

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellant,	:	
- VS -	:	CASE NO. 2012-P-0052
IAN R. WEBB,	:	
Defendant-Appellee.	:	

Criminal Appeal from the Portage County Municipal Court, Ravenna Division, Case No. R2011 TRC 12784.

Judgment: Reversed and remanded.

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

Nate N. Malek, 29025 Bolingbrook Road, Cleveland, OH 44124 (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, Ian R. Webb. 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, we reverse the decision of the trial court and remand the matter for further proceedings.

{¶2} On October 1, 2011, appellee was stopped for speeding. The officer noticed an odor of alcohol on appellee's breath as he spoke. The officer initiated field sobriety tests, which appellee failed. Appellee was subsequently arrested for operating a vehicle while intoxicated ("OVI"), in violation of R.C. 4511.19(A)(1)(a), and cited for speeding, in violation of 4511.21(B)(3). Appellee was taken to the station where a breath test revealed his blood-alcohol concentration was .128. Appellee was later cited for OVI, in violation of R.C. 4511.19(A)(1)(d).

{¶3} Appellee filed a motion to suppress and a supplement to his motion seeking to exclude the results of his breath tests based upon the general unreliability of the breath-testing instrumentation, the Intoxilyzer 8000. The matter came on for hearing. At the hearing, the state, relying on *State v. Vega*, 12 Ohio St.3d 185 (1984), 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 test machines, including the Intoxilyzer 8000. In light of this precedent, the state refused to produce any witnesses regarding the general reliability of the device.

{¶4} Because the state declined to go forward, the court granted appellee's motion. In support of its decision, the court relied on its recent decision in *State v. Johnson*, Portage M.C. No. R2011TRC4090. 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 *Vega*, the court granted the defendant's motion to suppress. After entering its final order, the trial court stayed the proceedings and this appeal followed.

{¶5} The state asserts the following assignment of error for our consideration:

{¶6} “The 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.”

{¶7} Under this assignment of error, the state asserts it is not required to produce expert witnesses to convince the municipal court of the general scientific reliability of the Intoxilyzer 8000 as a precondition for admissibility. The state observes the General Assembly delegated this issue to the Ohio Director of Health under R.C. 3702.143 and R.C. 4511.19(D). Pursuant to this legislative scheme, once the Director approves a device, it is presumptively admissible and a prosecutor is not required to produce evidence of the machine’s general reliability. The state underscores this delegation was upheld by the Supreme Court of Ohio in *Vega, supra*. The state consequently maintains the court below erred in requiring it to produce evidence of the Intoxilyzer 8000’s general reliability as a precursor to admitting the machine’s results. According to the state, the trial court’s decision stands in violation of both statutory and governing case law and therefore the judgment granting appellee’s motion must be reversed and the matter remanded.

{¶8} In response, appellee asserts the decision to admit or exclude evidence is a matter solely committed to the judiciary through the rules of evidence and the Ohio Constitution. Moreover, appellee notes, R.C. 4911.19(D)(1)(b) specifically affords a trial judge the discretion to admit or exclude evidence related to the concentration of alcohol in a defendant’s breath¹. Appellee further contends that *Vega* is inapplicable to this case because current evidentiary procedures require courts to assess the reliability of

1. That section provides, in relevant part: “The court *may admit* evidence on the concentration of alcohol * * * in the defendant’s * * * breath * * * at the time of the alleged violation as shown by the chemical analysis of the substance withdrawn within three hours of the time of violation.” (Emphasis added.)

scientific evidence as a prerequisite to admissibility. See Evid.R. 702; *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993). Given these points, appellee contends it is inappropriate and contrary to established rules of evidence as well as statutory and decisional law for a court to take judicial notice of a breath testing device's reliability.

{¶9} With respect to appellee's assertions, we first note that he did not advance the foregoing arguments in his motion to the trial court. Rather, appellee's supplemental motion to suppress simply alleged the Intoxilyzer is "inaccurate and unreliable as a breath testing mechanism." Additionally, the trial court, in its judgment entry, did not specifically utilize the legal positions advanced by appellee as justifications for its decision. Rather, the trial court simply "upheld" its previous ruling in *Johnson, supra*, as a basis for sustaining appellee's motion. And, although the *Johnson* ruling was premised generally upon the judge's role as gatekeeper, it did not specifically employ appellee's particular legal rationale to support its decision to sustain Johnson's motion.

