

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

STEVEN R. PROFFIT

Defendant-Appellant

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JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. John W. Wise, J.

Hon. Craig R. Baldwin, J.

Case No. CT2014-0044

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Muskingum County
Court, Case No. TRC 1402195

JUDGMENT:

Affirmed

DATE OF JUDGMENT:

June 15, 2015

APPEARANCES:

For Plaintiff-Appellee

GERALD V. ANDERSON II
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P.O. Box 189
Zanesville, OH 43702-0189

For Defendant-Appellant

ROBERT E. CALESARIC
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Farmer, J.

{¶1} On March 23, 2014, appellant, Steven Proffit, was charged with two counts of operating a motor vehicle while under the influence of alcohol in violation of R.C. 4511.19, one for being impaired and one for being over the breath legal per se limit. Appellant had tested 0.094 on a BAC DataMaster breath machine. Appellant was also charged with failure to stop for a posted stop sign in violation of R.C. 4511.43.

{¶2} On April 9, 2014, appellant filed a motion to suppress, contesting the stop and the results of the breath test. A hearing was held on September 3, 2014. By judgment entry filed September 19, 2014, the trial court denied the motion, finding the state had lawful cause to stop appellant and the state "showed substantial compliance with the regulatory and statutory testing requirements."

{¶3} On September 29, 2014, appellant pled no contest to the charges. By sentencing entry filed same date, the trial court found appellant guilty of the OVI breath legal per se limit charge and the stop sign violation, and sentenced him to three days in jail, suspended in lieu of his attendance at a Driver's Intervention Program.

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

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{¶5} "THE TRIAL ERRED BY NOT GRANTING APPELLANT'S MOTION TO SUPPRESS BECAUSE THE STATE DID NOT ESTABLISH THAT THE BAC DATAMASTER BREATH TEST MACHINE USED ON APPELLANT WAS IN SUBSTANTIAL COMPLIANCE WITH THE ESTABLISHED PROTOCOLS UNDER THE OHIO ADMINISTRATIVE CODE REGULATIONS AND OHIO REVISED CODE."

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{¶6} Appellant claims the trial court erred in denying his motion to suppress. We disagree.

{¶7} There are three methods of challenging on appeal a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's findings of fact. In reviewing a challenge of this nature, an appellate court must determine whether said findings of fact are against the manifest weight of the evidence. *State v. Fanning*, 1 Ohio St.3d 19 (1982); *State v. Klein*, 73 Ohio App.3d 486 (4th Dist.1991); *State v. Guysinger*, 86 Ohio App.3d 592 (4th Dist.1993). Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. *State v. Williams*, 86 Ohio App.3d 37 (4th Dist.1993). Finally, assuming the trial court's findings of fact are not against the manifest weight of the evidence and it has properly identified the law to be applied, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry*, 95 Ohio App.3d 93 (8th Dist.1994); *State v. Claytor*, 85 Ohio App.3d 623 (4th Dist.1993); *Guysinger*. As the United States Supreme Court held in *Ornelas v. U.S.*, 517 U.S. 690, 116 S.Ct. 1657, 1663 (1996), "...as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal."

{¶8} Appellant argues the state failed to establish that the breath testing machine was in substantial compliance with the Ohio Department of Health Regulations as set forth in Ohio Adm.Code 3701-53-04 which states the following in pertinent part:

[Ohio Adm.Code 3701-53-04(A)] A senior operator shall perform an instrument check on approved evidential breath testing instruments listed under paragraphs (A)(1), (A)(2), and (B) of rule 3701-53-02 no less frequently than once every seven days in accordance with the appropriate instrument checklist for the instrument being used. The instrument check may be performed anytime up to one hundred and ninety-two hours after the last instrument check.

(1) The instrument shall be checked to detect radio frequency interference (RFI) using a hand-held radio normally used by the law enforcement agency performing the instrument check. The RFI detector check is valid when the evidential breath testing instrument detects RFI or aborts a subject test. If the RFI detector check is not valid, the instrument shall not be used until the instrument is serviced.

(2) An instrument shall be checked using a solution containing ethyl alcohol approved by the director of health. An instrument check result is valid when the result of the instrument check is at or within five one-thousandths (0.005) grams per two hundred ten liters of the target value for that approved solution. An instrument check result which is outside the range specified in this paragraph shall be confirmed by the senior operator

using another bottle of approved solution. If this instrument check result is also out of range, the instrument shall not be used until the instrument is serviced or repaired.

[Ohio Adm.Code 3701-53-04(E)] A bottle of approved solution containing ethyl alcohol shall not be used more than three months after its date of first use, or after the manufacturer's expiration date on the approved solution certificate, whichever comes first. After first use, a bottle of approved solution shall be kept under refrigeration when not being used. The approved solution bottle shall be retained for reference until that bottle of approved solution is discarded.

