[Cite as *State v. Dukes*, 2015-Ohio-676.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101124

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CHARLES DUKES

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-570468-A

BEFORE: Boyle, J., Kilbane, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: February 26, 2015

ATTORNEYS FOR APPELLANT

Robert L. Tobik
Cuyahoga County Public Defender
BY: Erika B. Cunliffe
Assistant Public Defender
310 Lakeside Avenue
Suite 200
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor
BY: Brian D. Kraft
Assistant County Prosecutor
8th Floor, Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

MARY J. BOYLE, J.:

{¶1} Defendant-appellant, Charles Dukes, appeals his convictions for aggravated vehicular homicide and driving while under the influence. He raises three assignments of error for our review:

> 1. The trial court erred in denying defendant's motion to suppress.
>
> 2. The trial court violated Dukes' rights to due process and a fair trial by sustaining the state's objections to questions soliciting proper lay opinion testimony from a defense witness.
>
> 3. Trial counsel provided ineffective assistance of counsel in violation of the Sixth Amendment because he failed to challenge the admissibility of the data from the airbag control module.

{¶2} Finding merit to his first assignment of error, we reverse his convictions and remand for further proceedings.

Procedural History and Facts

{¶3} In February 2013, Dukes was indicted on five counts: two counts of aggravated vehicular homicide, Count 1, in violation of R.C. 2903.06(A)(1)(a) (caused someone's death as a proximate result of driving under the influence of alcohol under R.C. 4511.19(A)), a first-degree felony, and Count 2, in violation of R.C. 2903.06(A)(2)(a) (caused someone's death by operating a motor vehicle recklessly), a second-degree felony. Dukes was also indicted on three counts of driving while under the influence in violation of R.C. 4511.19(A)(1)(a) (Count 3, the "general" driving while impaired), 4511.19(A)(1)(b) (Count 4, driving while impaired with a prohibited alcohol concentration in the blood between 0.08 and 0.17), and 4511.19(A)(1)(g) (Count 5, driving while impaired with a prohibited alcohol concentration in the blood over 0.204).[1] The

[1]OVI charges are commonly referred to as either impaired or per se. *See State v. Brand*, 157 Ohio App.3d 451, 2004-Ohio-1490, 811 N.E.2d 1156 (1st Dist.), citing *Newark v. Lucas*, 40 Ohio St.3d 100, 532 N.E.2d 130 (1988). The impaired charge generally prohibits driving while impaired, while a per se charge prohibits operating a vehicle with certain concentrations of alcohol or drugs in a person's system. *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, 833 N.E.2d 1216, ¶ 18.

charges arose from a traffic accident that occurred on January 4, 2013, when Dukes's van collided with Thomas Thomas's vehicle, allegedly causing Thomas's death. Dukes pleaded not guilty to the indictment.

{¶4} Before trial, Dukes moved to suppress evidence against him relating to a blood sample taken by police while he was in the hospital following the accident. Dukes argued that police did not comply with Ohio Adm.Code 3701-53 and R.C. 4511.19(D)(1)(b) when collecting the blood sample. The following facts were presented at the hearing on Dukes's motion to suppress.

{¶5} Richard Cerny, a detective in the Cleveland Police Department, testified that he had been in the accident investigation unit for 25 years. Detective Cerny stated that he received a message from his supervisor around 6:10 a.m. on the morning of January 4, 2013, to respond to the scene of a fatal accident near East 156th Street and Harvard Avenue, in Cleveland, Ohio. The accident occurred at approximately 5:55 a.m. When Detective Cerny arrived at the scene, the victim, Thomas Thomas, was still in his car (because police had to cut him out of his vehicle), but Dukes had already been transported to the hospital. Detective Cerny went to the hospital to see if he could interview Dukes.

{¶6} Detective Cerny testified that when he arrived at the hospital, Dukes was being transferred to a private room. When Dukes was available to talk, Detective Cerny read him his rights; he said that is the first thing that he does when he talks to people. Detective Cerny said that Dukes appeared to be intoxicated; his eyes were bloodshot, and he smelled of alcohol. Dukes told Detective Cerny that he had been drinking "earlier in the night, he had a couple of beers and a Long Island iced tea." Detective Cerny testified that after talking to Dukes, he believed that Dukes was able to comprehend what Detective Cerny was telling him.

