

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellant,

vs.

MELISSA CUTLIP

Appellee.

SUPREME COURT CASE
NO.

08-2212

ON APPEAL FROM THE
COURT OF APPEALS,
NINTH APPELLATE
DISTRICT 08CA009353

LORAIN COUNTY
COMMON PLEAS COURT
CASE NO. 06CR070595

MEMORANDUM OF APPELLANT, THE STATE OF OHIO, IN
SUPPORT OF JURISDICTION

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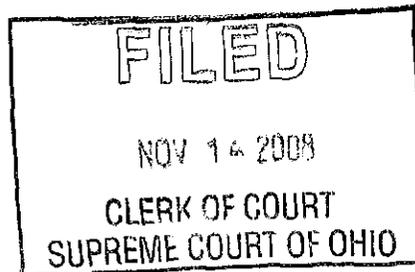


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EXPLANATION OF WHY THIS FELONY CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

The State of Ohio urges this Honorable Court to grant jurisdiction in the within matter. This case is a felony case and of public and great general interest because the suppression of Appellee's blood alcohol test results by the Lorain County Court of Common Pleas and as well as the Ninth District Court of Appeals violates public policy and produces an unjust result.

A careful review of R.C. 4511.19 reveals that this statute has been amended by the Ohio General Assembly multiple times during the past eight (8) years. Due to the frequency with which R.C. 4511.19 has been amended, it can be inferred that the Ohio General Assembly is quite concerned with punishing individuals who operate motor vehicles while impaired by drugs and/or alcohol in the State of Ohio. See generally Great Cent. Ins. Co. v. Tobias (1988), 37 Ohio St. 3d 127 (In recent years, society has registered increasing concern, even outrage, over the deplorable number of deaths and injuries caused by drunk drivers). To permit individuals to escape punishment for per se violation of the statute due to a de minimis violation of the Ohio Department of Health regulation violates public policy and produces an unjust result. State ex el Luckey v. Etheridge (1992), 62 Ohio St. 3d 404, quoting State ex rel. Brennan v. Vinton Cty. Local Bd. of Edn. (1985), 18 Ohio St.3d 208 ("the result we reach here is again "at war with any sound public policy considerations in support thereof."). The people of the State of Ohio should not have to bear the burden the holding of the trial court mandates.

"Public policy is a legal principle which declares that no one can lawfully do that which has a tendency to be injurious to the public welfare. The principle must be applied with caution and limited to those circumstances patently within the reasons upon which the doctrine rests. Lamont Building v. Court (1946), 147 Ohio St. 183, 185; Gugle v.. Loeser (1944), 143 Ohio St. 362, 367." Cleveland v. Shaker Heights (1987), 30 Ohio St. 3d 49, quoting Chickerneo v. Society National Bank (1979), 58 Ohio St. 2d 315.

To hold that the use of the alcohol or chloroprep swab to cleanse Appellee's skin prior to drawing her blood, in this situation, violates public policy and produces an unjust result. One (1) such issue that results from such holding would be law enforcement's insistence upon a subsequent, compliant blood draw at the expense of the life of Appellee and her unborn child. Law enforcement is currently left with little choice but to insist that medical personnel perform a "legal blood draw" at the expense of human life; otherwise individuals like Appellee are free to operate their motor vehicles while impaired, injure themselves and others, and escape the consequences because medical personnel valued their life more than compliance with the legal standard resulting in suppression of their blood alcohol test results. Such a result, while unconscionable, is now mandated by the trial court's decision.

Additionally, the officer's ability to order medical personnel to institute a second "legal draw" upon Appellee's acquiescence in the case at bar is questionable at best. It is not at all clear from the record that attending medical personnel would have complied with Walker's request for a second "legal blood draw" as Appellee was strapped to a gurney awaiting transport via helicopter for further life saving medical treatment. It is also not clear under what legal authority the officer would be acting in seeking delay of the transport of a patient for life saving medical treatment so that a second "legal blood draw" might be conducted.

Finally, a most inequitable result is obtained if Appellee is permitted to have the results of her blood alcohol test suppressed for non compliance with the Ohio Department of Health standards. The reason an alcohol swab was used by Kennedy was strictly to provide immediate medical care of which Appellee was desperately in need. Appellee's injuries were of such a nature that the attending R.N. believed it necessary to arrange for Appellee's immediate transport for further medical attention at a level one (1) trauma facility. It is fundamentally unfair at best for Appellee to be able to suppress the results of her blood sample

because an alcohol swab was used to cleanse her skin prior to the blood draw due to the serious nature of the injuries which she inflicted on herself due to her own drunken actions.

Accordingly, it is clearly of public and/or great general interest and involves a substantial constitutional question as well as a felony case when a trial court as well as an appellate court decisions results in the suppression of Appellee's blood test results, which in this case, violated public policy and produced an unjust result for the reasons discussed above as well as to be discussed. Only through accepting the instant matter on a discretionary appeal can this Court resolve this weighty issue. Therefore, the State of Ohio strongly urges this Honorable Court to accept jurisdiction in this matter.

STATEMENT OF THE CASE AND FACTS

On April 27, 2006, the Lorain County Grand Jury indicted Appellee on two (2) counts of Driving Under the Influence, violations of R.C. 4511.19, misdemeanors of the first degree; two (2) counts of Aggravated Vehicular Assault, violations of R.C. 2903.08, felonies of the third degree; and two (2) counts of Vehicular Assault, violations of R.C. 2903.08, felonies of the fourth degree.

