

# IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT  
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

LUCAS J. HALL,

Defendant-Appellant.

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## OPINION AND JUDGMENT ENTRY

Case No. 17 CO 0022

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Criminal Appeal from the  
Court of Common Pleas of Columbiana County, Ohio  
Case No. 2015 CR 454

### BEFORE:

Cheryl L. Waite, Gene Donofrio, Kathleen Bartlett, Judges.

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### JUDGMENT:

Affirmed.

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*Atty. Robert Herron*, Columbiana County Prosecutor and  
*Atty. Megan L. Bickerton*, Assistant Prosecuting Attorney  
105 South Market Street, Lisbon, Ohio 44432, for Plaintiff-Appellee

*Atty. Scott R. Cochran*, 19 E. Front Street, Youngstown, Ohio 44503, for Defendant-Appellant.

Dated: December 21, 2018

WAITE, J.

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{¶1} Appellant Lucas J. Hall appeals his two June 16, 2017 convictions in the Columbiana County Common Pleas Court. Appellant appeals his convictions for operating a vehicle under the influence of alcohol or drugs (“OVI”) on the basis that the trial court erroneously denied his motion to suppress/motion in limine which sought to exclude a laboratory report and a policy manual on the grounds that the documents did not comply with Ohio Adm.Code 3701-53-01(A) and 3701-53-06(D). For the reasons provided, Appellant’s arguments are without merit and the judgment of the trial court is affirmed.

#### Factual and Procedural Analysis

{¶2} On October 22, 2015, Ohio State Trooper Judi Bowlen initiated a traffic stop of Appellant’s vehicle. After observing Appellant’s behavior, Trooper Bowlen performed a field sobriety test. Based on Appellant’s performance on the field sobriety test, Trooper Bowlen arrested him.

{¶3} After Appellant’s arrest, the police obtained a urine sample from him which indicated the presence of marijuana. A report prepared by Nicholas J. Baldauf of the Ohio State Patrol Crime Lab found that the sample was “11-nor-9-Carboxy-Tetrahydrocannabinol (Marihuana Metabolite) positive. Results greater than 200 ng/mL.” (9/26/16 Motion Limine/Motion to Suppress, Exh. A.)

{¶4} On February 18, 2016, Appellant was indicted on one count of operating a vehicle under the influence of alcohol or drugs, a felony of the third degree in violation of R.C. 4511.19(A)(1)(a), and one count of operating a vehicle under the influence of alcohol or drugs, a felony of the third degree in violation of R.C. 4511.19(A)(1)(j)(viii)(II).

{¶5} Relevant to this appeal, Appellant filed a motion to suppress/motion in limine challenging both the results of the lab report and an Ohio State Patrol Crime Lab policy manual, which details the procedures for alcohol and drug testing. Appellant argued that the lab report failed to provide the specific amount of marijuana found in his system, and that the policy manual was not certified by the lab director. The trial court bifurcated the issues of the test results and policy manual certification. On December 5, 2016, the trial court denied the motion as to the laboratory report. On March 6, 2017, the trial court also denied Appellant’s motion as to the policy manual certification.

{¶6} On March 17, 2017, Appellant pleaded no contest to both offenses as charged in the complaint. The trial court held a plea hearing in accordance with Crim.R. 11 and the court accepted Appellant’s plea and found him guilty of the offenses. On June 16, 2017, the trial court sentenced Appellant to twenty-four months of incarceration in addition to sixty days of mandatory incarceration. Appellant received two days of jail-time credit. The court also fined Appellant and suspended his driver’s license for three years. The trial court granted Appellant’s motion for a stay of execution of the sentence pending this timely appeal.

