

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 09AP-635
Plaintiff-Appellant,	:	(M.C. No. 2008 TRC 188774)
v.	:	
	:	(ACCELERATED CALENDAR)
Maggie M. Burtch,	:	
	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on January 28, 2010

Richard C. Pfeiffer, Jr., City Attorney, *Lara N. Baker*, City Prosecutor, and *Melanie R. Tobias*, for appellant.

Koffel & Jump, and *Bradley P. Koffel*, for appellee.

APPEAL from the Franklin County Municipal Court.

McGRATH, J.

{¶1} Pursuant to Crim.R. 12(K) and App.R. 4(B)(4), plaintiff-appellant, State of Ohio, appeals from the judgment of the Franklin County Municipal Court in which that court granted the motion to suppress the results of a BAC Datamaster breath test in the prosecution of defendant-appellee, Maggie M. Burtch, for operating a vehicle under the influence of alcohol ("OVI impaired") and for operating a vehicle with a per se prohibited concentration of blood alcohol ("OVI per se").

{¶2} At approximately 1:58 a.m. on September 19, 2008, Ohio State Highway Patrol ("OSHP") Trooper Isaac Saunders initiated a traffic stop of appellee's vehicle as it

was traveling on Goodale Boulevard in the city of Columbus in Franklin County. Upon investigating, Trooper Saunders determined that there was probable cause to believe that appellee was operating her vehicle under the influence of alcohol, and he arrested appellee for a violation of R.C. 4511.19(A)(1)(a), OVI impaired.

{¶3} Following her arrest, appellee consented to a BAC Datamaster breath test to determine her blood-alcohol content. The test result indicated that the sample appellee provided contained .110 grams of alcohol per 210 liters of breath. Thereafter, appellee was additionally charged with a violation of R.C. 4511.19(A)(1)(d), OVI per se. Appellee was also charged with a multiple marked-lanes violation.

{¶4} On November 7, 2008, appellee filed two separate motions to suppress. The first argued that Trooper Saunders: (1) lacked reasonable suspicion to initiate the traffic stop; (2) lacked probable cause to arrest her; and (3) failed to advise her of her rights under *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602. The second asserted that law enforcement officers failed to administer the BAC Datamaster test in accordance with applicable provisions of the Ohio Administrative Code. Indeed, appellee challenged virtually every aspect of the BAC Datamaster test.

{¶5} The trial court held a hearing on the motion on April 6, 2009. Trooper Saunders testified that while following appellee's vehicle, he observed her weave within her own lane several times and, in addition, commit multiple marked-lane violations. After initiating a traffic stop, he detected a moderate odor of alcohol emanating from appellee; he further noted that appellee's eyes were bloodshot and glassy and that her face was flushed. At Trooper Saunders' request, appellee exited her vehicle. Appellee insisted that she had not consumed any alcohol; however, Trooper Saunders continued to detect

a moderate odor of alcohol on appellee's breath as she stood outside her vehicle. Thereafter, Trooper Saunders administered standardized field sobriety tests, including the Horizontal Gaze Nystagmus ("HGN") test, the one-leg stand, and the walk-and-turn test. Trooper Saunders noted no clues on the one-leg stand test, six clues on the HGN test, and two clues on the walk-and-turn test. He also administered a portable breath test, which sample registered .109 grams of alcohol per 210 liters of appellee's breath. Based upon these factors, Trooper Saunders arrested appellee under suspicion of driving while under the influence of alcohol.

