

[Cite as *State v. Doll*, 2015-Ohio-1875.]

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF WAYNE        )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No.     13CA0041

Appellee

v.

CYNTHIA K. DOLL

APPEAL FROM JUDGMENT  
ENTERED IN THE  
WAYNE COUNTY MUNICIPAL COURT  
COUNTY OF WAYNE, OHIO  
CASE No.    TRC 13-04-03578

Appellant

DECISION AND JOURNAL ENTRY

Dated: May 18, 2015

---

MOORE, Judge.

{¶1} Defendant-Appellant Cynthia Doll appeals from the judgment of the Wayne County Municipal Court. We reverse.

I.

{¶2} On April 7, 2013, at 1:24 a.m., Wooster Police Officer Ryan Laskowski observed a vehicle approach a stop sign at the corner of Timken Road and Grosjean and stop past the stop sign. The car continued onto Route 30 westbound. Officer Laskowski noticed the vehicle weaving in its lane and touching the white fog line at one point. The vehicle Officer Laskowski pulled over was driven by Ms. Doll.

{¶3} Ms. Doll was arrested for driving while under the influence and was taken to the jail where BAC testing was administered by Sergeant Kristopher Conwill. Sergeant Conwill administered the first test at 2:45 a.m., which came back as an invalid sample. This result usually occurs “from not getting a complete breath sample.” However, Sergeant Conwill

admitted that he did not know why the sample did not contain enough air. When he was recording the results, he noticed that the machine listed the incorrect time and that it was an hour ahead of the actual time.

{¶4} Thereafter, he told Sergeant Earl Kelly about the problem with the machine's clock. Sergeant Kelly was a senior operator of the BAC machine. He performed the weekly calibration tests and any repairs that needed to be done. The BAC machine automatically resets for daylight savings time; however, in recent years the date of the start of daylight savings time has changed and Sergeant Kelly believed the machine changed the clock at a point in time when it should not have.

{¶5} To fix the problem, Sergeant Kelly had to use a key and had to remove a panel to access the buttons that change the time. The BAC machine cannot be used while the time is being changed. After fixing the clock, Sergeant Kelly then reassembled the machine and Ms. Doll underwent a second BAC test at 3:05 a.m. after the 20 minute waiting period expired. On that occasion, the machine indicated that the sample was valid.

{¶6} Ms. Doll was arraigned on April 9, 2013, on one count of violating R.C. 4511.19(A)(1)(a), one count of violating R.C. 4511.19(A)(1)(d), one count of violating Wooster Codified Ordinance 331.19, and one count of violating Wooster Codified Ordinance 331.34. Ms. Doll filed a motion to suppress, asserting that the police lacked reasonable suspicion to stop Ms. Doll's vehicle, the breath test was not administered within three hours of the stop, and that the BAC testing was not done in compliance with Ohio Adm.Code 3701-53-02(D) and 3701-53-04.

{¶7} Following a suppression hearing, the trial court denied Ms. Doll's motion, concluding that the traffic stop was constitutionally permissible, that the BAC test was given in the three-hour time frame required by the statute, and that the BAC test was conducted in

substantial compliance with Ohio Adm.Code 3701-53-02(D) and 3701-53-04. Thereafter, Ms. Doll pleaded no contest to a violation of R.C. 4511.19(A)(1)(d) and the remaining charges were dismissed. Ms. Doll was sentenced to three days in jail, a \$600 fine, court costs, 12 months of community control, and a one year license suspension. Ms. Doll has appealed, raising a single assignment of error for our review.

## II.

### **ASSIGNMENT OF ERROR**

THE TRIAL COURT ERRED BY OVERRULING [MS. DOLL'S] MOTION TO SUPPRESS THE BAC TEST RESULT WHEN THE STATE FAILED TO PRESENT EVIDENCE OF SUBSTANTIAL COMPLIANCE WITH THE REQUIREMENTS OF [OHIO ADM.CODE] 3701-53-04.

{¶8} Ms. Doll asserts in her sole assignment of error that the trial court erred in denying her motion to suppress because the State failed to demonstrate substantial compliance with Ohio Adm.Code 3701-53-04. Specifically, Ms. Doll argues that the State failed to demonstrate that an instrument check or certification was performed after the machine was taken out of service to change the clock and prior to the second BAC test. Additionally, she argues that the State failed to present any evidence establishing when the machine was last checked prior to Ms. Doll's first BAC test in accordance with Ohio Adm.Code 3701-53-04(A). With respect to the latter argument, the State argues that Ms. Doll did not make this argument below, and, thus, has forfeited it for purposes of appeal.

Appellate review of a motion to suppress presents a mixed question of law and fact. 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.) *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8.

{¶9} “DUI offenses are prosecuted within a statutory and regulatory framework.” *State v. Edwards*, 107 Ohio St.3d 169, 2005-Ohio-6180, ¶ 10. “R.C. 4511.19(D)(1) provides that in any criminal DUI prosecution or juvenile court DUI proceeding a court ‘may admit evidence on the concentration of alcohol \* \* \* in the defendant’s \* \* \* breath \* \* \* at the time of the alleged violation as shown by chemical analysis of the substance[\* \* \*].” *Id.*, quoting R.C. 4511.19(D)(1)(b). “The statute, however, further provides: ‘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 \* \* \*.’” *Edwards* at ¶ 10, quoting R.C. 4511.19(D)(1).

