

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellant,	:	CASE NO. CA2011-08-059
- vs -	:	<u>OPINION</u> 7/9/2012
NICHOLAS A. KORMOS,	:	
Defendant-Appellee.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY MUNICIPAL COURT
Case No. 2010TRC18017

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, 123 North Third Street, Batavia, Ohio 45103, for plaintiff-appellant

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HENDRICKSON, P.J.

{¶ 1} Plaintiff-appellant, the state of Ohio, appeals from an order of the Clermont County Municipal Court granting Nicholas Kormos' motion to suppress. For the reasons that follow, we reverse the decision of the trial court.

{¶ 2} On December 17, 2010 at approximately 3:00 a.m., Trooper Michael Shimko of the Ohio State Highway Patrol stopped Kormos on Mt. Carmel-Tobasco Road for committing

a marked lane violation. Upon approaching Kormos' vehicle, Trooper Shimko noted a strong odor of alcoholic beverage and discovered Kormos had glassy, bloodshot eyes and slurred speech. After Kormos failed several field sobriety tests, Trooper Shimko placed Kormos under arrest. Kormos subsequently submitted to an Intoxilyzer 8000 breath test, which resulted in a reading of .143 grams by weight of alcohol per 210 liters of breath.

{¶ 3} Kormos was charged with operating a vehicle under the influence of alcohol in violation of R.C. 4511.19(A)(1)(a) and (A)(1)(d). Prior to trial, Kormos moved to suppress his breath test results. Kormos argued the Intoxilyzer 8000 did not comply with the calibration requirements set forth in Ohio Adm.Code 3701-53-04. The trial court heard evidence on Kormos' motion on March 23, 2011, and again on June 11, 2011. In a written decision dated August 3, 2011, the court granted Kormos' motion and suppressed the breath test results.

{¶ 4} The state timely appeals, raising one assignment of error:

{¶ 5} THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION TO SUPPRESS.

{¶ 6} In its sole assignment of error, the state argues the trial court erroneously suppressed the results of Kormos' breath test. The state claims the trial court's decision was based on an erroneous interpretation of Ohio Adm.Code 3701-53-04(B), as it applies to the Intoxilyzer 8000.

{¶ 7} 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. See also *State v. Wemer*, 112 Ohio App.3d 100, 102 (4th Dist.1996). 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. *State v. Mills*, 62 Ohio St.3d 357, 366 (1992). As such, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *Burnside* at ¶ 8. "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." *Id.*

{¶ 8} Pursuant to R.C. 3701.143, the Director of Health is authorized to issue regulations regarding blood, breath, and urine testing for drugs and alcohol. The approved methods for chemically analyzing a person's breath are set forth in Ohio Adm.Code 3701-53-01 et seq. Pertinent to this appeal is Ohio Adm.Code 3701-53-04, which specifies the "instrument check," or calibration requirements for approved breath-testing machines. Ohio Adm.Code 3701-53-04(B) states:

Instruments listed under paragraph (A)(3) of rule 3701-53-02 of the Administrative Code shall automatically perform a dry gas control test before and after every subject test and instrument certification using a dry gas standard traceable to the national institute of standards and technology (NIST). Dry gas control results are valid when the results are at or within five one-thousandths (0.005) grams per two hundred ten liters of the alcohol concentration on the manufacturer's certificate of analysis for that dry gas standard. A dry gas control result which is outside the range specified in this paragraph will abort the subject test or instrument certification in progress.

{¶ 9} The current calibration sequence for the Intoxilyzer 8000 is documented in a form called "Subject Test Report." The report has three sections. The first section, entitled "Subject Information," consists of the offender's information, including his or her name, address, date of birth, social security number, age, sex, and driver's license number. Below that is "Arrest Information," which includes the arresting officer's name, as well as the date and time of the violation. The last section is entitled "Test Information." Here, the actual calibration procedure is set forth as follows:

1. Air Blank
2. Diagnostic
3. Air Blank
4. Dry Gas Control

5. Air Blank
6. Subject Test 1
7. Air Blank
8. Air Blank
9. Subject Test 2
10. Air Blank
11. Dry Gas Control
12. Air Blank

{¶ 10} "Air Blanks" ensure that the previous breath sample has been purged from the machine. "Subject Test 1" and "Subject Test 2" indicate each time an individual blows into the machine. "Dry Gas Control" tests check the calibration of the instrument to ensure its results are accurate. See, e.g., *State v. Booth*, 151 Ohio App.3d 635, 2003-Ohio-829, ¶ 16 (9th Dist.) ("[c]alibration is the process by which a breathalyzer machine is tested for its range of accuracy").

