[Cite as *Cleveland v. Rollins*, 2002-Ohio-1087.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 79614

CITY OF CLEVELAND,	:	ACCELERATED
Plaintiff-Appellee	:	
	:	JOURNAL ENTRY
vs.	:	AND
	:	OPINION
RICKY ROLLINS, AKA RICKEY ROLLINS,	:	
Defendant-Appellant	:	
DATE OF ANNOUNCEMENT OF DECISION	:	MARCH 14, 2002
CHARACTER OF PROCEEDING:	:	Criminal appeal from Cleveland Municipal Court Case No. 2000 TRC 082392
JUDGMENT	:	AFFIRMED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

For plaintiff-appellee:

Lauren C. Moore, Esq.
Chief Prosecuting Attorney
City of Cleveland
BY: Christopher R. Fortunato, Esq.
Assistant City Prosecutor
The Justice Center – 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

For defendant-appellant:

Tina L. Tricarichi, Esq.
The Legal Aid Society of Cleveland
1223 West Sixth Street
Cleveland, Ohio 44113

MICHAEL J. CORRIGAN, P.J.:

{¶1} This cause came to be heard upon the accelerated calender pursuant to App.R. 11.1 and Loc.R. 11.1.

{¶2} Defendant-appellant herein, Ricky Rollins appeals from the trial court's decision overruling his motion to suppress the results of a blood alcohol test administered to him. For the reasons adduced below, we affirm the ruling of the trial court.

{¶3} On August 11, 2000, appellant was involved in a serious motor vehicle accident in the vicinity of East 55th Street and Chester Avenue. As a result of the accident, appellant sustained neck and back injuries and received treatment from EMS. An EMS crew member testified that an IV was inserted and, as part of that procedure, blood was drawn from the appellant. Subsequent testing on the sample showed that the appellant's BAC was above the legal limit. The EMS technician also testified that the appellant smelled of alcohol and admitted during transport that he had been drinking and smoking "primo," a combination of crack cocaine and marijuana. Appellant was transported to Huron Road Hospital for treatment of his injuries.

{¶4} While at the hospital, the appellant was charged with violations of Cleveland Codified Ordinance 433.01(a)(2), operating a motor vehicle under the influence of alcohol and C.C.O. 435.01(A), operating a motor vehicle without an operator's license. The officer who issued the citations testified at the suppression

hearing that the appellant was not arrested at the time that he was cited because he was told by the medical personnel that the appellant required additional treatment, including x-rays.

{¶5} On August 25, 2000, appellant entered pleas of not guilty to both charges. On January 11, 2001, the trial court held an evidentiary hearing on the appellant's motion to suppress the results of the blood test. Subsequent to the hearing the trial court denied the motion.

{¶6} On February 16, 2001, appellant withdrew his not guilty pleas and entered pleas of no contest to both charges. The trial court found the appellant guilty and sentenced him to a total of 30 days in jail and a $350 fine. The trial court granted a stay of sentence pending appeal.

{¶7} The appellant timely filed the within appeal containing a total of three assignments of error. The first two assignments of error, having a common basis in law and fact, will be addressed concurrently in this opinion. Assignments of error one and two state:

{¶8} THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS THE RESULTS OF THE BLOOD ALCOHOL TEST WHEN THE TEST WAS ADMINISTERED BY EMS OFFICIALS IN THE COURSE OF TREATMENT AT A TIME WHEN THE APPELLANT WAS NOT UNDER ARREST AND WHEN SAID TEST WAS NOT GIVEN AT THE DIRECTION OF A LAW ENFORCEMENT OFFICER; AND, WHEN APPELLANT WAS CONSCIOUS AND ABLE TO REFUSE THE TEST.

{¶9} THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE RESULTS OF A BLOOD ALCOHOL TEST WHEN SUCH TEST WAS TAKEN FOR TREATMENT PURPOSES AND WHEN ANY VICTIM OF A CAR ACCIDENT HAS A

REASONABLE EXPECTATION OF PRIVACY IN THESE MEDICAL RECORDS; AN ACCIDENT VICTIM'S PRIVACY INTERESTS (SIC) OUTWEIGH THE STATE'S RIGHT TO KNOW OR HAVE ACCESS TO THAT INFORMATION PARTICULARLY WHEN THE STATE HAS NOT EVEN MADE PROBABLE CAUSE TO ARREST THIS ACCIDENT VICTIM FOR DUI.

