[Cite as *State v. Conn*, 2015-Ohio-1989.]

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

State of Ohio — Court of Appeals No. OT-14-018

Appellee — Trial Court No. TRC 1303489 A

v.

Charles M. Conn — **DECISION AND JUDGMENT**

Appellant — Decided: May 22, 2015

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney, and
David R. Boldt, Assistant Prosecuting Attorney, for appellee.

Terrence R. Rudes, for appellant.

* * * * *

JENSEN, J.

Introduction

{¶ 1} Defendant-appellant, Charles M. Conn, appeals the April 14, 2014 decision and judgment of the Ottawa County Municipal Court. The lower court denied appellant's motion to suppress his breath alcohol test and further denied his request to qualify a

defense witness as an expert. For the reasons that follow, the judgment of the trial court is affirmed.

Statement of Facts and Procedural History

{¶ 2} On September 8, 2013, appellant was pulled over by Trooper Jeremy Albert for committing a marked lanes violation while operating his vehicle on State Route 163 in Ottawa County, Ohio. Trooper Albert administered a field sobriety test, which appellant failed. Appellant was then transported to the Port Clinton Police Department.

{¶ 3} At the police station, Officer Mark Anderson administered a breath test on a "BAC DataMaster" machine. Officer Anderson holds a senior operator permit and is responsible for ensuring that the BAC DataMaster is in proper working order. To do so, he performs regular "calibration checks."

{¶ 4} Officer Anderson administered the first test at 12:37 a.m., now September 9, 2013. Anderson followed the four-step operator checklist as set forth by the Ohio Department of Health. Those steps include (1) observing appellant for twenty minutes prior to testing him to assure that he did not place anything in his mouth; (2) pressing the "run" button; (3) entering data as prompted by the instrument display; and (4) taking a breath sample when "PLEASE BLOW" appears on the display.

{¶ 5} When appellant blew into the machine as instructed, it indicated an "invalid" test result.

{¶ 6} The BAC DataMaster is programmed to report an "invalid" test result for one of two reasons: either because the person blowing into the machine blows too hard,

causing saliva to flow into the air chamber, or because the machine detects "mouth alcohol." An invalid message does not indicate that the machine is malfunctioning. Rather, it indicates that a "breath alcohol" reading is currently unavailable. In case of an invalid message, the instructions recommend that "usually a retest of the subject after a short waiting period will result in a valid test."

{¶ 7} Following appellant's "invalid" result, Anderson waited two minutes and then administered a second test. This time, appellant tested .205 grams of alcohol per 210 liters of breath, well over the legal limit. Appellant was charged with operating a vehicle while impaired ("OVI"), in violation of R.C. 4511.19(A)(1)(a) and operating a vehicle with a prohibited alcohol level, in violation of R.C. 4511.19(A)(1)(h).

{¶ 8} On December 23, 2013, appellant filed a motion to suppress and exclude from evidence the results of his breath test on the BAC DataMaster machine. Appellant argued that the machine had experienced a "large proportion of invalid sample errors" and that those "errors" compromised his specific .205 test result.

{¶ 9} Nearly four months before appellant's arrest, on May 16, 2013, Port Clinton's BAC DataMaster was sent to the manufacturer for service. It was appellant's counsel who requested that the machine be serviced, based upon his concern that it was reporting an unusually high number of "invalid" results. As part of the service, the manufacturer removed some debris from some tubing and ran accuracy checks before returning it to the police department.

{¶ 10} The parties agree that the machine had not failed a calibration check before or after being serviced. The machine was successfully calibrated 54 times in 2013.

{¶ 11} Hearings on appellant's motion to suppress were held on March 26 and April 11, 2014.[1] During the second day of hearings, appellant proffered the testimony of defense witness Charles Rathburn, whom appellant argued was an expert "regarding scientific method utilized by the DataMaster, how its implemented and whether or not it's reliable * * *."