{¶6} Thereafter, Trooper Saunders transported appellee to the Grandview Heights Police Department ("GHPD") for a breath test. Trooper Saunders identified State's Exhibit A, an Ohio Department of Health ("ODH") permit issued July 26, 2008, valid through July 26, 2009, which authorized him to perform breath tests utilizing the BAC Datamaster. Trooper Saunders testified that in accordance with ODH regulations, he administered the breath test within three hours of the traffic stop, observed appellee for 20 minutes immediately preceding administration of the breath test, and did not permit appellee to ingest anything during that 20-minute period. He further stated that no radio transmitting device was in use while he administered the breath test, that the BAC Datamaster was in proper working order, and that no radio frequency interference ("RFI") was detected during the test. In addition, Trooper Saunders identified State's Exhibit C, the BAC Datamaster subject test form, which indicated that he checked all four boxes on the operational checklist. He also identified State's Exhibit D, the BAC Datamaster evidence ticket, which demonstrated that the sample appellee provided contained .110 grams of alcohol per 210 liters of breath. On cross-examination, Trooper Saunders

acknowledged that he had never performed an instrument check on the GHPD BAC Datamaster and that he did not know whether any OSHP hand-held radios had ever been tested for RFI on GHPD's BAC Datamaster.

{¶7} Immediately following Trooper Saunders' testimony, appellee stipulated that the pre- and post-test instrument checks of the BAC Datamaster conducted by GHPD complied with ODH regulations. More specifically, appellee stipulated that the BAC Datamaster had been properly checked for RFI presence using GHPD hand-held radios, that the individual who conducted the instrument checks, GHPD Officer Michael Ludwig, possessed a valid and unexpired operator's permit, and that the solution used to check the calibration was valid. Appellee reserved challenges to various ODH regulations, including, as pertinent here, GHPD's failure to check the BAC Datamaster for RFI using OSHP's hand-held radios.

{¶8} Following appellee's stipulations, the prosecution indicated that it would not question Officer Ludwig, but submitted Officer Ludwig's BAC Datamaster operator's permit, the pre-test instrument check and evidence ticket, the batch certificate for the instrument check solution, the operator's permit held by GHPD Officer Leslie S. Jackson, the individual who conducted the post-test instrument check, as well as the post-test instrument check, the post-test evidence ticket, and the post-test diagnostic check. (State's Exhibits F-M.)

{¶9} Officer Jackson, GHPD calibration and record-keeping officer, testified that she performed weekly instrument checks on the BAC Datamaster, including RFI tests using GHPD hand-held radios, and kept timely records of those tests in accordance with ODH regulations. On cross-examination, Officer Jackson acknowledged that even though

OSHP frequently utilized GHPD Datamaster, GHPD had never requested that OSHP provide its hand-held radios for weekly RFI checks. She further acknowledged that there was no sign posted at GHPD warning law enforcement officers to turn off electronic devices while conducting breath tests; she stated, however, that she believed that all law enforcement officers who administered breath tests turned their electronic devices off during testing. On redirect, Officer Jackson testified that she had never witnessed RFI during a breath test administered by OSHP.

{¶10} Appellee presented no witnesses or other evidence. However, prior to resting her case, appellee obtained leave of court to inspect the GHPD BAC Datamaster, survey the number of breath tests administered by OSHP as compared to GHPD, and, if warranted, to file a supplemental motion to suppress based upon those findings.

{¶11} In accordance with the leave granted by the court at the April 6, 2009 hearing, appellee, on April 28, 2009, filed a supplemental motion to suppress the results of her breath test. In particular, appellee submitted that for the period January 1, 2008 through December 31, 2008, OSHP administered 443 breath tests utilizing the GHPD BAC Datamaster; during the same time period, GHPD administered 125 breath tests. Appellee noted that Officer Jackson testified at the suppression hearing that despite OSHP's frequent use of the GHPD BAC Datamaster, GHPD had never requested that OSHP submit any of its hand-held radios for RFI testing during its weekly instrument checks. Appellee further noted that review of GHPD subject breath-test forms and instrument checks confirmed that OSHP had never submitted any of its hand-held radios for an RFI test as part of the GHPD weekly instrument check. Appellee argued that the large number of tests administered by OSHP, when compared to the number of tests

administered by GHPD, rendered the Datamaster, in essence, a de facto OSHP breathalyzer, requiring that OSHP-issued hand-held radios, in addition to GHPD's hand-held radios, be used in the weekly RFI check. Appellee argued that GHPD's failure to test OSHP's hand-held radios for RFI testing constituted a violation of Ohio Adm.Code 3701-53-04, rendering the reliability, and thus the validity, of the test result suspect. As such, argued appellee, the breath test result should be suppressed.