#### Standard of Review

{¶7} Both assignments of error stem from the trial court’s denial of Appellant’s motion to suppress/motion in limine. A motion to suppress presents mixed issues of law and fact. *State v. Lake*, 151 Ohio App.3d 378, 2003-Ohio-332, 784 N.E.2d 162, ¶ 12 (7th Dist.), citing *State v. Jedd*, 146 Ohio App.3d 167, 171, 765 N.E.2d 880 (4th Dist.2001). If a trial court’s findings of fact are supported by competent credible

evidence, an appellate court must accept them. *Id.* The court must then determine whether the trial court’s decision met the applicable legal standard. *Id.*

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT  
THE STATE OF OHIO ESTABLISHED SUBSTANTIAL COMPLIANCE  
WITH [Ohio Adm.Code] 3701-53-01(A)(4).

{¶8} Ohio Adm.Code 3701-53-01(A) provides: “Tests to determine the concentration of alcohol may be applied to blood, breath, urine, or other bodily substances. Results shall be expressed as equivalent to: \* \* \* (4) Nanograms by weight of a controlled substances or a metabolite or a controlled substance per milliliter of blood, urine, or other bodily substance.”

{¶9} Appellant argues that the laboratory report failed to state the results as equivalent to nanograms by weight of the metabolite per milliliter of urine as required by Ohio Adm.Code 3701-53-01(A)(4). Hence, Appellant argues that the laboratory report does not qualify as a “result” pursuant to *State v. Gibson*, 4th Dist. No. 04CA2805, 2005-Ohio-5273; *State v. Crace*, 4th Dist. No. 04CA2801, 2005-Ohio-5274; and *State v. Markin*, 149 Ohio App.3d 274, 2002-Ohio-4326, 776 N.E.2d 1163 (10th Dist.).

{¶10} Although Appellant’s exact and specific result is not provided, the state argues that the results substantially comply with the regulation, as a test result showing “greater than 200 nanograms per milliliter” is a quantified amount of marijuana metabolite per milliliter of urine. The state also urges the cases cited by Appellant are inapplicable, as those cases involved failed calibration tests, not actual test results.

{¶11} In order to challenge compliance with an Ohio Adm.Code regulation, a defendant must file a motion to suppress. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 24. Once the motion is filed, the state holds the burden of demonstrating substantial compliance with the regulation. *Id.* A showing of substantial compliance creates a presumption of admissibility. *Id.* The burden then shifts to the defendant to demonstrate prejudice by anything less than strict compliance. *Id.*

{¶12} The Ohio Supreme Court has held that strict compliance with Ohio Adm.Code regulations is not always realistic or possible. *Burnside, supra*, at ¶ 34, citing *State v. Plummer*, 22 Ohio St.3d 292, 490 N.E.2d 902 (1986). Thus, “rigid compliance with the Department of Health regulations is not necessary for test results to be admissible.” *Burnside* at ¶ 34. This is why only substantial compliance with the Ohio Adm.Code regulations is sufficient. *Id.* The *Burnside* Court explained that substantial compliance excuses errors that are “*de minimus*,” meaning “minor procedural deviations.” *Id.*, citing *State v. Homan*, 89 Ohio St.3d 421, 426, 732 N.E.2d 952 (2000).

{¶13} The state concedes that the test results do not strictly comply with Ohio Adm.Code 3701-53-01(A)(4). The issue, here, is whether the test results substantially complied with the regulation. There is no caselaw directly on point. The cases cited by Appellant address whether a failed deep lung breathalyzer calibration test result is a “result” for purposes of Ohio Adm.Code 3701-53-01(A)(2). As this question is not before us, these provide no guidance, here. See *Gibson, supra*; *Crace, supra*; *Markin, supra*. In denying Appellant’s motion, the trial court relied on *State v. Topolosky*, 10th Dist. No. 15AP-211, 2015-Ohio-4963. In *Topolosky*, the court relied on the exact circumstance before us in the present matter: “[a] tested marijuana metabolite level in

excess of 200 nanograms per milliliter gave rise to the lead charge of OVI per se.” *Id.* at ¶ 3. However, the appellant in *Topolosky* did not challenge the lack of a specific result as an assignment of error. Thus, *Topolosky* also provides little guidance, here.

