[Cite as *State v. Brennan*, 2015-Ohio-2547.]

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

STATE OF OHIO,	:	
	:	Case No. 14CA3440
Plaintiff-Appellee,	:	
	:	
vs.	:	DECISION AND JUDGMENT
	:	ENTRY
NICOLE BRENNAN,	:	
	:	
Defendant-Appellant.	:	**Released: 06/23/15**

APPEARANCES:

James T. Boulger, Chillicothe, Ohio, for Appellant.

Sherri K. Rutherford, Law Director, City of Chillicothe, and Michele R. Rout, Assistant Law Director, City of Chillicothe, Ohio, for Appellee.

McFarland, A.J.

{¶1} Appellant Nicole Brennan appeals the entry of sentence in the Municipal Court of Chillicothe, Ohio, entered on March 24, 2014. Appellant pled no contest to a violation of R.C. 4511.19(A)(1)(d), operating a vehicle under the influence of alcohol (OVI). Prior to entering her plea, Appellant filed a motion in limine challenging the admissibility of breath test results generated by the Intoxilyzer 8000 and raising challenges to the reliability of the breath testing device under Rule 702 and Rule 703 of the Ohio Rules of Evidence. The trial court overruled Appellant's motion. On

appeal, Appellant contends: (1) the delegation of authority contained in R.C. 3701.143 violates the separation of powers of government accomplished in Article II, Sec. 1, Article III, Sec. 5, and Article IV, Sec.1 of the Ohio Constitution; and (2) the denial of an opportunity to present evidence in support of specific challenges to the reliability of the Intoxilyzer 8000 violates the rights to both substantive and procedural due process. Upon review of this particular case, we find no merit to Appellant's arguments. Accordingly, we overrule both assignments of error and affirm the judgment of the trial court.

FACTS

{¶2} Appellant was cited for violations of R.C. 4511.19(A)(1)(a) and 4511.19(A)(1)(d) subsequent to a traffic stop which occurred on December 21, 2013 in Ross County, Ohio. The underlying facts surrounding Appellant's stop and citation are not material to our consideration of the issues as is our review of the procedural history of the case. The record reveals that after Appellant's stop and citation, a written not guilty plea was filed on January 3, 2014. Also on that date, Appellant filed a motion in limine challenging the admissibility of the test results generated by an Intoxilyzer 8000 breath testing device used to test Appellant's breath sample. The motion raised challenges to the reliability of the breath testing

device under Rules 702 and 703 of the Ohio Rules of Evidence. Also on that date, Appellant filed a request for additional discovery.[1]

{¶3} The matter came before the court for a pretrial and motion hearing on March 5, 2014. On that date, the trial court gave the parties the opportunity to make a presentation of evidence, which both declined. After minimal discussion amongst the court and the parties, the trial court subsequently announced it would overrule the motion, and the matter was scheduled for trial. On March 24, 2014, Appellant entered a plea of no contest to a violation of R.C. 4511.19(A)(1)(d), and the State moved to dismiss the "under the influence" charge. Appellant was found guilty and sentenced as a first offender. Additional relevant facts will be set forth below. This timely appeal followed.

ASSIGNMENTS OF ERROR

> "I. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT IN FINDING THE LEGISLATIVE DELEGATION OF AUTHORITY TO THE OHIO DEPARTMENT OF HEALTH TO APPROVE 'TECHNIQUES AND METHODS' FOR DETERMINING THE AMOUNT OF ALCOHOL IN THE BREATH AND BODILY FLUIDS OF PERSONS CHARGED WITH CERTAIN CRIMINAL OFFENSES CREATES A CONCLUSIVE PRESUMPTION OF RELIABILITY FOR INSTRUMENTS THE DEPARTMENT HAS APPROVED FOR THE TESTING OF SUCH SPECIMENS, FORECLOSING JUDICIAL INQUIRY UNDER RULES (SIC)

[1] The record does not indicate an initial filing of a discovery request.

> 702 OF THE OHIO RULES OF EVIDENCE, INTO THE RELIABILITY OF THE INSTRUMENT. GIVING SUCH EXPANSIVE FORCE AND EFFECT TO THE LIMITED DELEGATION OF AUTHORITY CONTAINED IN R.C. 3701.143 VIOLATES THE SEPARATION OF POWERS OF GOVERNMENT ACCOMPLISHED IN ARTICLE II, SEC. 1, ARTICLE III, SEC. 5, AND ARTICLE IV, SEC. 1 OF THE OHIO CONSTITUTION.
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> II. THE TRIAL COURT ERRED IN FINDING THAT THE OHIO DEPARTMENT OF HEALTH'S APPROVAL OF A BREATH TESTING INSTRUMENT CREATES A CONCLUSIVE PRESUMPTION OF THE DEVICE'S RELIABILITY AND MANDATES ADMISSION OF THE TEST RESULTS IF IT IS OPERATED IN ACCORDANCE WITH OHIO DEPARTMENT OF HEALTH PROCEDURES. SUCH A CONCLUSIVE PRESUMPTION AND THE CONSEQUENT DENIAL OF AN OPPORTUNITY TO PRESENT EVIDENCE IN SUPPORT OF SPECIFIC CHALLENGES TO THE RELIAIBILIY OF THE TESTING INSTRUMENT VIOLATES THE DEFENDANT'S RIGHT TO BOTH SUBSTANTIVE AND PROCEDURAL DUE PROCESS."