{¶10} In these assignments of error the appellant asserts that the results of the blood alcohol test should have been suppressed because R.C. 2317.02(B)(2)(a) determines whether a physician's testimony concerning the results of a hospital blood alcohol test is admissible. R.C. 2317.02(B)(2)(a) does not govern the admissibility of the results of a blood alcohol test, it merely provides the procedural requirements necessary for law enforcement officers to obtain copies of the results of such a test from a health care provider. These procedural requirements function, among other things, to protect the health care provider from potential civil liability arising out of the release of arguably privileged information. The statute does not afford due process protections to criminal defendants who are suspected of drunk driving or other criminal activity.

{¶11} In this case, the health care provider in question may have chosen to relinquish the test results without first receiving a written statement from the investigating officers. There is nothing in the language of R.C. 2317.02(B)(2)(a) which prohibits a health care provider from releasing these test results without the benefit of a written request if it chooses to do so and where the

circumstances are such that the records are clearly not protected by a physician-patient privilege.

{¶12} In *State v. Webb* (1994), 70 Ohio St.3d 325, 334-335, the Supreme Court discussed the nature and origins of the physician-patient privilege and its application to hospital records:

> **{¶13}** However, error involving privilege is not a constitutional violation. In the first place, the privilege is not a requirement of due process. Privileges do not make trial more fair; they neither "facilitate the fact-finding process" nor "safeguard its integrity." 1 McCormick on Evidence (4 Ed. 1992) 269, Section 72. Rather, they protect "principle[s] or relationship[s] *** that society deems worthy of preserving and fostering," even at some cost to the court's truth-finding function. *Lily*, Introduction to the Law of Evidence (2 Ed.1987) 381, Section 9.1. But, cf., *State v. Rahman* (1986), 23 Ohio St.3d 146, 150, 23 Ohio B.Rep. 315, 319, 492 N.E.2d 401, 406-407.

{¶14} In *State v. Slageter* (Mar. 31, 2000), Hamilton App. No. C-990584, the court held that the law enforcement agency in question fully complied with R.C. 2317.02(B)(2)(a) even though the medical records showing that the defendant was intoxicated were not requested until several days after the accident. In that case the defendant was also not under arrest at the time that the test was administered and was not even suspected of criminal activity until several days after his release.

{¶15} The fact that the investigating officers in this case did not initially submit a written statement to the pertinent health care provider stating that a criminal investigation had been commenced against the appellant is of no consequence. At the time

that the appellant's medical records were released to the investigating officers, any physician-patient privilege had already been waived per the terms of R.C. 2317.02(B)(1)(c). The written request did not need to be made on the night of the accident, and, indeed, could have been made at any time during the investigation up until trial.

{¶16} R.C. 2317.02(B)(1) states:

> **{¶17}** The testimonial privilege established under this division does not apply, and a physician or a dentist may testify or be compelled to testify, in any of the following circumstances:
>
> ***
>
> **{¶18}** (c) In any criminal action concerning any test or the results of any test that determines the presence or concentration of alcohol, a drug of abuse, or alcohol and a drug of abuse in a patient's blood, breath, urine, or other bodily substances at any time relevant to the criminal offense in question.

{¶19} Thus, it is evident that the physician-patient privilege is waived concerning any blood alcohol test which is relevant to a criminal offense. See *State v. Slageter*, *supra; City of Middletown v. Newton* (1998), 125 Ohio App.3d 540. This waiver is not predicated upon strict compliance by law enforcement officials and health care providers with the procedural regulations of R.C. 2317.02(B)(2)(a).