On February 8, 2007, Appellee filed a Motion to Suppress the results of her blood alcohol test. On February 21, 2008, the matter was heard before Judge James M. Burge of the Lorain County Court of Common Pleas. On February 28, 2008, the trial court granted Appellee's Motion to Suppress.

On September 30, 2008, the Ninth District Court of Appeals affirmed the trial court's suppression of Appellee's blood alcohol test. State v. Cutlip, 9th Dist. No. 08CA009353, 2008 Ohio 4999. In October 2008, the State of Ohio filed a discretionary appeal with this Honorable Court.

Carlene Kennedy is a Registered Nurse, R.N. On December 11, 2005, Kennedy was employed as an R.N. at the Avon Emergency Care Center. In her capacity as an R.N., Kennedy had an opportunity to provide medical care to Appellee. Appellee was one (1) of several individuals involved in a motor vehicle "accident". Upon Appellee's arrival, Kennedy immediately drew Appellee's blood, started IV lines, and

began to assess Appellee's condition. The time was 8:35 p.m. The chart notes also revealed that at 9:00 p.m., portable x-rays were done of Appellee in her room; at 9:04 p.m., a police officer arrived on scene; and at 9:05 p.m., Lifelight was present and ready to transfer Appellee to Metro Hospital.

When drawing Appellee's blood, Kennedy did not specifically recall whether she used a chloroprep (a swab with a mixture of hexachlorine and alcohol) or an alcohol swab to cleanse the skin of Appellee's arm prior to drawing her blood. This was through no fault of the State of Ohio. Kennedy was not particularly concerned with what she used to cleanse Appellee's skin prior to drawing blood as Kennedy was more concerned with providing immediate medical attention to Appellee. Had Kennedy known the blood draw would result in a "legal situation", she would have utilized Betadine to cleanse Appellee's skin prior to drawing blood.

When Kennedy realized later on that the blood draw would be used in a "legal situation", there was no time to conduct an additional blood draw. Lifelight was on scene to transport Appellee via helicopter to Metro Hospital in Cleveland, Ohio, a Level One (1) trauma center. This transport was necessary as Appellee's head had hit a vehicle windshield at approximately fifty (50) miles per hour, it was discovered that Appellee was pregnant, and Appellee was bleeding from her mouth and nose. Kennedy was only focused on obtaining the necessary life saving care that Appellee and her unborn child needed at that point. Kennedy then provided the responding officer with two (2) tubes of blood she had already drawn after Appellee consented.

Officer Walker is a law enforcement officer with the Sheffield Village Police Department. On December 11, 2005, Walker responded to a 911 call regarding a motor vehicle collision. Upon arrival, Walker saw Appellee bleeding profusely from her face. Walker discovered two (2) other individuals pinned inside their vehicle.

Subsequent to obtaining medical treatment for those involved in the collision, Walker proceeded to the emergency room where Appellee had been taken. Walker spoke with Appellee and smelled alcohol on her person. Walker then wanted Appellee to submit to a test for the presence of alcohol. Walker reviewed BMV Form 2255 with Appellee. Kennedy witnessed the form for Walker. Appellee agreed.

At the time Appellee acquiesced, she was wrapped up for transport in Lifeflight. Despite Walker wanting to use his own vials to collect Appellee's blood, this was not possible. Walker had to accept the two (2) tubes of blood from Kennedy. Walker placed the tubes into a plastic bag, sealed it, and returned to the department.

Walker testified that he felt it was necessary to test Appellee's blood for the presence of drugs and/or alcohol because she was involved in a collision, because he smelled alcohol on Appellee, and because Appellee admitted to having a few drinks that evening to medical personnel. Additionally, a neutral witness observed Appellee swerving off the road and driving in the opposite lane of travel immediately prior to the collision. Walker also confirmed that despite Appellee's head injury, she was coherent when they spoke at the emergency room.

Emmanuel DeLeon was stipulated to be an expert by both parties. DeLeon testified that it is unlikely to obtain a false positive blood test for the presence of ethanol (consumable alcohol) simply because an alcohol swab was used to cleanse an individual's skin prior to a blood draw. DeLeon testified that when an alcohol swab is used to cleanse an individual's skin prior to a blood draw, the alcohol has first evaporated by drying on the skin. In studies DeLeon conducted, less than a .005 percent variance in the presence of ethanol was discovered where an alcohol swab was used to cleanse the skin prior to a blood draw. DeLeon conducted testing of the blood sample obtained from Appellee on December 11, 2005. DeLeon determined that Appellee's blood alcohol level at the time of the collision was .212.

On cross examination, DeLeon confirmed that his lab is certified by the Ohio Department of Health and that Ohio Department of Health regulations prohibit the use of an alcohol swab to cleanse the skin prior to drawing blood for purposes of testing the blood for the presence of drugs and/or alcohol.

Mitchell LeBard is employed by MedTox Laboratories in St. Paul, Minnesota. LeBard is the associate director of forensic toxicology. LeBard ensures that those performing testing are in compliance with laboratory standard procedures, as well as any state or federal regulations. LeBard has degrees in biology, chemistry, and medical technology. LeBard has been involved in toxicology for twenty five (25) years.

MedTox determined that Appellee's blood alcohol level at the time of the collision was .213. On cross examination, LeBard testified that his St. Paul, Minnesota based lab was not in compliance with Ohio Department of Health regulations. LeBard ensures that his lab adheres to a universal protocol in regards to specimen handling and testing. LeBard also testified that MedTox is certified by the State of Minnesota to perform blood alcohol testing.