A. STANDARD OF REVIEW

{¶4} Generally, trial courts possess broad discretion to determine whether to admit, or to exclude, evidence. *State v. Zanni,* 15 N.E.3d 370, 2014-Ohio-2806 (4th Dist.), ¶ 8; E.g., *State v. Morris,* 132 Ohio St.3d 337, 2013-Ohio-2407, 972 N.E.2d 528, ¶ 19. Consequently, an appellate court ordinarily reviews a trial court's evidentiary ruling under the abuse of discretion standard of review. *Id., Zanni, supra.* The abuse of discretion standard is not appropriate, however, when a trial court's decision is based

upon an erroneous application of the law. *Zanni, supra*; *Morris*, at ¶ 16. Instead, whether a trial court properly applied the law presents a legal question that an appellate court reviews independently and without deference to the trial court. *Id.*, *Zanni, supra.*

B. LEGAL ANALYSIS

{¶5} Because Appellant's assignments of error are interrelated, we address them jointly.

1. Analysis.

{¶6} R.C. 4511.19(D)(1)(b) governs the admissibility of evidence regarding a defendant's breath-alcohol concentration:

> "In any criminal prosecution * * * for a violation of division (A) or (B) of this section * * * 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 chemical analysis of the substance withdrawn within three hours of the time of the alleged violation. * * *
>
> The 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."

{¶7} R.C. 3701.143 grants the Ohio Director of Health the authority to approve techniques or methods to chemically analyze a person's breath to determine alcohol content. *State v. Zanni*, 4th Dist. Ross No. 13CA3392, 2014-Ohio-2806, ¶ 10. The Director of Health has approved the

"Intoxilyzer model 8000 (OH-5) as an 'evidential breath testing instrument [ ] for use in determining whether a [defendant]'s breath contains a concentration of alcohol prohibited' under R.C. 4511.19." *Id*., Ohio Adm. Code 3701-53-02.

{¶8} In *State v. Vega*, 12 Ohio St.3d 185, 190, 465 N.E.2d 1303 (1984), the Supreme Court of Ohio held that R.C. 4511.19 prevents a defendant from making a "general attack upon the reliability and validity of the breath testing instrument." The General Assembly determined that "[I]ntoxilyzer tests are proper detective devices" and has "legislatively resolved the questions of the reliability and relevancy of [I]ntoxilyzer tests." *Id.* at 188, 465 N.E.2d 1303, *Zanni, supra* at ¶ 12. The *Vega* court further stated the General Assembly has thus determined 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." *Vega, supra*, at 188-189, 465 N.E.2d 1303, quoting *State v. Brockway*, 2 Ohio App.3d 227, 232, 441 N.E.2d 602 (4th Dist. 1981). *Zanni, supra*, at ¶ 12.

{¶9} In our decision in *Zanni*, we noted:

> "The *Vega* court stressed that 'while R.C. 4511.19 creates the presumption that one is under the influence of alcohol if there is a specific concentration of alcohol by weight in one's blood, such presumption is rebuttable.' *Id.* at 187, 465 N.E.2d 1303.

> * * *
>
> Under the statute, the accused may introduce any other competent evidence bearing upon the question of whether he was under the influence of intoxicating liquor. Rebuttable evidence may include non-technical evidence of sobriety, such as a videotape or testimony by the accused or by witnesses concerning the accused's sobriety and the amount of consumption, as well as technical evidence, such as additional chemical tests and the completion of field sobriety tests. There is no question that the accused may also attack the reliability of the specific testing procedure and the qualifications of the operator. See, e.g., *Cincinnati v. Sand*, 43 Ohio St.2d 330 N.E.2d 908 (1975). Defense expert testimony as to testing procedures at trial going to weight rather than admissibility is allowed." Accord *State v. Brockway, supra*, 2 Ohio App.3d at 232, 441 N.E.2d 602. (Emphasis Sic.) *Id.* at 189, 465 N.E.2d 1303; *Zanni, supra,* at ¶ 13.

{¶10} In a previous decision in *State v. Reid*, 4th Dist. Pickaway No. 12CA3, 2013-Ohio-562, we reiterated that *Vega* does not permit a defendant "to mount a general reliability challenge to the Intoxilyzer 8000." *Reid, supra,* at ¶ 10, 15. We also cited various Ohio appellate districts which have followed the basic holding of *Vega*. *Reid*, *supra,* at ¶ 11. In *Reid,* we did also acknowledge that "many problematic reliability issues surround the design of the Intoxilyzer 8000 and the instruments approval process." *Id.*, at ¶ 15; *Zanni,* at ¶ 15.