{¶7} Detective Cerny obtained a statement from Dukes. Dukes said that although he had been drinking, he was not drunk. Dukes stated that he was driving eastbound on Harvard Avenue to go to a gas station to get some food because he was hungry. Detective Cerny asked Dukes if he would be willing to give him a blood sample. According to Detective Cerny, Dukes replied,"that would be no problem because he wasn't drunk." Detective Cerny asked one of the nurses to draw the blood.

{¶8} At that point, the state introduced into evidence a form with the heading, "consent to obtain body specimens," showing that Dukes signed the consent form. Detective Cerny said that he read the consent form to Dukes. Detective Cerny then read the completed form into the record:

> I, Charles Dukes, Jr., having been informed of my ***CONSTITUTIONAL RIGHTS*** **not** to have any specimens taken from my person without a judicial order and my rights to refuse to consent to such, hereby authorize Det. R. Cerny 1985, and P.O.B. Scaggs, # 860 of the Cleveland Division of Police to obtain such specimens — you can get blood, hair, saliva, whatever you're looking for at that time as they deem necessary for the purpose of their investigation.
>
> This written permission is being given by me to the above named officers voluntarily and without threats or promises of any kind.

{¶9} Dukes signed the consent form. The consent form is also signed by Detective Cerny, Officer Scaggs, and the nurse who took the blood sample, Paul Ondus. Detective Cerny explained that he wrote Dukes's name at the beginning of the form, as well as filling in his name and Officer Scaggs's name because Dukes was "laying face up on a gurney at that time." The form also states that the blood was drawn on "01/04/12" at "0750 hours." Detective Cerny explained that he wrote the date and the time on the form as the nurse drew the blood at 7:50 a.m.

Detective Cerny stated that the form "fairly and accurately" depicted the document as it was signed on "January 4, 2013."[2]

{¶10} Detective Cerny stated that he was present when the blood was drawn. After it was drawn, the blood samples were never out of his sight. He explained that the nurse "types up the labels and seals it and puts it in a biohazard bag that is sealed." Detective Cerny stated that he spoke to the other officers for about five or ten minutes, and then he transported the blood to the medical examiner's office. He took the sample to the trace evidence department and someone took the sample from him and signed for it.

{¶11} Detective Cerny stated that on the consent form, you are supposed to circle which "body specimen" you are requesting a sample of from the person, but he did not circle any of them. He said he just forgot to circle that he was requesting blood, but said that he did inform Dukes that he wanted a blood sample from him.

{¶12} Detective Cerny also identified an exhibit, "Instructions for Specimen Collection for Testing under the Ohio Department of Health, Alcohol and Drug Testing Program," from the Cuyahoga County Regional Forensic Science Laboratory ("CCRFSL"). The nurse filled out the form and signed it, as well as Detective Cerny.

{¶13} Paul Ondus, the nurse who took the blood sample from Dukes, testified that he had been a registered nurse in the emergency room at MetroHealth hospital for a little over a year. He described the CCRFSL instruction checklist that he filled out when he drew the blood sample from Dukes. He said that he first obtained a "tub" from the equipment room that had all of the

[2]Although the document stated the date as January 4, 2013, the actual date was January 4, 2012. See Paul Ondus's testimony.

supplies in it that he needed to draw the blood. He then described how he performed each instruction on the checklist.

{¶14} The first instruction states, "Prepare the area by cleaning the skin with an aqueous solution of a non-volatile antiseptic. No alcohol based preparations should be used." He said that he first cleaned the skin with a non-volatile antiseptic; he used povidone-iodine.

{¶15} The second instruction states "Draw the blood with a sterile dry needle into a Gray Top [potassium oxalate] tube. Please note: The Gray Top tube is required for forensic instructions." Per the second instruction, he drew the blood with a sterile dry needle into the tubes with the "gray tops." Ondus explained that "some of the tubes they have a special preparation in them that keeps the sample fresh, so to speak, or to prevent the blood from clotting and whatnot, just different things that they use for testing. So this one contains that."

{¶16} Ondus read the third instruction, which stated that for alcohol testing, he was supposed to fill "one 4-5 mL vacuum container," and for drug screening, he was supposed to fill "four 4-5 mL vacuum containers." But Ondus explained that "they always just have us fill just as a standard about five, at least five different gray top tubes, so we never draw just one for strictly alcohol testing."