On re-direct examination, LeBard testified that the use of an alcohol swab to cleanse the skin prior to a blood draw would have no effect on the reliability of the testing of the blood sample for the presence of alcohol. LeBard confirmed that the type of alcohol used as an antiseptic, isopropyl, is able to be differentiated from ethanol, consumable alcohol.

LAW & ARGUMENT

FIRST PROPOSITION OF LAW

I. THE STATE OF OHIO SUBSTANTIALLY COMPLIED WITH OHIO ADMINISTRATIVE CODE SECTION 3701-53-05.

In making its ruling on a motion to suppress, the trial court makes both legal and factual findings. State v. Noble, 9th Dist. No. 07CA009083, 2007 Ohio 7051, citing State v. Jones, 9th Dist. No. 20810, 2002 Ohio 1109. It follows that this Court's review of a denial of a motion to suppress involves both questions of

law and fact. State v. Noble, 9th Dist. No. 07CA009083, 2007 Ohio 7051, citing State v. Long (1998), 127 Ohio App.3d 328, 332. As such, this Court will accept the factual findings of the trial court if they are supported by some competent and credible evidence. State v. Noble, 9th Dist. No. 07CA009083, 2007 Ohio 7051, citing State v. Searls (1997), 118 Ohio App.3d 739, 741. However, the application of the law to those facts will be reviewed de novo. Id.

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). State v. Burnside, 100 Ohio St. 3d 152, 2003 Ohio 5372. That section, which governs the admissibility of alcohol-test results, 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." Id. 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 blood." Id.

In accordance with this statutory mandate, the Director of Health promulgated the following alcohol-testing regulations in Ohio Adm. Code 3701-53-05, that provides in pertinent part:

"(B) When collecting a blood sample, an aqueous solution of a non-volatile antiseptic shall be used on the skin. No alcohols shall be used as a skin antiseptic..

The blood-testing procedure in Ohio Adm. Code 3701-53-05 thus requires the state to *** use an aqueous solution of a nonvolatile antiseptic on the skin***. State v. Burnside, 100 Ohio St. 3d 152, 2003 Ohio 5372. The purpose of these regulations is to ensure the accuracy of the alcohol-test results. State v. Burnside, 100 Ohio St. 3d 152, 2003 Ohio 5372, citing State v. Dickerson (1986), 25 Ohio St.3d 64, 65-66.

The application of the Department of Health regulations that govern alcohol testing was first addressed by the Ohio Supreme Court in State v. Steele (1977), 52 Ohio St.2d 187. State v. Burnside, 100 Ohio St. 3d 152, 2003 Ohio 5372. Steele established that rigid compliance with the alcohol- testing

procedures in the Ohio Administrative Code is not a prerequisite to the admissibility of alcohol- test results.
Id.

Nearly a decade later, this Court again addressed whether the state had complied with the Department of Health regulations relating to alcohol testing in State v. Plummer (1986), 22 Ohio St.3d 292. State v. Burnside, 100 Ohio St. 3d 152, 2003 Ohio 5372. Concluding that a three-to-four-hour interval without refrigeration did not render the test results inadmissible, the Court held that "absent a showing of prejudice to a defendant, the results of a urine-alcohol test administered in substantial compliance with Ohio Adm.Code 3701-53-05 are admissible in a prosecution under R.C. 4511.19." Id. at syllabus.

In the wake of Plummer, courts have applied a burden-shifting procedure to govern the admissibility of alcohol-test results. State v. Burnside, 100 Ohio St. 3d 152, 2003 Ohio 5372, citing State v. Zuzaga, 141 Ohio App. 3d at 698-699. The defendant must first challenge the validity of the alcohol test by way of a pretrial motion to suppress; failure to file such a motion "waives the requirement on the state to lay a foundation for the admissibility of the test results." State v. Burnside, 100 Ohio St. 3d 152, 2003 Ohio 5372, quoting State v. French (1995), 72 Ohio St.3d 446, 451, 1995 Ohio 32. 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. State v. Burnside, 100 Ohio St. 3d 152, 2003 Ohio 5372. 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. State v. Burnside, 100 Ohio St. 3d 152, 2003 Ohio 5372, citing State v. Brown (1996), 109 Ohio App.3d 629, 632. Hence, evidence of prejudice is relevant only after the state demonstrates substantial compliance with the applicable regulation. State v. Burnside, 100 Ohio St. 3d 152, 2003 Ohio 5372.

In determining the admissibility of alcohol-test results regulated by Ohio Adm.Code 3701-53-05, this Court has observed that "there is leeway for substantial, though not literal, compliance with such regulations." State v. Burnside, 100 Ohio St. 3d 152, 2003 Ohio 5372, quoting Plummer, 22 Ohio St.3d at 294. The state must therefore establish that it substantially complied with the alcohol-testing regulations to trigger the presumption of admissibility. State v. Burnside, 100 Ohio St. 3d 152, 2003 Ohio 5372. The conclusion that the state must establish substantial compliance rather than strict compliance, however, does not relieve the state of its burden to prove compliance with the alcohol-testing regulations, but rather defines what compliance is.