{¶12} In its June 26, 2009 amended entry and decision, the trial court found that there was reasonable suspicion for the stop and probable cause for the arrest and, thus, overruled appellee's motion as to those issues. Regarding the validity of the breath test, the court found that GHPD fully complied with Ohio Adm.Code 3701-53-04 with regard to RFI testing procedures. However, the court held that because appellee specifically raised an issue in her supplemental motion to suppress regarding OSHP hand-held radios not being used to check for RFI on the GHPD BAC Datamaster, appellant bore the burden of demonstrating that the radio frequencies transmitted by OSHP hand-held radios were either the same as GHPD radio frequencies which were used to check for RFI, or that they did not affect appellee's breath test. The court stated:

In our case, no evidence was presented as to the actual radio frequencies of the handheld radios used by Grandview Heights Officers or the OSHP Troopers. The Plaintiff was on notice as to this issue by virtue of Defendant's Motion, which shifted the burden for this information to be produced at hearing to address the possible presence of RFI during Defendant's breath test. This goes to the issue of prejudice to the Defendant resulting from possibly incorrect test results as opposed to the issue of substantial compliance with the testing regulations as contained in OAC 3701-53-04.

(Amended Decision and Entry, at 3.)

{¶13} The court thus concluded that because appellant presented no evidence as to the actual radio frequencies of the hand-held radios used by GHPD officers or the OSHP troopers, it was "without sufficient information to assess whether or not RFI was present during Defendant's breath test." (Entry at 3.) On that basis, the court sustained appellee's motion to suppress the results of the breath test.

{¶14} Appellant timely appealed and presents a single assignment of error for our review:

THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT DETERMINED THAT APPELLEE WAS PREJUDICED BY THE FACT THAT THE OHIO STATE HIGHWAY PATROL'S HAND-HELD RADIOS WERE NOT USED TO CHECK FOR RFI PURSUANT TO OHIO ADMIN. CODE 3701-53-04(A)(1).

{¶15} "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, ¶8. When considering a motion to suppress, the trial court assumes the role of fact finder and, accordingly, is in the best position to resolve factual questions and evaluate witness credibility. *Id.* ¶8, citing *State v. Mills* (1992), 62 Ohio St.3d 357, 366. As such, an appellate court must accept the trial court's factual findings if they are supported by competent, credible evidence. *Burnside*, ¶8, citing *State v. Fanning* (1982), 1 Ohio St.3d 19. Accepting these facts as true, the reviewing court must then independently determine, without deference to the trial court's conclusion, whether the facts satisfy the applicable legal standard. *Burnside*, ¶8, citing *State v. McNamara* (1997), 124 Ohio App.3d 706, 707.

{¶16} "R.C. 4511.19 is a strict liability statute in which the accuracy of the breath-test results [is] of paramount importance in determining a defendant's guilt or innocence." *State v. Massie*, 12th Dist. No. CA93-07-018, citing *Defiance v. Kretz* (1991), 60 Ohio St.3d 1. "The General Assembly established the threshold criteria for the admissibility of alcohol-test results in prosecutions for driving under the influence and driving with a prohibited concentration of alcohol in R.C. 4511.19(D)." *Burnside*, ¶9. That statute provides that a defendant's blood, breath, or urine "shall be analyzed in accordance with methods approved by the director of health by an individual possessing a valid permit issued by the director of health pursuant to section 3701.143 of the Revised Code." R.C. 3701.143 requires the director of health to "determine, or cause to be determined, techniques or methods for chemically analyzing a person's * * * breath * * * in order to ascertain the amount of alcohol * * * in the person's * * * breath[.]"