{¶ 12} In the April 14, 2014 decision and judgment, the trial court denied appellant's motion to suppress and further denied his request to qualify Rathburn as an expert witness at trial. The court found,

> The difficulty in these cases is that the Defendants[2] attempt to challenge their specific test results through unsupported conclusions, innuendo and generalizations relating to invalid samples, and do not allege any noncompliance with approved alcohol testing standards. For example, they suggest that due to "a large proportion of invalid samples," the Court should infer that the individual breath test results here are inadmissible. To

[1] In the motion, appellant also argued that the trooper lacked probable cause to stop him. He further challenged the results of his field sobriety test. Appellant withdrew those challenges during the hearing, and they are not before us on appeal.

[2] The same legal challenge argued by appellant was also presented by the named defendant in *State v. Trzaskos.* (Ottawa County Municipal case No. TRC 1303179 A.) At the request of the prosecutor and defense counsel, the trial court ruled on both cases in its April 14, 2014 decision. The *Trzaskos* case is not at issue herein.

the contrary, the invalid sample received is actually an indication that the DataMaster is functioning properly. The operator need only conduct another test. This was done in each case. * * *

The breath-testing instrument was in proper working order and used by persons appropriately certified to conduct the tests when each Defendant was arrested. There has been no evidence presented that "* * * something went wrong with (either) test and that, as a consequence, the result(s) (were) at (a) variance with what the approved testing process would have produced." *Columbus v. Day*, 24 Ohio App.3d 173, 493 N.E.2d 1002 (10th Dist.1985).

{¶ 13} With regard to the proposed expert witness, the trial court further found,

Defense witness Charles Rathburn who possesses a law degree, owns a DataMaster, attended and conducted numerous training sessions at the manufacturer on the operation of the DataMaster is simply not qualified to provide opinion testimony relative to "invalid samples" or generally why such a result could be received. Evid.R. 702. This Court finds that Mr. Rathburn had no knowledge of either of these Defendants' individual tests and that he (even if qualified as an expert) sought to show that the general testing procedure related to the DataMaster was flawed. This is an impermissible attack on this device [under] *State v. Vega*, 12 Ohio St.3d 185, 465 N.E.2d 1303 (1984).

{¶ 14} On April 22, 2014, the case came on for trial. In light of the above decision, appellant entered a no contest plea to an amended charge of a per se "OVI" offense, as set forth in R.C. 4511.19(A)(1)(c).

{¶ 15} The trial court found appellant guilty of the offense and sentenced him to ten days in jail, a fine of $375, and an operator license suspension for six months. The court stayed the sentence pending appellant's appeal.

{¶ 16} Appellant filed a notice of appeal on May 21, 2014. He asserts one assignment of error for our review:

> I. THE COURT COMMITTED PREJUDICIAL ERROR IN DENYING THE DEFENDANT THE RIGHT TO PRESENT A DEFENSE.

Expert Witness Testimony

{¶ 17} A trial court's determination of whether an individual qualifies as an expert will only be overturned by an appellate court for an abuse of discretion. *State v. Hartman*, 93 Ohio St.3d 274, 285, 754 N.E.2d 1150 (2001); *State v. Baston*, 85 Ohio St.3d 418, 423, 709 N.E.2d 128 (1999). "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 18} At the suppression hearing, appellant attempted to qualify Rathburn as an expert witness. The trial court found that Rathburn was not qualified to testify as an expert because he had no knowledge of appellant's individual test and because he was not qualified to testify regarding why the machine would produce an invalid result.

{¶ 19} Rathburn testified that he holds an undergraduate communications degree and a post-graduate juris doctorate degree. Rathburn purchased his first DataMaster device from the manufacturer, National Patent Analytical Systems, in 2003. He was trained by two factory representatives, including the owner of the company, in Mansfield, Ohio, where the manufacturer is located. He organized and attended twice-yearly training sessions between 2003 and 2010. Each three-day training session included "machine intensive" training such as "[h]ow the Datamaster accepts the sample, how it rejects the sample, what the error messages mean, how you calibrate the device, how you perform calibration checks." The sessions also included repairing the devices and conducting actual tests. Rathburn estimated that he has conducted over 100 actual tests on the DataMaster. Rathburn testified that the manufacturer has referred people to him for operational training on the machine. Rathburn has testified as an expert on the DataMaster in New York, Alaska, and Missouri courts.

