

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
ERIE COUNTY

State of Ohio

Court of Appeals No. E-13-030

Appellant

Trial Court No. TRC 1205826

v.

Juan Jimenez

**DECISION AND JUDGMENT**

Appellee

Decided: December 13, 2013

\* \* \* \* \*

Kevin J. Baxter, Erie County Prosecuting Attorney, Mary Ann Barylski, Frank Romeo Zeleznikar, and Nicholas J. Smith, Assistant Prosecuting Attorneys, for appellant.

K. Ronald Bailey and Kenneth R. Bailey, for appellee.

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**SINGER, P.J.**

{¶ 1} This is a state's appeal from an order of the Erie County Municipal Court, granting a motion to suppress the results of a breath test in an operating a vehicle under the influence of alcohol case. Because we conclude that a suppression hearing was a

proper forum to rebut the presumption of the validity of a chemical alcohol breath test and the court's finding that the presumption had been rebutted was based on relevant evidence, we affirm the trial court's order.

{¶ 2} On October 5, 2012, at approximately 5:00 a.m., a dispatcher relayed to an Ohio Highway Patrol trooper a motorist report of a vehicle driving erratically in the eastbound lane of the Ohio Turnpike. The trooper positioned his cruiser in the median and waited. A few minutes later the trooper observed a car meeting the description that had been relayed. According to the trooper, as he began following the car, he saw the driver swing the car from the right lane halfway into the center lane. The trooper stopped the car for a marked lane violation.

{¶ 3} The driver of the car was appellee, Juan Jimenez. The trooper later testified that when he approached appellee in his car that he could smell an odor of an alcoholic beverage and that appellee's eyes were bloodshot. The trooper administered both horizontal and vertical gaze nystagmus tests upon appellee, each returning six of six indicators of intoxication. A portable breath test registered .15.

{¶ 4} The trooper decided to transport appellee to the Milan, Ohio, patrol post where the trooper administered a breath test on the post's BAC Datamaster. This test registered a result of .154 percent equivalent blood alcohol content, slightly less than twice the legal limit. The trooper issued appellee a citation, charging a violation of R.C. 4511.19(A)(1)(a), operating a vehicle under the influence of alcohol, R.C.

4511.19(A)(1)(d), prohibited alcohol content, and a marked lane violation. Appellee pled not guilty and moved to suppress the results of the BAC Datamaster.

{¶ 5} At the suppression hearing, the trooper testified to the events of the stop and the procedures utilized in administering the breath test. Calibration tests for the BAC Datamaster upon which appellee's test was performed were submitted into evidence for September 30, 2012, a few days prior to appellee's test, and October 7, 2012, a few days after. Both tests indicated that the machine was operating properly.

{¶ 6} Six weeks later, however, the machine upon which appellee's test was performed failed. At the suppression hearing, appellee, over the state's objection, called a series of other highway patrol officers who testified to multiple failures of calibration checks for the BAC Datamaster used October 5, 2012, and its replacements. On November 18, 2012, the machine upon which appellee's test was conducted, serial No. 930024, failed a routine calibration check. Pursuant to standard procedures, the machine was tested again using a different bottle of known solution.<sup>1</sup> When the machine again failed, it was taken out of service and returned to its manufacturer for repair as required by Ohio Adm.Code 3701-53-04(A)(1). It was replaced with another machine, serial No. 921148.

{¶ 7} On November 23, 2012, when a calibration check was first conducted on machine No. 921148, it failed. A second test with a different bottle of known solution,

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<sup>1</sup> Ohio Adm.Code 3701-53-04(A)(2) specifies that instruments approved for administering breath tests for alcohol content be tested weekly against a solution containing a known quantity of ethyl alcohol.

however, passed and the machine was put into service. On December 2, machine No. 921148 failed two calibration checks using two different bottles of known solution and was taken out of service. It was replaced with machine No. 921071.

{¶ 8} On December 8, 2012, machine No. 930024, the original machine upon which appellee's breath test was conducted, was brought back after servicing, but immediately failed two calibration checks using two different bottles of known solution. Machine No. 921163 was put into service until December 23, when it failed two calibration checks using two different bottles of known solution.

{¶ 9} In granting appellee's motion to suppress the breath test, the trial court noted that at least nine calibration checks failed in a period of approximately 60 days after appellee's test, "includ[ing] the 'serviced' machine utilized to test [appellee]." No explanation of the cause of these failures was provided. The court concluded that it "simply has no faith in the reliability of [appellee's] test."

{¶ 10} From the order granting appellee's motion to suppress the results of his breath test, the state now brings this appeal. The state sets forth a single assignment of error:

The trial court erred in granting appellee's motion to suppress based on calibration checks which were conducted more than a month and a half after appellee's blood alcohol test had been administered.

{¶ 11} The state argues that the trial court went beyond the scope of a hearing to determine the admissibility of a breath test. The state insists that any matter beyond

whether there was substantial compliance with the regulations of the Department of Health is irrelevant. In that respect, the state argues, the regulations create a presumption of accuracy if the testing machine is successfully calibration checked within the week before and the week after the test at issue. The state proved compliance with the regulation and that, according to the state, entitles it to a ruling denying the suppression motion.

