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IN THE SUPREME COURT OF OHIO

CITY OF CINCINNATI, STATE OF OHIO Appellant, v. DANIEL ILG, Appellee.	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District 13-1102 Court of Appeals Case No. C-120667

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT CITY OF CINCINNATI, STATE OF OHIO

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FILED
JUL 11 2013
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
JUL 11 2013
CLERK OF COURT
SUPREME COURT OF OHIO

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This case presents three significant issues germane to the prosecutions for operating a vehicle while under the influence of alcohol ("OVI") in the State of Ohio. First, this case involves the question of whether the prosecuting attorney can be compelled to disclose information that is not material to any legally permissible defense to an OVI charge. Second, this case involves the question as to whether the Ohio Department of Health ("ODH") should be considered part of the "State" for purposes of sanctions for alleged violations of the discovery rules. Finally, this case asks whether it is proper to sanction the prosecution for a third party's failure to comply with an order of the court by suppressing the state's key evidence and effectively destroying any reasonable possibility of effective prosecution.

In this case, the court of appeals concluded that the trial court's decision that a defendant was entitled to documents that are only relevant to an attack on the general reliability of a breath testing instrument as a defense to an OVI charge was correct. The court of appeals also approved of the trial court sanctioning the prosecution for the failure of ODH to turn over computer online breath archive data (COBRA data) that is not in the possession or control of the prosecution. Finally, the court of appeals did not bat an eye at the trial court's determination that the appropriate sanction for the failure to produce this irrelevant and inadmissible information was to suppress the alcohol breath test of the defendant—the most important piece of evidence for the State in prosecuting an OVI under R.C. 4511.19(A)(1)(d).

The court of appeals' decision is significant. It departs from settled case law on the ability of defendants in OVI cases to challenge the reliability of the breath testing instrument. It subjects a policy making body to the constitutional obligations of the prosecution team. Lastly, it imposes the *most* severe punishment as a discovery sanction when the law clearly requires a court to use

only the least severe sanctions necessary to vindicate the purposes behind the criminal discovery rules. These consequences burden instrumentalities of the state charged with serving the public with unnecessary and unreasonable expectations which will substantially impair their respective abilities to perform their governmental functions.

Further, the precedent set by this case will greatly hamper the ability of prosecutors to combat and deter drunk driving. It is common knowledge that drunk driving is a public health hazard and thousands perish each year in alcohol related traffic fatalities. Additionally, the General Assembly has made clear that drunk driving is a blight that needs to be remedied by making such crimes a strict liability offense. *See* R.C. Section 4511.19. The court of appeals decision impairs the prosecution of OVI offenses by subjecting the prosecution to a standard of near perfection for pre-trial discovery and by allowing defendants to assert prohibited defenses. Thus, the hampering of prosecution of OVI cases impacts the safety of the public-at-large and the safety of our highways.

In addition, the decision imposes upon ODH a role that it has never before and should never have to assume—being a part of the prosecutorial machinery. The court of appeals held that ODH, as a state agency, is naturally part of the "State" when it comes to the prosecution of OVI offenses. This is a legally unreasonable conclusion. The Department of Health is a policy making body. The General Assembly has charged them with the task of making policy with regards to the proper procedure for testing suspects to determine their blood-alcohol content. They are also charged with evaluating various devices to determine which ones are scientifically reliable testing machines for determining blood-alcohol content. They do not investigate crime scenes. They do not administer breath tests. They do not issue citations to drivers for violations of the traffic laws. They set the standards that law enforcement must follow to obtain

scientifically reliable evidence of intoxication. It remains the duty of law enforcement to properly administer the tests. The prosecution must still prove the elements of the offense. The only role attributable to ODH that relates to the prosecution of these offenses is as custodian of data generated by the breath testing machine. This alone is not enough to tie them to the prosecution team. The Department of Health is not related in any meaningful way to the investigation or prosecution of OVI offenses.[1] The court of appeals decision injects ODH into a realm where they do not and should not belong.

