

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	09 - 1183
Appellee,	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
v.	:	
MARK A. FISHER,	:	Court of Appeals Case No. C-0800497
Appellant.	:	

**MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT
MARK A. FISHER**

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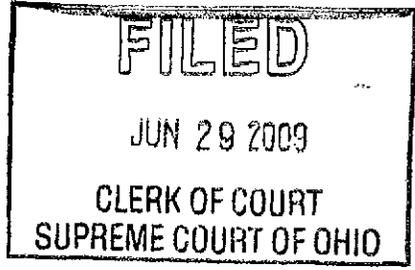


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Appellant's Proposition of Law:

Breath testing instruments utilized in Ohio for the measurement of the concentration of alcohol in an individual's breath must be operated and maintained in substantial compliance with regulations promulgated by the Director of Health, and a failure of a trial court to permit inquiry into such compliance by refusing to admit testimonial and documentary evidence relating to the repair and maintenance records of such instrument, when such reliability is challenged in the defendant's motion to suppress, constitutes prejudicial error.

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Opinion of the Hamilton County Court of Appeals (May 15, 2009)

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

This case involves a prosecution for operating a motor vehicle while under the influence of alcohol. Defendant was charged both with operating his vehicle while under the influence of alcohol and for operating a vehicle with a prohibited concentration of alcohol in his breath. The evidence supporting the under the influence charge was extremely weak, resulting in an acquittal by a jury.

However, the defendant was convicted of the *per se* offense based upon the introduction of the results of a breath alcohol test. Although a carefully drafted motion to suppress was filed and appropriate discovery was performed on behalf of defendant, the trial court refused to permit inquiry into areas relating to the compliance of the state with specific regulations promulgated by the Director of Health with respect to the operation, calibration and maintenance of approved breath testing devices. At one point, the trial court even indicated that a particular matter should have been obtained by the defendant through a pretrial deposition, a process not permitted by the Ohio Rules of Criminal Procedure.

The Court of Appeals, in affirming the judgment of the trial court, found no error in preventing the defendant from inquiring into matters relating to potential deficiencies with respect to the accuracy of the particular breath testing instrument used to measure the alcohol concentration of Mark Fisher's breath. The rulings of the trial court and Court of Appeals do not comport with this Court's pronouncements with respect to motions to suppress in OVI prosecutions, particularly those contained in *State v. Shindler* (1994), 70 Ohio

St.3d 54, 636 N.E.2d 319 and *Xenia v. Wallace* (1988), 37 Ohio St.3d 216, 524 N.E.2d 889.

STATEMENT OF THE CASE AND FACTS

This criminal proceeding was initiated by the filing of a complaint on September 4, 2006, charging defendant, Mark A. Fisher, with speeding, operating a vehicle with a prohibited concentration of alcohol in his breath, and operating a motor vehicle while under the influence of alcohol or drugs or abuse. A motion to suppress was filed by defendant on October 4, 2006, and, following a prolonged hearing on the motion, all matters addressed in the motion were overruled by entry dated November 13, 2007. Subsequently, the speeding charge was disposed of by the entry of a plea of guilty. A jury acquitted defendant of the charge of operating a motor vehicle while under the influence of alcohol or drugs of abuse. However, based upon the introduction of the results of a breath alcohol test, defendant was found guilty of operating a motor vehicle with a prohibited concentration of alcohol in his breath.

The arresting officer testified at the motion to suppress that he stopped the defendant for speed exceeding the posted limit, that Fisher was not weaving, straddling the lane line, swerving, drifting, did not almost strike another vehicle, did not accelerate rapidly, did not decelerate rapidly, was not following too closely, did not make an improper lane change, did not make an illegal or improper turn, and drove only on the roadway. The officer also did not note any unusual behavior on the part of the defendant. The officer further testified that Fisher did not have an eye fixation, was not tightly gripping the steering wheel, and was not slouching. The officer also conceded that each of these enumerated

behavior patterns were indicators of impairment that he was looking for and that he saw none of these indicators in Fisher.

The officer was also asked about his observations of the stopping sequence for indicators of impairment. His testimony indicated that defendant Fisher did not attempt to flee, responded to the officer's lights appropriately, did not swerve, did not make a sudden stop, and did not strike any objects while stopping in response to the officer's activation of his lights.