{¶ 12} Appellee maintains that a suppression hearing is the proper forum to hear all of the evidence relating to the reliability of a breath-alcohol test. The court hearing such evidence must act as a gatekeeper to prevent unreliable scientific evidence from being placed before a jury that may be improperly swayed by such evidence, appellee insists. Here, the trial court heard all the evidence and found the results of appellee's test unreliable and appellee insists that finding should not be disturbed on appeal.

{¶ 13} Crim.R. 12(C) permits any party to raise by pretrial motion "any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue." Certain motions, including a motion to suppress evidence, must be raised before trial. Crim.R. 12(C)(3).

{¶ 14} Although suppression motions ordinarily involve only constitutional issues, because a prohibited alcohol content violation is a per se offense, dependent solely on the accuracy of the blood, breath or urine test performed, the Ohio Supreme Court has deemed an examination into the validity of such tests a proper subject of a suppression hearing. *Defiance v. Kretz*, 60 Ohio St.3d 1, 3-4, 573 N.E.2d 32 (1991).

{¶ 15} After a defendant challenges the validity of the breath test in a pretrial motion, the burden is on the state to show that the test was administered in substantial compliance with regulations prescribed by the state director of health. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 24. Among other things, the regulations require that breath testing instruments be checked for calibration against an approved known solution every seven days. Ohio Adm.Code 3701-53-04(A)(2).

{¶ 16} If the state establishes that this and the other applicable regulations have been satisfied, two rebuttable presumptions arise. The first presumption is that the result of the test is reliable. *State v. Vega*, 12 Ohio St.3d 185, 188, 465 N.E.2d 1303 (1984). The second presumption is that, if the result is above the statutory limit, the subject of the test was alcohol impaired. *Id.* at 189. If these presumptions are not successfully rebutted, the only further evidence necessary to prove the offense is to show that the defendant operated a vehicle within the state. *Kretz* at 3.

{¶ 17} As to the type of evidence that may be used to rebut these presumptions, this

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. Defense

expert testimony as to testing procedures at trial going to weight rather than admissibility is allowed. (Citation omitted.) *Vega* at 189.

{¶ 18} The determination of whether the evidence presented is sufficient to overcome the presumption is a question of fact for a jury or the court in a bench trial. *Id.*

{¶ 19} In this matter, there is no dispute that the state complied with the directives of the department of health in its conduct of the breath test and in the procedures promulgated to assure the accuracy of the test. The state's position is that any evidence of irregularities that occurred outside of the calibration check in the week prior and in the week after appellee's test is simply irrelevant. Alternatively, the state suggests, if the evidence of subsequent irregularities is relevant, such evidence is more properly heard in a trial setting.

{¶ 20} We disagree with the state's position as to the relevance of the subsequent irregularities. Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. Although the subsequent machine calibration irregularities occurred several weeks after appellee's test, they were not so far removed in time that a reasonable mind could conclude that the difficulties were wholly isolated from the earlier time period. In that regard, the evidence is relevant.

{¶ 21} As to whether a suppression hearing is an appropriate forum to rebut the rebuttable presumption, we believe it is. The purpose of a pretrial hearing is to resolve evidentiary issues without recourse to a general trial, Crim.R. 12(C)(3), and the reliability

of a chemical alcohol test is such an issue. *Kretz*, 60 Ohio St.3d at 4, 573 N.E.2d 32.

Moreover, since the issue of whether a defendant has successfully rebutted the statutory presumptions is a question of fact, *Vega*, 12 Ohio St.3d at 189, 465 N.E.2d 1303, it is matter that may be resolved in a suppression hearing.

{¶ 22} Remaining then is only the question of whether the trial court's decision to grant appellee's suppression motion was in error. The review standard is familiar. A motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is, therefore, in the best position to resolve factual questions. *Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71 at ¶ 8. On review, there is a presumption in favor of the decision of the trier of fact. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 17. The role of the appeals court is to determine whether the trier of fact lost its way and created such a manifest miscarriage of justice that its finding must be overturned. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). Accepting the facts, as determined by the trial court, the appellate court must then determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. *Burnside, supra*, citing *State v. McNamara*, 124 Ohio App.3d 706, 707 N.E.2d 539 (4th Dist.1997).

{¶ 23} The legal standard is simply that a chemical breath test must be suppressed if it is not reliable. Reliability is presumed if the state proves compliance with the



regulations established by the department of health, but the presumption dissipates if rebutted.

{¶ 24} The trial court found that the evidence of multiple unexplained failures of multiple machines shortly following appellee's test rebutted the presumption of reliability. On review, we cannot say that such a finding was without support. Accordingly, the state's sole assignment of error is not well-taken.

{¶ 25} The judgment of the Erie County Municipal Court is affirmed. It is ordered that appellant pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

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JUDGE

Arlene Singer, P.J.

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JUDGE

Stephen A. Yarbrough, J.  
CONCUR.

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JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <a href="http://www.sconet.state.oh.us/rod/newpdf/?source=6">http://www.sconet.state.oh.us/rod/newpdf/?source=6</a>.</p>
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