The public implications of placing ODH in this position are significant. To require ODH to produce volumes of documents for every OVI prosecution imposes a significant financial and labor burden upon the agency. The agency does far more than set standards for breath testing. They track infectious disease trends in the state, credential various institutions, educate the public on health matters, and create policy on myriad public health issues wholly unrelated to OVI prosecution. Imposing a significant resource drain on the agency is likely to siphon resources from the other programs of the agency and hamper its mission to protect the health of the people of the State of Ohio.

Not only is the court of appeals conclusion difficult to apply to an organization with such diverse functions as the Department of Health, but the broad language used by the court of appeals would subject *all* agencies of the Ohio State government to being part of the "prosecution team." This is simply unworkable for agencies like the State Barber Board, Ohio Grape Industries Committee, Ohio Historical Society, Ohio Water Development Board, or the Ohio State Fair. All of these are state agencies that could be considered part of the prosecutorial

[1] This belief can be attributed to defense counsel in this case as well who attempted to obtain information from ODH by subpoena under Crim. R. 17, rather than Crim. R. 16.

machinery under the court of appeals decision and none of them have anything to do with day-to-day criminal prosecutions.

Finally, the court of appeals decision approves of a discovery sanction that undermines the ideal of fairness embodied in the criminal discovery scheme. As the Ohio Rule of Criminal Procedure 16 states, "This rule is to provide all parties in a criminal case with the information necessary for a full and fair adjudication of the facts, to protect the integrity of the justice system and the rights of defendants, and to protect the well-being of witnesses, victims, and society at large." Crim. R. 16(A). When the trial court sanctioned the prosecution by suppressing their most important piece of evidence as punishment for the failure of a third party to produce information it transgressed the principles of Crim. R. 16. Allowing such harsh sanctions will severely prejudice the justice system as an innocent oversight or miscommunication would result in the dismissal of charges against persons who may constitute a danger to society. This undermines the pursuit of justice and places an unreasonable burden on the state.

The decision of the Hamilton County Court of Appeals departs from well settled law from this Court, it imposes significant burdens on the Department of Health, and it blesses discovery sanctions that are wholly out of proportion to the offending act. The decision ignores clear policy articulated by the General Assembly about the reliability of breath testing instruments and the importance of prosecuting and deterring drunk driving and endangers the citizens of the State of Ohio by impairing the ability of the state to fulfill its duties in enforcing the OVI law. For these reasons, this Court should grant jurisdiction to hear this case to resolve these important issues.

STATEMENT OF THE CASE AND FACTS

This case arises from the prosecution of Daniel Ilg for operating a vehicle while under the influence of alcohol, in violation of R.C. 4511.19(A)(1); operating a vehicle with a prohibited level of alcohol in his breath, in violation of R.C. 4511.19(A)(1)(d) and failing to maintain control of his vehicle, in violation of R.C. 4511.202.

On October 22, 2011, Mr. Ilg was driving in Cincinnati, Hamilton County, Ohio when he lost control of his vehicle striking a fence, a city sign, and a utility pole. Cincinnati police arrived and observed that Mr. Ilg showed signs of inebriation. The officer administered field sobriety tests and then arrested Mr. Ilg. He was transported to the nearest police district where his breath was tested on an Intoxilyzer 8000. The instrument indicated that Mr. Ilg had a blood-alcohol content of .143 gram by weight of alcohol per two-hundred ten liters of breath. He was then charged with the above mentioned offenses.

Mr. Ilg retained counsel and his attorney served the City of Cincinnati with a Notice of Request for Discovery on November 18, 2011 which requested, *inter alia*, a broad spectrum of information pertaining to the breath test, *the machine*, and the operator. Additionally, a motion to suppress was filed the same day requesting suppression of the test results from the Intoxilyzer based on a laundry list of reasons why the test was improper. The City responded to the request for discovery on December 12, 2011.