{¶17} The fourth instructions states, "Label each tube with the name of donor, date and time of collection, and name or initials of collector." Ondus explained that he did this as instructed.

{¶18} The fifth instruction states, "Put evidence tape over the top of the tube to seal. Label the evidence tape with the name or initials of person sealing the sample." Ondus stated that he did not recall doing this step. He just recalled placing the samples in a plastic bag and handing it to the police officer.

{¶19} Ondus read from a "checklist" on the form, where he checked off that he labeled the specimen container with the donor's name, the date and time of collection, and with the collector's name or initials. But Ondus did not check the last two items, "Specimen container sealed with evidence tape," or "Seal on Specimen container contains initials of person sealing sample."

{¶20} Ondus also stated that although the form was dated "01/04/2012," it was actually January 4, 2013.

{¶21} Rindi Norris testified that she works in the toxicology department at the Cuyahoga County Medical Examiner's Office. She had worked there since May 2012. Norris had a bachelor's degree from the University of Toledo in pharmacology and toxicology. She testified that she has a certificate from the Ohio Department of Health stating that she is "able to do alcohol testing." To obtain that certificate, Norris stated that she had to have a four-year degree in the science field and six months of laboratory experience.

{¶22} Norris testified that the lab director of her lab is Medical Examiner Dr. Thomas Gilson. The lab's chief toxicologist is Dr. John Wyman. She explained that the lab is accredited by two accreditation organizations — ASCLAD, which is American Society of Crime Laboratory Directors, and ABFT, which is American Board of Forensic Toxicology. The lab was current in its accreditation.

{¶23} Norris stated that they keep all blood samples in a secured refrigerator "that only toxicology personnel" can open. Norris does not process the evidence when it comes in, but said that she knew that samples are received from the police department. When the police officer arrives, the lab's "assessor" meets with the officer and processes the sample if it is

dropped off during working hours. If it is not during working hours, they have a receiving department that receives the sample and places it in a secured refrigerator.

{¶24} Norris testified that she is in charge of alcohol testing and "ELISA [enzyme-linked immunosorbent assay] drug screen" testing. To test for alcohol in the blood, she obtains a sample from the tube and puts it in a glass vile, which then goes into an instrument called "headspace chromatography." After the sample is processed through the instrument, she "goes through the data and writes it down." She then gives the data to the chief toxicologist, who reviews the data and then gives it back to her. Once she receives the data back, she reports her findings, positive or negative, in their computer system. If the result was positive for alcohol, she also reports how much alcohol was in the blood.

{¶25} Norris testified that she was responsible for testing Dukes's blood sample. She found that Dukes tested negative for all drugs, but positive for alcohol in the amount of 0.154 grams per deciliter.

{¶26} After the hearing, the trial court denied Duke's motion to suppress. The trial court found, as pertinent to this appeal, that the state established substantial compliance with the Ohio Department of Health ("ODH") regulations when collecting, storing, and testing a person's blood for purposes of proving a violation of R.C. 4511.19(A).

{¶27} The case proceeded to a jury trial. The state dismissed Count 5 during its case in chief. At the close of all of the evidence, the jury found Dukes guilty of aggravated vehicular homicide in violation of R.C. 2903.06(A)(2)(a) (Count 2, causing someone's death by operating a motor vehicle recklessly), but not guilty of aggravated vehicular homicide in violation of R.C. 2903.06(A)(1)(a) (Count 1, causing someone's death as a proximate result of driving under the influence of alcohol under R.C. 4511.19(A)). The jury also found Duke**s** guilty of driving while

under the influence in violation of R.C. 4511.19(A)(1)(b) (Count 4, driving with a 0.154 grams per deciliter of alcohol in his blood), but not guilty of driving while under the influence in violation of R.C. 4511.19(A)(1)(a) (Count 3) (the "general" charge of driving while impaired).

{¶28} The trial court sentenced Dukes to an aggregate sentence of five years in prison, five years for aggravated vehicular homicide and six months for driving while under the influence, to be served concurrently to one another. The trial court also notified Dukes that he could be subject to up to three years of discretionary postrelease control. It is from this judgment that Dukes appeals.

Motion to Suppress

{¶29} In his first assignment of error, Dukes argues that the trial court erred when it denied his motion to suppress. He asserts that the state failed to substantially comply with various provisions of Ohio Adm.Code 3701-53 (the pertinent ODH regulations) when analyzing his blood for purposes of proving a violation of R.C. 4511.19.