{¶11} The Supreme Court of Ohio has recently reaffirmed the law as set forth in *Vega* in *Cincinnati v. Ilg*, 141 Ohio St.3d 22, 21 N.E.3d 278

(2014). There, Ilg sought COBRA data from a specific Intoxilyzer 8000 machine that tested his breath in order to challenge whether it operated properly on the day of his arrest in an effort to establish that the test results in his case were inaccurate - not to question the scientific reliability of Intoxilyzer 8000 machines in general. Ilg sought discovery of the subject test and instrument-check printouts and forms, diagnostic and calibration checks, maintenance, service, and repair records, radio frequency interference test records, and any computerized or downloaded information or data from specific Intoxilyzer 8000 machines used to test him. He also sought data from the particular machine not only as it related to his test, but also for three years prior to his arrest and for three months following it.

{¶12} The city of Cincinnati failed to produce the requested records so Ilg subpoenaed the program administrator for alcohol and drug testing at the Ohio Department of Health (ODH) and requested that the administrator produce additional records, "including but not limited to: a. Any and all computerized online breath archives data, also known as 'COBRA' data."[2] Finally, Ilg also subpoenaed records related to the machine's log-in history, repair and maintenance, radio frequency interference certification, and software changes or modifications, as well as any communications regarding

[2] "COBRA data" refers to a database maintained by ODH that records information transmitted from each breath-analyzer machine for each breath test performed in the field, and it also includes personal information of other individuals the machine had tested.

the Intoxilyzer 8000 between ODH and the city of Cincinnati, the Ohio Department of Public Safety, and the manufacturer of the breath-analyzer machine. None of the parties, the city, ODH, or the administrator responded to the subpoena.

{¶13} Ilg then moved for sanctions and sought to exclude the results of his breath test because of the failure to comply with his discovery request and the subpoena he had issued. At a hearing, the administrator testified that the COBRA data is stored in read-only format and cannot be released without redacting the personal information of other test subjects. She asserted ODH lacked the personnel and ability to copy the database. As a result of that hearing, the court ordered ODH to disclose the records requested in the subpoena and advised the city that it would grant the motion for sanctions if it failed to produce the evidence.

{¶14} After the court's deadline for compliance had passed, Ilg again moved for sanctions, arguing that the city had not obeyed the court's order to disclose, and he requested the exclusion of the breath-test results as a sanction. At another hearing, the administrator admitted that she had not provided the COBRA data, claiming that ODH lacked the personnel and technology to copy the database, that it would require an additional employee and approximately $100,000 to produce a copy that could be

released, and that even with those additional resources, the COBRA data would be technologically difficult to produce.

{¶15} The trial court found that Ilg had the right to challenge the reliability of his breath test but could not without the COBRA data generated by the Intoxilyzer 8000 that tested him. The trial court excluded the breath-test results from evidence. The city then filed an interlocutory appeal, and the appellate court determined the trial court had not abused its discretion because Ilg needed the COBRA data for trial preparation and had requested it in good faith. The appellate court further determined Ilg had not sought to challenge the scientific reliability of all Intoxilyzer 8000s, but rather sought to discover only the particular breath analyzer the Cincinnati Police had used to test his breath-alcohol concentration.

{¶16} The Supreme Court of Ohio accepted the city's discretionary appeal on one proposition of law: "*State v. Vega* prohibits defendants in OVI cases from making attacks on the reliability of breath testing instruments, thus a defendant cannot compel any party to produce information that is to be used for the purpose of attacking the reliability of the breath testing instrument." *Ilg, supra,* at ¶ 15. The Supreme Court framed the narrow issue in the case as follows: "[W]hether an accused defending a charge that he operated a motor vehicle with a prohibited level of alcohol in his breath is

precluded from attacking the reliability of his specific breath-testing machine that measured his blood-alcohol concentration." *Id.* at ¶ 20.

{¶17} In its analysis in *Ilg*, the Supreme Court held at ¶ 23:

> "Construing substantively similar former versions of these statutes in *State v. Vega*, 12 Ohio St.3d 185, 188, 465 N.E.2d 1303, we noted that the General Assembly had 'legislatively resolved the questions of the reliability and relevancy of intoxilyzer tests.' The court explained:
>
> '[The judiciary must recognize] the necessary legislative determination that breath tests, properly conducted, are reliable irrespective that not all experts wholly agree and that the common law foundation evidence has, for admissibility, been replaced by statute and rule; and that the legislative delegation was to the Director of Health, not the court, [of] the discretionary authority for adoption of appropriate tests and procedures, including breath test devices.' " (First bracketed insertion sic.) *Id*. at 188, 189, 465 N.E.2d 1303, quoting *State v. Brockway*, 2 Ohio App.3d 227, 232, 441 N.E.2d 602 (1981).