When the trooper approached Mr. Fisher's vehicle and made contact with him, he noted no indicators of impairment, including no slurred speech. The trooper indicated only that he noted a strong odor of alcohol coming from Fisher and that Fisher had slightly bloodshot eyes. Based upon these minimal findings, defendant was asked to exit his vehicle. The following testimony was elicited:

Q. You asked Mr. Fisher to exit his car?

A. Yes, sir, I did.

Q. He complied?

A. Yes, sir, he did.

Q. You are trained to observe how one exits their vehicle for indicators of impairment?

A. That's correct.

Q. And there is nothing in your statement of fact that indicates Mr. Fisher showed an angry response?

A. Correct.

Q. Showed an unusual reaction?

A. Correct.

Q. He was able to follow your instructions?

- A. Yes.
- Q. Was able to open his door?
- A. Yes, sir.
- Q. Did not leave the car in gear?
- A. Correct.
- Q. Did not have to climb out of the vehicle?
- A. That is correct.
- Q. Did not have to lean on the vehicle?
- A. Correct.
- Q. He did not have to put his hand on the vehicle for balance?
- A. That's correct.
- Q. These are all indicators of impairment that you are trained to look for?
- A. Yes, sir.
- Q. You saw none of these indicators of impairment?
- A. As he exited his vehicle, no sir.
- Q. After Mr. Fisher exited his car appropriately, you walked him back to your cruiser?
- A. That is correct.
- Q. And he had no problem walking?
- A. I don't believe so; no, sir.

Also testifying at the motion to suppress on behalf of the State was Officer Dennis Wells of the Montgomery, Ohio Police Department. During the cross-examination of officer Wells, Wells was asked if the breath testing instrument had previously been out of range. Wells indicated that it had and, on those

occasions, the instrument was returned to the manufacturer for recalibration. The officer further testified that he had with him the repair and maintenance records of the instrument. When officer Wells began to step down from the witness stand to get the repair and maintenance records, the State interposed an objection that was sustained by the trial court. In sustaining the objection, the trial court advised counsel for defendant that he should have obtained the information regarding repairs and maintenance through discovery. As a consequence of this evidentiary ruling, Mark Fisher was unable to inquire into the repair and maintenance of the breath testing instrument, a matter that was critical to his defense, particularly in light of the officer's affirmative indication that the instrument had previously been out of range.

On March 15, 2009, a decision of the Court of Appeals was journalized, affirming the judgment of the trial court. It is from this decision that defendant has timely filed his Notice of Appeal with this Court.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Appellant's Proposition of Law:

Breath testing instruments utilized in Ohio for the measurement of the concentration of alcohol in an individual's breath must be operated and maintained in substantial compliance with regulations promulgated by the Director of Health, and a failure of a trial court to permit inquiry into such compliance by refusing to admit testimonial and documentary evidence relating to the repair and maintenance records of such instrument, when such reliability is challenged in the defendant's motion to suppress, constitutes prejudicial error.

Defendant's motion to suppress specifically addressed the State's obligation under the Ohio Administrative Code to preserve records of repair and maintenance of the breath testing instrument used to measure the alcohol concentration of defendant's breath. Additionally, defendant, through counsel,

had issued a subpoena to the police department where the breath test was conducted, requiring the production of the repair and maintenance records of the subject breath testing instrument at the hearing on the motion to suppress. The trial court, by failing to permit Officer Wells to produce the records that were the subject of defendant's subpoena, prevented the State from establishing compliance with the three-year records maintenance requirements of the OAC and prevented the defendant from determining whether or not the instrument had been repaired at some time after the performance of his particular breath test.

Defendant believes that the lack of any indicators of impairment resulted in the not guilty finding by the jury on the under the influence charge. This lack of any probative evidence of impairment created an inference that Fisher's blood alcohol concentration was below the statutory *per se* limit of 0.08 grams of alcohol per 210 liters of breath, making the defendant's challenge to the reliability of the breath testing instrument more critical than in many OVI prosecutions. The rulings of the trial court and Court of Appeals, which defendant submits are inconsistent with this Court's decisions in *Shindler* and *Wallace*, prevented inquiry into the repair and maintenance records of the breath testing instrument, thereby prejudicing defendant.