Dissatisfied with the production of the prosecution, Mr. Ilg's attorney filed a subpoena duces tecum on Mary Martin, an employee with the Department of Health, requesting another wide ranging series of documents, many of which were unrelated to Mr. Ilg's specific breath test and incident. When the defendant did not receive the requested information, he filed a second subpoena duces tecum. After this second request went unanswered, the defendant filed a motion

to compel with the municipal court accusing the Department of Health of willfully hiding information and demanded the court require ODH produce the data and other requested items.

The trial court conducted a hearing on the motion to compel. Mary Martin, a representative from the Department of Health testified about producing each item on the subpoena duces tecum. The trial court ordered that the Department of Health produce all of the items listed in the subpoena. The items listed under subpoena paragraph 1a through 1j were to be produced by September 13, 2012 and the items listed under subpoena paragraph 1k and 1l were to be produced by November 5, 2012.

The next hearing took place on September 25, 2012. At this hearing the court acknowledged that it had received a portion of the documents, but noted it had not received the COBRA data among other things. The court then permitted defense counsel to inquire upon Ms. Martin about why certain pieces of information had not been provided. Ms. Martin testified that the COBRA data was not provided because the Department still lacked the staff, technology, and resources to convert the read-only database into a format for dissemination to persons outside the Department. Other items discussed were maintenance records, which Ms. Martin maintained did not exist because the machine had never been removed from service for repair or maintenance issues—counsel was undeterred, continuing to question Ms. Martin about why they did not exist.

Ultimately the court concluded at the end of the hearing that ODH had failed to comply with the court order and as a result of its failure to turn over the COBRA data the City of Cincinnati would be punished by excluding the breath test as evidence in the OVI trial.

The City appealed the ruling to the First Appellate District, Hamilton County arguing the trial court abused its discretion in ordering compliance with the subpoena duces tecum and for punishing the prosecution for ODH's failure to produce the requested documents. The court of

appeals affirmed the decision of the trial court holding that the COBRA data was relevant and it was within the discretion of the trial court to order its disclosure. Further, the court held that the Ohio Department of Health was part of the "State" for prosecution purposes.

The City is appealing this decision and its basis.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: *State v. Vega* prohibits defendants in OVI cases from making attacks on the general reliability of breath testing instruments, thus a defendant cannot compel any party to produce information that is to be used for the purpose of attacking the general reliability of the breath testing instrument.

In *State v. Vega*, this Court held that a defendant in an OVI prosecution cannot make a general attack on the reliability of the breath testing instrument because the reliability of those instruments had been legislatively resolved by the General Assembly. *State v. Vega*, 12 Ohio St.3d 185, 188-189, 465 N.E.2d 1303 (1984). This prohibits a defendant from attacking the functionality of the machine and limits his options to attacking the specific procedures employed for his test and the qualifications of the officer who administered the breath test to operate the machine. *Id.* at 188.

This issue was resolved by this Court both as a matter of separation of powers and as a matter of due process. This Court found that the judiciary must respect proper legislative enactments of the General Assembly and that in doing so defendants were not being deprived of their constitutional rights to confront witnesses against them or to make a defense. *Id.* at 188-189.

With regards to the subpoena of information pertaining to the reliability of the instrument, a defendant is only entitled to receive information that is evidentiary and relevant. *In Re Subpoena Duces Tecum Served upon Attorney Potts*, 100 Ohio St.3d 97, 796 N.E.2d 915 (2003), paragraph one of the syllabus . In the *Potts* case, this Court adopted the reasoning of the

U.S. Supreme Court in *U.S. v. Nixon*, 418 U.S. 683, 94 S. Ct. 3090 (1974). *Potts* at 100. In *Nixon*, the Supreme Court held that the burden to show the four requirements of a proper subpoena rests on the proponent of the subpoena. *Id.* at 699. The proponent "must clear three hurdles: (1) relevancy; (2) admissibility; (3) specificity." *Id.* at 700.

Further, under Ohio law, relevant evidence is defined as "evidence having any tendency to make the existence of any fact *that is of consequence to the determination of the action* more probable or less probable than it would be without the evidence." Evid. R. 401 (emphasis added). Thus, Mr. Ilg bore the burden to show that the documents sought from ODH were evidence that tended to make the existence of a fact of consequence to the action more or less probable.

Here, the court of appeals held that the trial court was within its discretion in recognizing that the COBRA data sought was relevant to Mr. Ilg's defense. Mr. Ilg offered no basis to conclude the information was used for any other purpose than to attack the reliability of the device. In his motion to suppress—a boiler plate document that adopts a shotgun approach,[2] challenging everything possible including admission of a field sobriety test that was never administered to Mr. Ilg—he does not proffer any argument to support an inference that such information is to be used for another purpose other than attacking the reliability of the instrument. Nor does Mr. Ilg articulate any specific reasons why *this* instrument was malfunctioning. This Court has made clear that the fact of a instrument's reliability is not of consequence to an OVI prosecution. Thus, because Mr. Ilg failed to show some purpose for this evidence beyond challenging the reliability of the instrument then this subpoena was nothing

[2] The First District has expressly disapproved of the use of the shotgun approach in motions to suppress submitted in OVI cases. *City of Norwood v. Kahn*, 1st Dist. Nos. C-060497, C060498, 2007-Ohio-2799.

more than a fishing expedition searching for information on issues conclusively resolved by the General Assembly and this Court.

Proposition of Law No. II: The Ohio Department of Health is not part of the "State" for purposes of a criminal prosecution or under Criminal Rule 16.

In *State v. Wiles*, a prosecutor was imputed with knowledge of the existence of evidence in the possession of the police department because this Court considered the police department to be part of the "prosecutional machinery." *State v. Wiles*, 59 Ohio St.3d 71, 78, 571 N.E.2d 97 (1991); *consider State v. Mosley*, 4th Dist. No. 00CA2739, 2001 Ohio App. LEXIS 3332, *7 (The court holds that while police are part of the prosecutorial machinery, EMTs and firefighters are not). This holding aligns with similar language used by other states and in some federal district courts. While some other jurisdictions have more closely examined these issues, there is little case law in Ohio exploring the scope of what is considered to be the prosecutional machinery.

The Mississippi Supreme Court has held that a prosecutor does not per se "possess" information in the hands of another governmental agency. *King v. State*, 656 So.2d 1168, 1176 (Ms. 1995). Only when the evidence is in the hands of an agency that is a member of the "prosecution team" is their knowledge imputed to the prosecutor herself. *Id.* Prosecution team was defined as including investigative and prosecutorial personnel. *Id.*

In the federal Fifth Circuit, the court of appeals held that a personnel file for the key witness of the prosecution that was kept with the U.S. Postal Service was in the possession of the prosecution for the purposes of a due process challenge under the Supreme Court's ruling in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). *U.S. v. Deutsch*, 475 F.2d 55, 57 (5th Cir. 1973). The court's conclusion on this point centered around the central role played by the witness, the fact that an employee of the Postal Service was being charged with the crime, and

that the crime occurred in the course of that employees work for the Postal Service. *Id.* That case involved the prosecution of a man for paying a postal worker to steal credit cards from the mail that he encountered in his work with the Postal Service. *Id.* at 56.

In the federal Eleventh Circuit, the court of appeals held that *Brady v. Maryland* would only apply to information possessed by the prosecutor directly or by anyone over whom the prosecutor had authority. *U.S. v. Meros*, 866 F.2d 1304, 1309 (11th Cir. 1989), *cert. denied*, 493 U.S. 932. The court went on to state that a prosecutor is not under a duty to undertake a fishing expedition every time a defendant makes a *Brady* request for information about a government witness. *Id.*

Other courts around the country have held similarly. *See Zant v. Moon*, 264 Ga. 93, 100, 440 S.E.2d 657 (1994) (the testimony of an agent from a Tennessee state agency did not make that agency or its officers part of the prosecution team for purposes of *Brady v. Maryland*); *Ellis v. State*, 641 So.2d 333, 336-338 (Al.Crim.App. 1994) (holding that an off-duty police officer-witness' refusal to provide information to the defense was not imputable to the prosecution), *cert. denied*; *U.S. v. Wiedman*, 572 F.2d 1199, 1207 (7th Cir. 1978) (the court ruled that "statements" held by the NLRB made by a witness were not considered in the possession of the prosecution because the NLRB, for purposes of the case at bar, is a non-prosecutorial arm of the federal government).

In this case, the court of appeals ruled that the Department of Health was part of the "State" when examining the trial court's suppression of the breath test for ODH's failure to comply with the trial court's order. This holding is inappropriate when considering the role of ODH in OVI prosecutions and the use of a subpoena.

With regards to blood-alcohol testing, ODH is a policy making body that sets the standards for testing and credentialing of instrument operators. ODH is not involved in the day-to-day investigation and prosecution of OVI offenses. While ODH is a custodian of data sent from testing instruments, this fact alone does not make them part of the prosecution team. In fact, even defense counsel in this case did not consider them part of the prosecution team as evidenced by his use of a subpoena under Crim. R. 17 as opposed to a discovery request under Crim. R. 16.

Imputing possession of documents held by ODH to local prosecutors around the state is unreasonable and inappropriate. It will penalize prosecutors for the acts of a third party over which the prosecutor has no authority. Additionally, the broad language used by the court of appeals in its decision would subject *all* agencies of the State of Ohio, not just ODH, to being part of the prosecutional machinery.

The court of appeals wrongly decided this issue.

Proposition of Law No. III The suppression of the State's key evidence, as a sanction for a third party's failure to respond to a subpoena, is an inappropriate and excessive sanction under *City of Lakewood v. Papadelis.*

"A trial court must inquire into the circumstances surrounding a discovery rule violation and, when deciding whether to impose a sanction, must impose the least severe sanction that is consistent with the purpose of the rules of discovery." *City of Lakewood v. Papadelis*, 32 Ohio St.3d 1, 511 N.E.2d 1138 (1987) paragraph 2 of the syllabus.

The rule in *Papadelis* requires a court to balance the interests of the respective parties and reach an appropriate decision on sanctions that comports with the ideals of fairness and justice and that is the least restrictive means of achieving that goal. *Id.* at 5. This Court stated that "the philosophy of the Criminal Rules is to remove the element of gamesmanship from a trial. The purpose of discovery rules is to prevent surprise and the secreting of evidence favorable to one

party. The overall purpose is to produce a fair trial." *Id.* at 3 (citations omitted). The court of appeals decision in this case does not follow these principles.

In a factually similar case, the Fourth Appellate District concluded that the suppression of an alcohol breath test as a sanction for failing to permit defense counsel to review the log book for the breath testing machine located at the police district where the defendant was tested was far too harsh. *State v. Linscott*, 4th Dist. Nos. 94CA1633, 94CA1634, 1995 Ohio App. LEXIS 3714, *13. The court stated that "the trial court's ruling for all practicable purposes eliminated the most important part of the state's case in chief. By imposing another sanction, such as contempt, the trial court could have achieved the overall purpose of discovery." *Id.*

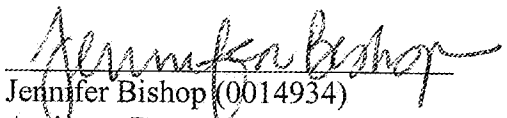
In the present case, the court suppressed the very same evidence that the Fourth District found to be an excessive sanction for similarly withheld information. *Cincinnati v. Ilg*, at ¶12. Also, similar to *Linscott*, the trial court had other options at its disposal to punish the state in keeping with the purposes of the rules while not destroying the state's case-in-chief: the court could have granted an adverse inference, it could have required ODH to allow defense counsel to inspect the data at the state's expense, or it could have held the Director of the Department of Health in contempt. Any of these other options would be less severe and still vindicate the purpose of the discovery rules and protect Mr. Ilg's right to a fair trial.