{¶10} With these points in mind, the legal theories asserted in appellee's response brief must be construed as additional foundations for affirming the trial court's ruling. The arguments shall therefore be considered as tantamount to cross assignments of error pursuant to R.C. 2505.22. The arguments shall be addressed in a consolidated fashion.

{¶11} Appellee contends the trial court's role as gatekeeper requires the court to adjudicate the reliability and ultimate admissibility of breath machine results. And, in appellee's view, the state cannot rely upon the Director of Health's approval of a breath test machine to usurp the judiciary's role. Appellee further claims the ruling in *Vega* is

inapplicable to this case because it does not prohibit a pretrial evidentiary hearing under Evid.R. 104 to determine the relevancy and reliability of the evidence to determine admissibility. Such a hearing, in appellee's view, is required of Evid.R. 702 and all scientific evidence post-*Daubert*.

{¶12} In *Vega*, the Supreme Court of Ohio acknowledged the deference that must be accorded to the legislature's delegation. The court emphasized:

{¶13} "[The judiciary must recognize] the necessity legislative determination that breath tests, properly conducted are reliable irrespective that not all experts wholly agree and that the common law foundational evidence has, for admissibility, been replaced by statute and rule; and that the legislative delegation was to the Director of Health, not the court, the discretionary authority for adoption of appropriate tests and procedures, including breath test devices." *Id.* at 188-189, quoting *State v. Brockway*, 2 Ohio App.3d 227, 232 (1981).

{¶14} In *Vega*, the court clearly endorsed the legislative delegation of R.C. 3701.143, and the rebuttable presumption of reliability. Moreover, and perhaps more substantively significant, *Vega* specifically states that a defendant is entitled to produce evidence to assail the particular results of the subject test, thereby preserving the trial court's role as gatekeeper. Because the delegation and the rebuttable presumption do not infringe upon the trial court's ability to admit or exclude evidence, we find appellant's argument unpersuasive.

{¶15} Moreover, Ohio Appellate Districts have addressed the specific issue raised by appellee, i.e., whether the state is required to present expert testimony regarding the reliability of breath testing instruments before their results are admissible. In *Dayton v. Futrell*, 2d Dist. No. CA 8615, 1984 Ohio App. LEXIS 11631 (Oct. 26, 1984), the Second District answered this question in the negative, stating:

{¶16} The [Supreme Court in *Vega*] held that the reliability and admissibility of [breath] tests * * * has been legislatively determined and that the accused may not make a general attack upon the reliability and validity of the breath testing instrument. *The judiciary must take notice that such tests, properly conducted, are reliable irrespective of disagreements among experts and that the results of such tests are admissible. Accordingly, judicial notice of this factor dispenses with the necessity for expert testimony by the state in chief for the efficiency of the intoxilyzer machine. Id. at *3-*4.* (Emphasis added.)

{¶17} More recently, the Tenth District, in *State v. Luke*, 10th Dist. No. 05FP-371, 2006-Ohio-2306, rejected appellee's argument. In *Luke*, the defendant filed a motion to suppress the results of his BAC Datamaster breath test. In its entry granting the defendant's motion to suppress, the trial court explained that it was suppressing the test result "pursuant to the court's 'gatekeeper' function, pursuant to *Daubert* [, *supra*.]" In holding that the trial court erred in applying *Daubert* in the context of the defendant's motion to suppress, the Tenth District stated:

{¶18} [T]he General Assembly has legislatively provided for the admission into evidence of alcohol test results, including breath tests, from tests conducted upon those accused of violating R.C. 4511.19, so long as such tests were conducted in accordance with procedures adopted by the Director of the Ohio Department of Health.

