

COURT OF APPEALS  
LICKING COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

THE STATE OF OHIO,	:	JUDGES:
	:	Hon. John F. Boggins, P.J.
Appellee,	:	Hon. William B. Hoffman, J.
	:	Hon. Sheila G. Farmer, J.
v.	:	
	:	
BOWERS,	:	Case No. 04CA65
	:	
Appellant.	:	
	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Municipal Court, Case No. 04TRC03189

JUDGMENT: Reversed

DATE OF JUDGMENT ENTRY: May 24, 2005

APPEARANCES:

Elena V. Tuhy, for appellee.

Robert E. Calesaric, for appellant.

---

FARMER, Judge.

{¶ 1} On March 28, 2004, appellant, Jimmy Bowers, blew into a breath-alcohol concentration (“BAC”) Datamaster breath-testing machine and tested .153. He was subsequently charged with driving under the influence in violation of R.C. 4511.19(A)(1)

and driving outside a marked lane in violation of R.C. 4511.33. Appellant filed several pretrial motions including a motion to suppress and/or in limine to bar the introduction of the breath-test results. A hearing was held on June 9, 2004. By judgment entry filed June 22, 2004, the trial court denied the motion.

{¶ 2} On August 13, 2004, appellant pleaded no contest to the charges. By judgment entry filed on the same date, the trial court found appellant guilty of the charges. The trial court then sentenced appellant to 30 days in jail, 27 of them suspended, and imposed a fine of \$300 plus court costs.

{¶ 3} Appellant filed an appeal, and this matter is now before this court for consideration. The assignment of error is as follows:

{¶ 4} "The trial court erred in not granting appellant-defendant's motion to suppress and/or in limine to exclude the Datamaster breath test."

{¶ 5} Appellant claims that the trial court erred in denying his motion to exclude the results of the BAC Datamaster breath-testing machine. We agree.

{¶ 6} Appellant argues that the state improperly submitted a certified copy of an uncertified copy of the calibration-solution certificate, as it was incomplete and unauthenticated.

{¶ 7} This issue was addressed by this court in *State v. Musick*, Licking App. No. 01CA77, 2002-Ohio-2890. In *Musick*, this court found that an unauthenticated or uncertified copy of a calibration-solution affidavit was inadmissible at a suppression hearing and, therefore, that the state had failed to meet its burden. Applying *Musick* to this case, we find that the trial court erred in admitting the certified copy of an uncertified copy of the calibration-solution affidavit. "[T]he authentication of a calibration solution

affidavit is a condition precedent to its admission." *State v. Edwards*, Tuscarawas App. No. 2003AP090077, 2004-Ohio-870, ¶21 (Farmer, J., dissenting).

{¶ 8} The sole assignment of error is granted.

{¶ 9} The judgment of the Municipal Court of Licking County, Ohio, is hereby reversed.

Judgment reversed

Boggins, P.J. concurs.

Hoffman, J. dissents.

---

BOGGINS, PRESIDING JUDGE, concurring

{¶10} I concur in the decision in this case but believe that cases from this court and others should be noted.

{¶11} This decision follows that of *State v. Keating* (Oct. 13, 1987), 5th Dist. No. CA-7148, Stark County; *Kirkersville v. Burt* (Nov. 25, 1994), 5th Dist. No. 94-CA-56, Licking County; *State v. Musick* (June 4, 2002), 5th Dist. No. 01CA77, Licking County; *State v. Koteff* (Apr. 8, 2005), 5th Dist. No. 04-COA-035, Ashland County; *Columbus v. Robbins* (1989), 61 Ohio App.3d. 324; *State v. Brown* (Apr. 13, 1992), 12th Dist. No. CA91-07-043; and *Cleveland Metroparks v. Ponsford* (Oct. 10, 1996), 8th Dist. No. 68257, Cuyahoga County.

{¶12} This court in *State v. Edwards* (Feb. 24, 2004), 5th Dist. No. 2003AP090077, Tuscarawas County, disagreed on the basis that at a suppression hearing, hearsay evidence is admissible even though at trial it would not be.

{¶13} I concur in the opinion, as was stated in *State v. Brown*, that

authentication of a certificate is a condition precedent to its admission into evidence, even at a suppression hearing.

---

HOFFMAN, J., dissenting

{¶14} I respectfully dissent from the majority opinion. I would affirm the trial court's opinion based on *State v. Edwards* (Feb. 24, 2004), Tuscarawas App. No. 2003AP090077, 2004-Ohio-870.