

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
JACKSON COUNTY

CITY OF WELLSTON, :
 :
 Plaintiff-Appellee, : Case No. 03CA25
 :
 vs. :
 :
 TAMARA D. BROWN, : DECISION AND JUDGMENT ENTRY
 :
 Defendant-Appellant. :
 : **Released 2/8/05**

APPEARANCES:

James T. Boulger, Chillicothe, Ohio, for Appellant Tamara D. Brown.

Joseph D. Kirby, Jackson, Ohio, for Appellee City of Wellston.

Harsha, J.

{¶ 1} Tamara Brown appeals her convictions for driving under the influence of alcohol and underage consumption of alcohol. Brown contends that the trial court erred in excluding her expert testimony, which challenged the credibility of the breath-alcohol test results. She also contests the court's decision to admit the State's "batch and bottle" affidavit and other derivative documents into evidence in spite of her contention that they did not satisfy the Ohio Rules of Evidence on authentication.

{¶ 2} We agree that the court erred in excluding her expert testimony. The expert opined that the results of the

breath-alcohol test were unreliable because the testing officer failed to wait twenty minutes after receiving two inconclusive samples. The court excluded this testimony on the grounds that it should have been offered during the suppression hearing since it related solely to the admissibility of the results. However, under State v. French, 72 Ohio St.3d 446, 1995-Ohio-32, 650 N.E.2d 887, a defendant can challenge the reliability of breath-alcohol test results at trial under the Rules of Evidence. Therefore, the trial court abused its discretion by not allowing the expert testimony regarding the credibility of the results. But, we conclude that the trial court properly admitted the "batch and bottle" affidavit and related documents because the testifying officer identified and had personal knowledge of those documents. Because we sustain appellant's first assignment of error, we reverse the judgment and remand this matter for a new trial.

{¶ 3} In March 2003, Brown drove a vehicle into a utility pole. When Patrolman Derek Wallace of the Wellston Police Department arrived at the scene, he noted an odor of alcohol coming from Brown and observed several bottles or cans of alcohol in the backseat of the vehicle.

{¶ 4} Patrolman Wallace arrested Brown and transported her to the Wellston Police Department where Sergeant Michael Perkins attempted to administer a BAC Datamaster (breath-

alcohol) test. He administered the first test at 11:13 p.m., but the test resulted in an "invalid sample." Sergeant Perkins administered a second test at 11:16 p.m., but the test again returned an "invalid sample." Finally, he administered a third test at 11:20 p.m. This test registered .152 grams of alcohol per 210 liters of breath. Consequently, the officer charged Brown with, among other charges, driving while under the influence and underage consumption of alcohol. Brown pled not guilty to the charges.

{¶ 5} Brown moved to suppress the results of her breath-alcohol test on the grounds that the testing failed to comply with the Ohio Department of Health Regulations. Specifically, Brown argued that the result "was not obtained after a twenty minute period of observation subsequent to the last previous failed attempt to deliver such specimen as required under Department of Health directives." Brown also cited other regulatory violations and Constitutional reasons for suppressing the test results, none of which are germane to the issues raised on appeal. The trial court was not convinced by any of Brown's arguments and overruled her motion to suppress.

{¶ 6} The case proceeded to a jury trial where Sergeant Perkins testified about his various attempts to administer the breath-test to Brown. He explained that the first two

tests registered invalid because Brown simply "quit blowing" into the machine. After warning Brown that if she continued to stop blowing part way through the test he would "mark it down as a refusal," Brown provided a sufficient and valid sample on the third attempt.

{¶ 7} The defense called Dr. Alfred Staubus, a professor at The Ohio State University College of Pharmacy, who specializes in "the measurement of drugs in the body and the determining of the time course of drugs in the body, including alcohol." The trial court excluded much of Dr. Staubus's testimony from the jury, but the defense proffered his expert opinion that, "in order to generate a reliable reading," Sergeant Perkins should have employed "a new twenty minute waiting period to allow the mouth alcohol to dissipate" before conducting the third breath test on Brown. Dr. Staubus also disagreed with Sergeant Perkins' assertion that the first two tests registered invalid due to Brown's failure to continue blowing during the test.

{¶ 8} At the conclusion of the trial, the jury found Brown guilty of driving while under the influence of alcohol, in violation of Wellston City Code Section 73.01, and underage consumption of alcohol, in violation of Wellston City Code Section 92.10. The trial court entered a judgment of conviction and imposed a partially suspended jail sentence, three years of probation and loss of driving

privileges for a period of two years.