{¶ 20} Evid.R. 702 governs the admissibility of expert testimony. It provides,

> A witness may testify as an expert if all of the following apply:
>
> (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a

misconception common among lay persons; (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony; (C) The witness' testimony is based on reliable scientific, technical, or other specialized information.

{¶ 21} No specific academic experience or special certification is necessary to confer expert status on a witness. *Hartman*, 93 Ohio St.3d at 285, 754 N.E.2d 1150. Likewise, an expert need not have a complete knowledge of the field in question, "or for that matter, be the best witness on the subject." *State v. Scurti*, 153 Ohio App.3d 183, 2003-Ohio-3286, 792 N.E.2d 224, ¶ 21 (7th Dist.) The test is whether the witness can aid the trier of fact in performing its factfinding function. *Id.; Hartman* at 287.

{¶ 22} *State v. Scurti* is particularly instructive. *Scurti* involved the chief executive officer of the company that manufactures the BAC DataMaster. *Id.* at ¶ 21. The prosecutor in that case called the CEO to testify on the issue of whether software upgrades to the BAC DataMaster had altered how the machine functioned. The defense argued that the CEO lacked the required expertise in computer software to qualify him as an expert on that particular issue.

{¶ 23} The court disagreed. It found,

[The CEO] testified that his company owns the BAC DataMaster product and has been in this business for the past 25 years. He stated he has personally attended numerous maintenance and theory seminars in electronics, breath-testing technology, traffic radar, and a 40-hour course on

> the technology of breath analysis. [The CEO] also testified that at these training seminars, he was instructed on the engineering of computer software for breath-testing instruments. However, he did state that he has not tried to engineer computer software of this type since the early 1990s. He also stated that he could not explain in specific terms how the computer software was altered due to the fact that the engineering specifications for computer software are extremely detailed and complicated; however, he could explain it in general terms. While [the CEO] may not be the best witness on the subject of these software modifications, his extensive background and experience with the BAC DataMaster are sufficient to uphold the trial court's ruling that [the CEO] has specialized knowledge, training, or education about the BAC DataMaster. *Id*. at ¶ 21.

{¶ 24} In this case, Rathburn possesses a similar skill set and underwent similar training on the BAC DataMaster over the course of many years. Importantly, he received specific training on how the machine "rejects the sample" and "what the error messages mean."

{¶ 25} The trial court's rationale for excluding Rathburn—that he was not qualified to testify as to why an invalid result could be received—is factually incorrect and strikes this court as unreasonable. The test is whether the witness can aid the trier of fact in performing its factfinding function. *Hartman* at 287. Given the complicated nature of the BAC DataMaster, including why it will at times produce nonnumeric

results, we find that Rathburn's testimony would have assisted the jury in performing its factfinding function. We conclude that Rathburn's testimony meets the criteria of Evid.R. 702, and it was error to prohibit him from testifying as an expert at trial.

{¶ 26} "An improper evidentiary ruling constitutes reversible error, however, only when the error affects the substantial rights of the adverse party or the ruling is inconsistent with substantial justice." *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 2005-Ohio-4787, 834 N.E.2d 323, ¶ 35. In order to find that substantial justice has been done, "the reviewing court must not only weigh the prejudicial effect of those errors but also determine that, if those errors had not occurred, the jury or other trier of the facts would probably have made the same decision." (Citations omitted). *Id.* at ¶ 35.

{¶ 27} As discussed below, we find that appellant failed to rebut the state's case that his breath test was presumptively admissible, even with Rathburn's testimony. Therefore, the trial court's rejection of Rathburn as an expert did not prejudice appellant's substantial rights and does not require reversal.

Appellant's Motion to Suppress the Breath Test Result

{¶ 28} In general, appellate review of a trial court's ruling on a motion to suppress presents a mixed question of law and fact. *State v. Codeluppi*, 139 Ohio St.3d 165, 2014-Ohio-1574, 10 N.E.3d 691, ¶ 7; *State v. Wesson*, 137 Ohio St.3d 309, 2013-Ohio-4575, 999 N.E.2d 557, ¶ 40; *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8.