Despite the above analysis, this Court went on to hold that a court infringes upon the authority of the Director of Health when it holds that the state need not do that which the director has required. State v. Burnside, 100 Ohio St. 3d 152, 2003 Ohio 5372. Nevertheless, the Court was cognizant that if "we were to agree * * * that any deviation whatsoever from the regulation rendered the results of a [test] inadmissible, we would be ignoring the fact that strict compliance is not always realistically or humanly possible." State v. Burnside, 100 Ohio St. 3d 152, 2003 Ohio 5372, quoting Plummer, 22 Ohio St.3d at 294. Precisely for this reason, the Court concluded in Steele that rigid compliance with the Department of Health regulations is not necessary for test results to be admissible. State v. Burnside, 100 Ohio St. 3d 152, 2003 Ohio 5372., citing Steele, 52 Ohio St.2d at 187 (holding that the failure to observe a driver for a "few seconds" during the 20-minute observation period did not render the test results inadmissible). To avoid usurping a function that the General Assembly has assigned to the Director of Health, however, the Court limited the substantial- compliance standard set forth in Plummer to excusing only errors that are clearly de minimis. State v. Burnside, 100 Ohio St. 3d 152, 2003 Ohio 5372. See also State v. Mayl, 106 Ohio St. 3d 207, 2005 Ohio 4629. Consistent with this limitation, the Court characterized those errors that are excusable under the substantial-compliance standard as "minor procedural deviations." State v. Burnside, 100 Ohio

St. 3d 152, 2003 Ohio 5372., quoting State v. Homan (2000), 89 Ohio St.3d 421, 426, 2000 Ohio 212. See also State v. May, 106 Ohio St. 3d 207, 2005 Ohio 4629.

Here, the State of Ohio substantially complied with the Ohio Department of Health regulations in collecting Appellee's blood. The use of the alcohol swab, in this case, constitutes a de minimis, procedural violation.

The testimony at the suppression hearing revealed that a sterile dry needle was used to draw blood into a vacuum container with a solid anticoagulant, the blood container was sealed in accordance with the appropriate procedures, the blood specimen was at all times refrigerated when it was not in transit or under examination, and that an alcohol or alcohol based swab was likely, but not definitively used, to cleanse Appellee's skin prior to her blood being drawn by Kennedy. Appellee's blood was analyzed by the Lorain County Crime Laboratory, a facility that is certified by the Ohio Department of Health as well as MexTox, a facility licensed by the State of Minnesota. Both tests revealed that the blood alcohol in Appellee's blood the night of the collision was well above the legal limit.

Moreover, Kennedy testified that upon Appellee's arrival at the emergency room, Appellee was bleeding profusely from her face and appeared to have sustained a head injury. At some point during treatment, a pregnancy test was performed upon Appellee and it was discovered that Appellee was pregnant. This caused Kennedy not only to be concerned with saving Appellee's life but with saving the life of her unborn child. Kennedy testified that she was more concerned with saving Appellee's life than with obtaining a blood sample that would comport with the Ohio Administrative Code even though Kennedy had been trained in the proper procedure to conduct a "legal blood draw".

Also, by the time Officer Walker arrived at the emergency room to interview Appellee and to obtain a blood sample, Appellee was already prepared for transport via Lifeflight, a helicopter, to Metro General Hospital, the closest Level One (1) trauma center to Lorain County, Ohio. Walker was given approximately

one (1) minute, prior to Appellee's transport, to review the BMV Form 2255 with Appellee and obtain her consent to remove two (2) tubes of her previously drawn blood for purposes of testing.

To hold that, in this instance, the use of the alcohol or chloroprep swab is not a de minimis violation creates significant issues. One (1) such issue would be law enforcement's insistence upon a subsequent, compliant blood draw at the expense of the life of Appellee and her unborn child. Law enforcement is currently left with little choice but to insist that medical personnel perform a "legal blood draw", which could place lives in jeopardy; otherwise, individuals like Appellee are free to operate their motor vehicles while impaired, injure themselves and others, and escape the consequences merely because medical personnel chose to save lives rather than comply with standards for a "legal blood draw" resulting in suppression of their blood alcohol test results. Such a result, while unconscionable, is now mandated by the trial court's decision.

Additionally, the officer's ability to order medical personnel to institute a second "legal draw" upon Appellee's acquiescence in the case at bar is questionable at best. It is not at all clear from the record that attending medical personnel would have complied with Walker's request for a second "legal blood draw" as Appellee was strapped to a gurney awaiting transport via helicopter for further life saving medical treatment. It is also not clear under what legal authority the officer would be acting in seeking delay of the transport of a patient for life saving medical treatment so that a second "legal blood draw" might be conducted.

Further, Appellant presented the testimony of two (2) expert witnesses that indicated that Kennedy's use of the alcohol or chloroprep swab had little, if any, impact on the results of the blood alcohol test. Both DeLeon and LeBard testified that little, if any, of the isopropyl alcohol or chloroprep would have entered Appellee's blood sample because the solution used to cleanse the skin prior to a blood draw has dried on the skin before the sample is drawn. DeLeon specifically testified that a differential of less than

.005 percent would result from the use of the alcohol or chloroprep swab to cleanse the skin prior to a blood draw. LeBard specifically testified that his laboratory was able to differentiate between ethanol (consumable alcohol) and isopropyl (rubbing) alcohol. Accordingly, the use of an alcohol swab prior to the blood draw would have no impact on the result; thus, rendering the use of the alcohol or chloroprep swab as a de minimis deviation from the Ohio Department of Health blood collection regulations as distinct from the situations in Burnside and Mayl where no expert testimony was offered.

In addition, this Court's refusal to create a medical treatment exception to a laboratory's certification requirement in State v. Mayl, 106 Ohio St. 3d 207, 2005 Ohio 4629 is also distinguishable. In Mayl, the defendant's blood has been drawn for medical purposes as well as for purposes of testing his blood for the presence of drugs and/or alcohol. Here, Appellee's blood had been drawn for purposes of medical treatment only. Also, the subsequent testing of blood for the presence of drugs and/or alcohol is typically not as urgent as the cleansing of the skin, the setting of the IV, the subsequent drawing of blood for medical treatment and/or administration of medication.

