[Cite as *State v. Oliver*, 2010-Ohio-6306.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C. A. No. 25162
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
KENNETH FORD OLIVER	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellee	CASE No. CR 09-07-2033

DECISION AND JOURNAL ENTRY

Dated: December 22, 2010

CARR, Presiding Judge.

{¶1} Appellant, the State of Ohio, appeals the judgment of the Summit County Court of Common Pleas granting the motion to suppress filed by appellee, Kenneth Ford Oliver. This Court affirms.

I.

{¶2} This case stems from an automobile accident which occurred on May 27, 2009. On July 16, 2009, the Summit County Grand Jury indicted Oliver on one count of aggravated vehicular homicide in violation of R.C. 2903.06(A)(1), a felony of the second degree; one count of aggravated vehicular homicide in violation of R.C. 2903.06(A)(2), a felony of the third degree; operating under the influence of alcohol or drugs in violation of R.C. 4511.19(A)(1)(a), misdemeanor of the first degree; operating under the influence of alcohol or drugs in violation of R.C. 4511.19(A)(1)(f), a misdemeanor of the first degree; and failure to control in violation of R.C. 4511.202, a minor misdemeanor.

{¶3} On August 20, 2009, Oliver filed a motion to suppress. This motion was later withdrawn. On October 14, 2009, Oliver filed a motion to suppress/motion in limine requesting the exclusion of any blood-alcohol test results which were taken on May 27, 2009. A hearing was held on the motion on November 3, 2009. Oliver filed a supplement to his motion to suppress/motion in limine on November 17, 2009. On November 30, 2009, the State filed a motion to deny Oliver's motion to suppress. Subsequently, on December 14, 2009, the trial court granted Oliver's motion to suppress.

{¶4} On appeal, the State raises one assignment of error.

II.

ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED AS A MATTER OF LAW IN GRANTING THE MOTION TO SUPPRESS."

{¶5} In its assignment of error, the State argues that the trial court erred in granting Oliver's motion to suppress. This Court disagrees.

{¶6} A motion to suppress evidence presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶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." (Internal citations omitted.) Id.

{¶7} In support of its assignment of error, the State contends the trial court erred in following *State v. Cutlip*, 9th Dist. No. 08CA009353, 2008-Ohio-4999. The State contends that trial court should have relied on the authority of *State v. Davenport*, 12th Dist. No. CA208-01-011, 2009-Ohio-557, where the Twelfth District held that a trial court has discretion to admit test

results of any blood draw as contemplated in R.C. 4511.19(D)(1)(a). Oliver argues that R.C. 4511.19(D)(1)(a) is inapplicable in this case and that the trial court correctly relied on *Cutlip* in ruling on the motion to suppress.

{¶8} At the November 3, 2009 hearing, the parties stipulated that the following facts could be established by clear and convincing evidence. Oliver was the operator of a vehicle involved in an accident at 3:00 p.m. on May 27, 2009. Oliver was transported to Akron General Medical Center and a nurse drew his blood at 3:45 p.m. The nurse would have testified that she used ChloraPrep as an antiseptic on Oliver's skin. ChloraPrep is 70 percent isopropyl alcohol. The nurse, who the parties stipulated controls the laboratory at Akron General, would have testified that the blood sample would have been refrigerated no later than 22 hours, 15 minutes after it was drawn.

{¶9} The only witness to testify at the hearing, Steve Perch, was called by the State. Mr. Perch is employed by the Summit County Medical Examiner's Office. Mr. Perch is also the director of the Akron Police Crime Scene Unit Forensics Lab. The parties stipulated that Mr. Perch has the qualifications to run the Akron Police Crime Scene Unit Forensics Laboratory. The trial court made a specific finding that Mr. Perch is qualified to testify as an expert witness. On direct examination, Mr. Perch testified that there was not any isopropyl alcohol in the blood. Mr. Perch was able to make this determination by using a methodology known as gas chromatography. Mr. Perch testified that the test "would not only give a level of the ethanol, which is basically the alcohol *** but it would also give you a level of how much isopropyl was in there or anything else that I found." Mr. Perch further testified that the fact that the sample was not clotted indicated that an anticoagulant was used. Mr. Perch was not certain whether the anticoagulant was solid or liquid. Mr. Perch testified that a blood sample kept at room

temperature for 22 hours and 15 minutes prior to refrigeration would not impact the results of the alcohol level testing. When asked to clarify his answer, Mr. Perch testified that "[t]here's minimal impact on alcohol levels that are sealed even at room temperature. There's been numerous studies that show actually for weeks that there's very little impact on the alcohol levels. And if there was an impact it would decrease[] the alcohol concentration."

{¶10} The Supreme Court of Ohio has held that "[w]hen results of blood-alcohol tests are challenged in an aggravated-vehicular-homicide prosecution that depends upon proof of an R.C. 4511.19(A) violation, the state must show substantial compliance with R.C. 4511.19(D)(1) and Ohio Adm.Code Chapter 3701-53 before the test results are admissible." *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, paragraph one of the syllabus.

{¶11} R.C. 4511.19(D)(1) was amended April 7, 2007, adding a section (a). R.C. 4511.19(D)(1)(a) states:

> "In any criminal prosecution or juvenile court proceeding for a violation of division (A)(1)(a) of this section or for an equivalent offense that is vehicle-related, the result of any test of any blood or urine withdrawn and analyzed at any health care provider, as defined in section 2317.02 of the Revised Code, may be admitted with expert testimony to be considered with any other relevant and competent evidence in determining the guilt or innocence of the defendant."

