[Cite as *State v. Lentz*, 2010-Ohio-762.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 09 CAC 07 0065
MELISSA LENTZ	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Delaware Municipal Court, Case No. 08TRC15060
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	February 26, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOSEPH E. SCHMANSKY 70 North Union Street Delaware, OH 43015-1939	D. TIMOTHY HUEY 1985 West Henderson Road #208 Columbus, OH 43220

Gwin, P.J.

{¶1} Appellant, Melissa R. Lentz, appeals from the May 11, 2009 judgment of the Delaware County Municipal Court overruling her motion to suppress evidence. Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant was arrested on December 28, 2008 and charged with two counts of Operating a Motor Vehicle While Under the Influence of Alcohol or Drugs ("OVI"), pursuant to R.C. 4511.19(A)(1)(a) and R.C. 4511.19(A)(1)(d). Appellant submitted a breath sample for testing and that sample produced a result of 0.156 grams by weight of alcohol per 210 liters of deep lung breath.[1]

{¶3} On February 26, 2009, Appellant filed a Motion to Suppress and/or Bar the Introduction of Evidence and a Motion to Suppress and Bar the Introduction of the "Results" of Breath Testing. Hearings were held on the motions on March 30, 2009 and May 4, 2009. The primary issues in the hearings was whether the state substantially complied with the Ohio Department of Health Rules relative to the breath testing, breath testing equipment, and documentation required to be maintained.

{¶4} The Trial Court denied the motions to suppress by Judgment Entry filed May 11, 2009.

{¶5} Appellant subsequently entered a no contest plea to the OVI *per se* charge. Appellee dismissed without prejudice the OVI charge alleged pursuant to Section 4511.19(A) (1) (a). Appellant was found guilty of the violation of RC 4511.19(A)

[1] A Statement of the Facts underlying Appellant's conviction is unnecessary to our disposition of this appeal. Any facts needed to clarify the issues addressed in Appellant's assignment of error shall be contained therein

(1) (d) and was sentenced thereon. The sentence of the court was stayed pending appeal.

{¶6} Appellant has timely appealed raising as her sole assignment of error:

{¶7} "I. THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION TO SUPPRESS EVIDENCE CHALLENGING THE STATE'S COMPLIANCE WITH THE OHIO DEPARTMENT OF HEALTH RULES BREATH ALCOHOL TESTING."

I.

{¶8} Appellant appeals the trial court's denial of her motion to suppress.

{¶9} There are three methods of challenging on appeal a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's findings of fact. In reviewing a challenge of this nature, an appellate court must determine whether the findings of fact are against the manifest weight of the evidence. See *State v. Fanning* (1982) 1 Ohio St.3d 19, 437 N.E.2d 583; *State v. Klein* (1991), 73 Ohio App.3d 486, 597 N.E.2d 1141; *State v. Guysinger* (1993), 86 Ohio App.3d 592, 621 N.E.2d 726. Second, an appellant may argue that the trial court failed to apply the appropriate test or correct law to the findings of fact. See *State v. Williams* (1993), 86 Ohio App.3d 37, 619 N.E.2d 1141, overruled on other grounds. Finally, assuming the trial court's findings of fact are not against the manifest weight of the evidence and it has properly identified the law to be applied, an appellant may argue that the trial court incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case.

State v. Curry (1994), 95 Ohio App.3d 93, 96, 641 N.E.2d 1172; *State v. Claytor* (1993), 85 Ohio App.3d 623, 627, 620 N.E .2d 906; and *State v. Guysinger,* supra.

{¶10} Judicial officials at suppression hearings may rely on hearsay and other evidence to determine whether alcohol test results were obtained in compliance with methods approved by the Director of Health, even though that evidence may not be admissible at trial. *State v. Edwards,* 107 Ohio St.3d 169, 2005-Ohio-6180, 837 N.E.2d 752 at paragraph 2 of the syllabus. [Citing Evid.R. 101(C) (1)].

{¶11} The Ohio Supreme Court has held that rigid compliance with ODH regulations is not required as such compliance is not always humanly or realistically possible. *State v. Plummer* (1986), 22 Ohio St.3d 292, 294, 490 N.E.2d 902. See, also, *State v. Morton* (May 10, 1999), Warren App.No. CA98-10-131. Rather, if the state shows substantial compliance with the regulations, absent prejudice to the defendant, alcohol tests results can be admitted in a prosecution under 4511.19. Id*.* In *State v. Burnside* (2003), 100 Ohio St.3d 152, 159, 797 N.E.2d 71, the Ohio Supreme Court limited the substantial-compliance standard set forth in *Plummer* to "excusing only errors that are clearly de minimis." The Court continued: "Consistent with this limitation, we have characterized those errors that are excusable under the substantial-compliance standard as 'minor procedural deviations.' "Id*.,* citing *State v. Homan* (2000), 89 Ohio St.3d 421, 426, 732 N.E.2d 952.

{¶12} The burden to establish substantial compliance, however, only extends to the level with which the defendant takes issue with the legality of the test. *State v. Johnson* (2000), 137 Ohio App.3d 847, 851, 739 N.E.2d 1249; *State v. Crothers,* Clinton App. No. CA2003-08-020, 2004-Ohio-2299, at ¶ 10. When the defendant's motion to

suppress merely raises a generalized claim of inadmissibility and identifies the section(s) of the Administrative Code implicated in that claim, the burden on the state is slight. *State v. Bissaillon,* Greene App. No. 06-CA-130, 2007-Ohio-2349 at ¶ 12; *State v. Williams* (Apr. 24, 1998), Montgomery App. No. 16554; *State v. Embry,* Warren App. No. CA2003-11-110, 2004-Ohio-6324, at ¶ 24 (simply reiterating Administrative Code provisions creates a burden on the State to respond only in general to the issues raised). The State is only required to present general testimony that there was substantial compliance with the requirements of the regulations; specific evidence is not required unless the defendant raises a specific issue in the motion to suppress. Id.*; State v. Bissaillon,* Greene App. No. 06-CA-130, 2007-Ohio-2349, at ¶ 12; *State v. Crotty,* Warren App. No. CA2004-05-051, 2005-Ohio-2923, at ¶ 19.