[Ohio Adm.Code 3701-53-07(C)] Breath tests used to determine whether a person's breath contains a concentration of alcohol prohibited or defined by sections 4511.19 and/or 1547.11 of the Revised Code, or any other equivalent statute or local ordinance prescribing a defined or prohibited breath alcohol concentration shall be performed by a senior operator or an operator. A senior operator shall be responsible for the care, maintenance and instrument checks of the approved evidential breath testing instruments listed in paragraphs (A)(1), (A)(2), and (B) of rule 3701-53-02 of the Administrative Code. Representatives of the director shall be responsible for the instrument certifications on approved evidential breath testing instruments listed under paragraph (A)(3) of rule 3701-53-02 of the Administrative Code.

[Ohio Adm.Code 3701-53-07(D)] An individual meets the qualifications for a senior operator's permit by:

(1) Being a high school graduate or having passed the "General Education Development Test";

(2) Being a certified law enforcement officer sworn to enforce sections 4511.19 and/or 1547.11 of the Revised Code, or any other equivalent statute or local ordinance prescribing a defined or prohibited breath alcohol concentration, or a certified corrections officer, and;

(3) Having demonstrated that he or she can properly care for, maintain, perform instrument checks upon and operate the evidential breath testing instrument by having successfully completed a basic senior operator, upgrade or conversion training course for the type of approved evidential breath testing instrument for which he or she seeks a permit.

{¶9} In *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 24, the Supreme Court of Ohio explained the following:

After a defendant challenges the validity of test results in a pretrial motion, the state has the burden to show that the test was administered in substantial compliance with the regulations prescribed by the Director of Health. Once the state has satisfied this burden and created a presumption of admissibility, the burden then shifts to the defendant to rebut that presumption by demonstrating that he was prejudiced by

anything less than strict compliance. *State v. Brown* (1996), 109 Ohio App.3d 629, 632, 672 N.E.2d 1050. Hence, evidence of prejudice is relevant only after the state demonstrates substantial compliance with the applicable regulation.

{¶10} The *Burnside* court further stated at ¶ 34:

Nevertheless, we are cognizant that if "we were to agree* * *that any deviation whatsoever from th[e] regulation rendered the results of a [test] inadmissible, we would be ignoring the fact that strict compliance is not always realistically or humanly possible." *Plummer*, 22 Ohio St.3d at 294, 22 OBR 461, 490 N.E.2d 902. Precisely for this reason, we concluded in *Steele* that rigid compliance with the Department of Health regulations is not necessary for test results to be admissible. *Steele*, 52 Ohio St .2d at 187, 6 O.O.3d 418, 370 N.E.2d 740 (holding that the failure to observe a driver for a "few seconds" during the 20–minute observation period did not render the test results inadmissible). To avoid usurping a function that the General Assembly has assigned to the Director of Health, however, we must limit the substantial-compliance standard set forth in *Plummer* to excusing only errors that are clearly de minimis. Consistent with this limitation, we have characterized those errors that are excusable under the substantial-compliance standard as "minor procedural

deviations." *State v. Homan* (2000), 89 Ohio St.3d 421, 426, 732 N.E.2d 952.

{¶11} In his appellate brief at 6, appellant argues the state failed to produce any evidence of substantial compliance in the following ways: 1) the calibration solution was kept under refrigeration after first use, 2) the radio frequency interference check was performed using a hand held radio normally used by the law enforcement agency, and 3) the person(s) calibrating the instrument were currently licensed to calibrate the instrument.

{¶12} During the suppression hearing, the sole witness was Ohio State Highway Patrol Sergeant K. B. Kelley. Sergeant Kelley was the arresting officer and conducted the breath test on appellant. State's Exhibits C and D. Sergeant Kelley did not conduct the calibration checks. T. at 36-37; State's Exhibits E-H. Those checks were conducted by Sergeants Merryman and Felix. *Id.*

{¶13} In the trooper's testimony is a detailed explanation of the standard procedure. T. at 17-18. He testified that all troopers in the State are senior operators thereby establishing a prima facie that Sergeants Merryman and Felix were senior operators. T. at 14. He also identified the pre and post calibration sheets. State's Exhibits E-H.

{¶14} The notation relative to the RFI detector is checked off and the troopers testified that the radio used is the trooper's portable radio. T. at 16.

{¶15} Therefore the requirement that of the Ohio Adm.Code 3701-53-04(A)(1) is satisfied. The Exhibits met the requirements of Evid. R. 803(6). There was no objection to the admission of the Exhibits. T. at 49.

{¶16} The trooper also testified that the BAC solution is stores in a refrigerator. T. at 18.

{¶17} We conclude the evidence established is substantial compliance with the Ohio Adm.Code.

{¶18} The sole assignment of error is denied.

{¶19} The judgment of the Muskingum County Court is hereby affirmed.

By Farmer, P.J.

Wise, J. and

Baldwin, J. concur.