It should also be noted that the opinion of the Court of Appeals is inconsistent with its own position on motions to suppress the results of an alcohol breath test. The following is reproduced verbatim from the opinion of the Hamilton County Court of Appeals:

{¶19} In ruling on the objections to the testimony of both witnesses,

the court stated that Fisher could have obtained that information during discovery, relying on this court's decision in *Norwood v. Kahn* [citation omitted]. In that case, we discussed the problem of shotgun motions to suppress, where "the defendant essentially regurgitates the administrative code and then waits for the police officer [sic] to forget to testify about one of the aspects of compliance" [citation omitted]. We decided to follow another appellate court's approach, holding that "to require the state to respond specifically and particularly to issues raised in a motion, an accused must raise issues that can be supported by facts, either known or discovered, that are specific to the issues raised. Unless an accused, either through discovery or cross-examination at the hearing, points to facts to support the allegations that specific health regulations have been violated in some way, the burden on the state to show substantial compliance with those regulations remains general and slight" [citation omitted].

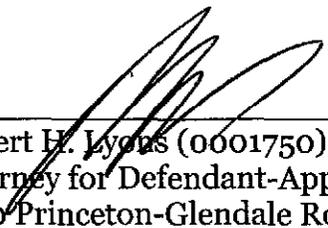
During cross-examination, defendant was able to determine that the breath testing instrument had been out of range and had been returned to the manufacturer for repairs or recalibration. This information was obtained by the defendant through "cross-examination at the hearing" and pointed to facts that support the allegation that the health regulations may have been violated in some way. Accordingly, defendant should have been able to review the documents subject to his subpoena and to cross-examine the individual who maintained those records about them. The records may have demonstrated that the breath testing instrument was removed from service immediately after the defendant's test. The trial court's ruling preventing such an inquiry was clearly prejudicial to defendant.

CONCLUSION

For the foregoing reasons, it is the belief of defendant that this case involves matters of public and great general interest. Trial courts in some appellate districts are not strictly applying this Court's standards for motions to suppress in driving under the influence cases involves breath alcohol testing

instruments. These appellate courts apparently believe that requiring the state to establish substantial compliance with Department of Health regulations creates an undue burden upon the prosecution. The appellant requests that this Court accept jurisdiction in this case so that the issues raised in this Memorandum in Support of Jurisdiction can be reviewed on their merits.

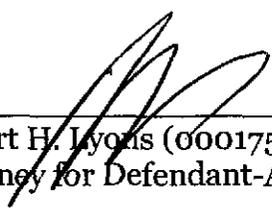
Respectfully submitted,



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PROOF OF SERVICE

I hereby certify that I served a copy of the foregoing Memorandum in Support of Jurisdiction upon Joseph T. Deters, Esq., Prosecuting Attorney, Hamilton County, Ohio, 230 Ninth Street, Suite 4000, Cincinnati, Ohio 45202 by ordinary U.S. Mail this 29th day of June, 2009.



Robert H. Lyons (0001750),
Attorney for Defendant-Appellant

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**



STATE OF OHIO, : APPEAL NO. C-080497
Plaintiff-Appellee, : TRIAL NO. C-06TRC-41917B
vs. : *JUDGMENT ENTRY.*
MARK A. FISHER, :
Defendant-Appellant. :

This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is affirmed for the reasons set forth in the Decision filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The Court further orders that 1) a copy of this Judgment with a copy of the Decision attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on May 15, 2009 per Order of the Court.

By: _____

A handwritten signature in cursive script, appearing to read "H. H. H. H.", written over a horizontal line.

Presiding Judge



**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-080497
Plaintiff-Appellee,	:	TRIAL NO. C-06TRC-41917B
vs.	:	<i>DECISION.</i>
MARK A. FISHER,	:	
Defendant-Appellant.	:	PRESENTED TO THE CLERK OF COURTS FOR FILING

MAY 15 2009

COURT OF APPEALS

Criminal Appeal From: Hamilton County Municipal Court

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: May 15, 2009

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Tanner B. McFall*,
Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Robert H. Lyons, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.



DINKELACKER, Judge.

