[Cite as *State v. Charette,* 2012-Ohio-5937.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**MEMORANDUM OPINION**
Plaintiff-Appellant,	:	**CASE NO. 2012-P-0045**
- vs -	:	
ISAAC J. CHARETTE,	:	
Defendant-Appellee.	:	

Criminal Appeal from the Portage County Municipal Court, Ravenna Division, Case No. R2012 TRC 00672.

Judgment: Appeal dismissed.

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

William D. Lentz, Sandvoss & Lentz, 228 West Main Street, P.O. Box 248, Ravenna, OH 44266-0248 (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, Isaac Charette. 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, the appeal is dismissed.

{¶2} On January 14, 2012, appellee was stopped for failing to have an illuminated rear license plate. He was eventually 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. He was also cited with failure to wear a safety belt, in violation of R.C. 4513.263, and no rear-plate light, in violation of R.C. 4513.05, both minor misdemeanors. Appellee filed a motion in limine seeking the exclusion of the results of the breath test based upon the general unreliability of the Intoxilyzer 8000. In support, appellee argued that, pursuant to R.C. 4511.19(D)(1)(b); and, because the Evid.R. 702 and precedent from both the United States Supreme Court and the Ohio Supreme Court required to make preliminary assessments of the admissibility of scientific evidence, the trial court is bound to hold a hearing on the Intoxilyzer 8000's general reliability. In further support of his position, appellee cited 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 May 2, 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} On May 2, 2012, 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 thereby excluding the breath test results. The court further dismissed the per se OVI charge sua sponte and stayed the matter pending appeal. On May 11, 2012, the state filed its notice of appeal.

{¶6} The state assigns the following error for our review:

{¶7} "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."

{¶8} We must initially address the threshold issue of whether the state has properly invoked this court's jurisdiction to hear the underlying appeal. It is well settled that the state may appeal a criminal case only when a statute gives it express authority to do so. *See e.g. State v. Fraternal Order of Eagles*, 58 Ohio St.3d 166, 167 (1991). R.C. 2945.67 confers upon the state a substantive, but limited, right of appeal. *State v. Kole*, 11th Dist. No. 99-A-0015, 2000 Ohio App. LEXIS 4551 (Sept. 29, 2000); *see also State v. Slatter*, 66 Ohio St.2d 452, 456-457 (1981). Pursuant to this authority, the state's right to appeal is available only when a final order falls within one of four specific categories; to wit, orders granting (1) a motion to dismiss all or part of an indictment, complaint, or information; (2) a motion to suppress evidence; (3) a motion for the return

of seized property; and (4) a petition for post-conviction relief. *State v. Matthews*, 81 Ohio St.3d 375, 377-378 (1998).

{¶9} Crim.R. 12(K) prescribes the procedures and conditions with which the state must comply to initiate an appeal as of right under R.C. 2945.67(A). *State v. Bassham*, 94 Ohio St.3d 269, 271, 2002-Ohio-797. That rule provides, in relevant part:

> **{¶10}** When the state takes an appeal as provided by law from an order suppressing or excluding evidence, or from an order directing pretrial disclosure of evidence, the prosecuting attorney shall certify that both of the following apply:
>
> **{¶11}** (1) the appeal is not taken for the purpose of delay;
>
> **{¶12}** (2) the ruling on the motion or motions has rendered the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed, or the pretrial disclosure of evidence ordered by the court will have one of the effects enumerated in Crim.R. 16(D).
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> **{¶13}** The appeal from an order suppressing or excluding evidence shall not be allowed unless the notice of appeal and the certification by the prosecuting attorney are filed with the clerk of the trial court within seven days after the date of the entry of the judgment or order granting the motion. Any appeal taken under this rule shall be prosecuted diligently.

{¶14} As an exception to the general rule that the state may not appeal orders from criminal prosecutions, Crim.R. 12(K) must be strictly construed. *Bassham*, *supra*; *see also State v. Caltrider*, 43 Ohio St.2d 157 (1975), paragraph one of the syllabus.

{¶15} In this case, the trial court's judgment excluding the appellee's breath test results was entered on May 2, 2012. The state filed its notice of appeal, with its Crim.R. 12(K) certification, on May 11, 2012, nine days after the judgment was entered. Although the trial court also dismissed the per se OVI charge contemporaneously with its judgment excluding the evidence, that decision is not the subject of the state's appeal. The state acknowledged this point in its appellate brief asserting that, although the motion before the trial court was captioned a motion in limine, the judgment acted to to suppress or exclude the state's evidence. Thus, the state concedes finality attached to the order because it was a ruling on the functional equivalent to a motion to suppress.

{¶16} The only matter at issue on appeal is the trial court's decision to exclude the breath test evidence. Because the state did not file its notice of appeal within seven days after the date of the entry, it failed to properly invoke this court's jurisdiction under Crim.R. 12(K). We accordingly hold the state's appeal must be dismissed.

DIANE V. GRENDELL, J.,

THOMAS R. WRIGHT, J.,

concur.