{¶ 9} Brown filed a timely notice of appeal, assigning the following errors: "Assignment of Error No. 1 - The trial court abused its discretion in denying the Defendant an opportunity to present expert testimony concerning the impact of specific circumstances of the testing of the Defendant's breath upon the reliability of the test results. The trial court's action in this regard deprived the Defendant of her right to confront witnesses, her right to compulsory process, her right to substantive and procedural due process and effectively negated her right to jury trial. Assignment of Error No. 2 - The trial court erred to the prejudice of the Defendant in admitting into evidence, over objection, a "batch and bottle affidavit" and derivative documents including the printout of Defendant's breath test in the absence of authentication sufficient under Rules 902 and 1005 of the Ohio Rules of Evidence."

{¶ 10} In her first assignment of error, Brown argues that the trial court erred in excluding the testimony of Dr. Staubus, who disputed the accuracy of the blood-alcohol test results.

{¶ 11} Relevant evidence is admissible unless an Ohio statute, the Ohio or United States Constitution, or a Court Rule establishes a basis for exclusion. Evid.R. 402. Relevant evidence is "evidence having any tendency to make

the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. Generally, the admission or exclusion of relevant evidence rests within the sound discretion of the trial court and its decision to admit or exclude such evidence will not be disturbed absent an abuse of that discretion. State v. Sage (1987), 31 Ohio St.3d 173, 510 N.E.2d 343, paragraph two of the syllabus; State v. Reed (1996), 110 Ohio App.3d 749, 752, 675 N.E.2d 77. An abuse of discretion consists of more than an error of judgment; it connotes an attitude of the trial court that is unreasonable, unconscionable, or arbitrary. State v. Lessin, 67 Ohio St.3d 487, 1993-Ohio-52, 620 N.E.2d 72; Rock v. Cabral (1993), 67 Ohio St.3d 108, 616 N.E.2d 218. When applying the abuse of discretion standard, we are not free to merely substitute our judgment for that of the trial court. In re Jane Doe I (1991), 57 Ohio St.3d 135, 566 N.E.2d 1181, citing Berk v. Matthews (1990), 53 Ohio St.3d 161, 559 N.E.2d 1301.

{¶ 12} In State v. French, 72 Ohio St.3d 446, 449, 1995-Ohio-32, 650 N.E.2d 887, the Ohio Supreme Court held that a defendant must use a motion to suppress in order to contest the admissibility of blood-alcohol test results on foundational grounds that relate to compliance with the directives of the Director of Health. Specifically, if the

defendant contends that the test is not admissible because: (1) the sample was not withdrawn within two hours of the time of the alleged violation; (2) the analysis was not conducted in accordance with methods approved by the Director of Health; or (3) the test was not conducted by a qualified permit holder, the defendant must file a motion to suppress.

French, supra, at paragraph one of the syllabus. Failure to do so or, alternatively, failure to succeed on the merits of the motion will result in admission of the test results without the necessity of the State laying a foundation on these issues. *Id.* The trial court relied on these holdings when it excluded Dr. Staubus's testimony.

{¶ 13} However, French specifically states that a defendant may challenge blood-alcohol test results at trial under the Rules of Evidence. *Id.* at 452. "Evidentiary objections challenging the competency, admissibility, relevancy, authenticity, and credibility of the chemical test results may still be raised." *Id.*

{¶ 14} Having failed in her attempt to render the test results inadmissible through a motion to suppress, Brown sought to attack the credibility of the results through Dr. Staubus's expert testimony. This is precisely what French instructs her to do. In effect, her proffered evidence argues, "while the test is admissible, i.e., it substantially complied with the Department of Health procedures, it's still

not reliable because the officer should have waited before retesting her. Jury, you're entitled to consider it, but my expert says don't give it any credit because it's inaccurate, i.e., unreliable." Specifically, Dr. Staubus opined that the three tests taken in such close proximity to one another would have caused an elevation in the amount of Brown's residual mouth alcohol resulting in a higher measurement of blood-alcohol than was actually present.

{¶ 15} Dr. Staubus's testimony was clearly relevant to the credibility of the test results. Because the State did not object to the testimony on the basis that it failed to quantify the degree of elevation involved, we do not reach the issue of whether such an omission from the proffer renders it inadmissible. Therefore, we conclude that the trial court abused its discretion by refusing to allow Dr. Staubus's testimony. We sustain Brown's first assignment of error.