{¶1} Following a jury trial, defendant-appellant, Mark A. Fisher, was convicted of driving with a prohibited breath-alcohol content in violation of R.C. 4511.19(A)(1)(d). We find no merit in his four assignments of error, and we affirm his conviction.

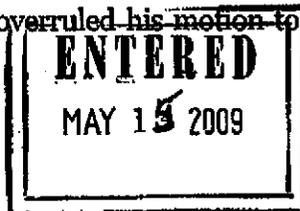
I. Facts and Procedure

{¶2} On September 4, 2006, at approximately 11:45 a.m., Fisher was travelling north on I-71 in Hamilton County. Ohio State Trooper Christopher Krantz determined he was going 76 m.p.h. in a 55-m.p.h. zone and stopped him for speeding. Krantz did not observe any erratic driving.

{¶3} When Krantz approached Fisher's car, he noticed that Fisher had slightly bloodshot eyes and a strong odor of alcohol about his person. Krantz asked to see Fisher's driver's license, and Fisher took 15 to 20 seconds longer than the average person to produce it.

{¶4} Krantz asked Fisher to get out of his car, and Fisher complied. Initially, Fisher denied that he had been drinking, but he later admitted that he had been drinking the night before. Krantz then had Fisher perform three field sobriety tests. According to Krantz, those tests showed that Fisher was under the influence of alcohol, so Krantz arrested him. Fisher took an Intoxilyzer test. The results were .135 gram by weight of alcohol per 210 liters of breath.

{¶5} Fisher was charged with driving while under the influence of alcohol under R.C. 4511.19(A)(1)(a) and driving with a prohibited breath-alcohol content under R.C. 4511.19(A)(1)(d). The trial court ~~overruled his motion to~~ suppress. A jury found



him guilty of driving with a prohibited breath-alcohol content, but it acquitted him of the other charge. This appeal followed.

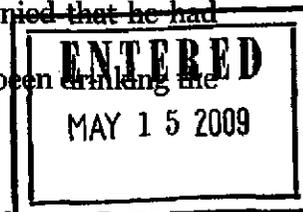
II. Search and Seizure

{¶6} In his first assignment of error, Fisher contends that the trial court erred in overruling his motion to suppress. He argues that Krantz did not have a reasonable suspicion that he was involved in criminal activity to justify detaining him. He also argues that Krantz did not have probable cause to arrest him. This assignment of error is not well taken.

{¶7} Appellate review of a motion to suppress presents a mixed question of law and fact. We must accept the trial court's findings of fact as true if competent, credible evidence supports them. But we must independently determine whether the facts satisfy the applicable legal standard.¹

{¶8} Once Krantz decided to detain Fisher beyond citing him for speeding, he had to have a reasonable and articulable suspicion that Fisher was subject to seizure for a violation of the law.² He had to be able to point to specific and articulable facts that, taken together with the rational inferences from those facts, reasonably warranted the seizure.³

{¶9} According to Krantz, (1) Fisher had bloodshot eyes; (2) he had a strong odor of alcohol coming from his person; (3) he took 15 to 20 seconds longer than the average person to produce his driver's license; and (4) he initially denied that he had been drinking, but upon further questioning, he admitted that he had been drinking the



¹ *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶18; *State v. Burton*, 1st Dist. No. C-080173, 2009-Ohio-871, ¶18.

² *Delaware v. Prouse* (1979), 440 U.S. 648, 663, 99 S.Ct. 1391; *State v. Robinette*, 80 Ohio St.3d 234, 240, 1997-Ohio-343, 685 N.E.2d 762; *State v. Lopez*, 166 Ohio App.3d 337, 2006-Ohio-2091, 850 N.E.2d 781, ¶14-20.

³ *State v. Andrews* (1991), 57 Ohio St.3d 86, 87, 565 N.E.2d 1271; *Lopez*, supra, at ¶13; *State v. Kiefer*, 1st Dist. No. C-030205, 2004-Ohio-5054, ¶11.

night before. These facts were sufficient to give Krantz a reasonable and articulable suspicion that Fisher had been driving under the influence of alcohol and justified him in detaining Fisher for further investigation.

