[Cite as *State v. Collins*, 2010-Ohio-5333.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 10-CA-16
JAMIE COLLINS	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Municipal Court Case No. 09TRC 7754
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	October 21, 2010

APPEARANCES:

For Plaintiff-Appellee:

TRICIA M. MOORE 0077414
Assistant Law Director
40 W. Main St.
Newark, Ohio 43055

For Defendant-Appellant:

ROBERT E. CALESARIC 0063212
35 South Park Place, Ste. 150
Newark, Ohio 43055

Delaney, J.

{¶1} Defendant-Appellant Jamie Collins appeals the judgment of the Licking County Municipal Court, finding her guilty of one count of Operating a Vehicle while Intoxicated (OVI). Specifically, she is contesting the municipal court's denial of her motion to suppress the results of the breathalyzer test taken after her arrest.

{¶2} The facts leading up to the motion to suppress are as follows:

{¶3} On July 21, 2009, at 2:32 a.m., Trooper Thaxton of the Ohio State Highway Patrol executed a traffic stop on Appellant's vehicle because she was speeding. Her speed was 38 mph in a 25 mph zone.

{¶4} Upon approaching Appellant, who was still in her vehicle, Trooper Thaxton noted that Appellant had glassy, bloodshot eyes, her face was flushed and she had an odor of alcohol on her person. Trooper Thaxton asked Appellant for her driver's license, registration, and proof of insurance, which she supplied to him at that time. He also stated that Appellant did not have slurred speech.

{¶5} Trooper Thaxton asked Appellant where she was coming from, and she stated that she was coming from her friend's house and that she was on her way home. At that time, the trooper asked Appellant if she had consumed any alcohol, and she denied that she had. He asked her to exit the car and had her walk to the front of the patrol car, where he immediately performed the Horizontal Gaze Nystagmus (HGN) test. According to Trooper Thaxton, he observed four clues in both of Appellant's eyes to indicate that she was intoxicated. He stated that displaying four out of six clues is considered a failure of the test.

{¶6} Trooper Thaxton then had Appellant perform the walk and turn test on a flat surface in the parking lot where they had stopped. He stated that he observed six out of eight clues, those being that she moved her feet to keep her balance, she started the test before she was instructed to, she did not touch heel to toe, she stepped off the line while walking in both directions, she turned incorrectly and took the incorrect number of steps. Trooper Thaxton stated that two clues are considered a failure on the walk and turn test.

{¶7} He then conducted a third field sobriety test, that being the one-legged stand test, wherein he asked Appellant to stand with her feet together and her hands at her side. Trooper Thaxton stated that he observed Appellant swaying while balancing and when raised her arms more than six inches, as she was instructed to do. He stated that two clues constitute a failure of the test and that she failed that test.

{¶8} He also asked Appellant to recite the Alphabet, starting with the letter “D” and ending with the letter “V”. Appellant performed that test correctly.

{¶9} At that point, Trooper Thaxton administered a portable breath test to Appellant and placed her under arrest.

{¶10} Later that night, at the police station, Appellant admitted that she had consumed three beers. She was asked to complete a breathalyzer test at the police station after being read the BMV 2255 form, wherein she was advised that if she refused to take the breathalyzer test, her driver’s license would be automatically suspended for one year. Appellant signed the BMV 2255 form and agreed to submit to the breathalyzer test.

{¶11} Trooper Thaxton stated that he observed Appellant for twenty minutes before administering the test and that she did not ingest anything during that time. She submitted to the breath test at 3:16 a.m. with a result of 0.108, which was over the legal limit.

{¶12} On cross examination, it was brought out by defense counsel that the machine on which Appellant was tested had been taken out of service on March 30, 2009, because it had two out of range simulator checks and there was also a problem with the printer. On April 20, 2009, the machine was serviced at the Heath Police Department. On July 13, 2009, there was a low, out of range test. The officers replaced the solution in the machine with a second bottle, Bottle 14, to bring the machine within proper testing range. On July 20, 2009, Trooper Thaxton conducted the simulator check and received an in-range simulator check. A week later, on July 27, 2009, he completed another simulator check that resulted in a .093 out of range with Bottle 14. Trooper Thaxton failed to complete the follow up simulator check on that day. Later that day, Trooper Sawyers completed the follow-up simulator check with a new bottle of solution and received a result of .097, which was within range.