{¶10} “[A]n assertion that test results are inadmissible in a criminal trial because the state failed to substantially comply with methods approved by the Director of Health for determining the concentration of alcohol in bodily fluids must be raised through a pretrial motion to suppress.” *Edwards* at ¶ 13. “After a defendant challenges the validity of test results in a pretrial motion, the state has the burden to show that the test was administered in substantial compliance with the regulations prescribed by the Director of Health.” *Burnside* at ¶ 24. The substantial-compliance standard excuses “only errors that are clearly de minimis.” *Id.* at ¶ 34. “Once the state has satisfied this burden and created a presumption of admissibility, the burden then shifts to the defendant to rebut that presumption by demonstrating that he was prejudiced by anything less than strict compliance.” *Id.* at ¶ 24. “[E]vidence of prejudice is relevant only after the state demonstrates substantial compliance with the applicable regulation.” *Id.*

{¶11} In her motion to suppress, Ms. Doll challenged the State’s compliance with Ohio Adm.Code 3701-53-04 in administering the BAC tests. The BAC machine used to administer Ms. Doll’s test on April 7, 2013, initially recorded an invalid sample. When Sergeant Conwill was recording the invalid sample reading, he noticed that the time displayed on the machine was

off by an hour. This prompted him to contact Sergeant Kelly, who used a key to remove a panel on the machine and then reset the clock to the correct time. There is no dispute that the machine could not conduct any BAC testing while Sergeant Kelly was resetting the clock. There is also no dispute that there was no evidence presented that the senior operator performed any calibration check on the machine when it was placed back into service prior to Ms. Doll's second BAC test.

{¶12} Ms. Doll argues that the State was required to demonstrate that a calibration check was conducted prior to Ms. Doll's second BAC test after the machine was placed back into service after resetting the clock pursuant to Ohio Adm.Code 3701-53-04(D). The trial court disagreed, concluding that resetting the clock was not a repair contemplated by Ohio Adm.Code 3701-53-04(D), particularly when there was no evidence that machine was malfunctioning. The trial court did not address whether the State complied with Ohio Adm.Code 3701-53-04(A) or whether Ms. Doll made an argument under that provision.

{¶13} This Court is unable to fully review this matter, however, because the trial court, in its decision, relied on a version of Ohio Adm.Code 3701-53-04(D) that was not in effect at the time of Ms. Doll's BAC tests on April 7, 2013. At the time of Ms. Doll's BAC tests, the regulation provided, "[a]n instrument check or certification shall be made in accordance with paragraphs (A) and (C) of this rule when a new evidential breath testing instrument is placed in service or when the instrument is returned after service or repairs, before the instrument is used to test subjects." Former Ohio Adm.Code 3701-53-04(D).

{¶14} The above quoted version was cited by Ms. Doll in her motion to suppress. However, the trial court's entry and the parties' brief on appeal rely on the current version of the regulation that went into effect on July 25, 2013. That version provides that, "[a]n instrument

check or certification shall be made in accordance with paragraphs (A) and (C) of this rule before a new evidential breath testing instrument is placed in service or before the instrument is placed into service following repairs, before the instrument is used to test subjects.” Ohio Adm.Code 3701-53-04(D). Notably the version in effect at the time of Ms. Doll’s BAC tests required an instrument check or certification at the time the machine is “returned after service *or* repairs,” (Emphasis added.) former Ohio Adm.Code 3701-53-04(D), whereas the current version only requires an instrument check or certification when the machine is “placed into service following repairs[.]” Ohio Adm.Code 3701-53-04(D). Thus, even assuming we were persuaded that resetting the clock following an invalid sample reading by the machine did not constitute a repair as contemplated by the Ohio Administrative Code, the regulation in effect at the time anticipated the performance of instrument checks or certifications under broader circumstances than just repairs. However, the trial court did not consider whether the facts and circumstances of this case demonstrated compliance with the version of Ohio Adm.Code 3701-53-04(D) in effect at the time of Ms. Doll’s arrest. Given our role as a reviewing court, we are not inclined to resolve this matter in the first instance. *See State v. Horvath*, 9th Dist. Medina No. 13CA0040-M, 2014-Ohio-641, ¶ 10.

{¶15} Moreover, as the trial court did not consider whether the State complied with Ohio Adm.Code 3701-53-04(A), or even whether Ms. Doll made an argument pursuant to that provision, the trial court should also consider that issue upon remand. This Court takes no position on whether that issue was properly raised below.

{¶16} To the extent Ms. Doll asserts the trial court committed reversible error in denying her motion to suppress, we sustain her assignment of error.

## III.

{¶17} The judgment of the Wayne County Municipal Court is reversed and the matter is remanded for proceedings consistent with this opinion.

Judgment reversed,  
and cause remanded.

---

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Wayne County Municipal Court, County of Wayne, 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(C). 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 Appellee.

---

CARLA MOORE  
FOR THE COURT

HENSAL, P. J.  
CARR, J.  
CONCUR.

APPEARANCES:

JOHN JOHNSON, JR., Attorney at Law, for Appellant.

DANIEL R. LUTZ, Prosecuting Attorney, and NATHAN R. SHAKER, Assistant Prosecuting Attorney, for Appellee.