{¶10} Fisher also contends that Krantz did not have probable cause to arrest him. In determining whether probable cause to arrest existed, a court must ascertain whether, at the time of the arrest, the police officer had sufficient facts and circumstances within his knowledge to warrant a prudent person in believing that the defendant was committing or had committed an offense.⁴

{¶11} In arguing that probable cause did not exist, Fisher relies upon this court's decision in *State v. Taylor*.⁵ In that case, we stated that the "act of speeding at a nominal excess coupled with the arresting officer's perception of the odor of alcohol, and *nothing more*, did not furnish probable cause to arrest the defendant for driving under the influence."⁶

{¶12} In this case, facts beyond nominal speeding and an odor of alcohol existed to support probable cause. Fisher was going 22 m.p.h. over the speed limit, which was not nominal speeding. Along with the facts that we have already cited justifying Krantz's continued detention of Fisher, the trial court found that Fisher had performed poorly on three field sobriety tests and that Krantz had conducted those tests in substantial compliance with Ohio Department of Health regulations.⁷

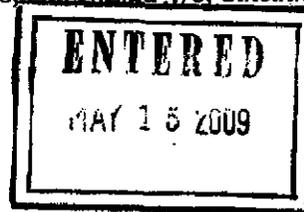
{¶13} Thus, the totality of the facts and circumstances supported a finding that Krantz had probable cause to arrest Fisher for driving under the influence of alcohol or

⁴ *State v. Heston* (1972), 29 Ohio St.2d 152, 155-156, 280 N.E.2d 376; *Cincinnati v. Wolfe*, 1st Dist. Nos. C-010303 and C-010304, 2001-Ohio-3916.

⁵ (1981), 3 Ohio App.3d 197, 444 N.E.2d 481.

⁶ *Id.* at 197-198. (Emphasis in original.)

⁷ See 4511.19(D)(4)(b).



drugs. The trial court did not err in overruling Fisher's motion to suppress, and we overrule his first assignment of error.

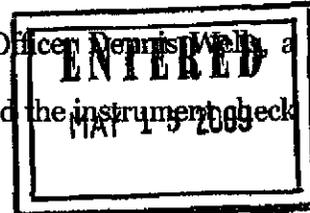
III. Limits on Cross-Examination

{¶14} In his second assignment of error, Fisher contends that the trial court erred at the suppression hearing in refusing to permit him to cross-examine the state's expert witnesses about proficiency testing related to administering breath-alcohol tests and about repairs made to the breath-testing machine. He argues that he was entitled to review all the records mandated by Ohio Department of Health regulations. This assignment of error is not well taken.

{¶15} A criminal defendant has the right to confront and cross-examine the witnesses against him, but that right is not unlimited.⁸ Decisions regarding the extent and scope of cross-examination lie within the trial court's discretion.⁹

{¶16} Sergeant John Crowell was the police officer who conducted the breath-alcohol test on Fisher. He testified on direct examination that he had passed a proficiency examination mandated by Ohio Department of Health regulations. On cross-examination, Fisher attempted to ask what questions he had passed on the proficiency examination. The state objected, and the trial court sustained the objection. Fisher argues he should have been able to question Crowell about his performance on the test.

{¶17} Fisher further argues that he should have been allowed to question the police officers about repairs on the breath-testing machine. Officer Dennis Welch, a senior operator of the Intoxilyzer, testified that he had performed the instrument check



⁸ *Delaware v. Van Arsdall* (1986), 475 U.S. 673, 678-679, 106 S.Ct. 1431; *State v. Rosemond*, 1st Dist. No. C-060578, 2007-Ohio-6333, ¶6-7; *State v. Albanese*, 11th Dist. No. 2005-P-0054, 2006-Ohio-4819, ¶56.

⁹ *State v. Faulkner* (1978), 56 Ohio St.2d 42, 46, 381 N.E.2d 934; *Rosemond*, supra, at ¶7; *Albanese*, supra, at ¶56.

on the Intoxilyzer on the day of Fisher's breath test. He further testified that the instrument check had complied with the Ohio Department of Health's approved procedure.

{¶18} Wells also testified that, in doing the instrument check, he had made sure that it was within a particular range. When asked if it had ever been out of range, he replied that it had. He stated that when it was out of range, "I down the unit and send it back to CMI and have them recalibrate the unit." Fisher asked about the records relating to when the machine was out of range, and the state objected on relevance grounds. The court sustained the objection.