{¶30} "Appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. In ruling on 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." *Id*., citing *State v. Mills*, 62 Ohio St.3d 357, 366, 582 N.E.2d 972 (1992). On appeal, we "must accept the trial court's findings of fact if they are supported by competent, credible evidence." *Id*., citing *State v. Fanning*, 1 Ohio St.3d 19, 437 N.E.2d 583 (1982). Accepting these facts as true, we must then "independently determine as a matter of law, without deference to the trial court's conclusion, whether they meet the applicable legal standard." *Id.*, citing *State v. McNamara*, 124 Ohio App.3d 706, 707 N.E.2d 539 (4th Dist.1997).

{¶31} A defendant who does not file a motion to suppress test results on the basis that the state did not comply with the above procedures may not object to the admissibility of the test results at trial on those grounds. *State v. French*, 72 Ohio St.3d 446, 449, 650 N.E.2d 887 (1995). In challenging his blood test on grounds of noncompliance with ODH regulations, Dukes properly filed his pretrial motion to suppress and, thus, the state was expected to lay a foundation showing admissibility of the test results. *See id.* at 452.

{¶32} R.C. 4511.19(D)(1)(b) provides in pertinent part:

> In any criminal prosecution or juvenile court proceeding for a violation of division (A) or (B) of this section or for an equivalent offense that is vehicle-related, the court may admit evidence on the concentration of alcohol, * * * in the defendant's whole blood, blood serum or plasma, breath, urine, or other bodily substance at the time of the alleged violation as shown by chemical analysis of the substance withdrawn within three hours of the time of the alleged violation. The three-hour time limit specified in this division regarding the admission of evidence does not extend or affect the two-hour time limit specified in division (A) of section 4511.192 of the Revised Code as the maximum period of time during which a person may consent to a chemical test or tests as described in that section. * * * Only a physician, a registered nurse, an emergency medical technician-intermediate, an emergency medical technician-paramedic, or a qualified technician, chemist, or phlebotomist shall withdraw a blood sample for the purpose of determining the alcohol, drug, controlled substance, metabolite of a controlled substance, or combination content of the whole blood, blood serum, or blood plasma. * * *
>
> The bodily substance withdrawn under division (D)(1)(b) of this section shall be analyzed in accordance with methods approved by the director of health by an individual possessing a valid permit issued by the director pursuant to section 3701.143 of the Revised Code.

{¶33} R.C. 3701.143 sets forth requirements for the "[a]nalysis of blood, urine, breath or other bodily substance to determine alcohol or drug content." It states in pertinent part:

> For purposes of [R.C. 4511.19], the director of health shall determine, or cause to be determined, techniques or methods for chemically analyzing a person's whole blood, blood serum or plasma, urine, breath, or other bodily substance in order to ascertain the amount of alcohol, a drug of abuse, controlled substance, metabolite of a controlled substance, or combination of them in the person's whole blood, blood serum or plasma, urine, 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. Such permits shall be subject to termination or revocation at the discretion of the director.

{¶34} Dukes asserts that the state failed to establish substantial compliance with several ODH regulations for obtaining, storing, and testing a person's blood for purposes of proving a violation of R.C. 4511.19. Specifically, Dukes contends that the state failed to establish (1) that his blood sample was properly sealed under Ohio Adm.Code 3701-53-05(E); (2) that his blood sample was drawn into a vacuum container with a solid anticoagulant under Ohio Adm.Code 3701-53-05(C); (3) that his blood sample was kept refrigerated under Ohio Adm.Code 3701-53-05(F); and (4) that laboratory personnel had the proper permits and qualifications required pursuant to Ohio Adm.Code 3701-53-07 and 3701-53-09.

{¶35} When determining whether the state establishes that a person's blood was drawn, stored, and tested within substantial compliance of the Department of Health regulations, the Ohio Supreme Court has explained:

> [I]f "we were to agree * * * that any deviation whatsoever from the regulation rendered the results of a [test] inadmissible, we would be ignoring the fact that strict compliance is not always realistically or humanly possible." [*State v. Plummer*, 22 Ohio St.3d 292, 490 N.E.2d 902 (1986)]. Precisely for this reason, we concluded in [*State v. Steele*, 52 Ohio St.2d 187, 370 N.E.2d 740 (1977)] 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 (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*, 89 Ohio St.3d 421, 426, 2000-Ohio-212, 732 N.E.2d 952 (2000).