{¶18} In *Ilg*, the Court therefore reaffirmed that "[b]ecause the legislature provided for the admissibility of intoxilyzer tests if analyzed in accordance with methods approved by the director of ODH, an accused may not present expert testimony attacking the general scientific reliability of approved test instruments." *Ilg*, at ¶ 23; *Brockway*, *supra*, at 189, 441 N.E.2d 602.

{¶19} The *Ilg* court also recognized that "although an accused may not challenge the general accuracy and scientific reliability of the test procedure selected by ODH, the accused, 'may still challenge the accuracy

of his specific test results.' " *Id*., ¶ 24; *State v. Tanner*, 15 Ohio St.3d 1, 472 N.E.2d 689 (1984). The *Ilg* court went on to review its decisions in *Columbus v. Taylor*, 39 Ohio St.3d 162, 529 N.E.2d 1382 (1988)[3]; *State v. French*, 72 Ohio St.3d 446, 650 N.E.2d 887 (1995)[4]; and *State v. Edwards*, 107 Ohio St.3d 169, 2005-Ohio-6180, 837 N.E.2d 752.[5] *Ilg*, at ¶ 28, held:

> "As these cases demonstrate, the General Assembly has delegated to the director of ODH the authority to adopt appropriate tests and procedures to chemically analyze specified bodily substances to ascertain the concentration of alcohol, drug, controlled substance, or combination thereof in those bodily substances and issue permits to qualified persons to perform those analyses. As we indicated in *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 32, 'the General Assembly instructed the Director of Health - and not the judiciary - to ensure the reliability of alcohol-test results by promulgating regulations precisely because the former possesses the scientific expertise that the latter does not.' (Emphasis sic.) The director has decided that Intoxilyzer 8000s, when used in accordance with department regulations, are capable of accurately measuring breath-alcohol concentrations. Ohio Adm. Code 3701-53-02(A)(3), and an accused therefore may not attack the general scientific reliability of that machine test, *Vega*, 12 Ohio St.3d at 186, 465 N.E.2d 1303."

{¶20} *Ilg* concluded, however, that despite the rule in *Vega*, neither

[3] The Court noted "[i]t is well established that a defendant may challenge the accuracy of his specific results." (Emphasis sic.) *Id*. at 163.

[4] The Court held that "the failure to 'challenge the admissibility of the chemical test results through a pretrial motion to suppress waives the requirement on the state to lay a foundation for the admissibility of the test results at trial.' " *Id*. at paragraph one of the syllabus. We also stated that "this waiver 'does not mean, however, that the defendant may not challenge the chemical test results at trial under the Rules of Evidence. Evidentiary objections challenging the competency, admissibility, relevancy, authenticity, and credibility of the chemical tests may still be raised.' " *Id.* at 452, 650 N.E.2d 887.

[5] The Court noted that an accused may move to suppress an alcohol-content test based on noncompliance with regulations governing the maintenance and operation of testing devices. *Id*. at 11, citing *French* at 449, 650 N.E.2d 887.

the director's approval of the Intoxilyzer 8000 nor the relevant statutes or our case law precludes an accused from challenging the accuracy, competence, admissibility, relevance, authenticity, or credibility of specific tests rendered by an Intoxilyzer 8000 at issue in a pending case. *Id.* ¶ 29. *Ilg* explicitly held at ¶¶ 30 and 32:

> "In this case, the COBRA data that Ilg sought in the subpoena expressly targeted evidence related solely to the Intoxilyzer 8000 that the city used to perform his breath test. Ilg's expert * * * provided the only evidence in the record on that issue and averred that '[i]n order to be able to evaluate the reliability of the test, this particular Intoxilyzer 80000 machine, and the testing procedures in this case, all of the documents requested of the State and ODH are necessary.' No one from ODH gave any testimony suggesting that the COBRA data is not, in fact, relevant to demonstrating the inaccuracy of Ilg's breath test on the night of his arrest. Thus, the record supports the trial court's finding that Ilg could not challenge the reliability of this breath test without the COBRA data generated by the Intoxilyzer 8000. * * * Here, neither the statute nor our caselaw precludes Ilg from showing that the Intoxilyzer 8000 that tested his breath provided an inaccurate result, and he is entitled to discovery of relevant evidence to support his claim that the Intoxilyzer 8000 machine used to test him failed to operate properly."

{¶21} *Ilg* was decided on October 1, 2014 and two other appellate cases have cited *Ilg.* On October 16, 2014, the 10th District Court of Appeals decided *Columbus v. Horton,* 10th Dist. Franklin No. 13AP-966, 2014-Ohio-4584. In *Horton*, the appellate court reiterated that Ohio has legislatively resolved the question of the general reliability of tests for blood

alcohol content. *Id.* at ¶ 25, citing *Vega*, *supra,* at 188, 465 N.E.2d 1303 (1984). Horton argued the trial court impermissibly limited his right to cross-examine the arresting law enforcement officer regarding the reliability of the chemical breath test he administered. In overruling Horton's assignment of error with regard to his breath test, the appellate court also denied his motion for supplemental briefing and argument in light of the *Ilg* decision.