{¶ 16} In her second assignment of error, Brown argues that the trial court erred by allowing the "batch and bottle" affidavit and other "derivative documents" into evidence because the State failed to comply with the authentication requirements of the Ohio Rules of Evidence. We disagree.

{¶ 17} At trial, Sergeant Perkins testified concerning these documents without objection. Only after the State rested its case and moved for the introduction of the

exhibits did Brown raise any concerns about authentication. By not objecting during the State's case in chief, when any evidentiary problems could have been corrected, we believe that Brown waived any arguable error. See State v. Gordon (1971), 28 Ohio St.2d 45, 276 N.E.2d 243, at paragraph two of the syllabus.

{¶ 18} Assuming arguendo that no waiver occurred, we would find no merit in appellant's argument. In State v. Easter (1991), 75 Ohio App.3d 22, 589 N.E.2d 845, we addressed similar issues and concluded: "The issue posited for our review * * * is whether there was sufficient evidence to authenticate and admit the batch and bottle affidavits below. * * * In State v. Pariscoff (Mar. 13, 1990), Ross App. No. 1513, unreported, 1990 WL 34122, we held that such affidavits could be properly authenticated under Evid.R. 901(B)(1) by testimony from a record keeper at the highway patrol station having personal knowledge of the document having been received and filed with the highway patrol. * * *

* The provisions of Evid.R. 901(A) require only that a proponent of a document produce "evidence sufficient to support a finding that the matter in question" is what the proponent claims it to be. (Emphasis added.) This low threshold standard does not require conclusive proof of authenticity, but only sufficient foundational evidence for the trier of fact to conclude that the document is what its proponent claims it to be. 1 Weissenberger, Ohio Evidence (1991) 4-5, Section 901.2; see, also, Giannelli, Ohio

Evidence Manual (1990) 6, Section 901.01. * * * However, contrary to the arguments of the appellants * * *, personal knowledge of a document's receipt is not the only type of knowledge which will lay a sufficient foundation to authenticate the item. In *Weissenberger*, supra, at 10, Section 901.14, it states that "[a] writing may be authenticated under Rule 901(B)(1) by testimony of a witness with firsthand knowledge of the execution, preparation or custody of the writing." (Emphasis added.) In the cases before us, Trooper Shasteen (*State v. Easter*) and Sgt. Turner (*State v. Alexander*) both gave testimony to the effect that they were responsible for maintaining the records received from the Department of Health. In our opinion, this was sufficient to establish custody of those records and, thus, lay a foundation from which the trier of fact could reasonably find the batch and bottle affidavits to be authentic. * * * [T]he ultimate question facing the trial court is whether the authentication testimony was sufficiently complete that it convinced the court of the improbability of the original item having been exchanged with another or otherwise tampered with. See *United States v. Howard-Arias* (C.A.4, 1982), 679 F.2d 363, 365-366; *United States v. Brewer* (C.A.10, 1980), 630 F.2d 795, 802. * * *

Even assuming, *arguendo*, that the batch and bottle affidavits were not counterpart originals as they were in *Pariscoff*, Evid.R. 1003 allows for admission of duplicates unless there is a "genuine" question as to authenticity or its admission,

in lieu of the original, would be unfair."

{¶ 19} Sergeant Perkins identified the "batch and bottle affidavit" as the document that accompanied the calibration solution he used to calibrate the machine. This testimony shows that the witness had personal knowledge of the receipt of that document. His testimony further reveals that he had personal knowledge of the other "derivative documents" surrounding Brown's breath test. Finally, the record indicates that the defense did not actually question the authenticity or reliability of these documents.

{¶ 20} We find no error in the trial court's decision to admit these documents into evidence. Therefore, we overrule Brown's second assignment of error.

{¶ 21} Having found merit in Brown's first assignment of error, we reverse the trial court's judgment and remand this matter for further action consistent with this opinion.

JUDGMENT REVERSED AND
CAUSE REMANDED.

Abele, J., Dissenting:

I respectfully dissent. For the reasons provided below, I believe that the trial court's judgment of conviction and sentence should be affirmed.

Initially, I note that in the case sub judice the defendant's expert's proffered testimony does not assert that the authorities failed to follow the mandated testing procedures. Rather, the expert attacks the Ohio Department of Health (ODH) regulation regarding the twenty minute waiting and observation period before an operator may conduct a breath alcohol test. In particular, the appellant's expert asserted that if a suspect provides a breath sample, but fails to produce a sufficient amount of breath and, consequently, the device registers an "invalid sample" result (in this case the appellant quit blowing into the machine), the breath testing device's operator should then be required to wait an additional twenty minutes before the suspect is asked to provide another breath sample. The ODH regulations, however, do not require a second waiting period after an invalid sample is registered.