{¶ 11} The sole issue here is a narrow one. The parties ask this court to determine what Ohio Adm.Code 3701-53-04(B) means by requiring a dry gas control test "*before and after every subject test * * **" (Emphasis added.) *Id.*

{¶ 12} Kormos contends that a new "subject test" occurs each time a person blows into the machine. Thus, Kormos argues the phrase "before and after every subject test" requires dry gas control tests before and after "Subject Test 1," and again before and after "Subject Test 2," for a total of four dry gas tests per person tested. Conversely, the state argues that the term "subject" as referred to in the code means the "person" being tested, such that there is only one "subject test," with two opportunities to blow into the machine. Thus, pursuant to the state's rationale, only two dry gas control tests are required: one before the "subject" first blows into the machine, and a second test after the subject has completed

both blows.

{¶ 13} Statutory construction presents a legal issue, which we review de novo. See *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, ¶ 8. In a de novo review, this court independently reviews the record without giving deference to the trial court's decision. *Washington Cty. Home v. Ohio Dept. of Health*, 178 Ohio App.3d 78, 2008-Ohio-4342, ¶ 27 (4th Dist.).

{¶ 14} In determining what is meant by the phrase "subject test" in connection with Ohio Adm.Code 3701-53-04(B), we employ fundamental rules of statutory construction, which apply equally to administrative regulations. See *Meadowwood Manor, Inc. v. Ohio Dept. of Health*, 12th Dist. No. CA2006-08-010, 2007-Ohio-2067, ¶ 19; *State v. Anthony*, 96 Ohio St.3d 173, 2002-Ohio-4008, ¶ 11. The primary goal of statutory interpretation is to discern the intent of the legislature, or, in this case, the Health Department. *Anthony* at ¶11; *Symmes Twp. Bd. of Trustees v. Smyth*, 87 Ohio St.3d 549, 553 (2000). In determining intent, we first look to the language of the statute. *Provident Bank v. Wood*, 36 Ohio St.2d 101, 105 (1973). Where the meaning of the statute is clear and definite, it must be applied as written. *Bailey v. Republic Engineered Steels, Inc.*, 91 Ohio St.3d 38, 40 (2001). However, where the words are ambiguous and are subject to varying interpretations, further interpretation is necessary. *Id.*

{¶ 15} Here, the trial court agreed with Kormos' interpretation, and found the failure to run dry gas control tests between "Subject Test 1" and "Subject Test 2" was "directly contrary" the language in Ohio Adm.Code 3701-53-04(B). In so holding, the court applied what it believed the phrase "subject test" to mean.

{¶ 16} The trial court was correct insofar as it intended to define the phrase "subject test" using common meaning, as it is not defined in the regulation. See *Anthony*, 2002-Ohio-4008 at ¶ 11. However, it is unclear where the court derived its definition. The word

"subject" is commonly defined as: "one that is placed under the authority, dominion, control, or influence of someone or something * * * an individual whose reactions or responses are studied (as in the testing of physiological or psychological phenomenon) * * *." *Webster's Third New International Dictionary* 2275 (1993). In applying this definition toward Ohio Adm.Code 3701-53-04(B), it is quite clear that a "subject test" is synonymous with running the Intoxilyzer 8000 on a single "subject," i.e., "individual" under law enforcement's control. Because the language set forth by the Health Department is clear and definite, we must apply it as written and hold that there is only one "subject" being tested during any one breathalyzer test. See *Kneisley v. Lattimer-Stevens Co.*, 40 Ohio St.3d 354, 357 (1988). It follows that the items listed in the "Subject Test Report" form, including "Subject Test 1" and "Subject Test 2," are simply recurring components of the same Intoxilyzer 8000 test, where one subject blows twice before reaching the end result.