In addition to the severity of the sanction, suppression of evidence *is not* the remedy for a violation of a subpoena duces tecum. Criminal Rule 17 could not be clearer: Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court or officer issuing the subpoena. See Crim. R. 17(G). The trial court clearly erred in suppressing the breath test result as a discovery sanction. The court of appeals likewise erred when it affirmed the judgment of the trial court.

CONCLUSION

For the foregoing reasons, this is a case of public and great general interest. The appellant asks this court to accept jurisdiction in this case so that the important issues presented may be reviewed on the merits.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary mail to counsel for Daniel Ilg, Steven R. Adams and Marguerite Slagle, The Law Office of Steven R. Adams, 8 W. Ninth Street, Cincinnati, OH 45202 on 10th July 2013.

Jennifer Bishop

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

CITY OF CINCINNATI,	:	APPEAL NO. C-120667 TRIAL NO. 11TRC-53698
Plaintiff-Appellant,	:	
vs.	:	*OPINION.*
DANIEL ILG,	:	
Defendant-Appellee.	:	

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MAY 31 2013

COURT OF APPEALS

Criminal Appeal From: Hamilton County Municipal Court

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: May 31, 2013

John Curp, City Solicitor, *Charlie Rubenstein*, City Prosecutor, and *Jennifier Bishop*, Assistant City Prosecutor, for Plaintiff-Appellant,

The Law Office of Steven R. Adams, Steven R. Adams and *Marguerite Slagle*, for Defendant-Appellee.

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

HILDEBRANDT, Judge.

{¶1} Plaintiff-appellant city of Cincinnati appeals the judgment of the Hamilton County Municipal Court granting a motion for sanctions for failure to comply with the court's discovery order.

Ilg's Discovery Efforts

{¶2} In 2011, defendant-appellee Daniel Ilg was charged with driving with a prohibited breath-alcohol concentration and driving while impaired. During discovery, Ilg sought a number of documents from the Ohio Department of Health ("the ODH") relating to the performance of the Intoxilyzer 8000, the machine the city had used to measure his breath-alcohol concentration. Among other items, Ilg sought the ODH's computerized online breath archives, or "COBRA" data.

{¶3} When he did not receive the requested material, Ilg served the ODH with two subpoenas duces tecum. Those efforts also proved futile, and Ilg then filed a motion to compel the production of the documents along with a motion for sanctions. The city countered with a motion to strike the subpoenas, and the trial court conducted a hearing on August 27, 2012.

{¶4} ODH representative Mary Martin testified at the hearing. Martin testified that the Intoxilyzer 8000 saves data for each test that is performed, and that this COBRA information is compiled by the ODH in a spreadsheet. But Martin stated that the COBRA material was stored in a "read-only" format and that ODH did not have the resources to copy the database for dissemination. The trial court granted the motion to compel and ordered ODH to produce the COBRA data as well as other material listed in the subpoenas duces tecum.

{¶5} On September 25, 2012, the trial court conducted another hearing to address the discovery issues. At that hearing, the parties indicated that certain documents had been produced but that the COBRA data had not been provided to

Ilg. Martin again testified that the ODH did not have the personnel or technology required to provide the requested material.

{¶6} The trial court then ordered the exclusion of the breath test from evidence, leaving the case to proceed on the impairment charge alone. The city appealed.

The Motion to Quash

{¶7} In its first assignment of error, the city argues that the trial court erred in ordering the production of the documents listed in Ilg's subpoenas duces tecum. But because the trial court's decision regarding the exclusion of the breath test was based on the state's failure to produce the COBRA data, we confine our discussion to that portion of the discovery order.