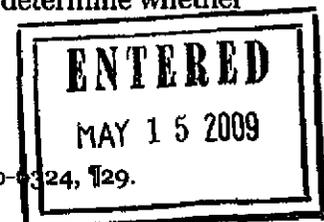
{¶19} In ruling on the objections to the testimony of both witnesses, the court stated that Fisher could have obtained that information during discovery, relying on this court's decision in *Norwood v. Kahn*.¹⁰ In that case, we discussed the problem of shotgun motions to suppress, where "the defendant essentially regurgitates the administrative code and then waits for the police officer to forget to testify about one of the aspects of compliance."¹¹ We decided to follow another appellate court's approach, holding that "to require the state to respond specifically and particularly to issues raised in a motion, an accused must raise issues that can be supported by facts, either known or discovered, that are specific to the issues raised. Unless an accused, either through discovery or cross-examination at the hearing, points to facts to support the allegations that specific health regulations have been violated in some way, the burden on the state to show substantial compliance with those regulations remains general and slight."¹²

{¶20} We went on to state that "the emphasis is properly placed on the discovery process during which the defendant has an opportunity to determine whether

¹⁰ 1st Dist. Nos. C-060497, C-060498, and C-060499, 2007-Ohio-2799.

¹¹ Id. at ¶7.

¹² Id. at ¶8, quoting *State v. Embry*, 12th Dist. No. CA2003-11-110, 2004-Ohio-4324, ¶29.



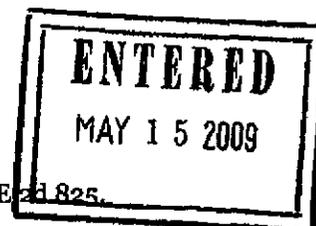
the state has failed to comply with a regulation. * * * '[T]o support a motion to suppress, with particular facts that would put the state on notice of the areas to be challenged, a defendant must first complete due and diligent discovery, on all issues which he or she intends to challenge, in the motion to suppress.'¹³

{¶21} This case involves a situation similar to that described in *Kahn*. Fisher filed a general motion to suppress and asked questions on cross-examination with little relevance and no factual support.

{¶22} Officer Crowell testified on direct examination that he had passed the proficiency test, and the state offered into evidence his senior-operator permit. Thus the state met its burden to show compliance with the regulations in that respect. Therefore, under Ohio law, Crowell was qualified to operate the Intoxilyzer and the issue of what questions he had passed on that test was irrelevant. Absent some information of an irregularity on the test, which should have been obtained in discovery, Fisher had no factual basis for his questions about the specifics of the test, and he was simply on a fishing expedition.

{¶23} Similarly, Wells testified that he had performed the instrument check on the Intoxilyzer as the regulations required. Thus, the state met its burden to show compliance with the regulations in that respect. Wells indicated that at some point in the past, when the instrument was out of range, it was recalibrated. Absent some indication that the recalibration was defective in some way, information that Fisher could have obtained in discovery, he had no factual basis for inquiring about the calibration records. Therefore, they were irrelevant to the issues in this case.

¹³ Id. at ¶9, quoting *State v. Neuhoff* (1997), 119 Ohio App.3d 501, 506, 695 N.E.2d 825.



{¶24} We cannot hold that the trial court's decision to limit cross-examination on those matters was so arbitrary, unreasonable, or unconscionable as to connote an abuse of discretion.¹⁴ Consequently, we overrule Fisher's second assignment of error.

IV. Expert Testimony about the Reliability of the Intoxilyzer

{¶25} In his third assignment of error, Fisher contends that the trial court erred in failing to allow Steven Adams, his expert witness, to testify at trial about the reliability of the Intoxilyzer. He argues that while expert testimony is not admissible to attack the reliability of Intoxilyzers generally, the court may admit testimony to attack the reliability of a particular instrument or operator. This assignment of error is not well taken.