{¶12} Oliver argues that the trial court properly followed this Court's previous decision in *Cutlip*. The defendant in that case was involved in a car accident and taken by ambulance to a hospital. A nurse drew blood samples from the defendant in accordance with the hospital's standard procedure, which involved swabbing the area with an alcohol-based antiseptic. By the time a police officer arrived at the hospital to request consent to test for the presence of alcohol, the defendant was strapped to a gurney and awaiting transportation by helicopter to a different hospital. The police officer did not have time to collect additional blood samples using a nonalcohol-based antiseptic. Thus, the blood samples that had already been drawn were the only

samples available for testing. The trial court suppressed the test results because the defendant's blood was not collected in substantial compliance with R.C. 4511.19 and O.A.C 3701-53-05. Because O.A.C. 3701-53-05(B) provides that "[n]o alcohols shall be used as a skin antiseptic," this Court affirmed the trial court's order. *Cutlip* at ¶1.

{¶13} The State urges this Court to rely on the authority of the Twelfth District's decision in *Davenport*. After being involved in a head-on collision, the defendant in *Davenport* was taken to a hospital. As part of his diagnosis and treatment, the defendant was subjected to a non-forensic blood-alcohol test. The defendant moved to suppress the blood test results alleging the samples were not collected pursuant to R.C. 4511.19(D)(1)(b), in substantial compliance with the Ohio Department of Health regulations. After holding a suppression hearing, the trial court found that the State had failed to establish substantial compliance with the ODH regulations. Notwithstanding the lack of substantial compliance, the trial court determined, pursuant to R.C. 4511.19(D)(1)(a), "that [the] blood-alcohol test results were admissible for the purposes of establishing OVI in violation of R.C. 4511.19(A)(1)(a) and the 'equivalent offense' of aggravated vehicular homicide in violation of R.C. 2903.06(A)(1)(a)." *Davenport* at ¶3. The defendant went on to plead no contest and was then found guilty by the trial court. On appeal, the defendant argued that "the results of the blood-alcohol test were inadmissible because there was no evidence presented at the suppression hearing in regard to the 'chain of custody, or of preservation and labeling' of his blood sample." Id. at ¶7. The defendant contended that because the State did not show substantial compliance with R.C. 4511.19(D)(1) and O.A.C. 3701-53, the test results were inadmissible. The Twelfth District applied the plain language of R.C. 4511.19(D)(1)(a) and reached the following holding:

> "[T]he results of 'any test of any blood' may be admitted with expert testimony and considered with any other relevant and competent evidence in order to

> determine the guilt or innocence of the defendant for purposes of establishing a violation of division R.C. 4511.19(A)(1)(a), or 'an equivalent offense,' including aggravated vehicular homicide in violation of R.C. 2903.06(A)(1)(a), so long as the blood was withdrawn and analyzed at a 'health care provider' as defined by R.C. 2317.12." Id. at ¶16.

{¶14} There is no dispute that there was not substantial compliance with OAC 3701-53-05 in this case. OAC 3701-53-05(B) requires that no alcohols shall be used as a skin antiseptic. The parties stipulated that the nurse who withdrew the blood used an alcohol-based antiseptic swab. OAC 3701-53-05(C) mandates the use of a solid anticoagulant. Mr. Perch testified that he was not certain whether the anticoagulant used was solid or liquid. Furthermore, OAC 3701-53-05(F) specifies that all blood and urine specimens shall be refrigerated while not in transit or under examination. The parties stipulated that the blood sample could have been stored at room temperature for as long as 22 hours and 15 minutes.

{¶15} The State contends that even if there was not substantial compliance with OAC 3701-53-05, the trial court had discretion to admit the results pursuant to R.C. 4511.19(D)(1)(a). In order to be admitted pursuant to R.C. 4511.19(D)(1)(a), the sample must be both "withdrawn and analyzed at any health care provider, as defined in section 2317.02 of the Revised Code[.]" R.C. 2317.02(B)(5)(b) defines "health care provider" as a "hospital, ambulatory care facility, long-term care facility, pharmacy, emergency facility, or health care practitioner."

{¶16} In its merit brief, the State emphasizes that because the Akron General Medical Center is a hospital, the facility qualifies as a health care provider pursuant to R.C. 2317.02(B)(5)(b). The parties stipulated to the fact that a nurse at the Akron General Medical Center drew Oliver's blood at 3:45 p.m. The sample was then analyzed by Mr. Perch, who serves as the director of the Akron Police Crime Scene Unit Forensics Laboratory and is also employed at the Summit County Medical Examiner's Office. The trial court found that R.C.

4511.19(D)(1)(a) was inapplicable because "the blood was drawn by a nurse, but analyzed at a law enforcement laboratory." While the parties stipulated to the fact that the blood was drawn at a health care provider, the State also had the burden of demonstrating that the blood was analyzed at a health care provider pursuant to R.C. 4511.19(D)(1)(a). There is no question that the parties stipulated to the fact that Mr. Perch was an expert witness. However, at the hearing on the motion to suppress, the State did not present evidence that the blood was analyzed at a "health care provider" as defined by R.C. 2317.02(B)(5)(b). There was no evidence presented suggesting that the blood was analyzed at the Akron General Medical Center. Thus, the State failed to demonstrate that the facts of this case are analogous to the facts in *Davenport*, where the defendant "was subject to a non-forensic, or 'medical,' blood-alcohol test" at The Ohio State University Medical Center. *Davenport* at ¶19. It follows that the trial court did not err in granting Oliver's motion to suppress.

{¶17} The State's assignment of error is overruled.

III.

{¶18} The State's sole assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
BAIRD, J.
CONCUR

(Baird, J., retired, of the Ninth District Court of Appeals, sitting by assignment pursuant to §6(C), Article IV, Constitution.)

APPEARANCES:

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellant.

GEORGE G. KEITH, Attorney at Law, for Appellee.