{¶17} When an accused challenges the admissibility of a breath test based upon a failure to comply with an ODH regulation, the state need only demonstrate substantial compliance, rather than strict compliance, with that regulation. *Defiance v. Kretz* (1991), 60 Ohio St.3d 1, 3. Once the state has demonstrated substantial compliance, the burden then shifts back to the defendant to show that he or she was prejudiced by less than literal compliance. *State v. Plummer* (1986), 22 Ohio St.3d 292, 295. In *Burnside*, the court limited the substantial-compliance standard to excusing only deviations from the regulations that are "clearly de minimis," also characterized as "minor procedural deviations." *Id.* at ¶34, citing *State v. Homan* (2000), 89 Ohio St.3d 421, 426. Limiting the substantial-compliance standard to excusing only errors that are clearly de minimis prevents the judiciary from usurping the director of health's authority to promulgate

regulations that ensure the reliability of alcohol-test results. *Burnside*, ¶34. The *Burnside* court explained that the General Assembly instructed the director of health, not the judiciary, to establish regulations concerning alcohol testing because the former possesses the scientific expertise that the latter does not. *Id.* at ¶32. Nonetheless, the court was also cognizant of the fact that strict compliance with the regulations is not always realistic or humanly possible. *Id.* at ¶34, citing *Plummer* at 294. Therefore, the court determined that the proper balance was to excuse only "clearly de minimis" errors. *Burnside*, ¶34.

{¶18} In accordance with R.C. 4511.19(D) and 3701.143, the director of health promulgated a test protocol for use in measuring RFI factors affecting the operation of any breath-testing instrument used to support a charge of OVI. That protocol, set forth in Ohio Adm.Code 3701-53-04(A)(1), provided, at the time of appellee's breath test, that:

(A) A senior operator shall perform an instrument check on approved evidential breath testing instruments and a radio frequency interference check (RFI) check no less frequently than once every seven days in accordance with the appropriate instrument checklist for the instrument being used. The instrument check may be performed anytime up to one hundred and ninety-two hours after the last instrument check.

(1) The instrument shall be checked to detect RFI using a hand-held radio normally used by the law enforcement agency. The RFI detector check is valid when the evidential breath testing instrument detects RFI or aborts a subject test. If the RFI detector check is not valid, the instrument shall not be used until the instrument is serviced.¹

¹ Ohio Adm.Code 3701-53-04(A)(1) now provides as follows:

(A) A senior operator shall perform an instrument check on approved evidential breath testing instrument listed under paragraphs (A)(1), (A)(2), and (B) of rule 3701-53-02 no less frequently than once every seven days in accordance with the appropriate instrument checklist for the instrument being used. The instrument check may be performed anytime up to one hundred and ninety-two hours after the last instrument check.

{¶19} Ohio Adm.Code 3701-53-04(A)(1) thus requires that a senior operator check the breath-testing instrument for RFI at least once every seven days using a hand-held radio "normally used by the law enforcement agency." As noted, the trial court determined that appellant's evidence demonstrated that the GHPD fully complied with Ohio Adm.Code 3701-53-04 with regard to RFI testing procedures. Such determination is supported by competent, credible evidence. A senior operator, GHPD Officer Jackson, testified that she performed weekly instrument checks on the BAC Datamaster, which included RFI surveys using GHPD hand-held radios. The pre- and post-instrument check forms relating to appellee's test were admitted into evidence and demonstrated that the internal RFI detector check was performed and the BAC Datamaster properly detected RFI. Appellee stipulated to GHPD's compliance with Ohio Adm.Code 3701-53-04(A)(1) with regard to the pre- and post-test instrument checks, including the internal RFI detector checks. Trooper Saunders, who conducted appellee's test, testified that no one used a radio transmitting device during appellee's test and that the BAC Datamaster did not indicate that it detected any RFI.