{¶22} Also on October 16, 2014, the 8th District Court of Appeals decided *Cleveland v. Evans,* 8th Dist. Cuyahoga No. 100721, 2014-Ohio-4567. There, Evans argued that his Fourth Amendment rights were violated when the trial court denied his motion to suppress the evidence of his breath alcohol test based on a challenge to the reliability of the Intoxilyzer 8000 system used throughout the state. The *Evans* court cited *Ilg*, stating at ¶ 39:

> "More recently, the Ohio Supreme Court reaffirmed that general attacks on the reliability of the Intoxylizer 8000 are improper grounds for a motion to suppress. (Citation omitted.) The *Ilg* court outlined what presumptive validity and the Ohio Department of Health regulations did not preclude; namely, challenges to specific machines or specific test results, including the manner the test was conducted, the timing of the test, and the proper operation of the specific machine used."[6]

{¶23} The *Evans* court further held at ¶ 40:

[6] Here we acknowledge there are inconsistencies in the way the word "Intoxilyzer" is spelled. The spelling referencing the breath testing machine contained in the Ohio Adm. Code, 3701-53-02, is "Intoxilyzer." In *Evans, supra,* and other opinions which were reviewed, the word referencing the machine is sometimes spelled "Intoxylizer."

> "As to the reliability and admissibility of the Intoxylizer 8000 generally, the state legislature has given the Ohio Department of Health the task of implementing standard and sufficiently reliable equipment to determine alcohol breath concentration. R.C. 3701.43. As a result, breath tests are given presumptive validity. *State v. Hill*, 4th Dist. Gallia No. 92CA30, 1993 Ohio App. LEXIS 2726, *5, 1993 WL 183493 (May 21, 1993); *Ilg* at ¶ 28."

{¶24} Finally, the *Evans* court concluded the case was dissimilar to *Ilg*, where the state failed to comply with subpoena requests regarding records. In *Evans*, the court observed, the defendant never attempted to prove that the results of his specific breath test were faulty; the motion to suppress made general attacks on the reliability of the machines; and no subpoenas, summons, or discovery requests appeared in the record. The *Evans* court opined that such filings in the record would provide an inference that the defendant was attempting to challenge the accuracy or reliability of the specific machine, specific test results, or the specific method in which the test was administered.

{¶25} We find Appellant's case to be somewhat distinguishable from *Ilg.* In this matter, there is no record that Appellant made any initial discovery request. If one was made but somehow a notice of filing was not placed in the record, we do not know what information was requested.

{¶26} Appellant did file a request for additional discovery. In particular, Appellant requested:

> 1) The archived breath test date for this machine maintained within the Ohio Department of Health's COBRA system for the two-month period preceding the date of Appellant's testing on December 21, 2013;
>
> 2) The identification of the software utilized in the same machine on the date of Appellant's test, and the identity of the software utilized in the machine on the date of its first use;
>
> 3) A digital copy of the source code for the software in use in the Intoxilyzer 8000 on the date of Appellant's breath test;
>
> 4) Repair and maintenance records for this machine since the date of first use.

Appellant's request for additional discovery requested specific information in order to mount a specific attack, but the record indicates the information was never provided. Furthermore, the record reveals Appellant did not file a motion to compel the requested information.

{¶27} We have reviewed the content of Appellant's motion in limine, which was filed the same day as the request for additional discovery. Appellant requested the Court make a preliminary determination of the admissibility of the results of the testing of a sample of the defendant's breath, generated by the Intoxilyzer 8000, Serial No. 80-004213 on December 12, 2013. The reliability of the test results were challenged under Rules 702 and 703 of the Ohio Rules of Evidence.

{¶28} Appellant's motion was heard on March 5, 2014. The transcript of the hearing indicates Appellant declined to present additional

evidence to support the motion. The trial court noted the request for additional discovery and Appellant's counsel indicated the request had not been followed up with a subpoena duces tecum. Counsel further indicated to the court that the defense would not be pursuing "that" any further,[7] and that no other discovery would be requested. The trial court overruled Appellant's motion in limine.

{¶29} The trial court held in pertinent part:

> "This Court is bound to follow the dictates of the Fourth District Court of Appeals. Therefore, the Motion in Limine is overruled. It is this court's position that it need not look into the general reliability of the Intoxilyzer 8000 because that authority has been statutorily delegated to the Ohio Department of Health. The statutory delegation was judicially approved by the Ohio Supreme Court in *State v. Vega*. In other words, the statute [R.C. 4511.19(D)(1)(b)] means that the court shall admit evidence analyzed in accordance with ODH rules and regulations. This holding does not preclude the defense from presenting all relevant evidence at trial going to the weight to be given the specific test result in any given case. In practical terms, the defendant might seek to offer expert testimony at trial that goes to the weight to be given to the Intoxilyzer 8000. Pursuant to Criminal Rule 16, the defendant would be required to provide the expert's report to the state. The state might then decide to file a motion in limine to keep out the expert's opinion."