{¶14} The report at issue states: “Results as confirmed by Gas Chromatography/Mass Spectroscopy: 11-nor-9-Carboxy-Tetrahydrocannabinol (Marihuana Metabolite) positive. Results greater than 200 ng/mL. \* \* \* 4511.19 A1 (j)(viii)(II) is to be cited if the concentration of marihuana metabolite in the person’s urine is thirty five nanograms per milliliter (35 ng/ml) or greater.” Appellant correctly points out that the report does not specify the exact amount of marijuana metabolite in Appellant’s sample, thus does not appear to strictly comply with Ohio Adm.Code 3701-53-01(A)(4).

{¶15} Unfortunately, this Court was not provided a complete record of the trial court proceedings. Both parties acknowledge that Appellant was given a CD that, according to the state, provided Appellant’s exact result. Appellant does not dispute the existence of this CD. However, as the record is devoid of any evidence other than the lab report showing that Appellant had a result over the statutory threshold, the existence of other relevant evidence is inconsequential to our review.

{¶16} While we acknowledge in a perfect world the best case scenario would be to provide every defendant with a specific result, it is clear that Ohio law allows for substantial compliance with Ohio Adm.Code regulations. The caselaw involving substantial compliance appears currently limited to cases involving compliance with actual testing procedures. See *Burnside, supra* (state did not substantially comply with Ohio Adm.Code regulation when it failed to use a solid anticoagulant when drawing the

defendant's blood as required by Ohio Adm.Code 3701-53-05(C)); *State v. Baker*, 146 Ohio St.3d 456, 2016-Ohio-451, 58 N.E.3d 1114 (the failure to refrigerate blood specimen for a period of four hours and ten minutes before placing it in transit for analysis was a *de minimis* error. The relevant Ohio Adm.Code regulation requires refrigeration while a sample is not in transit or under examination); *State v. Akers*, 4th Dist. No. 06CA22, 2007-Ohio-1684 (the failure to perform a second test after a breathalyzer machine malfunctioned was not a *de minimus* error.)

{¶17} Substantial compliance is difficult to discern where a regulation requires a result to be expressed as “equivalent” to a measurement. However, it is clear that substantial compliance allows some level of deviation. While strict compliance would perhaps involve a report detailing Appellant’s specific and exact result, the state provided Appellant with a result that reveals his levels of prohibited substance were in excess of the legal threshold number. This result is clearly above the 35 ng/ml prescribed by law. Thus, the reported testing shows, and Appellant was aware, that he tested well above a level prohibited by law. For purposes of guilt pursuant to statute, it makes no difference if an accused is only slightly over the limit or greatly over; any amount above the statutory threshold will result in the same violation. As the amount determined in this report is legally sufficient to convict Appellant of the crime with which he was charged, such result constitutes substantial compliance.

{¶18} In addition, we note that R.C. 4511.191(A)(5)(a) provides that an officer must “advise the person at the time of the arrest that the person may have an independent chemical test taken at the person’s own expense.” We assume that Officer Bowlen complied with this advisement. Thus, Appellant should have been placed on

notice that if he was not satisfied with the test results provided by the state, he could have arranged for an independent test.

{¶19} Because the test result substantially complies with Ohio Adm.Code 3701-53-01(A)(4), we must next determine whether Appellant suffered prejudice. Appellant argues that he is unable to attack the credibility of the testing process because he does not know his exact results. Appellant contends, without support, that some tests produce abnormally high results that are not humanly possible, allowing a defendant to attack the credibility of the test. Without knowledge of his exact result, Appellant argues that he is precluded from making such an argument, here.

{¶20} Our review of the matter shows that Appellant was not barred from making that argument at trial. In fact, Appellant may have had a strong argument at trial that without evidence of his specific result, the testing process lacked credibility. The prohibited range of marijuana metabolite in a person's system is between 35 and 165 ng/ml. Appellant's test results produced a result in excess of 200 ng/ml. Appellant's result is at least 35 ng/ml higher than the upper end of the threshold. Even without expert testimony, it would appear that Appellant's argument regarding the reliability of the testing would be available to him, here. As such, Appellant has not demonstrated prejudice as a result of allowing substantial compliance.