> 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 and evaluate the credibility of witnesses. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. Burnside at ¶ 8 (citations omitted).

{¶ 29} R.C. 4511.19(D)(1)(b) allows a trial court to admit the results of a chemical analysis to show the alcohol concentration contained in a defendant's bodily substance. *Cincinnati v. Ilg*, 141 Ohio St.3d 22, 2014-Ohio-4258, 21 N.E.3d 278, ¶ 21. The statute further specifies that the director of the Ohio Department of Health ("ODH") shall approve methods for analyzing bodily substances. *Id.*

{¶ 30} R.C. 3701.143 provides that the ODH,

> [S]hall determine, or cause to be determined, techniques or methods for chemically analyzing a person's * * * breath, or other bodily substance in order to ascertain the amount of alcohol * * * in the person's * * * 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.

{¶ 31} Pursuant to this authority, ODH promulgated Ohio Adm.Code 3701-53-02(A)(1) which specifically approves a "BAC DataMaster" as a permissible device for analyzing the alcohol content contained in a person's breath. The regulation also provides

> (D) Breath samples using instruments listed under paragraphs (A)(1) * * * of this rule shall be analyzed according to the operational checklist for the instrument being used and checklist forms recording the results of subject tests shall be retained in accordance with paragraph (A) of rule 3701-53-01 of the Administrative Code. The results shall be recorded on forms prescribed by the director of health.

{¶ 32} A defendant who wants to challenge the validity of an alcohol test result must first file a motion to suppress. *Burnside* at ¶ 24. If the defendant challenges the validity of an alcohol test, the state bears the burden to establish that the testing procedures substantially complied with ODH regulations. *Id.* The substantial compliance standard is limited "to excusing only errors that are clearly *de minimis*," i.e., irregularities amounting to "'minor procedural deviations.'" *Id.* at ¶ 34, quoting *State v. Homan*, 89 Ohio St.3d 421, 426, 732 N.E.2d 952 (2000). Once the state shows substantial compliance with the regulations, the test result is presumptively admissible. *Burnside* at ¶ 24. The burden then shifts to the defendant to show prejudice resulting from "anything less than strict compliance." *Id.*

{¶ 33} The Ohio Supreme Court has explained what type of evidence a defendant may rely upon to rebut the presumption of admissibility:

> [I]t 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. *State v. Jimenez*, 6th Dist. Erie No. E-13-030, 2013-Ohio-5469, ¶ 17, quoting *State v. Vega*, 12 Ohio St.3d 185, 188, 465 N.E.2d 1313 (1984).

{¶ 34} In the case at bar, the evidence shows that the state substantially complied with ODH regulations. That is, there is no question that (1) the machine had been successfully and regularly calibrated; (2) that the test was administered by a credentialed individual; and (3) that the officer followed the approved testing methods as set forth by ODH in the operational checklist form.

{¶ 35} Accordingly, we find that appellant's test result was presumptively admissible. Therefore, the burden shifted to appellant to show that he was prejudiced by something "less than strict compliance." *Burnside* at ¶ 24.

{¶ 36} During the hearing, appellant's counsel pursued a line of questioning regarding whether, following the initial "invalid" reading, Trooper Albert observed

appellant for an additional 20 minutes before retesting him. The lower court noted that the issue—of whether a second observational period was required—was not a basis of appellant's motion to suppress. The court then refused further questioning on the subject. Appellant did not appeal the ruling. In his appellate memorandum, however, appellant argues that "it is the court that is saying that the operator does not have to follow the [DOH] checklist and conduct a 20 minute observation period as the checklist requires."

