

[Cite as *Cleveland v. Stover*, 2005-Ohio-1310.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84734

CITY OF CLEVELAND	:	
	:	
Plaintiff-appellant	:	
	:	JOURNAL ENTRY
vs.	:	and
	:	OPINION
TERRY G. STOVER	:	
	:	
Defendant-appellee	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	MARCH 24, 2005
CHARACTER OF PROCEEDING	:	Criminal appeal from
	:	Cleveland Municipal Court
	:	Case No. 2003-TRC 105068
JUDGMENT	:	REVERSED AND REMANDED.
DATE OF JOURNALIZATION	:	
APPEARANCES:		
For plaintiff-appellant	:	PABLO A. CASTRO Assistant Prosecuting Attorney City of Cleveland Law Dept. Justice Center, 8 th Floor 1200 Ontario Street Cleveland, Ohio 44113
For defendant-appellee	:	WALTER A. LUCAS Attorney at Law Buckingham, Doolittle & Burroughs, LLP 1375 E. 9 th Street, Suite 1700 Cleveland, Ohio 44114

KENNETH A. ROCCO, J.:

{¶ 1} This is an accelerated appeal brought pursuant to App.R. 11.1 and Loc.R. 11.1. The purpose of an accelerated appeal is to permit the appellate court to render a brief and conclusory opinion. *Crawford v. Eastland Shopping Mall Assn.* (1983), 11 Ohio App.3d 158.

{¶ 2} Plaintiff-appellant the City of Cleveland invokes Crim.R. 12(K) in order to challenge in its two assignments of error the Cleveland Municipal Court's decision to grant a portion of defendant-appellee Terry G. Stover's motion to suppress evidence.¹

{¶ 3} The trial court found that since the city did not perform a timely post-test calibration of the instrument used to measure Stover's blood alcohol content ("BAC"), the city had not "substantially complied" with Ohio Administrative Code ("OAC") regulations.² As a result of the trial court's decision, the test

¹The city's assignments of error state:

"I. The trial court erred in granting the motion to suppress because the BAC Datamaster was administered to Stover within the prescribed time of a proper pre-test calibration of the breath-test instrument.

"II. The trial court abused its discretion

A. By granting Stover's motion to suppress despite Ohio case law requiring only a proper pre-test calibration

B. By granting Stover's motion to suppress despite the city being in substantial compliance with the Ohio Department of Health regulations."

²OAC Section 3701-53-04(A) requires an instrument check "no less than once every seven days," and permits a check "any time up to one hundred and ninety-two hours after the last instrument check."

results were deemed inadmissible at his trial for driving under the influence of alcohol ("DUI").

{¶ 4} This court will decide the case on its merits, although based upon the facts of this case, the city's Crim.R. 12(K) certification seems improbable.³ Nevertheless, the city's decision to invoke Crim.R. 12(K) is a matter of trial judgment to which this court will give deference. Moreover, the issue the city raises has merit.

{¶ 5} The record reflects Stover became involved in an automobile accident following his attendance at a Cleveland Browns football game. When a Cleveland Police officer responded to the scene, he first administered field sobriety tests to Stover, then Stover submitted to a BAC test which provided a result over the legal limit. Stover received citations for violating three city ordinances; relevant to this appeal was Stover's violation of Cleveland Codified Ordinance 433.01, DUI.

{¶ 6} After obtaining discovery, Stover filed a motion to suppress evidence. In part, he challenged the BAC test results based upon the timing of the instrument's calibration. The trial court held a hearing on the motion. During the hearing, the city prosecutor stated for the record that Stover had been cited for DUI rather than driving with a prohibited BAC.

³In order to appeal the trial court's decision, Crim.R. 12(K) requires the city to certify that the granting of the motion to suppress evidence has rendered its "proof with respect to the pending charges so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed." (Emphasis added.)

{¶ 7} The parties did not dispute the fact that the instrument had been calibrated six days before Stover's test. The prosecutor acknowledged, however, that the post-test calibration occurred nine days later. There was no suggestion at the hearing that the instrument did not perform properly.⁴ Nevertheless, the trial court held that the city had not substantially complied with its duties, and granted the portion of Stover's motion to suppress evidence that sought to exclude the results of the BAC test.

{¶ 8} This court does not dispute the trial court's factual conclusions, but analyzes whether it met the applicable legal standard. *Gates Mills v. Wazbinski*, Cuyahoga App. No. 81863, 2003-Ohio-5919, ¶18.

{¶ 9} In *State v. Glenn*, Seneca App. No. 13-04-15, 2004-Ohio-7038, ¶10, the applicable legal standard was stated as follows:

{¶ 10} "In general, when faced with a challenge to the admissibility of a blood test on the grounds that the state failed to comply with its regulations, the state must show substantial compliance, rather than strict compliance, with administrative regulations.***[T]he state has the burden of proving substantial compliance with the regulations set forth by the Ohio Administrative Code. *State v. Plummer* (1986), 22 Ohio St.3d 292, 294, 22 B. 461, 490 N.E.2d 902. The Ohio Supreme Court has stated that only 'minor procedural deviations' will be excused under the

⁴The Alcohol/Drug Influence Report Form does not appear in the record on appeal.

substantial compliance standard. *State v. Burnside*, 100 Ohio St.3d 152, 2003 Ohio 5372, ¶34, 797 N.E.2d 71. Moreover, absent a showing of prejudice to a defendant, the results of a blood-alcohol test administered in substantial compliance with Ohio Administrative Code regulations are admissible***. *State v. French* (1995), 72 Ohio St.3d 446, 1995 Ohio 32, 650 N.E.2d 887, paragraph one of the syllabus."