{¶20} The appellant asks that this court find error in the trial court's finding that the results of the blood test were requested by the investigating officers as allegedly neither

officer testified to making such a request and the record does not contain evidence of a written request. In fact, the record shows that on October 14, 2000, a subpoena *duces tecum* was issued to the Medical Records Department at Huron Road Hospital instructing the custodian of the records to appear for trial on November 2, 2000 and to bring "certified copies of Ricky Rollins' blood-alcohol content in c/w DUI arrest." The subpoena listed the name of the assistant prosecutor assigned to the case.

{¶21} The statute states that a health care provider must produce records of a blood alcohol test whenever "any law enforcement officer submits a written statement to a health care provider that states that *** a criminal action or proceeding has been commenced against a specific person." R.C. 2901.01 specifically defines a "law enforcement officer" to include "[a] prosecuting attorney, assistant prosecuting attorney, *** or municipal prosecutor." Accordingly, the appellee fully complied with the statute prior to the appellant's trial and prior to the hearing on the motion to suppress. Thus, regardless of whether the test results were verbally requested by the investigating officers on the day of the accident, as was found by the trial court in its findings of fact, the trial court's refusal to suppress the results as evidence was legally correct.

{¶22} Even if we are to assume that no written or verbal request was ever made and the hospital turned over the results of

the test on its own initiative, the appellant would not be entitled to have the results suppressed as they were not privileged medical records. The statute does not mandate that a written request be made before such test results can be released, it merely mandates that such test results must be released when a proper request is made. This distinction is obviously relevant in the instant case.

{¶23} Accordingly, for all of the above reasons, assignments of error one and two are hereby overruled.

{¶24} The appellant's third assignment of error states:

{¶25} THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO STATE ITS FACTUAL FINDINGS ON THE RECORD PURSUANT TO THE MOTION TO SUPPRESS EVIDENCE PARTICULARLY WHEN A REQUEST FOR A FINDINGS OF FACTS (SIC) AND CONCLUSIONS OF LAW MOTION WAS FILED WITH THAT TRIAL COURT.

{¶26} The trial court filed its findings of fact and conclusions of law on April 18, 2001. Accordingly, this assignment of error is moot.

Judgment affirmed.

{¶27} It is ordered that appellee recover of appellant its costs herein taxed.

{¶28} The court finds there were reasonable grounds for this appeal.

{¶29} It is ordered that a special mandate issue out of this court directing the Cleveland Municipal Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

{¶30} A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MICHAEL J. CORRIGAN
PRESIDING JUDGE

ANN DYKE, J., CONCURS.

COLLEEN CONWAY COONEY, J., DISSENTS WITH SEPARATE DISSENTING OPINION.

[Cite as *Cleveland v. Rollins*, 2002-Ohio-1087.]

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 79614

CITY OF CLEVELAND	:	
	:	
Plaintiff-Appellee	:	D I S S E N T I N G
	:	
vs.	:	O P I N I O N
	:	
RICKY ROLLINS, a/k/a RICKEY ROLLINS	:	
	:	
Defendant-Appellant	:	

DATE: MARCH 14, 2002

COLLEEN CONWAY COONEY, J., DISSENTING:

{¶31} I respectfully dissent from the majority's decision because I would reverse the trial court's decision denying Rollins' motion to suppress.

{¶32} In reviewing a trial court's decision on a motion to suppress, an appellate court must independently determine as a matter of law, without deference to the trial court's conclusions, whether the appropriate legal standard has been met. See *State v. Venham* (1994), 96 Ohio App.3d 649, 645 N.E.2d 831.

{¶33} Rollins argues that the trial court's failure to suppress the results of his blood alcohol test was in violation of his rights under Ohio's Implied Consent statute, R.C. 4511.191.

{¶34} R.C. 4511.191 states:

{¶35} Any person who operates a vehicle upon a highway or any public or private property used by the public for vehicular travel or parking within this state shall be deemed to have given consent to a chemical test or tests of the person's blood, breath, or urine for the purpose of determining the alcohol, drug, or alcohol and drug content of the person's blood, breath, or urine *if arrested for operating a vehicle while under the influence of alcohol*, a drug of abuse, or alcohol and a drug of abuse or for operating a vehicle with a prohibited concentration of alcohol in the blood, breath, or urine. *The chemical test or tests shall be administered at the request of a police officer* having reasonable grounds to believe the person to have been operating a vehicle upon a highway or any public or private property used by the public for vehicular travel or parking in this state while under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse or with a prohibited concentration of alcohol in the blood, breath, or urine. The law enforcement agency by which the officer is employed shall designate which of the tests shall be administered.

