispute the finality of the order on appeal. Because appellee does not claim the judgment was merely a ruling on a motion in limine and the trial court did not actually treat appellee's reliability argument as a request for a ruling in limine, there is no error on which this court is asked to rule. The state's initial assignment of error rests upon a presumed controversy; as far as this court can discern, however, there are no existing facts to support a claim of error. To the extent this is so, the state's initial assignment of error is moot.

{¶12} For its second assignment of error, the state alleges:

{¶13} "The Portage County Municipal Court erred in permitting a general attack on the scientific reliability of the Intoxilyzer 8000 contrary to Ohio statutes and well-established case law."

{¶14} Under this assignment of error, the state asserts it is not required to produce expert witnesses to convince the municipal court of the general scientific reliability of the Intoxilyzer 8000 as a precondition for admissibility. The state observes the General Assembly delegated this issue to the Ohio Director of Health under to R.C. 3702.143 and R.C. 4511.19(D). Pursuant to this legislative scheme, once the Director approves a device, it is presumptively admissible and a prosecutor is not required to produce evidence of the machine's general reliability. The state underscores this delegation was upheld by the Supreme Court of Ohio in *Vega, supra*. The state

consequently maintains the court below erred in requiring it to produce evidence of the Intoxilyzer 8000's general reliability as a precursor to admitting the machine's results. According to the state, the trial court's decision stands in violation of both statutory and governing case law and therefore the judgment granting appellee's motion must be reversed and the matter remanded.

{¶15} In response, appellee asserts the decision to admit or exclude evidence is a matter solely committed to the judiciary through the rules of evidence and the Ohio Constitution. Because the judiciary has exclusive province to adjudicate the value and admissibility of evidence, appellee asserts the legislature's delegation to the Director of Health to determine the presumptive reliability of breath testing machines violates the doctrine of separation of powers. Appellee additionally contends that *Vega* is inapplicable to this case because current evidentiary rules require courts to assess the reliability of scientific evidence as a prerequisite to admissibility. See Evid.R. 702; *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). And, given these points, appellee contends it is inappropriate and contrary to established statutory and decisional law for a court to take judicial notice of a breath testing device's reliability.

{¶16} With respect to appellee's assertions, we first note that she did not advance the foregoing arguments in her motion to the trial court. Rather, appellee's motion simply challenged the general reliability of the Intoxilyzer. Additionally, the trial court, in its judgment entry, did not specifically utilize any of the legal positions advanced by appellee as justifications for its decision. Rather, the trial court simply "upheld" its previous ruling in *Johnson, supra*, as a basis for sustaining appellee's motion. In *Johnson*, the lower court, acknowledging its role as "gatekeeper" of

admissibility, ruled that admitting the breath test results from the Intoxilyzer 8000, without a hearing to determine the general scientific reliability and admissibility of the breath test results, would be a violation of appellee's due process rights. The *Johnson* ruling did not specifically address or employ any of appellee's particular legal bases to support its decision to sustain Johnson's motion.

{¶17} With these points in mind, the legal theories asserted in appellee's response brief must be construed as additional foundations for affirming the trial court's ruling. The arguments shall therefore be considered as tantamount to cross assignments of error pursuant to R.C. 2505.22. The arguments shall be addressed in a consolidated fashion.

{¶18} Appellee initially contends the legislative delegation combined with the presumption of reliability violates the doctrine of separation of powers. She contends, in effect, that the General Assembly's delegation and statutory presumption functions to usurp the trial court's role as sole constitutional arbiter of evidential value.

{¶19} We first recognize that *Vega* did not specifically address the separation of powers issue; it did, however, acknowledge the deference that must be accorded to the legislature's delegation. The court emphasized:

{¶20} "[The judiciary must recognize] the necessary legislative determination that breath tests, properly conducted, are reliable irrespective that not all experts wholly agree and that the common law foundational evidence has, for admissibility, been replaced by statute and rule; and that the legislative delegation was to the Director of Health, not the court, the discretionary authority for

adoption of appropriate tests and procedures, including breath test devices.” *Id.* at 188-189, quoting *State v. Brockway*, 2 Ohio App.3d 227, 232 (1981).