{¶ 37} We disagree that the lower court made any ruling with regard to the necessity, if any, of conducting another 20-minute observation in the event of an invalid reading. The court found that the issue was not properly before it, just as it is not before this court. We do note, however, that other appellate districts, including our own, have found "there is no ODH regulation or other rule requiring an additional 20 minute observation period prior to retesting a defendant." *State v. Eyer*, 12th Dist. Warren No. CA2007-06-071, 2008-Ohio-1193, ¶ 26. *See also State v. Williams*, 6th Dist. Ottawa No. OT-03-020, 2004-Ohio-2453, ¶ 21, fn. 1 (Noting that a December 14, 1998 policy by ODH's Bureau of Alcohol and Drug Testing, that would require an additional 20-minute observational period, was "without the force of a statute or regulation.").

{¶ 38} Appellant's other argument is that the "Port Clinton Machine was producing more than 10 percent non numeric results;" that such a number is indicative of machine error; and that appellant's invalid result therefore casts doubt on his second test result. It was the second test which indicated a .205 grams of alcohol per 210 liters of breath. We reject appellant's arguments.

{¶ 39} First, the records, including the service manuals, do not support appellant's claims regarding the ten percent threshold. The manuals state that an invalid reading "can be caused by a [person] blowing too hard * * * through the mouthpiece, [and] * * * [i]t can also be caused by the presence of mouth alcohol."

{¶ 40} In other words, if a person blows excessively or has mouth alcohol, then an "invalid" message should follow, not ten percent of the time, but every time. Even Rathburn noted that an invalid message under these circumstances is a sign that the BAC DataMaster is functioning properly. Appellant failed to explain when an invalid result is a signal that the machine is functioning properly and when it is not.

{¶ 41} Likewise, appellant produced no evidence that his initial, invalid result somehow compromised, or otherwise affected, his second test. It was the second test that led to his arrest.

{¶ 42} Appellant relies primarily upon the testimony of Rathburn who reviewed two defense exhibits. The first shows all of the breath tests administered on the police department's BAC DataMaster in 2013 and 2014, including the two given to appellant on September 8, 2013. A second exhibit lists all of the "invalid sample" results between June 16, 2013 and January 5, 2014.

{¶ 43} The following exchange took place between appellant's counsel and Rathburn on the subject of "invalid samples."

> Q. In assessing causes for those [nonnumeric results], are you trained to look for patterns?

A. Yes.

Q. What sort of patterns would you look for?

A. [I]f you see results other than numeric and ratios * * * 10 percent or higher, that's an indication that you've either got an instrument problem or an operator error.

* * *

A. [Y]ou've given me a list of the [test subjects who took] the test, the dates of the test and the results of the test, *but there's nothing in there to tell me who the operator is. I would want to look to see who the operator is*, to see if Officer Jones has a high level of refusal to a high number of invalid samples. That *may be* an indication that he's not properly doing his observation, or doing something else in terms of asking how to blow into the machine. It *could be* an operator causing this to happen. If it's happening with Officer Jones, Officer Smith, Officer Johnson and there's no pattern there, then that *would lead me* to conclude that there was an instrumentation issue.

Q. Does the Port Clinton DataMaster machine, since its repair, have a percentage of nonnumeric [test results] greater than [10%]?

A. * * * [S]ince the instrument was repaired, there are approximately 135 tests. * * * Of those 135 tests, there were approximately

16 invalid samples, which is greater than 10 percent of the tests that were administered during this period.

Q. And that would indicate, *assuming they were different operators*, machine error, possible machine error.

A. A problem with the machine, yes. (Emphasis added.)

{¶ 44} Accepting Rathburn's testimony, not even he could say that the machine malfunctioned in appellant's case. At best, he spoke in general terms that if the invalid messages were produced by different operators, then that would be evidence of machine error. Without such evidence, Rathburn could not say whether appellant's invalid test result was erroneous or proper. In short, Rathburn's testimony does not support appellant's case of machine malfunction in this case.

{¶ 45} We find that appellant failed to sustain his burden to show that the machine malfunctioned and/or that he was prejudiced by something less than substantial compliance with testing procedures. Therefore, the trial court properly denied appellant's motion to suppress evidence of his breath alcohol test on the BAC DataMaster.

{¶ 46} Appellant's assignment of error is found not well-taken. The decision of the trial court is affirmed. Appellant is ordered to pay the 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.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE