

CIRCLEVILLE MUNICIPAL COURT

STATE OF OHIO,

PLAINTIFF,

V.

CASE NO. [REDACTED]

[REDACTED]
DEFENDANT.

FILED
CIRCLEVILLE
MUNICIPAL COURT
SEP 10 2015
CONNIE NEAL
CLERK
CIRCLEVILLE, OHIO

DECISION AND ENTRY
DEFENDANT'S MOTION TO SUPPRESS/EXCLUDE EVIDENCE

Defendant filed a motion to suppress/exclude evidence in this OVI case based upon two concerns, which motion was heard on September 2, 2015. The defense motion moved to suppress the breath test on the basis of failure to comply with Ohio Administrative Code Section 3701-53-02(C), which requires the test operator to follow the breath testing machine's operational checklist when administering a test. In this matter, that operational checklist included observation of the defendant for a period of twenty minutes prior to test administration to prevent oral intake of any material, which would potentially produce an inaccurate result. The defense also moved to suppress any statements or observations of the arresting officer due to the failure to observe the twenty minute rule stated above, arguing a "fruit of the poisonous tree" consideration.

The state was represented by City Law Director Gary D. Kenworthy and the defense by George M. Wolfe, Esq.

The facts as necessary to determine the above two issues are as follows. After a lawful stop and arrest, defendant was given a breath test for alcohol measurement purposes using the BAC DataMaster, prior to which

the defendant was observed for a twenty minute period by the arresting officer and the test administrator. The results were a .123 blood alcohol reading.

The defense established through testimony of the defendant, the arresting officer and the breath test administrator that the defendant did in fact have blood in his mouth during the testing procedure; was wiping blood with a paper towel and spitting blood into the towel; and that neither the arresting officer or the test administrator looked in his mouth as to the source or quantity of blood involved. No one saw blood on the plastic mouth tube of the DataMaster and the blood came from a cut or two to the lips from dentures broken in a one car automobile accident, which brought about law enforcement involvement.

The purpose of the twenty minute observation period is to prevent the suspect from orally ingesting any substance which might affect the test results. *State v. Birth* (1987), 41 Ohio App. 3d 112; *State v. Murray* (1995) 95-LW-5115, Fourth Dist. Ct. Apps. The Fourth District further discussed this concept in *State v. Arledge* (1991), Hocking App. No. 91 CA 8, unreported, in citing *Birth*, supra, by adding that the “applicable regulation requires that the test administrator ‘observe the subject for twenty minutes prior to testing to prevent oral intake of any material.’ Within the context of OAC 3701.53-02, the term ‘oral intake,’ for purposes of submitting to a BAC Verifier test, means that material must be orally ingested in such a manner that it would be digested and pass into the blood stream, or received into the respiratory system and interact with alveolar air so as to have an effect on the breath test result. The apparent purpose of the twenty minute period is to prevent the accused from orally ingesting any foreign substances

which might affect the test results. *State v. Drake* (1988), Defiance App. No. 4-86-10, unreported.”

Murray, supra, involved tobacco in a defendant’s mouth, which the officer had asked Murray to spit out at the scene; that Murray had used his own finger to do so; and Murray had rinsed out his mouth at the station with water prior to being observed for the twenty minute period. At the suppression hearing, Murray argued that tobacco residue remained in his mouth as a foreign substance which may have affected the test result. The trial court did not believe that Murray had anything in his mouth as a result of the above and the appellate court accepted that finding.

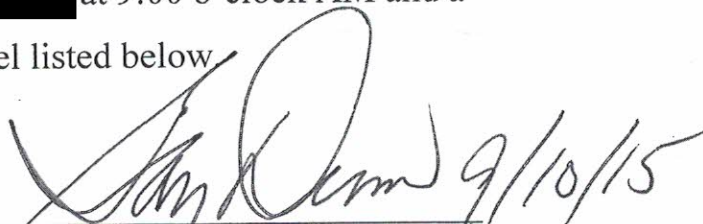
In *Murray*, supra, and subsequent thereto, the Fourth District has held that the officer substantially complied with OAC 3701-53-02(C) and ruled that the test was admissible. The court further added that in that setting, the defendant had the burden of going forward and explaining the effect the foreign substance had on the test.

In *State v. Hawes* (1996) 96-LW-0518, Fourth Dist. Ct. Apps., the court again said that “the purpose of the observation rule is to require positive evidence that during the twenty minutes prior to the test the accused did not ingest some material which might produce an inaccurate result. To overcome that inference, the accused must show that he or she did, in fact, ingest some material during the twenty minute period.”

It follows then, when the accused demonstrates at the hearing that he or she, in fact did, ingest some material during the twenty minute period, the burden shifts back to the State to establish that the material ingested did not have an effect on the test. *State v. Baldrige* (2001) 01-LW-5311 Fifth Dist. Ct. Apps.; *State v. Siegel* (2000) 138 Ohio App.3d 562.

In the case herein, the defendant clearly ingested some amount of blood during the twenty minute observation period and the State did not present any evidence to establish that the blood ingested did not have an effect on the test. On its face, *State v. Siegel*, supra, appears to say that water effects the breath test if ingested within the twenty minute observation period; however, *Siegel* actually says that water is a foreign substance and if the State had presented expert testimony of the non-effect of water on the test, the court would most likely have denied the motion to suppress. The current case is in the same factual and legal category. If the State had addressed the effect of the ingestion of blood during the twenty minute observation period, it may have made its case and the .123 breath test result may have been admitted. We will not know in this case whether blood has an effect. The motion to suppress as to the breath test result is granted herein. The motion to suppress on the issue of the defendant's statements and the officers' observations of his behavior based upon the "fruit of the poisonous tree" argument is denied as being without legal or factual foundation.

The matter shall be set for trial on the charges against the defendant on the [REDACTED] at 9:00 o'clock AM and a copy of this entry shall be mailed to counsel listed below


GARY DUMM, JUDGE DATE 9/10/15

cc: Gary D. Kenworthy, Esq. City Law Director, for the State
George M. Wolfe, Esq. for the Defense