{¶21} In *Vega*, the court clearly endorsed the legislative delegation of R.C. 3702.143 and the rebuttable presumption of reliability of R.C. 4511.19(D)(1)(b). Moreover, and perhaps more substantively significant, *Vega* specifically states that a defendant is entitled to produce evidence to assail the particular results of the subject test, thereby preserving the trial court’s role as gatekeeper. Because the delegation and the rebuttable presumption do not infringe upon the trial court’s ability to admit or exclude evidence, we find appellant’s argument unpersuasive.

{¶22} Appellee next claims the ruling in *Vega* is inapplicable to this case because it restricts the defense from presenting expert testimony at trial to generally attack a chemical test once the test had already been admitted. In appellant’s view, however, it does not prohibit a pretrial evidentiary hearing under Evid.R. 104 to determine the relevancy and reliability of the evidence to determine admissibility, hearing which, in appellee’s view, is required of Evid.R. 702 and all scientific evidence post-*Daubert*.

{¶23} Ohio Appellate Districts have addressed the specific issue raised by appellee, i.e., whether the state is required to present expert testimony regarding the reliability of breath testing instruments before their results are admissible. In *Dayton v. Futrell*, 2d Dist. No. CA 8615, 1984 Ohio App. LEXIS 11631 (Oct. 26, 1984), the Second District answered this question in the negative, stating:

{¶24} The [Supreme Court in *Vega*] held that the reliability and admissibility of [breath] tests * * * has been legislatively determined and that the accused may not make a general attack upon the reliability and validity of the breath testing instrument. *The judiciary must take notice that such tests, properly conducted, are reliable irrespective of disagreements among experts and that the results of such tests are admissible. Accordingly, judicial notice of this factor dispenses with the necessity for expert testimony by the state in chief for the efficiency of the intoxilyzer machine. Id. at *3-*4.* (Emphasis added.)

{¶25} More recently, the Tenth District, in *State v. Luke*, 10th Dist. No. 05FP-371, 2006-Ohio-2306, rejected appellee's argument. In *Luke*, the defendant filed a motion to suppress the results of his BAC Datamaster breath test. In its entry granting the defendant's motion to suppress, the trial court explained that it was suppressing the test result "pursuant to the court's 'gatekeeper' function, pursuant to *Daubert*[, *supra*.]" In holding that the trial court erred in applying *Daubert* in the context of the defendant's motion to suppress, the Tenth District stated:

{¶26} [T]he General Assembly has legislatively provided for the admission into evidence of alcohol test results, including breath tests, from tests conducted upon those accused of violating R.C. 4511.19, so long as such tests were conducted in accordance with procedures adopted by the Director of the Ohio Department of Health.

{¶27} *This legislative mandate for admissibility obviates the need for trial courts to determine admissibility based upon reliability of the processes and methods underlying the use of breath testing machines. It follows, then, that because the Daubert inquiry involves only determinations as to the reliability of the principles and methods upon which a particular scientific test result is based, the legislative mandate recognized in Vega forestalls the need for any Daubert analysis in cases such as the present one. That is why we agree with the holding of the Fifth Appellate District that, pursuant to Vega, “an attack on the accuracy and credibility of breath test devices in general is prohibited. Therefore, there is no need to determine the reliability of the machine under a Daubert * * * standard.” State v. Birkhold, 5th Dist. No. 01CA104, 2002-Ohio-2464, ¶19. Luke, supra, at ¶23-24. (Emphasis added.)*

{¶28} As discussed above, appellee’s argument that the Intoxilyzer 8000 is unreliable was an attack on the general reliability of a director-approved breath-testing instrument, which is prohibited by Vega. Given the general pronouncements in Vega as well as the ruling in Luke, we maintain a Daubert hearing is unnecessary as it pertains to the general reliability of the Intoxilyzer.

{¶29} For the above reasons, we decline to endorse the arguments asserted under appellee’s cross-assignments of error.