{¶19} *This legislative mandate for admissibility obviates the need for trial courts to determine admissibility based upon reliability of the processes and methods underlying the use of breath testing machines.* It follows, then, that because the *Daubert* inquiry involves only determinations as to the reliability of the principles and methods upon which a particular scientific test result is based, *the legislative mandate recognized in Vega forestalls the need for any Daubert analysis* in cases such as the present one. That is why we agree with the holding of the Fifth Appellate District that, pursuant to *Vega*, “an attack on the accuracy and credibility of breath test devices in general is prohibited. Therefore, *there is no need to determine the reliability of the machine under a Daubert * * * standard.*” *State v. Birkhold*, 5th Dist. No. 01CA104, 2002-Ohio-2464, ¶19. *Luke, supra*, at ¶23-24. (Emphasis added.)

{¶20} As discussed above, appellee’s argument that the Intoxilyzer 8000 is unreliable was an attack on the general reliability of a director-approved breath-testing instrument, which is prohibited by *Vega*. Given the general pronouncements in *Vega* as

well as the ruling in *Luke*, we maintain a *Daubert* hearing is unnecessary as it pertains to the general reliability of the Intoxilyzer 8000.

{¶21} For the above reasons, we decline to endorse the arguments asserted under appellee's cross-assignments of error.

{¶22} Turning to the state's argument, the lower court sustained appellee's motion premised upon the state's failure to produce evidence of the Intoxilyzer 8000's general reliability. Under *Vega*, once suitable methods for breath analysis are established by the Director of Health, pursuant to the legislative directive, a statutory presumption of reliability then attaches to the approved testing devices. "Administrative rules enacted pursuant to a specific grant of legislative authority are to be given the force and effect of law." *Doyle v. Ohio Bureau of Motor Vehicles*, 51 Ohio St.3d 46 (1990), paragraph one of the syllabus. Further, once the Director of Health has promulgated regulations for breath testing instruments, they are to be given the force and effect of law. *State v. Yoder*, 66 Ohio St.3d 515, 519, citing *Doyle, supra*. Thus, Ohio Adm.Code 3701-52-02, which approved the Intoxilyzer 8000 as an evidential breath testing instrument, has the force and effect of law.

{¶23} In the matter below, appellee filed a motion in limine, which was eventually treated as a motion to suppress, which challenged the general reliability of the Intoxilyzer 8000. Although the motion lacked any clear specificity as to what legal or factual bases appellee was challenging, the court granted the motion because the state failed to produce any evidence demonstrating the test results were reliable.

{¶24} First of all, as discussed above, *Vega* prohibits a "*general* attack on the reliability * * * of a breath instrument." (Emphasis added.) This holding, however,

allows for a *specific* challenge to the reliability of the Intoxilyzer 8000. Here, appellee generally asserted the Intoxilyzer 8000 is unreliable and inaccurate. He thus did not present a specific challenge to the Intoxilyzer 8000, but rather, made a general attack.

{¶25} A motion to suppress must state its legal and factual basis with sufficient particularity to put the prosecutor and the trial court on notice of the issues to be decided. *State v. Perl*, 11th Dist. No. 2006-L-082, 2006-Ohio-6100, ¶15. In *State v. Shindler*, 70 Ohio St.3d 54 (1994), syllabus, the Supreme Court of Ohio found that the defendant's motion to suppress was sufficient when it "stated with particularity the statutes, regulations and constitutional amendments she alleged were violated, set forth some underlying factual basis to warrant a hearing, and gave the prosecutor and court sufficient notice of the basis of her challenge." Here, appellee's motion in limine provided no legal or factual grounds in support of her challenge. Thus, the state had no notice of any alleged specific defects of the Intoxilyzer 8000, making it virtually impossible for the prosecutor to defend the motion.