Finally, because the use of the alcohol or chloroprep swab to cleanse Appellee's skin prior to the blood draw is a de minimis violation of the Ohio Administrative Code, Appellee bore the burden to demonstrate that she was prejudiced by anything less than strict compliance. Appellee presented no such evidence at the suppression hearing. In fact, evidence presented by Appellant revealed that either blood alcohol test result, even with the .005 percent margin of error factored in, produces a blood alcohol level well in excess of .08.

In sum, the use of the alcohol or chloroprep swab, in this case, is a de minimis violation of Ohio Department of Health regulations for the reasons discussed above. Because no evidence of prejudice was presented by Appellee as to the admissibility of the blood test result, the trial court should have denied Appellee's Motion to Suppress. As such, Appellant's first proposition of law should be granted.

SECOND PROPOSITION OF LAW

- II. THE HOLDING IN BURNSIDE SHOULD BE MODIFIED TO PERMIT THE ADMISSION OF BLOOD TEST RESULTS WHERE AN ALCOHOL SWAB HAS BEEN USED UPON PROOF BY THE STATE THAT A LABORATORY HAS MECHANICALLY EXCLUDED THE EFFECT OF ISOPROPYL ALCOHOL FROM THE RESULTS, AND SUCH ACTION CONSTITUTES A DE MINIMIS ERROR DEMONSTRATING SUBSTANTIAL COMPLIANCE WITH OHIO ADMINISTRATIVE CODE SECTION 3701-53-05.

Should this Court determine that Appellant was not in substantial compliance with Ohio Administrative Code section 3701-53-05, Appellant contends that this Court's holding in State v. Burnside, 100 Ohio St. 3d 152, 2003 Ohio 5372 should be modified to permit the admission of blood test results where an alcohol swab has been used upon proof by the State of Ohio that a laboratory has mechanically excluded the effect of isopropyl alcohol from the results. Such action should then be determined to constitute a de minimis error demonstrating substantial compliance with Ohio Administrative Code section 3701-53-05.

In determining the admissibility of alcohol-test results regulated by Ohio Adm. Code 3701-53-05, the Ohio Supreme Court has observed that "there is leeway for substantial, though not literal, compliance with such regulations." State v. Burnside, 100 Ohio St. 3d 152, 2003 Ohio 5372, quoting Plummer, 22 Ohio St.3d at 294. To avoid usurping a function that the General Assembly has assigned to the Director of Health, however, the Court limited the substantial-compliance standard set forth in Plummer to excusing only errors that are clearly de minimis. State v. Burnside, 100 Ohio St. 3d 152, 2003 Ohio 5372. See also State v. Mayl, 106 Ohio St. 3d 207, 2005 Ohio 4629. Consistent with this limitation, the Court characterized those errors that are excusable under the substantial-compliance standard as "minor procedural deviations." State v. Burnside, 100 Ohio St. 3d 152, 2003 Ohio 5372, quoting State v. Homan (2000), 89 Ohio St.3d 421, 426, 2000 Ohio 212. See also State v. Mayl, 106 Ohio St. 3d 207, 2005 Ohio 4629.

The facts underlying the holding in Burnside are distinguishable from the instant case. In Burnside, Chadd Burnside's vehicle had been stopped for a speeding violation when the Trooper noticed Burnside's

glassy eyes and odor of alcohol about his person. State v. Burnside, 100 Ohio St. 3d 152, 2003 Ohio 5372. Burnside was then transported so the Trooper could obtain a sample of his blood after refusing to consent. Id. Once at the Fairfield Medical Center, Burnside's blood was drawn, specifically for the purposes of alcohol testing, into a tube that contained no anti-coagulant. Id.

Whereas, in the instant case, Officer Walker was investigating a motor vehicle collision where all parties were seriously injured when he discovered that Appellee may have been under the influence of alcohol at the time of the collision. Walker's ability to obtain a legally compliant blood sample was thwarted as Appellee was being transported by helicopter to obtain life saving medical treatment due to injuries she sustained in the collision. In fact, Walker barely had sufficient time to review BMV Form 2255 with Appellee prior to her transport to Metro Hospital, let alone to ensure that a "legal blood draw" had been completed by attending medical personnel. It is also common practice for attending medical personnel to be more concerned with treating individuals than with complying with "legal requirements" in obtaining blood samples.

Moreover, Kennedy had no knowledge that when she initially drew Appellee's blood that the blood would be used for the purpose of establishing whether Appellee was under the influence of drugs and/or alcohol. Rather, Kennedy was solely concerned with obtaining sufficient blood samples from Appellee for medical testing purposes.

Further, the testimony of two (2) expert witnesses was presented on behalf of the State of Ohio during the suppression hearing. The sum and substance of the expert testimony was that Kennedy's use of the alcohol or chloroprep swab had little, if any, impact on the results of the blood alcohol test. Both DeLeon and LeBard testified that little, if any, of the isopropyl alcohol or chloroprep would have entered Appellee's blood sample because the solution used to cleanse the skin prior to a blood draw has dried on the skin before the sample is drawn. DeLeon specifically testified that a differential of less than .005

percent would result from the use of the alcohol or chloroprep swab to cleanse the skin prior to a blood draw. LeBard specifically testified that his laboratory was able to differentiate between ethanol (consumable alcohol) and isopropyl (rubbing) alcohol. Accordingly, the use of an alcohol swab prior to the blood draw would have no impact on the result; thus, rendering the use of the alcohol or chloroprep swab as a de minimis deviation from the Ohio Department of Health blood collection regulations as distinct from the situations in Burnside and Mayl where no expert testimony was offered.