{¶13} In the case at bar, the motion to suppress filed by appellant on February 26, 2009 merely recites a laundry list of shortcomings by citing the applicable Ohio Administrative Code language and section number and alleging noncompliance with each of them. The motion contains no supporting factual basis.

{¶14} Although appellant's motion to suppress raised several issues regarding the state's compliance with the ODH regulations, on appeal appellant challenges only one. Appellant now contends that the state failed to prove substantial compliance with the record-keeping requirements of Ohio Adm.Code 3701-53-01(A) and 3701-53-04(E). These administrative code sections require service records and results of breath tests, instrument checks, and calibration checks to be kept for at least three years. Appellant does not allege any specific facts indicating that records were not kept as required by

law. Rather, appellant argues that the state failed to prove substantial compliance with these record-keeping provisions.

{¶15} In the case sub judice, Troopers Glascox and Bee testified that they know the records are kept in compliance with the Department of Health's Regulations. (1T. at 24-25; 2T. at 9). Trooper Glascox testified that records are maintained in a sequential manner on site for a period, and then the records are moved to a specific room in the Ohio State Highway Patrol Post in Delaware, Ohio. Further, he testified, that every senior operator at the post is aware of how the records are maintained as well as their location.

{¶16} Because of the very general nature of appellant's motion to suppress, specific evidence in response is not necessary, and general testimony of compliance is sufficient. See Columbus *v. Morrison,* Franklin App. No. 08AP-311, 2008-Ohio-5257; *State v. Cook,* Wood App. No. WD-04-029, 2006-Ohio-6062, at ¶ 31-33 (statement that police officer maintains log books for machine as required by rules and regulations of the Ohio Department of Health sufficient to show substantial compliance with record-keeping regulations); *State v. Hernandez-Rodriguez,* Portage App. No. 2006-P-0121, 2007-Ohio-5200, at ¶ 52-53 (trooper's general testimony of compliance with record-keeping requirements sufficient to defeat motion to suppress); *Crotty* at ¶ 22-28 (finding that State satisfied its burden with officer's testimony that machine was in good working order based upon records).

{¶17} The absence of the records at the patrol post on the date of the Department of Health's inspection in 2008 does not mandate the conclusion that the records were not kept properly. *State v. Deutsch*, Butler App. No. CA2008-03-035,

2008-Ohio-5658 at ¶ 26. This fact, alone, does not prove that the records were never created, kept irregularly, permanently lost, or something of that nature that would establish a tangible violation of Ohio Adm.Code 3701-53-04(E) and 3701-53-01(A). Id.

{¶18} Trooper Glascox admitted that the machine used to test Appellant had not been in the custody and control of the Delaware Post for three years, that they had only had it about eighteen months. He believed they got the machine from the Franklin County jail. It was impossible for records to have been maintained by the Ohio State Highway Patrol for a three-year period on a unit that had only been in use by them for approximately eighteen months. There is no requirement that the record books be admitted into evidence at a hearing on a motion to suppress. *Upper Sandusky v. Salyer,* (June 1, 1987), Wyandot App. No. 16-86-6.

{¶19} We recognize that record keeping, including maintenance and repair records, is important so that defendants may conduct complete and relevant discovery concerning the instrument that was used to conduct their test. However, rigid compliance with the three-year specification in the ODH record-keeping regulation is not required where the records themselves are not shown to be misleading, inaccurate, or incomplete. *State v. Morton* (May 10, 1999), CA98-10-131; State *v. Gerrard* (July 27, 1998), Warren App. No. CA97-10-107.

{¶20} Therefore, substantial compliance with the regulations was established by the state, thereby triggering the presumption of admissibility. Accordingly, the burden shifted to Appellant to rebut such presumption by a showing of prejudice. *State v. Burnside,* supra. It is difficult to imagine how appellant could have been prejudiced. In the case at bar, the evidence showed that the BAC Datamaster was functioning

properly at the time of appellant's test. The evidence also showed that the instrument had been tested and found to be working properly within the regulatory time frame before and after appellant's test. These crucial facts are not affected by a failure to affirmatively establish that records have been kept for three years. In the absence of any indication of misleading or altered records, records for the life of the machine are in substantial compliance with the regulations. See *State v. Plummer* (1986), 22 Ohio St.3d 292, 294, 490 N.E.2d 902. See also, *State v. Morton*, supra; *State v. Gerrard*, supra; *State v. Wetherill,* Tuscarawas App. No. 05AP090062, 2006-Ohio-5687 at ¶ 125. ("While it is correct that the specific three year retention was not stated but only that the records are kept as long as they had the device, we find that the retention for three years is unrelated to the compliance with the testing and the specific time omission, at best, a de minimus aberration".)

{¶21} Appellant's sole assignment of error is overruled.

{¶22} The judgment of the Delaware County Municipal Court is affirmed.

By Gwin, P.J.,

Wise, J., and

Delaney, J., concur

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HON. W. SCOTT GWIN

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HON. JOHN W. WISE

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HON. PATRICIA A. DELANEY

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[Cite as *State v. Lentz*, 2010-Ohio-762.]

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
MELISSA LENTZ	:	
Defendant-Appellant	:	CASE NO. 09 CAC 07 0065

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Delaware County Municipal Court is affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. JOHN W. WISE

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HON. PATRICIA A. DELANEY