{¶26} Notwithstanding this inherent defect and despite Vega's ruling that an accused may not make a general attack on the reliability of a breath-testing instrument, the court sustained the motion. Neither party disputes the Intoxilyzer 8000 was used in this case. And since the legislature determined that the Intoxilyzer 8000 is reliable, it must be presumed the device is reliable. See *State v. Yoder*, 66 Ohio St.3d 515, 518 ("[I]n promulgating the regulation, it must be presumed that the Director of Health acted upon adequate investigation * * *. We must defer to the department's authority and we may not substitute our judgment for that of the Director of Health.") Given these points, the state did not have the burden to produce evidence of the machine's reliability as a

predicate for presenting appellee's breath-test results. To the contrary, because the instrument is presumed to be a reliable breath-testing instrument, appellee had the burden to produce evidence that the Intoxilyzer 8000 is not reliable.

{¶27} It is necessary to underscore that, even though a general attack on the reliability of the Intoxilyzer 8000 is prohibited, the statutory presumption is nevertheless rebuttable. The court in *Vega* stated that a defendant may still “notwithstanding the presumption, [establish if he can, that] he was not under the influence of alcohol at the time of his arrest, or that there was something wrong with the test and the results were erroneous.” *Id.* at 189, quoting *Erwin Defense of Drunk Driving Cases* (3 Ed.1971) 26-9, Section 26.03. Thus, upon filing a particularized motion to suppress that triggers the statutory presumption, appellee is still entitled to go forward with evidence that the machine is unreliable.

{¶28} With respect to a judgment granting a motion to suppress, an appellate court reviews a court's application of the law de novo. See *e.g. State v. Holnapy*, 194 Ohio App.3d 444, 2011-Ohio-2995, ¶28 (11th Dist.) By requiring the state to go forward with evidence of the machine's reliability, the trial court disregarded the legal prohibition on general, unparticularized challenges in motions to suppress as well as the legislative presumption of reliability concerning the Intoxilyzer 8000. The trial court therefore erred, as a matter of law, in requiring the state to make this initial showing.

{¶29} We therefore conclude the trial court erred in requiring the state to produce evidence of the Intoxilyzer 8000's reliability and in granting appellee's motion to suppress; further, pursuant to these erroneous rulings, the trial court erred in excluding

the results of appellee's breath test with no evidence to overcome the presumptive reliability of the Intoxilyzer 8000's results.

{¶30} In light of *Vega* as well as the validity of the legislative presumption, once the prosecution has demonstrated an approved breath-testing device was used, a defendant may make specific challenges to the reliability of his or her breath test results. In this case, it is undisputed that the Intoxilyzer 8000 is an approved device. On remand, therefore, appellee is entitled, but has the burden of production, to specifically challenge the results of his breath test.

{¶31} The state's second assignment of error is well-taken.

{¶32} For the reasons discussed in this opinion, the judgment of the Portage County Municipal Court, Ravenna Division, is reversed and the matter is remanded for further proceedings.

TIMOTHY P. CANNON, P.J., concurs,

THOMAS R. WRIGHT, J., dissents with Dissenting Opinion.

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{¶33} R.C. 4511.19(D)(1)(b) does not mandate admissibility of breath test results derived from the Intoxilyzer 8000. Rather, that statute which, by its plain language controls the issue in this case, vests the trial court with discretion regarding admissibility despite approval from the director. I, therefore, respectfully dissent.

{¶34} R.C. 3701.143 empowers the director to approve breath testing devices, and R.C. 4511.19(D)(1)(b) grants trial courts the discretion to admit the results from approved devices without further proof of reliability when circumstances warrant. Although some claim the contrary, nobody is correct all the time. In recognizing human fallibility, the legislature had the wisdom to vest within the trial court the discretion per R.C.4511.19(D)(1)(b) to conduct further inquiry when there is an issue as to the reliability of an approved breath testing device before admitting the results.

{¶35} R.C. 4511.19(D)(1)(b) states that “[i]n any criminal prosecution or juvenile court proceeding for a violation of division (A) or (B) of this section or for an equivalent offense that is vehicle-related, the court *may* admit evidence on the concentration of alcohol, drugs of abuse, controlled substances, metabolites of a controlled substance, or a combination of them in the defendant’s whole blood, blood serum or plasma, breath, urine, or other bodily substance at the time of the alleged violation as shown by chemical analysis of the substance withdrawn within three hours of the time of the alleged violation[,]” and “[t]he bodily substance withdrawn under division (D)(1)(b) of this section shall be analyzed in accordance with methods approved by the director of health by an individual possessing a valid permit issued by the director pursuant to section 3701.143 of the Revised Code.” (Emphasis added.)