{¶26} A trial court has broad discretion in the admission of evidence, including expert testimony. This court will not reverse the trial court's decision absent an abuse of discretion.¹⁵

{¶27} The Ohio Supreme Court has held that R.C. 4511.19 represents a legislative determination that that certain breath-testing devices are generally reliable. This determination means that the state has replaced the common-law foundational requirements for admissibility.¹⁶ Therefore, an accused may not make a general attack upon the reliability and validity of a breath-testing instrument.¹⁷

{¶28} Nevertheless, the accused may attack the reliability of the specific testing procedure and the qualifications of the operator and may present expert testimony on these issues.¹⁸ The accused "may endeavor to show something went wrong with his test

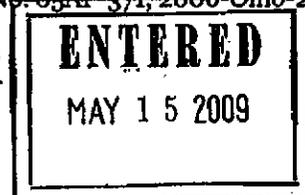
¹⁴ See *State v. Clark*, 71 Ohio St.3d 466, 470, 1994-Ohio-43, 644 N.E.2d 331.

¹⁵ *State v. Awkal*, 76 Ohio St.3d 324, 331, 1996-Ohio-395, 667 N.E.2d 960; *Rosemond*, supra, at ¶15.

¹⁶ *State v. Vega* (1984), 12 Ohio St.3d 185, 188-189, 465 N.E.2d 1303; *State v. Massie*, 2nd Dist. No. 2007 CA 24, 2008-Ohio-1312, ¶15; *State v. Luke*, 10th Dist. No. 05AP 371, 2006-Ohio-2306, ¶22.

¹⁷ *Vega*, supra, at 190; *Massie*, supra, at ¶15; *Luke*, supra, at ¶22.

¹⁸ *Vega*, supra, at 189; *Massie*, supra, at ¶18; *Luke*, supra, at ¶25.



and that, as a consequence, the result was at variance with what the approved testing process would have produced.”¹⁹

{¶29} In this case, Adams testified that he had expertise and experience related to the Intoxilyzer machine. During voir dire, the court stated, “So I guess my question is, are you saying Ohio’s procedure, as it relates to every single test is given and every arrest is faulty?” Adams replied, “Correct. Correct. It’s not reliable and I would be explaining why.” The court stated, “[T]he Court’s going to rule that the procedure followed in the state of Ohio followed by the Montgomery Police Department in this case was the same procedure * * * that the Department of Health and everybody else puts out and the Court is going to rule they are in compliance. With that, the Court is going to exclude his testimony with regards to that issue.”

{¶30} Thus, the record shows that Adams’s testimony was going to attack the reliability of breath tests in general, which is an issue the legislature has already decided. The trial court did not abuse its discretion in excluding that testimony. The trial court allowed Adams to testify regarding other issues, but Fisher never asked him about the specific test in this case. Consequently, we overrule Fisher’s third assignment of error.

V. Jury Instructions

{¶31} In his fourth assignment of error, Fisher contends that the trial court did not properly instruct the jury. He argues that the court failed to tell the jury that Fisher had to have the prohibited breath-alcohol content “at the time of operation.” This assignment of error is not well taken.

{¶32} A trial court must fully and completely give all jury instructions that are relevant and necessary for the jury to weigh the evidence and to discharge its duty as the

¹⁹ *Massie*, supra, at ¶18; *Luke*, supra, at ¶26.



factfinder.²⁰ An appellate court will not reverse a conviction due to improper jury instructions unless the defendant was prejudiced.²¹ Further, a single instruction cannot be judged in isolation, but must be viewed in the context of the overall charge.²²

{¶33} In this case, the trial court instructed the jury on all the statutory elements of driving with a prohibited breath-alcohol content under R.C. 4511.19(A)(1)(d). It told the jury that it had to find that Fisher had operated the vehicle on the day in question with a prohibited breath-alcohol content. Fisher was not prejudiced by any omission. We, therefore, overrule his fourth assignment of error, and we affirm his conviction.

Judgment affirmed.

HILDEBRANDT, P.J., and PAINTER, J., concur.

Please Note:

The court has recorded its own entry this date.

²⁰ *State v. Comen* (1990), 50 Ohio St.3d 206, 553 N.E.2d 640, paragraph two of the syllabus; *State v. Robinson*, 1st Dist. No. C-060434, 2007-Ohio-2388, ¶18.

²¹ *Robinson*, supra, at ¶18.

²² *State v. Price* (1979), 60 Ohio St.2d 136, 398 N.E.2d 772, paragraph four of the syllabus; *Robinson*, supra, at ¶18.