{¶13} However, the record reflects the machine continued to have problems in August. On August 10, 2009, it tested out of range and the officers used another bottle to bring it back into range. On August 17, the first test was at a .091, which was out of range and later on that same date, the machine tested at .095, which was within range. On August 24, 2009, the machine again tested out of range and was brought within range again. Trooper Thaxton admitted on cross examination that records of this

machine indicate that this is an ongoing problem with this machine and that even up to the date of the suppression hearing, these problems still exist with this machine.

{¶14} No other witnesses testified at the suppression hearing.

{¶15} The trial court admitted into evidence a packet, identified as State's Exhibit 3, which was comprised of the following documents: (a) the affidavit of Lt. L.H. Roseboro, certifying all of the documents contained in Exhibit 3 were true and accurate copies of the original documents maintained at the Granville Post of the Ohio State Patrol and that he is custodian of the records; (b) the BAC DataMaster senior operator permit of Trooper Sawyers; (c) a certificate of course instruction for field sobriety testing by Trooper Thaxton; (d) the BAC DataMaster senior operator permit of Trooper Thaxton; (e) the Ohio Dept. of Health approval of the instrument check solution, lot or batch #08360; (f) the BAC DataMaster instrument check form, dated July 20, 2009 and signed by Trooper Thaxton; (g) the BAC DataMaster calibration ticket, dated July 20, 2009 and signed by Trooper Thaxton; (h) the BAC DataMaster subject test form for Appellant, dated July 21, 2009 and signed by Trooper Thaxton; (i) the BAC DataMaster test ticket for Appellant, dated July 21, 2009 and signed Trooper Thaxton; (j) addendum for calibration check form, dated July 20, 2009 and signed by Trooper Thaxton ; (k) the BAC DataMaster instrument check form, dated July 27, 2009 and signed by Trooper Sawyers; (l) the BAC DataMaster calibration ticket, dated July 27, 2009 and signed by Trooper Sawyers; and (m) addendum for calibration check form, dated July 27, 2009 and signed by Trooper Sawyers.

{¶16} Appellant objected to the admission of State's Exhibit 3, specifically on the basis that Appellant's Sixth Amendment right to confront witnesses was denied by the

admission of Trooper Sawyers' post-test calibration records (State's Exhibit 3 k, l and m) when Trooper Sawyers did not testify at the suppression hearing.

{¶17} The trial court overruled the objection and admitted State's Exhibit 3 in total. On November 6, 2009, the trial court denied the motion to suppress, finding that the test was in substantial compliance with the Ohio Department of Health regulations. The trial court did not address Appellant's contention that the State's failure to present the testimony of Trooper Sawyers violated her right to confront a witness.

{¶18} Appellant subsequently pled no contest to a violation of R.C. 4511.19(A)(1)(d), the OVI per se charge, and speeding. The OVI impaired charge, pursuant to R.C. 4511.19(A)(1)(a) was dismissed without prejudice.

{¶19} Appellant timely appealed and raises one Assignment of Error:

{¶20} "I. THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION TO SUPPRESS EVIDENCE CHALLENGING THE STATE'S COMPLIANCE WITH THE OHIO DEPARTMENT OF HEALTH RULES FOR BREATH ALCOHOL TESTING."

I.

{¶21} In her sole assignment of error, Appellant argues the trial court erred in failing to suppress the results of the breath alcohol test in her case.

{¶22} "Appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Burnside*, 100 Ohio St.3d 152, 797 N.E.2d 71, 2003-Ohio-5372, paragraph 8. During a suppression hearing, the trial court assumes the role of trier of fact and, as such, is in the best position to resolve questions of fact and to evaluate witness credibility. Id., citing *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d

972. A reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *Burnside,* paragraph 8, citing *State v. Fanning* (1982), 1 Ohio St.3d 19, 437 N.E.2d 583. Accepting these facts as true, the appellate court must independently determine as a matter of law, without deference to the trial court's conclusion, whether the trial court's decision meets the applicable legal standard. *Burnside,* paragraph 8, citing *State v. McNamara* (1997), 124 Ohio App.3d 706, 707, 707 N.E.2d 539.