State v. Burnside, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 34.

{¶36} Thus, in this case, we must determine if the state established substantial compliance with the blood testing procedures set forth in Ohio Adm.Code 3701-53 (the ODH regulations). After reviewing all of the evidence, we find that the state established substantial compliance with Ohio Adm.Code 3701-53-05(C) (that Dukes's blood was drawn into a vacuum container with a solid anticoagulant) and that Norris was qualified to test for alcohol in blood and possessed the proper ODH certifications to test it under Ohio Adm.Code 3701-53-07 and 3701-53-09. But we further find that the state did not establish substantial compliance with Ohio Adm.Code 3701-53-05(E) (properly sealing the sample), 3701-53-05(F) (refrigerating the sample), and 3701-53-07 and 3701-53-09 (with respect to the lab director obtaining a permit from the ODH).

A. *Evidence that a Solid Anticoagulant was Used*

{¶37} Dukes argues that the state failed to establish substantial compliance with Ohio Adm.Code 3702-53-05(C), which provides: "Blood shall be drawn with a sterile dry needle into a vacuum container with a solid anticoagulant, or according to the laboratory protocol as written in the laboratory procedure manual based on the type of specimen being tested." Specifically, Dukes maintains that the state failed to establish that a solid anticoagulant was used. We disagree.

{¶38} Nurse Ondus testified that he used "grey top" vacuum tubes with potassium oxalate. Although he did not say specifically that potassium oxalate is an anticoagulant, he did state that "some of the tubes they have a special preparation in them that keeps the sample fresh, so to speak, or to prevent the blood from clotting and whatnot, just different things that they use for testing. So this one contains that." Anticoagulants prevent blood from clotting. Nurse

Ondus's testimony was sufficient to establish substantial compliance with Ohio Adm.Code 3702-53-05(C).

B. *Evidence of Sealing the Blood Sample*

{¶39} Dukes argues that the state failed to establish substantial compliance with Ohio Adm.Code 3701-53-05(E), which provides:

> Blood and urine containers shall be sealed in a manner such that tampering can be detected and have a label which contains at least the following information:
>
> (1) Name of suspect;
>
> (2) Date and time of collection;
>
> (3) Name or initials of person collecting the sample; and
>
> (4) Name or initials of person sealing the sample.

{¶40} In this case, Nurse Ondus testified that he did not recall completing the fifth instruction on the CCRFSL form titled "Instructions for Specimen Collection for Testing under the Ohio Department of Health, Alcohol and Drug Testing Program." This instruction states, "Put evidence tape over the top of the tube to seal. Label the evidence tape with the name or initials of the person sealing the sample." Nurse Ondus further stated that he did not check the last two items of the "checklist" on the form: "[s]pecimen container sealed with evidence tape" and "[s]eal on specimen container contains initials of person sealing sample." Dukes argues that because Nurse Ondus did not do so, the state failed to establish substantial compliance with Ohio Adm.Code 3701-53-05(E).

{¶41} Nurse Ondus further testified that he labeled each tube with the name of the donor, the date and time that he collected the sample, and his initials as the person collecting the sample. Nurse Ondus then placed the tubes of blood into a plastic biohazard-type bag that he handed to police officers. Nurse Ondus did nothing to seal the plastic biohazard bag.

{¶42} We find that the state failed to present evidence to establish substantial compliance with Ohio Adm.Code 3701-53-05(E) because it failed to present any evidence that the samples were sealed in such a manner that tampering could be detected. Although Ohio Adm.Code 3701-53-05(E) does not require evidence tape, it still requires the samples to be sealed in such a way so that tampering can be detected. A biohazard bag, without more, is not sufficient. The bag would somehow need to be sealed as well.

C. *Evidence of Refrigerating the Blood Sample*

{¶43} Dukes further argues that the state failed to establish substantial compliance with Ohio Adm.Code 3701-53-05(F), which states that "[w]hile not in transit or under examination, all blood and urine specimens shall be refrigerated." We agree.