{¶21} Accordingly, Appellant's first assignment of error is without merit and is overruled.

#### ASSIGNMENT OF ERROR NO. 2



THE TRIAL COURT ERRED IN FINDING THAT THE STATE OF OHIO DEMONSTRATED SUBSTANTIAL COMPLIANCE WITH OAC 3701-53-06(D).

{¶22} In relevant part, Ohio Adm.Code 3701-53-06(D) provides “[t]he designated laboratory director shall review, sign, and date the procedure manual as certifying that the manual is in compliance with this rule.”

{¶23} Appellant argues that the laboratory’s policy manual does not substantially comply with Ohio Adm.Code 3701-53-06(D). Appellant contends that a director’s signature after the word “approved” in the policy manual is insufficient to show that the director certified the manual’s compliance with the Ohio Adm.Code. Appellant cites to a Fifth District case which found that testimony from a state laboratory representative that she performed a procedure in compliance with Ohio Adm.Code regulations is insufficient to prove compliance. See *State v. Schlupp*, 5th Dist. No. 2012 CA 0007, 2012-Ohio-6072.

{¶24} The state responds by arguing that the laboratory director’s dated signature is sufficient to show substantial compliance with Ohio Adm.Code 3701-53-06(D). The state distinguishes *Schlupp* from the instant case as the evidence of compliance in *Schlupp* was limited to a conclusory testimony from a laboratory technician. The evidence in the instant matter includes the policy manual with the director’s dated signature.

{¶25} The signature page of the policy manual is also not in the appellate record, however, it is clear from the trial court’s March 6, 2016 judgment entry that it viewed the signature page. According to the trial court, the signature page is found on

page 34 of the manual and includes the dated signature of the designated director, Joseph Jones. Immediately preceding Jones’ signature is the word “approved.” The trial court found that Jones’ signature established substantial compliance with Ohio Adm.Code 3701-53-06(D).

{¶26} The issue, here, is limited to whether Jones’ signature at least substantially complied with Ohio Adm.Code 3701-53-06(D) which requires the laboratory director’s dated signature “as certifying” compliance with the Ohio Adm.Code. As addressed by the state, *Schlupp* is distinguishable from the instant case. In *Schlupp*, that state asked a medical technologist whether the procedures that were conducted complied with the Ohio Adm.Code to which she responded “[y]es.” *Id.* at ¶ 66-67. The *Schlupp* court found her one word response was insufficient to demonstrate substantial compliance.

{¶27} In another Fifth District case, a criminologist testified that the laboratory director reviewed, signed, and dated a procedural manual. *State v. Clark*, 5th Dist. No. 17 CAA 08 0057, 2018-Ohio-1046, ¶ 20. The *Clark* court held that the testimony was sufficient to demonstrate substantial compliance with Ohio Adm.Code 3701-53-06(D). *Id.* at ¶ 24.

{¶28} The language of Ohio Adm.Code 3701-53-06(D) states “[t]he designated laboratory director shall review, sign, and date the procedure manual as *certifying* that the manual is in compliance with this rule.” (Emphasis added.) The plain language of regulation does not require the word “certify” to be included in the manual, but does require a dated signature as *certifying* the manual’s compliance. Thus, the director’s dated signature is the certification. While the trial court focused its analysis on the

similarity between the words “approved” and “certify,” the language of the statute simply requires a dated signature in order to certify compliance. Thus, Jones’ signature constitutes strict compliance. As such, it is unnecessary to discuss prejudice. Regardless, Appellant does not argue prejudice and none is apparent from this record.

{¶29} Accordingly, Appellant’s second assignment of error is without merit and is overruled.

### Conclusion

{¶30} Appellant argues that the trial court erroneously denied his motion to suppress/motion in limine which sought to exclude a laboratory report and a policy manual on the grounds that the documents did not comply with Ohio Adm.Code 3701-53-01(A) and 3701-53-06(D). For the reasons provided, Appellant’s arguments are without merit and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Bartlett, J., concurs.

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For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

**NOTICE TO COUNSEL**

**This document constitutes a final judgment entry.**