{¶36} Any person who is dead or unconscious, or who is otherwise in a condition rendering the person incapable of refusal, shall be deemed not to have withdrawn consent as provided by division (A) of this section and the test or tests may be administered, subject to sections 313.12 to 313.16 of the Revised Code. (Emphasis added.)

{¶37} Unless a defendant is under arrest for a violation of R.C. 4511.19 and the test is requested by a police officer, the defendant is not deemed to have consented to the administration of the blood alcohol test under R.C. 4511.191. See *City of Middletown v. Newton* (1998), 125 Ohio App.3d 540.

{¶38} As the trial court found, the evidence supports Rollins' contention that the administration of his blood test was not in compliance with R.C. 4511.191.

{¶39} It is undisputed that Rollins was not under arrest at the time the test was performed. Further, the blood sample was not drawn at the request of the investigating officers. Rather, the EMS technician testified that the test was performed for medical purposes.

{¶40} Despite finding that the blood test did not comply with R.C. 4511.191, the trial court held that the blood alcohol test was admissible pursuant to R.C. 2317.02.

{¶41} The majority erroneously states that Rollins asserted that the blood test should have been suppressed pursuant to R.C. 2317.02. However, Rollins does not raise this argument on appeal nor did either party rely on that statute below. The trial court was the first to apply R.C. 2317.02 to the case at hand in its decision.

{¶42} R.C. 2317.02 governs the evidentiary issue of privileged communications. R.C. 2317.02(B)(2)(a) in particular determines whether the result of a hospital blood alcohol test is a privileged communication.

{¶43} R.C. 2317.02, entitled "privileged communications," states that "[t]he following persons shall not testify in certain

respects: *** (B)(1) A physician *** except as otherwise provided in *** division (B)(2) ***."

{¶44} R.C. 2317.02(B)(2)(a) states as follows:

{¶45} If any law enforcement officer submits a written statement to a health care provider that states that an official criminal investigation has begun regarding a specified person or that a criminal action or proceeding has been commenced against a specified person, that requests the provider to supply to the officer copies of any records the provider possesses that pertain to any test or the results of any test administered to the specified person to determine the presence or concentration of alcohol, a drug of abuse, or alcohol and a drug of abuse in the person's blood, breath, or urine at any time relevant to the criminal offense in question, and that conforms to section 2317.022 [2317.02.2] of the Revised Code, the provider, except to the extent specifically prohibited by any law of this state or of the United States, shall supply to the officer a copy of any of the requested records the provider possesses. If the health care provider does not possess any of the requested records, the provider shall give the officer a written statement that indicates that the provider does not possess any of the requested records.

{¶46} In order for this type of physician "testimony" to be admissible, it must fall within the exception set forth in R.C. 2317.02(B)(2). Here, the trial court erred in holding that the blood alcohol test at issue is a non-privileged communication, as the requirements of R.C. 2317.02(B)(2) were not met.

{¶47} The trial court cites *City of Middletown v. Newton* (1998), 125 Ohio App.3d 540, in support of its decision. In *Newton*, the Twelfth District Court of Appeals applied R.C. 2317.02 to a similar set of facts and found that the blood alcohol test in that case was admissible. However, in *Newton*, the police requested

the results of the alcohol test approximately two weeks after the test was administered.[1] Thus, the court held that the record showed full compliance with R.C. 2317.02(B)(2)(a).

{¶48} In the case at bar, the trial court makes an unsubstantiated finding that "Cleveland Police Officers Herrin and Robinson went to Huron Road Hospital and, after discovering that blood was taken from the Defendant, requested results of any blood tests taken." See April 18, 2001 journal entry, Doc. 20. However, a review of the transcript reveals that neither officer testified to making such a request. Nor does the record contain evidence of a written request. As such, no competent, credible evidence exists to support this finding.