{¶44} The state provided evidence that as soon as Nurse Ondus obtained the blood samples from Dukes, he handed them to Detective Cerny. After five or ten minutes of talking to other police officers, Detective Cerny took the blood samples to the medical examiner's office. The state did not present any other evidence establishing that Dukes's blood was refrigerated from the time that Detective Cerny dropped it off until the time it was tested by Norris. Norris never testified that she retrieved Dukes's blood samples from a refrigerator; she only testified that the lab's policy was to refrigerate samples when they are not being tested. But she never specifically stated that Dukes's blood samples were refrigerated.

D. *Evidence of Qualifications and Permits of Laboratory Personnel*

{¶45} In his final issue relating to his motion to suppress, Dukes argues that the state failed to establish substantial compliance with the qualifications and permits of laboratory personnel. Specifically, he claims that the state failed to prove substantial compliance with Ohio Adm.Code 3701-53-07(A) and 3701-53-09(A).

{¶46} Ohio Adm.Code 3701-53-07, "Qualifications of personnel," provides in relevant part:

> (A) Blood, urine, and other bodily substance tests for alcohol shall be performed in a laboratory by an individual who has a laboratory director's permit or, under his or her general direction, by an individual who has a laboratory technician's permit. General direction does not mean that the laboratory director must be physically present during the performance of the test. Laboratory personnel shall not perform a technique or method of analysis that is not listed on the laboratory director's permit.
>
> (1) An individual who is employed by a laboratory, which has successfully completed a proficiency examination administered by a national program for proficiency testing for the approved technique or method of analysis for which the permit is sought and who possesses at least two academic years of college chemistry and at least two years of experience in a clinical or chemical laboratory and possesses a minimum of a bachelor's degree shall meet the qualifications for a laboratory director's permit.
>
> (2) An individual who is employed by a laboratory, which has successfully completed a proficiency examination administered by a national program for proficiency testing for the approved technique or method of analysis for which the permit is sought, has been certified by the designated laboratory director that he or she is competent to perform all procedures contained in the laboratory's procedure manual for testing specimens and meets one of the following requirements shall meet the qualifications for a laboratory technician's permit:
>
> (a) Has a bachelor's degree in laboratory sciences from an accredited institution and has six months experience in laboratory testing;
>
> (b) Has an associate's degree in laboratory sciences from an accredited institution or has completed sixty semester hours of academic credit including six semester hours of chemistry and one year experience in laboratory testing;
>
> (c) Is a high school graduate or equivalent and has successfully completed an official military laboratory procedures course of at least fifty weeks duration and has held the military enlisted occupational specialty of medical laboratory specialist (laboratory technician); or
>
> (d) Is a high school graduate or equivalent and was permitted on or before July 7, 1997.

{¶47} Ohio Adm.Code 3701-53-09, "Permits," provides in relevant part:

> (A) Individuals desiring to function as laboratory directors or laboratory technicians shall apply to the director of health for permits on forms prescribed and provided by the director. A separate application shall be filed for a permit to perform tests to determine the amount of alcohol in a person's blood, urine or other bodily substance, and a separate permit application shall be filed to perform tests to determine the amount of drugs of abuse in a person's blood, urine or other bodily substance. A laboratory director's and laboratory technician's permit is only valid for the laboratory indicated on the permit.
>
> (1) The director shall issue permits to perform tests to determine the amount of alcohol in a person's blood, urine or other bodily substance to individuals who qualify under the applicable provisions of rule 3701-53-07 of the Administrative Code or under paragraph (A) of this rule. Laboratory personnel holding permits issued under this rule shall use only those laboratory techniques or methods for which they have been issued permits.
>
> (a) The laboratory where the permit holder is employed shall have successfully completed a proficiency examination from a national program for proficiency testing using the applicable techniques or methods, and provide to representatives of the director all proficiency test results.
>
> (b) Permit holders shall successfully complete proficiency examinations by representatives of the director using the techniques or methods for which they have been issued permits.
>
> (2) The director shall issue permits to perform tests to determine the amount of drugs of abuse in a person's blood, urine or other bodily substances to individuals who qualify under the applicable provisions of rule 3701-53-07 of the Administrative Code or under paragraph (A) of this rule. Laboratory personnel holding permits issued under this rule shall use only those laboratory techniques or methods for which they have been issued permits.
>
> The laboratory where the permit holder is employed shall have successfully completed a proficiency examination from a national program for proficiency testing using the applicable techniques or methods, and provide to representatives of the director all proficiency results.

