

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 09AP-659
v.	:	(M.C. No. 2009 TRC 128209)
	:	
Diana Dumitrescu,	:	(ACCELERATED CALENDAR)
	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on December 24, 2009

Richard C. Pfeiffer, Jr., City Attorney; *Lara N. Baker*, City Prosecutor, and *Melanie R. Tobias*, for appellant.

Shawn R. Dominy, for appellee.

APPEAL from the Franklin County Municipal Court

KLATT, J.

{¶1} Plaintiff-appellant, the State of Ohio, appeals from a judgment entry of the Franklin County Municipal Court granting defendant-appellee, Diana Dumitrescu's motion to suppress an alcohol breath test result. Because the State demonstrated substantial compliance with the regulations governing the renewal of operator permits to conduct alcohol breath tests, and because appellee failed to demonstrate she was prejudiced by

the absence of strict compliance with those regulations, we reverse that judgment and remand the matter to the trial court for further proceedings.

{¶2} In the early morning hours of March 22, 2009, Officer Mark Rice of the Perry Township Police Department pulled over a car driven by appellee. Rice ultimately took appellee to the Perry Township Police Department, where appellee submitted to a breath test for alcohol. The test result indicated that appellee had a breath-alcohol content of 0.164, which is above the prohibited limit. Thereafter, appellee was charged with operating a vehicle under the influence in violation of R.C. 4511.19(A)(1)(a) and (A)(1)(d).¹

{¶3} Appellee filed a motion to suppress the result of her breath test, claiming that the test was not administered in substantial compliance with the requirements of the Ohio Revised Code and the Ohio Department of Health Regulations. The trial court held a hearing on appellee's motion. That hearing focused on whether or not Rice had a valid operator's permit when he administered appellee's breath test.

{¶4} Rice was the only witness to testify at the hearing. He testified that his current operator's permit was issued on November 5, 2008 and was valid for one year. Rice administered appellee's breath test on March 22, 2009, which was within the period of time covered by his operator's permit. During Rice's cross-examination, however, he testified that his prior operator's permit expired on October 10, 2008. Officer Rice testified that he took an in-service course and renewed that permit 25 days later.

¹ Appellant was also charged with speeding and a marked lanes violation.

{¶5} The trial court granted appellee's motion to suppress, concluding that Rice did not hold a valid operator's permit when he administered appellee's breath test because Rice failed to timely renew the permit.

{¶6} Pursuant to Crim.R. 12(K) and App.R. 4(B)(4), the State appeals that ruling and assigns the following error:

THE TRIAL COURT ERRED WHEN IT SUPPRESSED THE RESULTS OF APPELLEE'S BREATH ALCOHOL TEST BASED ON A FINDING THAT THE OFFICER DID NOT HAVE A VALID OPERATOR'S PERMIT AT THE TIME HE ADMINISTERED APPELLEE'S TEST.

{¶7} An appellate court's review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Long* (1998), 127 Ohio App.3d 328, 332. When considering a motion to suppress, the trial court assumes the role of the trier of fact and, is therefore, in the best position to resolve factual questions and evaluate witness credibility. *State v. Curry* (1994), 95 Ohio App.3d 93, 96. As such, we accept the trial court's findings of fact so long as they are supported by competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594. However, an appellate court independently reviews the trial court's legal conclusions based on those facts and determines, without deference to the trial court's decision, "whether, as a matter of law, the facts meet the appropriate legal standard." *Curry* at 96.

{¶8} Appellee sought suppression of her breath test result because Rice allegedly did not have a valid permit to perform the test. After a defendant challenges the results of a breath alcohol test by way of a motion to suppress, the state has the burden to show that the test was administered in substantial compliance with the Ohio Department of Health Regulations. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-

5372, ¶24; *State v. Plummer* (1986), 22 Ohio St.3d 292, 294. This substantial compliance standard excuses errors that are clearly de minimis, errors which the Supreme Court of Ohio has characterized as " 'minor procedural deviations.' " *Burnside* at ¶34 (citing *State v. Homan* (2000), 89 Ohio St.3d 421, 426). If the State establishes substantial compliance, the burden then shifts to the defendant to demonstrate that he or she was prejudiced by anything less than strict compliance. *Burnside*.

{¶9} Appellee claims that because Rice did not timely renew his operator's permit, he did not possess a valid permit when he administered appellee's breath test. We disagree.

{¶10} To properly determine the validity of Rice's permit, we must consider the regulations governing permits for individuals who perform alcohol breath tests. Those regulations begin with Ohio Adm.Code 3701-53-07. This provision requires that breath tests be performed by a person with an operator permit. Ohio Adm.Code 3701-53-07(C).² To qualify for an operator's permit, the individual must be a high school graduate and must have successfully completed a basic operator or conversion training course. Ohio Adm.Code 3701-53-07(E).³ The director of health shall issue a permit to an individual who meets those initial qualifications and applies for a permit. Ohio Adm.Code 3701-53-09(B).

{¶11} An operator's permit issued under Ohio Adm.Code 3701-53-09(B) expires one year from the date issued. Ohio Adm.Code 3701-53-09(C). A permit holder may renew an operator's permit by filing an application to renew no sooner than six months

² These code sections deal with a number of different permits. For purposes of this decision, we need only address the portions that involve operator permits.

before the permit's expiration date. To qualify for the renewal of an operator's permit, the individual must continue to meet the initial qualifications required for an operator's permit and must satisfactorily complete an in-service course. Ohio Adm.Code 3701-53-09(D).

{¶12} The facts in this case are not disputed. Rice is a high school graduate who successfully completed a basic operator's course earlier in his career. He, therefore, satisfied the qualifications to receive an operator's permit. Rice held a valid operator permit until it expired on October 10, 2008. Rice did not renew that permit before it expired. However, Rice completed an in-service renewal course on November 5, 2008, 25 days after his permit expired, and the director of health renewed Rice's operator permit that same day. Rice's permit was in effect at the time he administered appellee's breath test.

{¶13} To properly renew his operator's permit, Rice was required: (1) to apply for a renewal at some point, but not more than six months before the expiration of his current permit; (2) to continue to satisfy the initial qualifications required for an operator's permit; and (3) to complete an in-service renewal course. Although Rice did not strictly comply with the regulations, because he did not renew his permit before it expired, the state need only demonstrate substantial compliance with the regulations. *Burnside*.

{¶14} Here, Rice completed the in-service renewal course required to renew a permit. Further, he continued to satisfy the initial qualifications required for an operator's permit. Additionally, he received a facially-valid renewed permit from the

³ The current version of this regulation, effective after Rice sought to renew his permit, adds a third

Ohio Department of Health. Rice's only failing was that he did not renew his permit until 25 days after the expiration of his previous permit. Rice's delay of 25 days to renew his operator's permit is a "de minimis" or minor procedural deviation. Therefore, we find that Rice substantially complied with the renewal regulations.

{¶15} Because the state demonstrated substantial compliance with the relevant regulations, the burden shifted to appellee to show that she was prejudiced by anything less than strict compliance. *Burnside*. The record reflects no attempt by appellee to prove that she was prejudiced by the absence of strict compliance. Accordingly, the trial court erred by granting appellee's motion to suppress.

{¶16} The State's single assignment of error is sustained. The judgment of the Franklin County Municipal Court is reversed and the matter is remanded to that court for further proceedings consistent with this decision.

Judgment reversed and cause remanded.

BRYANT and McGRATH, JJ., concur.