I believe that the expert's opinion in this case directly attacks not the appellant's specific test results, but rather the pertinent ODH regulations. This, in my mind, is akin to an attack on the general reliability of alcohol testing equipment, which is not permitted, rather than a

challenge of the appellant's specific test results (i.e. the testing procedure used to administer the appellant's specific and particular alcohol test result, including the reliability of the specific breath testing device and the specific testing procedures. See State v. Vega (1984), 12 Ohio St.3d 185, 465 N.E.2d 1303. I note that the expert does not argue that the machine malfunctioned, or that the machine's operator failed to follow the proper procedure or otherwise committed some testing procedure error. In fact, the operator did comply with all applicable ODH regulations. Rather, the appellant's expert in the case sub judice argues that the ODH regulations should be changed to reflect his view of this subject.

I again note that a defendant may attack the validity of his or her specific alcohol test result. I do not believe, however, that a defendant's attack may be completely unfettered. While a defendant does generally possess the right to mount a defense to a criminal charge, I believe that the trial court in the instant case did not err by prohibiting this particular expert from offering this particular testimony at trial. What if an expert took the position, in direct opposition to R.C. 4511.19(D)(1), that an accurate measure of a person's breath alcohol content requires that the alcohol test time limit should be one hour (rather than two)? Should a court then permit the expert to

so testify, and then place the onus on the prosecution to call expert witnesses to refute this testimony and to support the rationale behind the statute's two hour test requirement? No. What if an expert witness believes that a twenty minute supervised pre-test waiting period is insufficient and that a valid test result demands a one hour waiting period? Must the prosecution call an expert to refute this assertion regarding the length of a pre-test waiting period? No. What if an expert witness believes that breath and urine tests do not provide reliable and accurate measures of alcohol concentration and that only blood tests should be accepted into evidence? Must the prosecution call expert witnesses to explain and to support R.C. 4511.19 and the ODH regulations that permit breath and urine testing? No. In each of these scenarios an expert's opinion diverges from an applicable statute or regulation on that very topic. With respect to these topics, the expert's opinion should not, in my opinion, be admitted into evidence at trial. I believe that the issue in the instant case falls into the same category. The expert's position in the instant case is, again, akin to a general attack on the reliability of approved breath testing equipment and the companion testing regulations.

I emphasize that I do not dispute the general proposition that statutes and regulations should be subject

to challenge. Rule making bodies are not infallible and the law evolves over time. However, I believe that the trial court's action in the instant case is proper in light of the particular issue that the appellant's expert advanced. The appellant's jury trial is not the proper forum in which this type of argument should be considered.¹

Additionally, I note that the appellant's expert did not attempt to quantify his opinion concerning the variance between the appellant's actual test result (.152) and an alcohol test result performed in the manner that the expert would find to be acceptable. Without this evidence, we cannot speculate whether the variance is slight or substantial. Without some evidence to establish that the variance is substantial, we should not accept the argument that the appellant's alcohol test, in light of her actual breath alcohol concentration, should have been suppressed. I note that in State v. Blazer (1992), Ross App. No. 91CA1806, we held that the defendant failed to establish that her act of ingesting chewing gum during the twenty minute observation period prior to taking an alcohol test, although a violation of the rule, had any measurable effect on her alcohol test result. See, also, Medina v. Koshar (1991), Medina App. No. 1925 (even if the spirit of the

¹ I note that a defendant may present this issue in the context of a suppression motion. Thus, a defendant may raise and preserve this issue for consideration.

twenty minute rule was violated, Koshar has not suggested how gum chewing affected the test result). Thus, without some evidence from the appellant's expert concerning the precise impact on the appellant's alcohol test result, I do not believe that the expert's opinion should be admitted into evidence.

Therefore, in light of the foregoing discussion I believe that the trial court did not abuse its discretion by excluding the expert witness' proffered testimony. Thus, I would affirm the trial court's judgment in toto.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED AND CAUSE REMANDED and that the Appellant recover of Appellee costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Jackson County Municipal Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Ohio Supreme Court an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Ohio Supreme Court in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, P.J.: Dissents with Attached Dissenting Opinion.
Kline, J.: Concurs in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.