{¶30} In this matter, we find the trial court correctly applied the law to the facts of Appellant's case. Appellant filed a motion in limine, allegedly making challenges to the reliability of the test in question.

[7] We must presume "that" meant the request for additional discovery and/or a subpoena duces tecum.

Appellant couches his arguments by using language that his requests are "specific." However, upon review of the motion and its challenges, we observe that the challenges are generally directed to all Intoxilyzer 8000 machines.[8]

{¶31} Furthermore, Appellant did not make any argument that she was denied specific information which would enable her to make a specific attack. Appellant could have filed a motion to compel discovery of the specific requests. And if denied, Appellant could have filed a motion in limine based upon the denial of her motion to compel specific requests. Appellant could have issued subpoenas and summoned witnesses.

{¶32} In *Ilg,* his expert provided the only evidence in the record regarding the information sought in the subpoena. The Supreme Court observed at ¶ 30:

> "Ilg's expert * * * averred that '[i]n order to be able to evaluate the reliability of the test, this particular Intoxilyzer 8000 machine, and the testing procedures in this case, all of the documents requested of the State and ODH are necessary.' *Id.,* at ¶ 30. No one from ODH gave any testimony suggesting that the COBRA data is not, in fact, relevant to demonstrating the inaccuracy of Ilg's breath test on the night of his arrest. Thus, the record supports the trial court's finding that Ilg could not challenge the reliability of his breath test without the COBRA data generated by the Intoxilyzer 8000." *Id.*

[8] At the hearing where Appellant changed her plea to no contest, counsel stated: "The intention of the no contest plea is to preserve issues for possible appellate review regarding the Court's earlier decision on the Motion in Limine challenging aspects of the general reliability of the breath testing device."

{¶33} Here, Appellant offered no expert testimony, as did Ilg, that "expressly targeted evidence related solely to the Intoxilyzer 8000 that [was used] to perform [her] breath test." We recognize this decision is a "close call." The question that logically now follows is "how much" is required or must be pursued by a defendant procedurally in order to mount a specific attack. No doubt, this decision will create further debate. However, we find the trial court correctly applied the law in *Vega* and reaffirmed in *Ilg* to the facts of Appellant's case. As such, we further find the trial court did not abuse its discretion in overruling Appellant's motion.

2. Violation of the separation of powers of government accomplished in Article II, Sec. 1, Article III, Sec. 5, and Article IV, Section 1 of the Ohio Constitution.

{¶34} R.C. 3701.143 provides in relevant part:

> "[T]he director of health shall determine, or cause to be determined, techniques or methods for chemically analyzing a person's whole blood, blood serum or plasma, urine, breath, or other bodily substance in order to ascertain the amount of alcohol * * * in the person's whole blood, blood serum or plasma, urine, breath, or other bodily substance. The director shall approve satisfactory techniques or methods, ascertain the qualifications of individuals to conduct such analyses, and issue permits to qualified persons authorizing them to perform such analyses * * *."

{¶35} Here, Appellant argues the legislature has delegated to the Director of Health the authority to approve "techniques or methods," not particular instruments, for the chemical analysis of blood, urine, breath or

other bodily fluids. Appellant points out the regulation which the director has promulgated under the heading of "techniques or methods" set forth as follows at OAC 3701-53-01 contains only this definition as to "techniques": "(A) Tests to determine the concentration of alcohol may be applied to blood, breath, urine, or other bodily substances." Appellant further emphasizes the regulation has only this to say as far as "methods": "(B) At least one copy of the written procedure manual required by paragraph (D) of rule 3701-53-06 of the Administrative Code for performing blood, urine, or other bodily substance tests shall be on file in the area where the analytical tests are performed." Then, the department of health simply lists four breath testing instruments which it approves without "elucidation of the techniques or methods utilized in such instruments" and with respect to the Intoxilyzer 8000, "excuses the use of an operational checklist, merely requiring that the analysis be performed according to the 'instrument display." OAC 3701-53-02(E).[9] Appellant further cites OAC 3701-53-03 which imposes specific criteria upon the "approved techniques or methods" as such: "The technique or method must have documented sensitivity, specificity, accuracy, precision and linearity. The technique or method can be based on procedures which

[9] The breath testing instrument at issue is referenced as the "Intoxilyzer 8000, Serial Number 80-004213." There are two Intoxilyzer models, the "(OH-5)" and the "(OH-2)." Pursuant to Appellant's reference to OAC 3701-53-02(E), and Appellee's concurrence with Appellant's statement of the facts and statement of the case, the Intoxilyzer model at issue in this case is apparently an (OH-5) model.

have been published in a peer reviewed or juried scientific journal or thoroughly documented by the laboratory." Appellant's argument concludes that "the regulations promulgated pursuant to R.C. 3701.143 make a necessary distinction between 'techniques or methods' and 'instruments' which may execute or perform functions associated with the techniques and methods."