{¶ 11} When the legal standard is applied to the facts of this case, it is apparent the trial court's decision was incorrect. This court previously has stated that, as opposed to an alleged violation of driving with a prohibited BAC content, in a prosecution for DUI, the "accuracy of the test is not [so] critical as" is the behavior of the defendant. *Gates Mills v. Wazbinski*, supra at ¶56.

{¶ 12} In this case, indeed, the accuracy of the test itself is not even at issue, but only whether the post-test calibration, although untimely, constituted only a "minor deviation" from OAC requirements. The object is to ensure the city maintained "substantial" compliance with the regulations promulgated by the Ohio Director of Health, as defined by the Ohio Supreme Court in *Burnside* and *Plummer*. Since there is no indication the machine malfunctioned either before, during, or after the test given to Stover, this court holds the city met its burden. *Id.* Moreover, since Stover was under prosecution for DUI and not prohibited BAC,

he demonstrated no prejudice from the city's failure strictly to comply with OAC requirements. *State v. Glenn*, supra.

{¶ 13} The city's assignments of error are sustained.

{¶ 14} The trial court's order is reversed, and this case is remanded for further proceedings.

This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellant recover of said appellee costs herein.

It is ordered that a special mandate be sent to the Cleveland Municipal Court to carry this judgment into execution.

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

KENNETH A. ROCCO
JUDGE

MARY EILEEN KILBANE, J. CONCURS

PATRICIA ANN BLACKMON, P.J. DISSENTS
(SEE SEPARATE DISSENTING OPINION)

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the

journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84734

CITY OF CLEVELAND

Plaintiff-Appellant

-VS-

TERRY G. STOVER

Defendant - Appellee

DISSENTING

O P I N I O N

DATE: MARCH 24, 2005

PATRICIA ANN BLACKMON, J., DISSENTS:

{¶ 15} With all due respect to the Majority Opinion, I dissent.

This case is not properly before this court, and I would have dismissed this appeal because the City failed to invoke Crim.R. 12(K). Crim.R. 12(K) requires the prosecution to show that the suppression order has so weakened its case that any reasonable possibility of effective prosecution has been destroyed. The prosecution has failed in this regard. The defendant moved to suppress the BAC results. The defendant was not charged with a BAC violation. He was charged with a DUI, and the evidence showed the

defendant admitted drinking, admitted involvement in an accident, and failed several field sobriety tests.

{¶ 16} The Majority Opinion voices concern that the City's Crim.R. (K) certification might be improbable. Additionally, the Majority Opinion uses the fact that defendant was charged with DUI as further evidence that the BAC procedure did not prejudice him. Consequently, I would have ended the inquiry at that point and dismissed the appeal.

{¶ 17} Nevertheless, I am compelled to address whether the trial court erred in suppressing the defendant's BAC results. The evidence as stipulated to by both the City and the defendant is that the police performed an instrument check six days before the defendant's test and nine days after the defendant's BAC results. The query is whether the post-instrument check impacted the admissibility of the defendant's results in light of *State v. Burnside*, 2003-Ohio-5372.

{¶ 18} *State v. Burnside* holds that the police must substantially comply with the Director of Health's requirements. As it relates to instrument checks, the Director of Health proscribes that an instrument check may be performed anytime up to 192 hours after the last check. In this case, the post-instrument check occurred 44 hours beyond the 192 hours as proscribed by the Director of Health.

{¶ 19} The trial court held the untimely post-instrument check affected the admissibility of the defendant's test results. The

Majority Opinion agreed with the City and held that since no evidence of malfunction existed, the defendant had not been prejudiced by the untimely post-instrument check. I am concerned that the issue is not one of malfunction, but of reliability of the defendant's results as general principle.

{¶ 20} The Director of Health has proscribed that any check after the proscribed 192 hours is suspect. The Ohio Supreme Court in *Burnside* held the following:

"A court infringes upon the authority of the Director of Health when it holds that the state need not do that which the director has required. Such an infringement places the court in the position of the Director of Health for the precise purpose of second-guessing whether the regulation with which the state has not complied is necessary to ensure the reliability of the alcohol-test results."

{¶ 21} In light of *Burnside*, I think the issue of reliability is covered by the proscription of the Director of Health's regulation.

I recognize that many district courts have followed the reasoning of *Pioneer v. Martin* (1984), 16 Ohio App.3d 428, and have held that when the pre-instrument check is strictly complied within the 168 hours, the post-instrument check is irrelevant. I believe the City has to substantially comply with the 192 hour instrument check as proscribed by the Director of Health, and any untimely instrument check pre or post calls into question the reliability of the test, whether the instrument malfunctioned or not.

{¶ 22} Accordingly, I would have held that post-instrument check impacts upon the reliability of the defendant's BAC results, that

an untimely instrument check pre or post does not meet the de minimis standard of *Burnside*, and prejudice is irrelevant unless the City shows substantial compliance; consequently, I would have affirmed the trial court's decision.