{¶23} The Ohio Supreme Court explained in *Burnside* that the General Assembly instructed the director of health, not the judiciary, to establish regulations concerning alcohol testing because the former possess the scientific expertise that the latter does not. Id. at paragraph 32, 797 N.E.2d 71. However, the court also recognized the fact that strict compliance with the regulations is not always realistic or humanly possible. Once a defendant challenges the admissibility of a breath test based upon a failure to comply with an Ohio Department of Health regulation, the State must demonstrate substantial compliance with that regulation. In *Burnside*, the court limited the substantial compliance standard to excusing only deviations from the regulations that are "clearly de minimis," also characterized as "minor procedural deviations." Id. at paragraph 34, 797 N.E.2d 71 (citation omitted).

{¶24} In this appeal, Appellant specifically challenges the trial court's determination that the State demonstrated substantial compliance because Trooper Sawyers, who conducted the post-test calibration of the BAC DataMaster as required by OAC 3701-53-04, was not called as a witness at the suppression hearing. Therefore, Appellant argues, Trooper Sawyers' reports should be suppressed on the basis

Appellant was denied the opportunity to confront this witness in violation of the Confrontation Clause of the Sixth Amendment to the U.S. Constitution, which states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him..."

{¶25} Appellant argues the U.S. Supreme Court's recent decision in *Melendez-Diaz v. Massachusetts*, --- U.S. ---, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), bars, in the absence of the live testimony of the trooper who performed the test, admission of the State's proferred records for the post-test calibration. We disagree.

{¶26} In *Melendez-Diaz*, the Supreme Court held that "certificates of analysis" prepared by Massachusetts lab analysts as to seized substances, reporting that the substances contained cocaine and stating the quantity, were within the core class of testimonial statements covered by the Confrontation Clause. "Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to "'be confronted with'" the analysts at trial." Id. at 129 S.Ct. 2532, citing *Crawford v. Washington*, 541 U.S. 36, 54, 124 S.Ct. 1354.

{¶27} Importantly, in the footnote to this holding, the Supreme Court was careful to limit the reach of its decision. The Court stated: "Contrary to the dissent's suggestion * * * , we do not hold and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or *accuracy of the testing device*, must appear in person as part of the prosecution's case. * * * Additionally, documents prepared in the regular course of equipment maintenance may well qualify as non-testimonial records." *Melendez-Diaz, supra,* at fn. 1.

{¶28} Indeed, this Court previously and consistently has held statements contained in documents evidencing pre- and post test instrument checks performed on BAC DataMaster breath machines are not "testimonial" under the Confrontational Clause.

{¶29} In *Village of Granville v. Eastman*, 5th Dist. No. 2006CA00050, 2006-Ohio-6237, at paragraph 24, we held:

{¶30} "Here, the documents [instruments checks] were not prepared with an eye to a specific prosecution and an essential element of the offense; rather, they were administrative reports prepared according to administrative rules and regulations and foundational in nature, without regard to a specific prosecution. Accordingly, the documents fall within the business record exception, and we find they are not testimonial. *State v. Cook* (6th Dist. March 31, 2005), 2005-Ohio-1550."

{¶31} See also, *State v. Wang*, 5th Dist. No. 2007CAC090048, 2008-Ohio-2144; *Granville v. Graziano*, 5th Dist. No. 2006-CA-00070, 2007-Ohio-1152; *State v. Pumphrey*, 5th Dist. No. 2006CA00054, 2007-Ohio-251.

{¶32} We adhere to our earlier rulings and find the documents prepared by Trooper Sawyers were nontestimonial and not subject to confrontation under the Sixth Amendment.