{¶36} The substance of Appellant's argument is that the Ohio Department of Health has seen fit to approve a "technique" embodied within the Intoxilyzer 8000 device without reviewing or even having access to its software. Appellant asserts the instrument in question incorporates the technique of infrared spectroscopy for the identification and quantification of ethyl alcohol. The Department's approval of this technique for these stated purposes is within the scope of its delegated authority. However, Appellant argues, for the judicial branch to establish a conclusive presumption of reliability attached to a particular instrument which incorporates this technique is an unnecessary and unjustified diminution of a trial court's authority under Rules 402, 702, and 703.[10] In response Appellee points out, as discussed at length above, defendants are not precluded from

[10] Ohio Evid.R. 402 governs relevant and irrelevant evidence. Ohio Evid.R. 702 governs testimony by experts. Ohio Evid.R. 703 governs bases of opinion testimony by experts.

challenging the Intoxilyzer 8000's operation on any particular day as relates to the particular sample given.[11]

{¶37} In *Zanni, supra,* Appellant made a separation of powers argument. We noted Zanni's argument was based upon the same notion as here, that the legislative delegation of authority to the Director of Health to determine the reliability of testing methods and devices infringed upon the Ohio Supreme Court's authority to promulgate rules of evidence. In *Zanni,* we concluded:

> "The delegation of authority to the [D]irector of [H]ealth to establish the appropriate methods for determining the amount of alcohol in a defendant's bodily substances does not conflict with any Rule of Evidence." *Id.* at ¶ 23; *State v. Canino,* 2013-Ohio-551, 986 N.E.2d 1112, ¶ 29; *Lucarelli* at ¶ 32; *State v. O'Neill,* 11th Dist. Portage No. 2012-P-0016, 2013-Ohio-2619, ¶ 17. Moreover, nothing in the rules of evidence establish the trial court as the sole gatekeeper with respect to the general reliability of breath-testing instruments. *Id.* To the contrary, Evidence Rule 102 states that '[t]hese rules shall not supersede substantive statutory provisions.' " *Id.; Zanni, supra,* at 23.

We further held at ¶ 24:

> "In addition, the statutory presumption of reliability does not usurp the trial court's role as gatekeeper. Because '*Vega* specifically states that a defendant is entitled to produce evidence to assail the particular results of the subject test' it has 'preserv[ed]the trial court's role as gatekeeper.' " *State v. Smith,* 11th Dist. Portage No. 2012-P-0076, 2013-Ohio-640, ¶ 17. Defendants 'may always challenge the accuracy of his or her

[11] Appellee further acknowledged that if a statute attempted to limit a trial court's review in such circumstances, it might well violate the separation of powers doctrine.

> specific test results and the qualifications of the person administering the test, and otherwise strive to discredit the weight to be given the specific test results * * *.' *Canino* at ¶ 32."

{¶38} As we have reasoned above, Appellant here made only general challenges to the scientific reliability of all Intoxilyzer 8000 breath-testing machines. The Supreme Court of Ohio's decision in *Cincinnati v. Ilg*, *supra,* reaffirms the holdings in *Vega.* As in *Zanni*, *supra,* we reject the separation of powers argument. As such, we overrule Appellant's first assignment of error and affirm the judgment of the trial court.

> 3. Violation of the right to substantive and procedural due process.

{¶39} Appellant recognizes our holding in *Zanni*, however, argues that in her case, there is a stacking of conclusive presumptions:

> "The instrument generating the test result is conclusively presumed reliable. The test result, when used in a per se prosecution, serves as a de facto conclusive presumption of impairment. Such a scheme raises substantial questions under the due process clauses of the Fifth and Fourteenth Amendments." (Brief at p. 13).

{¶40} In *Zanni,* at ¶ 17, we held:

> "We do not believe that the application of *Vega* violates a defendant's due process rights because the trial courts retain the authority to suppress test results when the state fails to demonstrate that it followed the testing procedures set forth by the Director of Health, or when the operator was not properly qualified to administer the test. *State v. Lucarelli,* 11th Dist. Portage No. 2012-P-0065, 2013-Ohio-1606, ¶ 27. A

> defendant's due process rights are further protected because '[a] defendant may also challenge the accuracy of his specific test results at trial and with evidence going to the weight accorded the test results.' " *Id.*

{¶41} Again, based on our analysis set forth above, we agree with Appellee that the facts in this case do not differ in any manner sufficient to change the analysis and results of this Court's application of the law as set forth in *Zanni*. As such, we find no merit to Appellant's second assignment of error and we affirm the judgment of the trial court.