{¶30} Turning to the state’s argument, the lower court sustained appellee’s motion premised upon the state’s failure to produce evidence of the Intoxilyzer 8000’s

general reliability. Under *Vega*, once suitable methods for breath analysis are established by the Director of Health, pursuant to the legislative directive, a statutory presumption of reliability then attaches to the approved testing devices. “Administrative rules enacted pursuant to a specific grant of legislative authority are to be given the force and effect of law.” *Doyle v. Ohio Bureau of Motor Vehicles*, 51 Ohio St.3d 46 (1990), paragraph one of the syllabus. Further, once the Director of Health has promulgated regulations for breath testing instruments, they are to be given the force and effect of law. *State v. Yoder*, 66 Ohio St.3d 515, 519, citing *Doyle, supra*. Thus, Ohio Adm.Code 3701-52-02, which approved the Intoxilyzer 8000 as an evidential breath testing instrument, has the force and effect of law.

{¶31} In the matter below, appellee filed a motion in limine, which was eventually treated as a motion to suppress, which challenged the general reliability of the Intoxilyzer 8000. Although the motion lacked any clear specificity as to what legal or factual bases appellee was challenging, the court granted the motion because the state failed to produce any evidence demonstrating the test results were reliable.

{¶32} First of all, as discussed above, *Vega* prohibits a “*general* attack on the reliability * * * of a breath instrument.” (Emphasis added.) This holding, however, allows for a *specific* challenge to the reliability of the Intoxilyzer 8000. Here, appellee generally questioned “the accuracy and reliability of the 8000.” She thus did not present a specific challenge to the Intoxilyzer 8000, but rather, made a general attack.

{¶33} A motion to suppress must state its legal and factual bases with sufficient particularity to put the prosecutor and the trial court on notice of the issues to be decided. *State v. Perl*, 11th Dist. No. 2006-L-082, 2006-Ohio-6100, ¶15. In *State v.*

Shindler, 70 Ohio St.3d 54 (1994), syllabus, the Supreme Court of Ohio found that the defendant's motion to suppress was sufficient when it "stated with particularity the statutes, regulations and constitutional amendments she alleged were violated, set forth some underlying factual basis to warrant a hearing, and gave the prosecutor and court sufficient notice of the basis of her challenge."

{¶34} Here, appellee's motion to suppress, filed prior to her motion in limine, made a number of specific challenges to procedural aspects of her breath test. These challenges, however, neither directly nor implicitly took issue with the reliability of the Intoxilyzer 8000 itself. And appellee's motion in limine which, as discussed above, was treated by the trial as a supplement to her motion to suppress, provided no legal or factual grounds in support of her challenge. Appellant simply asserted the Intoxilyzer 8000 yielded generally inaccurate and unreliable results. Due to this flaw, the state had no notice of any alleged specific defects of the Intoxilyzer 8000, making it virtually impossible for the prosecutor to defend the motion.

{¶35} Notwithstanding this inherent defect and, despite *Vega's* ruling that an accused may not make a general attack on the reliability of a breath testing instrument, the court sustained the motion. Neither party disputes the Intoxilyzer 8000 was used in this case. And since the legislature determined that the Intoxilyzer 8000 is reliable, it must be presumed the device is reliable. See *Yoder, supra*, at 518 ("[I]n promulgating the regulation, it must be presumed that the Director of Health acted upon adequate investigation * * *. We must defer to the department's authority and we may not substitute our judgment for that of the Director of Health.") Given these points, the state did not have the burden to produce evidence of the machine's reliability as a

predicate for presenting appellee's breath test results. To the contrary, because the instrument is presumed to be a reliable breath testing instrument, appellee had the burden to produce evidence that the Intoxilyzer is not reliable.

{¶36} It is necessary to underscore that, even though a general attack on the reliability of the Intoxilyzer 8000 is prohibited, the statutory presumption is nevertheless rebuttable. The court in *Vega* stated that a defendant may still “notwithstanding the presumption, [establish if he can, that] he was not under the influence of alcohol at the time of his arrest, or that there was something wrong with the test and the results were erroneous.” *Id.* at 189, quoting *Erwin Defense of Drunk Driving Cases* (3 Ed.1971) 26-9, Section 26.03. Thus, upon filing a particularized motion to suppress that triggers the statutory presumption, appellee is still entitled to go forward with evidence that the machine is unreliable.