{¶49} The majority analogizes the case at hand with *State v. Slageter* (Mar. 31, 2000), Hamilton App. No. C-990584, to support its decision. However, *Slageter* is distinguishable from the instant case.

{¶50} As stated by the majority, Slageter "was not even suspected of criminal activity until several days after his

[1] Also, in *Newton*, the police issued no citations at the hospital due to Newton's "condition."

release." The criminal investigation of Slageter's alleged alcohol use did not start until several days after his accident. The defendant in *Slageter* was charged with failure to maintain an assured clear distance, not driving under the influence. The investigation was reopened after a witness told the police that the defendant was intoxicated. Prior to receiving this information, the police officer who was at the scene testified that he did not smell any alcohol, and no one at the scene indicated that the defendant had been drinking alcohol.

{¶51} When the police were notified of the defendant's intoxication, the nature of the criminal investigation changed, prompting the sheriff's department to request a release of the defendant's medical records pursuant to R.C. 2317.02(B)(2).

{¶52} Here, there was no change in the nature of the criminal investigation. The testimony of the officers and their actions at the hospital make it clear that at all times it was their intent to charge Rollins with driving under the influence of alcohol.

{¶53} The police captain at the scene of the accident observed Rollins and noted that he was unresponsive to the questions of a witness. The captain instructed other officers to cite Rollins for

driving under the influence of alcohol, and a responding officer cited him at the hospital.[2]

{¶54} Assuming, as the majority decides, that law enforcement officers complied with the mandates of R.C. 2317.02 when the prosecution obtained the blood test results via subpoena, R.C. 4511.191 still bars the admissibility of the blood alcohol test results. To find otherwise creates an avenue by which law enforcement can circumvent R.C. 4511.191, thus rendering the statute meaningless. Clearly, this was not the intent of the General Assembly in enacting R.C. 2317.02.

{¶55} As stated by the Ohio Supreme Court in *Thiel v. Allstate Ins. Co.* (1986), 23 Ohio St.3d 108, 111, 491 N.E.2d 1121:

> **{¶56}** It is a fundamental rule of statutory construction that sections and acts *in pari materia* that is, `in relation to the same matter, subject or object,' should be construed together. * * * [S]tatutes relating to the same or similar subject matter * * * should, where a case calling for the application of both is presented, be read together as if they were a single statute, and both should be reconciled, harmonized, and made to apply, and given meaning and effect, so as to render their contents operative and valid * * *. * * * [T]he various statutory provisions affecting a particular subject

[2] The majority incorrectly states that Rollins was charged under C.C.O. 433.01(a)(2); however, no subsection was specified.

> should be construed and applied so as to accomplish the manifest purpose of their enactment and give full force and effect to the legislative intent. (Citations omitted.)

{¶57} The two statutes here are easily harmonized. R.C. 2317.02 simply removes the physician-patient privilege as it pertains to alcohol and drug tests in criminal investigations. Thus, it was permissible for the police to obtain the blood alcohol test results.

{¶58} However, as the majority correctly states, R.C. 2317.02 merely serves as a means by which law enforcement officials can obtain blood test results from physicians. It does not mandate that the trial court admit the results once they have been obtained. Thus, while the results are obtainable, they are not admissible in the instant case due to the officer's failure to comply with R.C. 4511.191.

{¶59} Such a reading renders the contents of both R.C. 2317.02 and R.C. 4511.191 operative. Such a conclusion is further supported by the "elementary rule of statutory construction that, in the absence of language to the contrary, a specific statute controls over a general provision." *Quality Ready Mix, Inc. v. Mamone* (1988), 35 Ohio St.3d 224, 226.

{¶60} Here, R.C. 4511.191 is the specific statute tailored to the facts herein, while R.C. 2317.02 can be applied in other situations. Accordingly, R.C. 4511.191 controls.

{¶61} Based on the foregoing analysis, I would reverse the decision of the trial court denying the motion to suppress.