{¶8} When deciding a motion to quash a subpoena under Crim.R. 17, the trial court must conduct an evidentiary hearing. *In Re Subpoena Duces Tecum Served upon Attorney Potts,* 100 Ohio St.3d 97, 2003-Ohio-5324, 796 N.E.2d 915, paragraph one of the syllabus. At the hearing, the proponent of the subpoena bears the burden of demonstrating that the subpoena is not unreasonable or oppressive by showing (1) that the subpoenaed documents are evidentiary and relevant; (2) that they are not otherwise reasonably procurable in advance of trial by due diligence; (3) that the proponent cannot properly prepare for trial without production and inspection of the documents and that the failure to obtain the documents may tend to unreasonably delay the trial, and (4) that the subpoena is made in good faith and not intended as a general "fishing expedition." *Id.* An appellate court generally applies an abuse-of-discretion standard in reviewing a trial court's decision concerning a motion to quash a subpoena. *State v. Strickland,* 183 Ohio App.3d 602, 2009-Ohio-3906, 918 N.E.2d 170, ¶ 37 (8th Dist.).

{¶9} In the case at bar, we find no abuse of discretion. The evidence indicated that the COBRA database was a comprehensive repository of information

relative to the functioning of the Intoxilyzer 8000 used in this case. Ilg therefore demonstrated that the COBRA data was relevant to the reliability of his breath test. The evidence further indicated that Ilg could not procure the data without the cooperation of the ODH, that the material was needed for trial preparation, and that he had requested the material in good faith. Although Martin testified that compliance with the court's discovery order would have been difficult and would have required additional resources, we cannot say that the trial court's order was arbitrary, unreasonable, or unconscionable.

{¶10} The city maintains that Ilg's request—and the trial court's discovery order—went beyond the scope of what was relevant. According to the city, the court required the ODH to disclose material relating to the reliability of the Intoxilyzer 8000 in general, rather than the reliability of the breath test in Ilg's case. Thus, the city maintains that the court's order ran afoul of *State v. Vega*, 12 Ohio St.3d 185, 465 N.E.2d 1303 (1984) and *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, in which the Supreme Court of Ohio held that determining the general reliability of a testing machine was within the sole province of the ODH.

{¶11} Again, this argument is not persuasive. The subpoenas duces tecum specifically identified the machine used to test Ilg's breath, and the entry granting the motion to compel did not expand the terms of the subpoenas. The city has therefore failed to demonstrate that the order exceeded the permissible scope of *Vega* and *Burnside*. Moreover, even if the court's order could conceivably be construed as overbroad, the fact remains that the ODH did not produce *any* of the COBRA data. The city thus cannot complain about any overbreadth in the discovery order, and we overrule the first assignment of error.

The Exclusion of the Breath Test

{¶12} In its second and final assignment of error, the city contends that the trial court erred in excluding the breath test from evidence because the discovery violation had been attributable to the ODH, which was not a party to the prosecution. In essence, the city argues that the court improperly sanctioned it for the acts or omissions of the state of Ohio.

{¶13} We find no merit in this assignment. Cities are regarded as subordinate governmental instrumentalities created by the states to assist in the carrying out of state functions. *See, e.g., Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); *South Euclid v. Swirsky,* 8th Dist. No. 79865, 2002-Ohio-1072. As such, a city and the state are essentially the same sovereign, and the city in this case may not avoid the consequences of the ODH's failure to comply with the court's order.

{¶14} Moreover, the trial court's exclusion of the test in this case was not merely punitive. As we have already stated, the material sought in discovery was relevant to Ilg's defense. Therefore, the discovery violation implicated Ilg's fundamental right to a fair trial, and the trial court's sanction was reasonably calculated to protect that right. We overrule the second assignment of error.

Conclusion

{¶15} We affirm the judgment of the trial court

Judgment affirmed.

HENDON, P.J., and **FISCHER, J.,** concur.

Please note:

The court has recorded its own entry this date.

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

CITY OF CINCINNATI,	:	APPEAL NO. C-120667 TRIAL NO. 11TRC-53698
Plaintiff-Appellant,	:	
vs.	:	*JUDGMENT ENTRY.*
DANIEL ILG,	:	
Defendant-Appellee.	:	D102251584

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 Opinion 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 Opinion 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 31, 2013 per order of the court.

By: _____
Presiding Judge