{¶37} With respect to a judgment granting a motion to suppress, an appellate court reviews a court's application of the law de novo. See *e.g. State v. Holnapy*, 194 Ohio App.3d 444, 2011-Ohio-2995, ¶28 (11th Dist.) By requiring the state to go forward with evidence of the machine's reliability, the trial court disregarded the legal prohibition on general, unparticularized challenges in motions to suppress as well as the legislative presumption of reliability concerning the Intoxilyzer 8000. The trial court therefore erred, as a matter of law, in requiring the state to make this initial showing.

{¶38} We therefore conclude the trial court erred in requiring the state to produce evidence of the Intoxilyzer 8000's general reliability and in granting appellee's motion to suppress. Further, pursuant to these erroneous rulings, the trial court erred in

excluding the results of appellee's breath test with no evidence to overcome the presumptive reliability of the Intoxilyzer's results.

{¶39} In light of *Vega*, as well as the validity of the legislative presumption, once the prosecution has demonstrated an approved breath testing device was used, a defendant may make specific challenges to the reliability of his or her breath test results. In this case, it is undisputed that the Intoxilyzer 8000 is an approved device. On remand, therefore, appellee is entitled, but has the burden of production, to specifically challenge the results of her breath test.

{¶40} The state's second assignment of error is well-taken.

{¶41} For the reasons discussed in this opinion, the judgment of the Portage County Municipal Court, Ravenna Division, is reversed and the matter is remanded for further proceedings.

TIMOTHY P. CANNON, P.J., concurs,

DIANE V. GRENDALL, J., concurs in part, and dissents in part, with a Concurring/Dissenting Opinion.

DIANE V. GRENDALL, J., concurs in part, and dissents in part, with a Concurring/Dissenting Opinion.

{¶42} I concur in the narrow judgment of this court, that, pursuant to R.C. 4511.19(D)(1)(b) and R.C. 3701.143, as interpreted by *State v. Vega*, 12 Ohio St.3d 185, 465 N.E.2d 1303 (1984), a defendant may not challenge the general reliability of the Intoxilyzer 8000 as a testing instrument approved by the Ohio director of health.

{¶43} I disagree, however, with the majority’s assertion that Rouse “did not present a specific challenge to the Intoxilyzer 8000” in her Motion to Suppress Evidence. I further disagree with the majority’s statements that Rouse bears the burden of production in challenging the results of her breath test.

{¶44} The decisions of the Ohio Supreme Court establish the permissible parameters for challenging the results of tests measuring the amount of alcohol in bodily substances.

{¶45} When duly challenged, the State must demonstrate that the bodily substance was “analyzed in accordance with methods approved by the director of health” and “by an individual possessing a valid permit.” R.C. 4511.19(D)(1)(b). The Supreme Court has recognized that “[t]here is no question that the accused may * * * attack the reliability of the specific testing procedure and the qualifications of the operator,” as well as present “expert testimony as to testing procedures at trial going to weight rather than admissibility.” *Vega*, 12 Ohio St.3d at 189, 465 N.E.2d 1303. Thus, “[t]he defendant may still challenge the accuracy of his specific test results, although he may not challenge the general accuracy of the legislatively determined test procedure as a valid scientific means of determining blood alcohol levels.” *State v. Tanner*, 15 Ohio St.3d 1, 6, 472 N.E.2d 689 (1984); *Columbus v. Aleshire*, 187 Ohio App.3d 660, 2010-Ohio-2773, 933 N.E.2d 317, ¶ 27 (10th Dist.) (“while [supreme court precedent] permits evidentiary objections to the test results challenging issues such as competency, admissibility, relevancy, authenticity, and credibility, it does not indicate that a challenge to the ‘general reliability’ is among the permissible challenges”).