{¶20} Once the state demonstrates strict compliance with an ODH regulation, the accused cannot demonstrate prejudice. In this case, however, the trial court held that because appellee specifically raised an issue regarding OSHP hand-held radios not being used to check for RFI, appellant bore the additional burden of demonstrating that the

(1) the instrument shall be checked to detect radio frequency interference (RFI) using a hand-held radio normally used by the law enforcement agency performing the instrument check. The RFI detector check is valid when the evidential breath testing instrument detects RFI or aborts a subject test. If the RFI detector check is not valid, the instrument shall not be used until the instrument is serviced.

radio frequencies transmitted by OSHP radios were either the same as GHPD radio frequencies which were used to check for RFI, or that they did not affect appellee's breath test. The trial court stated that such goes to the issue of prejudice to the defendant resulting from possibly incorrect test results as opposed to the issue of substantial compliance with ODH regulations.

{¶21} In support of its finding, the trial court relied on *State v. McNamara* (1997), 124 Ohio App.3d 706. In that case, an Athens City Police Officer arrested McNamara for OVI and transported her to an OSHP post for a breath test. The officer parked his cruiser in the post's parking lot and entered the building, leaving his CB radio, the patrol car radio, and his cell phone in the "on" position in his cruiser. A senior operator administered McNamara's breath test on the OSHP's BAC Datamaster, the results of which indicated that she had consumed alcohol in excess of the legal limit. McNamara moved to suppress the test results, alleging that the results were presumptively inaccurate because Athens Police Department ("APD") radios, which had never been tested against the OSHP BAC Datamaster for potential RFI, were in use within 30 feet of the BAC Datamaster during her test. The relevant ODH regulation, former Ohio Adm. Code 3701-53-02(C), provided that "[r]adio transmitting antennae shall not be used within any RFI affected zone during the conduct of a subject test or a calibration check. No radio transmitting antennae that have not been subjected to an RFI survey shall be used within thirty feet of the breath testing instrument during conduct of a subject test or a calibration test."

{¶22} At the hearing on the motion to suppress, the state conceded that the three untested radios were left in the "on" position during McNamara's breath test. The state

further conceded that the APD regularly used the OHSP testing device for a period of four to five months and that the APD radios were never tested for RFI during that time. The trial court granted McNamara's motion to suppress, finding that APD radios had not been RFI surveyed and were within 30 feet of the BAC Datamaster device during McNamara's breath test.

{¶23} On appeal, the state challenged the trial court's factual finding that APD radios were within 30 feet of the BAC Datamaster during McNamara's test. The state further argued that regardless of the location of the radios relative to the BAC Datamaster, McNamara was not prejudiced because no radio traffic could have interfered with the testing device during her test.

{¶24} The appellate court found that the record contained competent, credible evidence to support the trial court's finding that APD radios which had not been RFI surveyed were left "on" within 30 feet of the BAC Datamaster. Accordingly, the court overruled the state's challenge to the trial court's factual finding that APD radios were within 30 feet of the BAC Datamaster.

{¶25} Regarding the trial court's application of the law to McNamara's case, the court noted that for test results to be admissible into evidence, the state need only prove substantial compliance with ODH regulations. Accordingly, the court found that the issue to be determined was whether, in light of the BAC Datamaster being frequently used by the APD, whose radios had not been RFI surveyed, the state achieved substantial compliance with Ohio Adm.Code 3701-53-02(C).

{¶26} In considering this issue, the court noted that in *State v. Adams* (1992), 73 Ohio App.3d 735, the court declined to suppress an accused's breath test even though

the local police department did not conduct an RFI survey on radios frequently used by OSHP in the vicinity of the testing instrument. The *Adams* court held that, absent evidence that OSHP frequencies were, in fact, transmitted from a radio within 30 feet of the local police department's testing instrument during the testing, failure to perform an RFI survey for those other frequencies did not preclude admission of the test results.