{¶36} The statute does not use the word “shall,” which would mandate admission regardless of the circumstances. Rather, the statute uses the word “may.” For purposes of statutory construction, “use of the word ‘may’ is generally construed to make the provision in which it is contained optional, permissive, or discretionary * * *.”

Dorrian v. Scioto Conservancy Dist., 27 Ohio St.2d 102, 107 (1971); *State v. Suchevis*, 138 Ohio App.3d 99, 102 (11th Dist. 1999).

{¶37} In this case, the trial court exercised its discretion not to admit the breath test absent proof from the state that the Intoxilyzer 8000 is generally reliable, a decision consistent with the discretion it possesses under R.C.4511.19(D)(1)(b). As reliability presents a threshold admissibility issue, reliability, as opposed to the weight to be afforded any admitted evidence, is one for the trial court. *Knott v Revolution Software Inc.* 181 Ohio App.3d 519, 2009-Ohio-1191, ¶45 (5th Dist.); *State v. Riley*, 6th Dist. No. WD-03-076, 2007-Ohio-879, ¶27 (expert testimony must be deemed reliable before it is deemed admissible.); *Saad v. Shimano American Corp.*, 2000 U.S. Dist. LEXIS 10974, *7 (N.D. Ill. 2000)(The Supreme Court has made it clear that the courts must allow into evidence only expert testimony that meets certain threshold standards of reliability and usefulness).

{¶38} Moreover, the determination of evidential reliability necessarily implicates the defendant's substantive due process rights.

{¶39} "Substantive due process, [although an] ephemeral concept, protects specific fundamental rights of individual freedom and liberty from deprivation at the hands of arbitrary and capricious government action. The fundamental rights protected by substantive due process arise from the Constitution itself and have been defined as those rights which are 'implicit in the concept of ordered liberty.' (* * *) While this is admittedly a somewhat vague definition, it is generally held that an interest in liberty or property must be impaired before the protections of substantive due process become

available.” *State v. Small*, 162 Ohio App.3d. 375, 2005-Ohio-3813, ¶11 (10th Dist.), quoting *Gutzwiller v. Fenik*, 860 F. 2d. 1317, 1328 (6th Cir. 1989).

{¶40} However vague the conceptual parameters of one’s substantive due process guarantees may be, the following principle is clear; “[substantive] * * * due process is violated by the introduction of seemingly conclusive, but actually unreliable evidence.” *Barefoot v. Estelle*, 463 U.S. 880, 931, fn. 10 (1983).

{¶41} The trial court was aware that other courts had deemed the Intoxilyzer 8000 unreliable even though it was approved. Against the backdrop, the court ordered the state to establish the general reliability of the Intoxilyzer 8000 before admitting the results. Given the constitutional gravity of admitting unreliable results, however, and its statutory authority to act as gatekeeper regarding breath test results, the lower court’s decision to require the state to produce evidence of the machines reliability was an eminently reasonable and sound legal decision. “[A]n abuse of discretion is the trial court’s ‘failure to exercise sound, reasonable, and legal decision-making.’” *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting Black’s Law Dictionary (8 Ed.Rev.2004) 11.

{¶42} Rather than present evidence of the general reliability of the Intoxilyzer 8000, the state took the position that the trial court could not require it to do so pursuant to *Vega* and its progeny. *Vega*, 12 Ohio St.3d 185 (1984). I do not read *Vega* as holding that under no circumstances can a trial court exercise its discretion to require evidence of general reliability of an approved breath testing device as a condition to admissibility.

{¶43} In *Vega*, the court held “* * * an accused is not denied his constitutional right to *present a defense* nor is the state relieved of its burden of proving guilt beyond a reasonable doubt where a trial judge does not permit expert testimony to attack the *reliability of intoxilyzers in general*.” (Emphasis added.) *Id.* at 186.