{¶46} Accordingly, a trial court still exercises its “gatekeeper” role to regulate the admission of evidence regarding test results, excluding the issue of the instrument’s general reliability and validity. Where the State fails to demonstrate that it followed the procedures set forth by the director of health and/or that the operator was properly qualified, test results may be suppressed. A defendant may also challenge the reliability of the Intoxilyzer 8000 with specific arguments, and the accuracy of his specific test results at trial and with evidence going to the weight accorded to the test results.

{¶47} In the present case, the municipal court excluded the results of the Intoxilyzer 8000 based on the judgment in *State v. Johnson*, Portage County Municipal Court, Ravenna Division, Case No. 2011 TRC 4090, holding that the State was required to introduce evidence of the “general scientific reliability and admissibility of the breath test results from this machine.” Rouse’s Motion to Suppress Evidence, however, did not cite or rely on the *Johnson* judgment.

{¶48} Contrary to the majority’s assertion that Rouse provided the State with “no notice of any alleged specific defects of the Intoxilyzer 8000,” the Motion to Suppress raised the following specific challenges, inter alia, to the admissibility of the breath test results:

8. The individual administering the Defendant’s bodily substance test did not conduct the test in accordance with the time limitation and regulations of the State of Ohio in R.C. 4511.19(D) and the Ohio Department of Health governing such testing and/or analysis, as set forth in chapter 3701-53-02 of the Ohio Administrative Code,

including the operator's checklist instructions issued by the Ohio Department of Health. This includes the mandatory 20 minute observational period prior to any breath test.

9. The samples were not analyzed according to the instrument display for the instrument being used, and the results were not retained in a manner prescribed by the director of health as is required by OAC 3701-53-02.

10. The instrument did not automatically perform a dry gas control test before and after each subject test and instrument certification using a dry gas standard traceable to the national institute of standards and technology as is required by OAC 3701-53-04(B). In the case sub judice, it appears as if there was a dry gas control test before subject test one and after subject test two, but no dry gas control in between. The regulations require that it be done before and after each test; as such, this rule was not complied with.

11. The dry gas control was not at or within five one-thousandths grams per two hundred ten liters of the alcohol concentration on the manufacturer's certificate of analysis for that dry gas standard as is required by OAC 3701-53-04(B).

12. The individual performing the instrument certification was not a "representative of the director," and therefore OAC 3701-53-04(C) and/or 3701-53-07(B) were not complied with.

{¶49} Under the precedents discussed above, these are valid challenges to the admissibility of the breath test results duly raised in a motion to suppress. The State had been put on notice of the legal and factual basis for suppressing the test results.

{¶50} The Ohio Supreme Court has similarly delineated the “burden-shifting procedure to govern the admissibility of alcohol-test results.” *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 24.

{¶51} The defendant must first challenge the validity of the alcohol test by way of a pretrial motion to suppress; failure to file such a motion “waives the requirement on the state to lay a foundation for the admissibility of the test results.” *State v. French* (1995), 72 Ohio St.3d 446, 451, 1995-Ohio-32, 650 N.E.2d 887. After a defendant challenges the validity of test results in a pretrial motion, the state has the burden to show that the test was administered in substantial compliance with the regulations prescribed by the Director of Health. Once the state has satisfied this burden and created a presumption of admissibility, the burden then shifts to the defendant to rebut that presumption by demonstrating that he was prejudiced by anything less than strict compliance. *State v. Brown* (1996), 109 Ohio App.3d 629, 632, 672 N.E.2d 1050. Hence, evidence of prejudice is relevant only after the state demonstrates substantial compliance with the applicable regulation. *Id.*

{¶52} For these reasons, I disagree with the majority’s conclusion that, on remand, Rouse “has the burden of production * * * to specifically challenge the results of

her breath test results.” As demonstrated above, Rouse has already challenged the admissibility of the results with specific factual and legal arguments. On remand, the State bears the burden of showing compliance with regulations prescribed by the Ohio director of health. Moreover, Rouse is also entitled to raise arguments at trial regarding the reliability of her specific test results with respect to the weight of the evidence.