4. Reliance on the 11th District decisions is misplaced.

{¶42} Appellant also points to decisions rendered in the 11th District in *State v. Rouse,* 11th Dist. Portage No. 2012-P-0032, 2013-Ohio-5584; *State v. Carter*, 11th Dist. Portage No. 2012-P-0027, 2012-Ohio-5583; *State v. Miller,* 11th Dist. Portage No. 2012-P-0032, 2012-Ohio-5585; and *State v. Johnson,* 11th Dist. Portage No. 2012-P-0008, 2013-Ohio-440 and emphasizes that in *State v. Bergman,* 11th Dist. Portage No. 2012-P-0124, 2013-Ohio-5811, the court affirmed a single line of authority regarding pretrial challenges of the reliability of breath testing instruments. However, Appellant glosses over the specific issue the court decided, which was "whether the state of Ohio has the burden of going forward in a hearing on a motion to suppress when there is a challenge to the general reliability of the Intoxilyzer 8000, a breath testing instrument approved by the Director of the

Ohio Department of Health." The full holding set forth in *Bergman* is as follows:

> "On the authority of *State v. Rouse* * * * we answer the question in the negative. Where the breath testing device at issue has been approved by the Director of the Ohio Department of Health, there is no need for the state to prove the general reliability of the device itself. *Rouse, supra,* at ¶ 39; *Carter, supra,* at ¶ 43; *Miller, supra,* at ¶ 32; *Johnson, supra,* at ¶ 32. Given this holding, *Rouse, Carter*, *Miller*, *Johnson,* and their progeny are affirmed and the opinion and judgment in the underlying matter * * * as well as all other opinions and judgments contrary to this holding are expressly overruled."

{¶43} We also noted the line of decisions from the 11th District in *Zanni,* but observed that other appellate courts have continued to follow *Vega* and have held that a defendant may not mount an attack on the general reliability of a breath-testing device. *Zanni, supra,* at ¶ 26; *Reid, supra,* at ¶ 11.

C. CONCLUSION

{¶44} Based on the reasoning set forth above, we find the trial court did not err in its application of the law to the facts. As such, we find no abuse of discretion. Appellant's two assignments of error are overruled and we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

Harsha, J., concurring in judgment only:

{¶45} I concur in the judgment but believe that the constitutional issues raised by Brennan on appeal need not be addressed because she did not raise them in her motion in limine, during the hearing on the motion, or at sentencing. *See State v. Quarterman*, 140 Ohio St.3d 464, 2014 -Ohio-4034, 19 N.E.3d 900, ¶ 15. Although we may have discretion to consider these forfeited issues, *id.* at ¶ 16, I would not because it is not absolutely necessary to do so. *See, e.g., State ex rel. Essig v. Blackwell*, 103 Ohio St.3d 481, 2004-Ohio-5586, 817 N.E.2d 5, ¶ 34, quoting *State ex rel. DeBrosse v. Cool*, 87 Ohio St.3d 1, 7, 716 N.E.2d 1114 (1999) *345 (" 'courts decide constitutional issues only when absolutely necessary' "). Instead, I would "leave [these issues} for another day when [they are] properly before us." *State v. Zanni*, 2014-Ohio-2806, 15 N.E.3d 370, ¶ 32 (4th Dist.) (Harsha, J., concurring). I would note, however, that the Supreme Court of Ohio unanimously rejected an appeal from our decision in *Zanni*. 141 Ohio St.3d 1421, 2014-Ohio-5567, 21 N.E.3d 1114.

Hoover, P.J., dissenting:

{¶46} I respectfully dissent from the per curiam decision. As I stated in *State v. Zanni*, 15 N.E.3d 370, 2014-Ohio-2806 (4th Dist.) ¶34-35:

> * * * I believe the existing presumption of reliability infringes upon an accused's constitutional right of confrontation; the trial court's role as "gatekeeper" for scientific evidence; and the separation of powers doctrine. *See Reid* at ¶ 17 (McFarland, J., dissenting) ("These rights [constitutional due process right of confrontation] and the trial judge's gatekeeper role of trial evidence is of great importance to our system of justice and fundamental fairness."); *Vega*, 12 Ohio St.3d at 190-191, 465 N.E.2d 1303 (Brown, J., dissenting) ("The admissibility of relevant evidence is a judicial function. * * * The issue of relevancy or admissibility of evidence cannot be usurped by the legislature nor delegated by the legislature to the Director of Health. The constitutional principle of separation of powers among the branches of government demands this conclusion."). Moreover, R.C. 4511.19(D)(1)(b) merely states that a court "may admit" evidence from a Director of Health approved device. Thus, the General Assembly apparently wished to

afford trial court's discretion in determining whether to admit breath alcohol tests into evidence. *Reid* at ¶ 14; *Vega* at 190 (Brown, J., dissenting).

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Municipal Court of Chillicothe 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 Supreme Court of Ohio 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 Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio 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.

Harsha, J.: Concurs in Judgment Only with Opinion.
Hoover, P.J.: Dissents with Dissenting Opinion.

For the Court,

BY: _____
Matthew W. McFarland,
Administrative 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.