Finally, because the use of the alcohol or chloroprep swab to cleanse Appellee's skin prior to the blood draw is a de minimis violation of the Ohio Administrative Code, Appellee bore the burden to demonstrate that she was prejudiced by anything less than strict compliance. Appellee presented no such evidence at the suppression hearing. In fact, evidence presented by Appellant revealed that either blood alcohol test result, even with the .005 percent margin of error factored in, produces a blood alcohol level well in excess of .08.

Based on the facts and circumstances of this case, the holding in Burnside should be modified to permit the admission of blood test results as the use of an isopropyl alcohol swab constitutes a de minimis error when the State of Ohio demonstrates that during the process of testing the blood sample that the testing is sophisticated enough to exclude the effect of the isopropyl alcohol swab on the test results, thus producing a true and accurate blood alcohol test result demonstrating substantial compliance with Ohio Administrative Code section 3701-53-05. As such, Appellant's second proposition of law should be accepted for review.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Honorable Court accept jurisdiction over the instant matter.

Respectfully Submitted,
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PROOF OF SERVICE

A copy of the foregoing Brief of Appellant was sent by regular U.S. Mail to W. Zack Dolyk, Esq.,
Counsel for Appellee, 1513 State Route 60, Vermillion, Ohio 44089, this 13th day of
November, 2008.

Billie Jo Belcher

Billie Jo Belcher
Assistant Prosecuting Attorney

[Cite as *State v. Cutlip*, 2008-Ohio-4999.]

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 08CA009353

Appellee

v.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 06CR070595

MELISSA M. CUTLIP

Appellant

DECISION AND JOURNAL ENTRY

Dated: September 30, 2008

DICKINSON, Judge.

INTRODUCTION

{¶1} After hitting the windshield of her car during a collision, Melissa Cutlip was taken by ambulance to the Avon Emergency Care Center. A nurse withdrew blood samples from her in accordance with the hospital's standard procedure, which included swabbing the area with an alcohol-based antiseptic. By the time Patrolman Franklin Walker arrived at the hospital to ask for Ms. Cutlip's consent to test her blood for the presence of alcohol, she was strapped to a gurney, waiting to be transported by helicopter to a different hospital. Because Patrolman Walker did not have time to collect additional blood samples from Ms. Cutlip using a non-alcohol-based antiseptic, he could only test the blood that had already been drawn. The trial court suppressed the test results because Ms. Cutlip's blood was not collected in substantial compliance with Section 4511.19 of the Ohio Revised Code and Section 3701-53-05 of the Ohio

Administrative Code. Because Section 3701-53-05(B) of the Ohio Administrative Code provides that "[n]o alcohols shall be used as a skin antiseptic," this Court affirms.

FACTS

{¶2} On December 11, 2005, Ms. Cutlip collided with another vehicle, propelling her into the windshield of her car. When Patrolman Walker arrived, he saw that she was bleeding profusely from the face. Because of Ms. Cutlip's injuries, he did not have her perform any field sobriety tests. She was transported to the hospital, where a nurse swabbed her with an alcohol-based antiseptic and drew seven tubes of blood. Had the nurse known that the blood was needed for law enforcement purposes, she would have used a Betadine swab instead of the alcohol-based antiseptic.

{¶3} Because Patrolman Walker had smelled alcohol on Ms. Cutlip's breath, he followed her to the hospital to obtain a blood sample from her. By the time he arrived, the hospital had learned that Ms. Cutlip was pregnant. It, therefore, had decided to transport her by helicopter to a different hospital. Patrolman Walker found Ms. Cutlip strapped to a gurney awaiting transport. According to Patrolman Walker, he had only a couple of minutes to review a blood-alcohol test consent form with her and did not have time to obtain additional blood samples. Although Ms. Cutlip was unable to sign the consent form, she agreed to let her blood be tested for alcohol. The nurse gave Patrolman Walker two of the tubes of blood that she had previously drawn from Ms. Cutlip.

{¶4} The police initially sent Ms. Cutlip's blood to a laboratory in Minnesota. Because that lab was not certified by the Ohio Department of Health, the police had to have the blood retested by a certified lab. During the eight days that it took for the blood samples to be

transported from the first lab to the second lab, they were not refrigerated. The certified lab determined that Ms. Cutlip's blood-alcohol level at the time of the collision was .212.

{¶5} The Grand Jury indicted Ms. Cutlip on two counts of driving under the influence, two counts of aggravated vehicular assault, and two counts of vehicular assault. Ms. Cutlip moved to suppress the results of the blood test, arguing that the samples tested were not collected in conformance with Section 3701-53-05 of the Ohio Administrative Code. At a hearing on the motion, experts for the State testified that the test results were not affected by the nurse's use of an alcohol-based antiseptic. An expert from the certified lab testified that he had performed his own experiments and found that the use of an alcohol-based antiseptic changed the blood-alcohol content of a sample by no more than .005. An expert from the Minnesota lab testified that the alcohol contained in the swab is different from the alcohol in beverages. He also testified that his laboratory's equipment is sophisticated enough to distinguish between the two types of alcohol. Nevertheless, the trial court granted Ms. Cutlip's motion to suppress, concluding that, because "an alcohol-based solution was used to clean the injection site, the state has not shown substantial compliance with OAC 3701-53-05(B)." The State has appealed, assigning three errors.