{¶44} Threshold admissibility was not at issue in *Vega*. That is, the defendant made no challenge to the trial court's admission of his breath test result. Instead, after the state presented its case and rested, the defendant attempted to present a “reliability” defense by attacking intoxilyzers in general. See also *State v. Vega*, 5th Dist. No. CA-1766, 1993 Ohio App LEXIS 14350, *16 (Nov.22, 1983)(Hoffman, J., dissenting). Unlike *Vega*, 12 Ohio St. 3d 185, threshold admissibility is the issue in the case before us. Moreover, unlike *Vega*, our case is not about the reliability of intoxilyzers in general. Our case is limited to whether the Intoxilyzer 8000 is reliable. In short, the circumstances at issue in *Vega* were fundamentally distinguishable from those in our case.

{¶45} Additionally, the rule in *Vega* does not contemplate a situation where, as here, an approved device's general reliability has been assessed by other courts for both use in and out of this state and the device's reliability has been found suspect. See *State v. Johnson*, Portage County Municipal Court, January 6, 2012. *Vega* expressly states that its holding does not involve a situation where there was an assertion that there was an abuse of discretion by the director in approving the breath testing device at issue. *Vega* at 187, fn. 2. Obviously, in our case if the Intoxilyzer 8000 is unreliable, approval would amount to an abuse of discretion and admission of the test results a violation of substantive due process.

{¶46} Breath tests are “* * * generally recognized as being reasonably reliable on the issue of intoxication when conducted *with proper equipment* and by competent operators.” (Emphasis added.) *Vega* at 186, quoting *Westerville v. Cunningham*, 15 Ohio St.2d 121, 128(1968). Thus, the central issue as presented in the case before us, does the Intoxilyzer 8000 qualify as “proper equipment”? The answer is “yes” if it is generally reliable and “no” if it is not. This is a query, however, that, under Ohio law, a trial court is entitled to resolve pursuant to R.C. 4511.19(D)(1)(b).

{¶47} In this case, the trial court exercised its discretion to safeguard the defendant’s right to substantive due process by merely requiring the state to show the Intoxilyzer 8000 is generally reliable. Under the circumstances, this decision was sound and reasonable. This is particularly true in light of the fact that a trial court is vested with broad discretion in the admission or exclusion of evidence and in recognition that it has inherent power to exclude or strike evidence *on its own motion*. *Caroll v Carroll*, 7th Dist. No. 89-C-1, 1990 Ohio App. LEXIS 1339, *8 (April 5, 1990); *Neil v. Hamilton County*, 87 Ohio App.3d 670; *Oakbrook Realty Corp. v. Blout*, 48 Ohio App.3d 69, 70 (10th Dist. 1988).

{¶48} Given the foregoing point, there is no reason to remand this case to the trial court based upon perceived inadequacies in the motion to suppress. The trial court made it abundantly clear that it would not admit the test results absent proof of reliability of the Intoxilyzer 8000. Requiring the proponent to establish the reliability of scientific evidence is something that a trial court *may require* as previously discussed. The state was well aware of what the trial court required when it ordered it to produce evidence of the Intoxilyzer 8000’s reliability, independent and irrespective of the contents of the

motion to suppress. Accordingly, there is no procedural due process violation of the state's right to notice and an opportunity to be heard. The trial court's order was unambiguous and an exercise of the sound discretion as the gatekeeper of breath test result admissibility.

{¶49} When an appellate court [**14] is reviewing a pure issue of law, "the mere fact that the reviewing court would decide the issue differently is enough to find error (of course, not all errors are reversible. Some are harmless; others are not preserved for appellate review). By contrast, where the issue on review has been confined to the discretion of the trial court, the mere fact that the reviewing court would have reached a different result is not enough, without more, to find error." *Sertz v. Sertz*, 11th Dist. No. 2011-L-063, quoting *Beechler*, 2010-Ohio-1900 at ¶67.

{¶50} This appeal is centered around a discretionary decision made by the trial court. As I find the court's decision not only reasonable, but constitutionally astute, I would affirm the trial court's exclusion of the breath test in light of the state's refusal to present evidence on the issue.