{¶ 17} We note that our view of Ohio Adm.Code 3701-53-04(B) is consistent with what appears to be the Health Department's current interpretation thereof. See *State ex rel. Turner v. Eberlin*, 117 Ohio St.3d 381, 2008-Ohio-1117, ¶ 17 (courts must give due deference to the department's reasonable interpretation of administrative regulations); *State v. Yoder*, 66 Ohio St.3d 515, 518 (1993).

{¶ 18} During the suppression hearing, the state presented the testimony of Mary Martin, the Program Director for Drug and Alcohol Testing for the Health Department. Martin testified she received training from the manufacturer as to how the Intoxilyzer 8000 worked, and that she was familiar with Ohio Adm.Code 3701-53-04(B). Martin stated it would be inappropriate to construe the code to require a dry gas control test between a person's consecutive blows. Instead, Martin explained "[there] needs to be a dry gas control before the first blow and then a dry gas control after the last blow * * * What is labeled as Subject Test 1 and Subject Test 2 are actually *samples*, breath samples given." (Emphasis added.)

Martin recognized the potential for confusion, however, and indicated that the Health Department had since changed the wording from "Subject Test 1" and "Subject Test 2" to "Subject Sample 1" and "Subject Sample 2."

{¶ 19} As an aside, Kormos indicates that Martin was never properly qualified as an expert witness in the field of regulatory interpretation. However, Kormos makes no argument on appeal as to any error in this regard. Even if we were to view Martin as an expert witness not formally qualified by the trial court, her experience as Program Director for the Health Department solidifies her ability to testify as to the department's current interpretation of its own regulation. *See, e.g., State v. Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, ¶ 94-95; *State v. Anderson*, 10th Dist. No. 04AP-1171, 2005-Ohio-5243, ¶ 14. Furthermore, while Martin's testimony as to the interpretation of "subject test" was helpful, an expert opinion was not necessary in this regard, where, as previously discussed, this interpretation is supported by a commonly accepted definition of the phrase. Thus, any conceivable error in permitting Martin's testimony would be harmless, at best. *See State v. Baston*, 85 Ohio St.3d 418, 423 (1999) (harmless error in admitting unqualified expert testimony).

{¶ 20} Lastly, we note that Ohio Adm.Code 3701-53-04(B) does not refer to dry gas control testing before, after, and *in between* "every subject test * * *." If it did, we would be more inclined to agree with Kormos that each time a particular individual blows into the Intoxilyzer 8000, another "subject test" occurs, which would require a dry gas control test. However, the Health Department did not insert such language, and we cannot expound upon its silence to construe the phrase "subject test" beyond its common and unambiguous meaning. Thus, it is clear there is only one "subject test" per person tested, even if the test includes two incidents of blowing. As a result, we decline to interpret the code phrase that requires dry gas control tests "before and after every subject test" as requiring them "before and after every *separate blow*." *See Grubb v. Hollingsworth*, 12th Dist. No. CA91-12-024,

1992 WL 276547, * 2 (Oct. 5, 1992) (courts cannot rewrite the law or judicially insert words that are not used); *State v. Ferrato*, 167 Ohio App.3d 136, 2006-Ohio-3219, ¶ 11 (11th Dist.).

{¶ 21} Based on the foregoing, we find the Intoxilyzer 8000 calibration sequence comports with the requirements of Ohio Adm.Code 3701-53-04(B). It follows that the trial court misinterpreted the code so as to require dry gas control tests between "Subject Test 1" and "Subject Test 2," as they are nothing more than consecutive breath samples taken during the same "subject test." The trial court erred in suppressing Kormos' breath test results on these grounds.

{¶ 22} The state's single assignment of error is sustained.

{¶ 23} Judgment reversed and cause remanded.

PIPER and HUTZEL, JJ., concur.