{¶27} In *McNamara*, the state argued that it substantially complied with Ohio Adm.Code 3701-53-02(C) by administering RFI surveys for the radio frequencies used by OSHP. In support of its argument, the state relied upon *State v. Day* (1990), 67 Ohio App.3d 325, wherein the court held that "the applicable regulations do not clearly mandate that a[n] RFI survey be conducted with respect to every frequency used by anyone who might happen to enter the premises where a machine is kept." *McNamara* at 173, quoting *Day* at 328. The *McNamara* court noted that it applied and expanded the *Adams* and *Day* holdings in *State v. Buchanan* (Nov. 22, 1996), 4th Dist. No. 95CA48. In *Buchanan*, the BAC Datamaster located at the local police department had not been RFI tested for radios used by OSHP, and OSHP accounted for almost 50 percent of the machine's use; nonetheless, the court determined that the burden lay with the accused to show that a radio transmitting on an untested frequency was in use within 30 feet of the BAC Datamaster when the breath test was administered.

{¶28} The *McNamara* court, relying on *Adams*, *Day*, and *Buchanan*, found that the state substantially complied with ODH regulations regarding RFI testing. The court further found that "[t]he fact that untested APD radios were 'on' and within 30 feet of the BAC Datamaster goes to the issue of prejudice resulting from possibly incorrect test results rather than to the issue of substantial compliance." *McNamara* at 714. Having so

found, the court next considered whether McNamara met her burden of proving that APD radios were actually used during her breath tests. The court concluded that McNamara made a sufficient showing of prejudice by demonstrating that unsurveyed APD radios were "on" and therefore "in use," within the meaning of Ohio Adm.Code 3701-53-02(C), within a 30-foot radius of the BAC Datamaster during her breath test. For this reason, the court concluded that the trial court did not err in suppressing the results of McNamara's breath test.

{¶29} Although *McNamara* and the cases upon which it relied construed a different Ohio Administrative Code regulation than is at issue here, the rationale underlying those courts' findings that the state substantially complied with the applicable Ohio Administrative Code regulation applies equally here. As noted, the regulation at issue in this case, Ohio Adm.Code 3701-53-04(A)(1), required that a senior operator check the breath-testing instrument for RFI at least once every seven days using a hand-held radio "normally used by the law enforcement agency." Ohio Adm.Code 3701-53-04(A)(1) did not clearly mandate that the law enforcement agency conducting the survey use hand-held radios of other agencies that might also use the machine to run subject tests. Such an expansive judicial construction of the regulation would constitute a impermissible supplanting of the director of health's authority to approve evidential breath-testing procedures. Accordingly, we find that GHPD substantially complied with former Ohio Adm.Code 3701-53-04(A)(1) by conducting its weekly RFI survey using only its own hand-held radios.

{¶30} Because GHPD met its initial burden of demonstrating substantial compliance with former applicable Ohio Adm.Code 3701-53-04(A)(1), the burden then

shifted back to appellee to demonstrate that she was prejudiced by less than literal compliance. Here, the trial court placed the burden of demonstrating that the radio frequencies transmitted by OSHP radios were either the same as GHPD radio frequencies which were used to check for RFI, or that they did not affect appellee's breath test, on appellant. In essence, the trial court saddled appellant with the burden of proving that appellee was not prejudiced, rather than shifting the burden to appellee to prove that she was prejudiced. Appellee failed to present any evidence demonstrating that she was prejudiced by the fact that OSHP's hand-held radios were not utilized in the GHPD's weekly instrument checks. Appellee presented no evidence that the radio frequencies transmitted by OSHP radios were different than GHPD radio frequencies used to check for RFI, or that they affected appellee's breath test. Such evidence is necessary to demonstrate prejudice by way of possibly incorrect test results. Absent such evidence, admission of the breath-test result was not precluded.

{¶31} For the foregoing reasons, we hereby sustain appellant's sole assignment of error, reverse the Franklin County Municipal Court's granting of the motion to suppress, and remand this case to that court for further proceedings in accordance with law and consistent with this decision.

Judgment reversed and cause remanded.

BROWN and KLATT, JJ., concur.