{¶48} First, Dukes asserts that the state failed to establish that Norris possessed a laboratory technician's permit. Next, Dukes contends that the state failed to present any evidence that the laboratory director possessed a laboratory director's permit. Dukes also raises several other issues with the state's lack of proof at the motion to suppress hearing, all of which we will address.

{¶49} Norris testified that she has an ODH certificate stating that she is "able to do alcohol testing." Despite Dukes's argument to the contrary, this is sufficient to establish that she possesses a laboratory technician's permit. Further, Dukes's argument that Norris "could not have met the educational requirements for a laboratory technician's permit because she possessed a bachelor's degree in pharmacology and toxicology rather than one in laboratory sciences, as required," is completely unfounded. Pharmacology and toxicology are laboratory sciences.

{¶50} Dukes further argues that Norris was required to obtain "a separate permit to determine the amount of alcohol in a person's blood," pursuant to Ohio Adm.Code 3701-53-09(A). Again, Norris's testimony established that she had obtained a permit to test for alcohol in a person's blood.

{¶51} Next, Dukes argues that the state failed to prove that the laboratory had successfully completed a proficiency examination from a national program. But because the state established that Norris possessed a laboratory technician's permit, it also established that the laboratory has "successfully completed a proficiency examination administered by a national program for proficiency testing for the approved technique or method of analysis for which the permit is sought" (or otherwise, Norris could not have qualified for the permit under the requirements of Ohio Adm.Code 3701-53-07(A)(2)). Moreover, Norris testified that her lab, the Cuyahoga County Medical Examiner's Office, was currently accredited by the national organizations of the American Society of Crime Laboratory Directors and the American Board of Forensic Toxicology.

{¶52} Finally, we will address Dukes's argument that the state failed to establish that the lab director had obtained a permit from the ODH.

{¶53} To meet the qualifications for a laboratory director's permit, a person must meet two requirements. First, the person must possess "at least two academic years of college chemistry and at least two years of experience in a clinical or chemical laboratory and possesses a minimum of a bachelor's degree." Norris testified that the lab director of the Cuyahoga County Medical Examiner's Office is the medical examiner, Dr. Thomas Gilson. There is no doubt that Dr. Gilson meets those qualifications.

{¶54} The second requirement is that the person must be "employed by a laboratory, which has successfully completed a proficiency examination administered by a national program for proficiency testing for the approved technique or method of analysis for which the permit is sought." As we already stated, because the state established that Norris possessed a laboratory technician's permit, it also established that the laboratory has "successfully completed a proficiency examination administered by a national program for proficiency testing for the approved technique or method of analysis for which the permit is sought" (or otherwise, Norris could not have qualified for the permit). Moreover, Norris testified that the lab is accredited by the American Society of Crime Laboratory Directors and the American Board of Forensic Toxicology. Accordingly, the state established that the lab has successfully completed a proficiency examination administered by a national program.

{¶55} Thus, under Ohio Adm.Code 3701-53-07(A)(1), Dr. Gilson was certainly qualified to obtain a laboratory director's permit. The state, however, failed to present any evidence whatsoever that Dr. Gilson had actually obtained the laboratory director's permit from the ODH.

{¶56} In *Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, 833 N.E.2d 1216, the Ohio Supreme Court held that the state had not shown substantial compliance with the ODH regulations when it was undisputed that the hospital lab that tested the defendant's blood did not

have any permits issued by the director of health. The Supreme Court noted that it had "every reason to believe that the lab was properly qualified to test blood," but "the ODH regulations provide the standard that must be met for the admissibility of bodily substance test results in a prosecution involving a violation of R.C. 4511.19(A) as an element of proof." *Id.* at ¶ 52, fn. 3.

{¶57} Thus, we find that the state failed to establish substantial compliance with the ODH regulation that Dr. Gilson have a laboratory director's permit.

{¶58} Accordingly, we are constrained to sustain Dukes's first assignment of error as the state did not establish substantial compliance with the ODH regulations regarding the sealing of Dukes's blood sample, refrigerating it, and whether the lab director had obtained a permit from the director of health. Thus, the trial court erred when it denied Dukes's pretrial motion to suppress evidence surrounding the blood alcohol test.