MOTION TO SUPPRESS

{¶6} The State's first assignment of error is that the trial court incorrectly granted Ms. Cutlip's motion to suppress. It has argued that the blood-alcohol test results are admissible because her blood was collected in substantial compliance with Section 3701-53-05 of the Ohio Administrative Code.

{¶7} 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. A reviewing court "must accept the trial

court's findings of fact if they are supported by competent, credible evidence." *Id.*, but see *State v. Metcalf*, 9th Dist. No. 23600, 2007-Ohio-4001, at ¶14 (Dickinson, J., concurring). The reviewing court "must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *Burnside*, 2003-Ohio-5372, at ¶8.

{¶8} When a defendant challenges the results of a blood-alcohol test, "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, at paragraph one of the syllabus. Section 4511.19(D)(1) is a "three paragraph gate-keeping statute." *Id.* at ¶20. It provides the time in which a blood sample must be collected after an alleged violation, delineates who may collect the sample, and provides the methods that must be used to analyze the sample. Regarding the methods of analysis, Section 4511.19(D)(1)(b) provides that a defendant's blood "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." *Burnside*, 2003-Ohio-5372, at ¶9

{¶9} The Ohio Director of Health has promulgated regulations pursuant to Section 3701.143 regarding how blood samples must be collected. Section 3701-03-05(A) of the Ohio Administrative Code provides that "[a]ll samples shall be collected in accordance with [R.C.] 4511.19 . . ." "When collecting a blood sample, an aqueous solution of a non-volatile antiseptic shall be used on the skin. No alcohols shall be used as a skin antiseptic." Ohio Admin. Code 3701-53-05(B). "Blood shall be drawn with a sterile dry needle into a vacuum container with a solid anticoagulant, or according to the laboratory protocol as written in the laboratory procedure manual based on the type of specimen being tested." Ohio Admin. Code 3701-53-05(C).

“Blood . . . containers shall be sealed in a manner such that tampering can be detected” Ohio Admin. Code 3701-53-05(E). “While not in transit or under examination, all blood and urine specimens shall be refrigerated.” Ohio Admin. Code 3701-53-05(F).

{¶10} The Ohio Supreme Court has adopted “a burden-shifting procedure to govern the admissibility of alcohol-test results.” *Burnside*, 2003-Ohio-5372, at ¶24. “The defendant must first challenge the validity of the alcohol test by way of a pretrial motion to suppress” *Id.* “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. 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.* “[E]vidence of prejudice is relevant only after the state demonstrates substantial compliance with the applicable regulation.” *Id.*

{¶11} In *Burnside*, the Supreme Court discussed the substantial compliance standard, recognizing that it presented a “fundamental problem.” *Id.* at ¶32. The Court noted that “a judicial determination that an alcohol test, although not administered in strict compliance with the alcohol-testing regulations, is reliable and therefore admissible may subvert the rule-making authority and the statutory mandate of the Director of Health.” *Id.* It noted that “the General Assembly instructed the Director of Health—and *not* the judiciary—to ensure the reliability of alcohol-test results by promulgating regulations precisely because the former possesses the scientific expertise that the latter does not.” *Id.* (emphasis in original). “A court infringes upon the authority of the Director of Health when it holds that the state need not do that which the director has required.” *Id.* at ¶33. The Court concluded that “[t]o avoid usurping a function that

the General Assembly has assigned to the Director of Health . . . we must limit the substantial-compliance standard . . . to excusing only errors that are clearly *de minimis*.” *Id.* at ¶34. The Court “characterized those errors that are excusable under the substantial-compliance standard as ‘minor procedural deviations.’” *Id.* (quoting *State v. Homan*, 89 Ohio St. 3d 421, 426 (2000)).

{¶12} The State has argued that the use of an alcohol swab in this case was a *de minimis*, procedural violation. It has noted that the nurse used a sterile dry needle, that she drew Ms. Cutlip’s blood into a vacuum container containing a solid anticoagulant, that the container was properly sealed, and that the blood was refrigerated at all times when it was not in transit or under examination. It has further noted that, although the nurse testified that it is likely that she used an alcohol-based swab, it is not certain that she did. It has also pointed out that both laboratories that tested Ms. Cutlip’s blood-alcohol level determined that it was well above the legal limit. It has further noted that the only reason the officer was not able to obtain a legal blood draw was because members of the medical staff were more concerned with saving Ms. Cutlip’s life and the life of her unborn child than gathering evidence to be used against her. According to the State, if Patrolman Walker had insisted on a compliant blood draw, it would have placed Ms. Cutlip’s and her unborn child’s lives at risk. Even if he had insisted, it is uncertain whether the attending medical personnel would have complied with his request.