{¶33} We also note that since *Melendez-Diaz* was rendered, other jurisdictions have continued to recognize that calibration and maintenance records of breath test machines or radar devices are nontestimonial for the purposes of the Confrontation Clause. *U.S. v. Bacas*, 662 F.Supp.2d 481 (E.D. Virginia, 2009); *State v. Bergin* (2009),

231 Or. App.36, 217 P.3d 1087; *People v. Lent*, ---N.Y.S.2d ---, 2010 WL 2802714 (N.Y.Sup.App.Term), 2010 N.Y. Slip Op. 20283.

{¶34} Appellant further contends the State failed to demonstrate substantial compliance with the regulations found at OAC 3701-53-01 and 3701-53-04, which mandate that alcohol test results, instrument checks, and records of service be retained for not less than three years. Trooper Thaxton testified that the records of tests and instrument checks are retained for the "current year and then also three years prior" and that records concerning service and repairs made on the machine are kept at the patrol post by Lt. Roseboro. In addition, Trooper Sawyers' addendum (Exhibit 3 M) establishes that the results of the calibration checks and other tests performed on the instrument, and a record of maintenance and repairs are retained for three years.

{¶35} In her brief, Appellant argues that substantial compliance was not established by the State because "there were repairs done from April to July but there is no record of the repair in the log book with the other repair records and that Trooper Thaxton has no personal knowledge of the repairs." Appellant's Brief at p. 12. The following testimony was elicited at the suppression hearing during the cross-examination of Trooper Thaxton:

{¶36} "[Defense Counsel]: * * * [H]ave you had a chance to take a look at any repair records that might have come back with that machine when it came back in July?

{¶37} "Trooper Thaxton: No, I haven't.

{¶38} "[Defense Counsel]: Okay, I was wondering if curiosity got the best of you. So you haven't seen the repair records. They aren't in that log book?

{¶39} "Trooper Thaxton: I haven't been at work. I've been off, so I haven't been at work. Well, I've been here, but off from there.

{¶40} "[Defense Counsel]: So you have no personal knowledge of what's in those repair records or what they did not correct the problem, correct?

{¶41} "Trooper Thaxton: No, I don't."

{¶42} T. at 54-55.

{¶43} We simply cannot glean from the record before us that it was established by the defense that any test or repair records were in fact missing nor does Appellant point us to such evidence in the record. Accordingly, we find this argument to be meritless.

{¶44} Lastly, Appellant contends the breath test results are inadmissible because the State failed to establish that Trooper Thaxton observed Appellant for twenty minutes prior to testing to prevent oral intake of any material or regurgitation. Trooper Thaxton testified that Appellant was handcuffed, placed in the back of his cruiser and driven to the Heath police station where the breath test was performed. While driving, he observed Appellant in his rear-view mirror. The State submits substantial compliance was shown because the trooper accompanied Appellant at all times, her mouth was checked for any substances and there was never any indication that Appellant vomited prior to taking the breath test.

{¶45} In *State v. Steele* (1977), 52 Ohio St.2d 187, 370 N.E.2d 740, the Ohio Supreme Court held that rigid compliance with the alcohol-testing procedures in the Ohio Administrative Code is not a prerequisite to the admissibility of alcohol-test results. In *Steele,* the court observed that the failure to observe the subject for a "few seconds"

while the officer exited and walked around his patrol car did not render the test inadmissible.

{¶46} Based on the uncontroverted testimony of Trooper Thaxton, we find the State established substantial compliance with the continuous observation requirement, which created a presumption of admissibility. The Appellant has not rebutted that presumption by demonstrating that she was prejudiced by anything less than strict compliance nor does a constant vigil of the suspect seem reasonable under the circumstances.

{¶47} For all of these reasons, we overrule Appellant's assignment of error. The judgment of the Licking County Municipal Court is affirmed.

By: Delaney, J.

Gwin, P.J. and

Hoffman, J. concur.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

[Cite as *State v. Collins*, 2010-Ohio-5333.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
JAMIE COLLINS	:	
	:	
Defendant-Appellant	:	Case No. 10-CA-16
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Municipal Court is affirmed. Costs assessed to Appellant.

_____

HON. PATRICIA A. DELANEY

_____

HON. W. SCOTT GWIN

_____

HON. WILLIAM B. HOFFMAN