{¶59} We further find that the evidence regarding Dukes's level of alcohol in his blood, nearly twice that of the legal limit, was prejudicial to Dukes's aggravated vehicular homicide conviction based on causing someone's death by driving recklessly under R.C. 2903.06(A)(2)(a). We therefore vacate both of Dukes's convictions, but note that the state may retry Dukes on aggravated vehicular homicide based upon causing someone's death by driving recklessly under R.C. 2903.06(A)(2)(a).

{¶60} Based upon our disposition of Dukes's first assignment of error, his remaining assignments of error are moot.

{¶61} Judgment reversed, convictions vacated; remanded for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas 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.

MARY J. BOYLE, JUDGE

MARY EILEEN KILBANE, P.J., CONCURS;
MELODY J. STEWART, J., CONCURS IN PART AND DISSENTS IN PART
(SEE SEPARATE OPINION)

MELODY J. STEWART, J., CONCURRING IN PART, DISSENTING IN PART:

{¶62} I agree with the majority's conclusions that the court erred by failing to suppress the results of Dukes's blood alcohol testing. However, I respectfully disagree that the suppression of the blood alcohol requires reversal of Dukes's conviction for aggravated vehicular homicide as charged in Count 2 of the indictment.

{¶63} Count 2 of the indictment charged Dukes with causing the victim's death while recklessly operating a vehicle under R.C. 2903.06(A)(2)(a). That count was not premised on Dukes causing a death when driving while intoxicated, so the suppression of evidence showing his blood alcohol level at the time of the accident would not be crucial to the jury verdict on this count.

{¶64} The jury had ample evidence that Dukes recklessly operated his vehicle when causing the victim's death: he was traveling nearly 60 m.p.h. in a 25 m.p.h. speed zone at 5:55 a.m. (in the month of January) without his headlights on. And even though we find that the results of his blood alcohol levels should be suppressed, other evidence of Dukes being under the

influence of alcohol could be considered in finding that he recklessly operated the vehicle. *See State v. Runnels*, 56 Ohio App.3d 120, 126, 565 N.E.2d 610 (8th Dist.1989). The jury heard testimony from the arresting officer that Dukes smelled of alcohol, was slurring his words at the time of his arrest, and that he admitted to drinking beer and Long Island iced tea earlier in the evening. From this evidence, the jury could find that Dukes acted recklessly by speeding while under the influence of alcohol. *See State v. Hennessee*, 13 Ohio App.3d 436, 439, 469 N.E.2d 947 (4th Dist.1984) ("A licensed driver is charged with knowledge that driving while under the influence is against the law, and creates a substantial risk to himself and others."). Because Count 2 was not dependent upon the results of otherwise inadmissible blood alcohol results and was supported by independent evidence that Dukes recklessly caused a death while operating a vehicle, his conviction on Count 2 should stand.

{¶65} Having concluded that Dukes's conviction for aggravated vehicular homicide is unaffected by the suppression of the blood alcohol testing, I would overrule his assignments of error relating to the court's refusal to allow a lay witness to render an opinion on who caused the accident and that trial counsel was ineffective for failing to object to the admission of data obtained from an airbag control module that recorded Dukes's speed at the time of the crash.

{¶66} An objection to a question by defense counsel asking a defense witness to give a "lay opinion as a driver" on which car caused the accident was properly sustained because whether Dukes committed aggravated vehicular homicide was a question of law for the jury to decide. *Woods v. Capital Univ.*, 10th Dist. Franklin No. 09AP-166, 2009-Ohio-5672, ¶ 71. The witness could testify that she saw the victim's car pull out into the street without warning in front of Dukes, but it was up to the jury to decide whether that act, if believed, absolved Dukes of

liability. The witness's opinion was unnecessary, and the court did not err by sustaining the objection.

{¶67} I would also find that defense counsel was not ineffective for failing to object to the admission of data obtained from the airbag control module of Dukes's vehicle on grounds that it was unreliable. While it is true that the data showed Dukes's vehicle speed increasing one-tenth of a second after the impact, that fact alone did not mean that the data derived from the van was faulty. Dukes merely assumes that this was a discrepancy, without offering proof to support his assumption. In any event, the data collected from the airbag control module closely matched the testimony of the police officer who testified at trial that he saw Dukes's van traveling at least 50 m.p.h. just seconds before the crash. So there was independent verification of Dukes's speed just before the crash and no basis for finding that the data was so skewed that, but for its admission, the jury would not have found that Dukes was reckless in causing the victim's death while operating a vehicle.