{¶13} In *Burnside*, the State argued “that it substantially complied with the alcohol-testing regulations notwithstanding its failure to establish the use of a solid anticoagulant.” *Burnside*, 2003-Ohio-5372, at ¶36. The Supreme Court disagreed, noting that “Ohio Adm. Code 3701-53-05(C) declares in no uncertain terms that ‘[b]lood *shall* be drawn . . . into a vacuum container with a solid anticoagulant.’” *Id.* (emphasis in original). The Court noted that the regulation’s “language does not *advise* the use of a solid anticoagulant when drawing a blood

sample; it *demand*s it." *Id.* (emphasis in original). The Court determined it could not "conclude that such an error is de minimis and therefore permissible under the substantial-compliance standard." *Id.*

{¶14} Similarly, Section 3701-53-05(B) of the Ohio Administrative Code provides that "[n]o alcohols shall be used as a skin antiseptic." It does not advise the State not to use alcohol as an antiseptic, it demands it. This Court, therefore, cannot conclude that the nurse's use of an alcohol-based antiseptic swab was a minor procedural deviation that was "clearly de minimis." See *Burnside*, 2003-Ohio-5372, at ¶34. The trial court correctly concluded that Ms. Cutlip's blood samples were not drawn in substantial compliance with Section 4511.19(D)(1)(b) of the Ohio Revised Code and Section 3701-53-05(B) of the Ohio Administrative Code. See *State v. White*, 12th Dist. No. CA2006-05-111, 2007-Ohio-350, at ¶14 (concluding State had not substantially complied with Section 3701-53-05(B) of the Ohio Administrative Code because isopropyl alcohol had been used to clean the injection site).

{¶15} The State has also argued that its experts established that the use of an alcohol-based antiseptic would have little effect on a blood-alcohol test. As the Supreme Court noted in *Burnside*, however, "[t]his argument is properly directed not to us but to the Director of Health, whose charge it is to promulgate regulations that will ensure the reliability of alcohol-test results. To hold otherwise would be to speculate, with neither the requisite expertise nor the statutory authority, whether [using an alcohol-based antiseptic] affected the reliability of the alcohol-test results." *Burnside*, 2003-Ohio-5372, at ¶37. Accordingly, even though the State offered expert testimony regarding the accuracy of the test results, this Court would usurp the authority of the Director of Health if it allowed the State to do what the Director has prohibited.

{¶16} The State has further argued that this Court should create an exception regarding the laboratory certification requirement and let the Minnesota lab's test results be admitted. See *State v. Mayl*, 106 Ohio St. 3d 207, 2005-Ohio-4629, at ¶23-24 (citing R.C. 3701.143). Because Ms. Cutlip's blood was not drawn in substantial compliance with Section 3701-53-05(B) of the Ohio Administrative Code, however, it is not necessary to consider whether the Minnesota lab's test results of those samples should be admitted. The State's first assignment of error is overruled.

MODIFYING *BURNSIDE*

{¶17} The State's second assignment of error is that *Burnside* should be modified to permit the admission of a blood-alcohol test result, even when an alcohol swab has been used as an antiseptic, if there is proof that a laboratory has mechanically excluded the effect of the isopropyl alcohol in the swab. This Court has no authority to modify a decision of the Ohio Supreme Court. As the Tenth District noted in *Gehad & Mandi Inc. v. Ohio State Liquor Control Comm'n*, 10th Dist. No. 05AP-1181, 2006-Ohio-3081, at ¶7, "[t]his court as an intermediate appellate court, is bound by, and must follow and apply, the decisions of the Ohio Supreme Court. This court has no authority to modify, and much less to overrule, any decision of the Ohio Supreme Court. . . . This court is required to follow and apply Ohio Supreme Court decisions, as to the law, even if the appellate judges disagree with the Ohio Supreme Court's determination." The State's second assignment of error is overruled.

PUBLIC POLICY

{¶18} The State's third assignment of error is that the suppression of the blood-alcohol test result violates public policy and produces an unjust result. It has argued that, in light of "the frequency with which [Section] 4511.19 has been amended, it can be inferred that the Ohio

General Assembly is quite concerned with punishing individuals who operate motor vehicles while impaired” It has argued that “[t]o permit individuals to escape punishment for per se violation[s] of the statute due to a de minimis violation of the Ohio Department of Health regulation violates public policy” It has further argued that law enforcement officers should not have to insist on compliant blood draws at the expense of human life and that individuals who have operated motor vehicles while impaired should not escape the consequences of their decisions just because medical personnel value those individuals’ lives more than compliance with the standard for legal blood draws. It has also argued that it is uncertain whether attending medical personnel would have complied with a request by Patrolman Walker for another blood draw, because that would have delayed Ms. Cutlip’s transfer to another hospital for life-saving medical treatment. Finally, it has argued that it is inequitable to suppress the test results just because the nurse used an alcohol swab while trying to administer medical treatment to Ms. Cutlip as quickly as possible.

{¶19} “Where the General Assembly has spoken, and in so speaking violated no constitutional provision, [courts] must not contravene the legislature’s expression of public policy.” *Painter v. Graley*, 70 Ohio St. 3d 377, 385 (1994). “Judicial policy preferences may not be used to override valid legislative enactments, for the General Assembly should be the final arbiter of public policy.” *Id.* (quoting *State v. Smorgala*, 50 Ohio St. 3d 222, 223 (1990)). The General Assembly has specifically delegated authority to the Director of Health to determine standards for the collection and analysis of bodily substances. This Court, therefore, declines to consider whether the suppression of the blood-alcohol test results in this case violates public policy. The State’s third assignment of error is overruled.

CONCLUSION

{¶20} Because the nurse used an alcohol-based antiseptic when she drew Ms. Cutlip's blood, the draw did not substantially comply with Section 4511.19(D)(1)(b) of the Ohio Revised Code and Section 3701-53-05(B) of the Ohio Administrative Code. The trial court correctly suppressed the blood-alcohol test results. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that 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 Lorain, 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.

CLAIR E. DICKINSON
FOR THE COURT

SLABY, J.
CARR, P. J.
CONCUR

APPEARANCES:

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DENNIS WILL, Prosecuting Attorney, and BILLIE JO BELCHER, Assistant Prosecuting Attorney, for appellee.