

IN THE SUPREME COURT OF OHIO

CITY OF CINCINNATI,

Appellant,

v.

DANIEL ILG,

Appellee.

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Case No. 2013-1102

On Appeal from the
Hamilton County
Court of Appeals,
First Appellate District

MERIT BRIEF OF APPELLANT CITY OF CINCINNATI

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STATEMENT OF FACTS

This case is another in a long line of challenges to OVI prosecutions that have arisen since the Ohio Department of Health put a new breath test instrument, the Intoxilizer 8000, into use. Defendants have used the adoption of the new instrument to try to get courts to revisit long-settled OVI law. This particular case is about whether a criminal defendant is entitled to discovery of information that is not discoverable, not relevant under *State v. Vega* because it is solely for the purpose of attacking the reliability of a breath testing instrument, and nearly impossible to produce. The courts below held that the information was discoverable, and the government's failure to produce it meant that evidence of the breath test must be suppressed.

The defendant, Daniel Ilg was operating a motor vehicle on October 2, 2011 when his vehicle hit a fence, a city sign, and a utility pole. At the scene, Cincinnati police officers observed evidence that the defendant operated his vehicle while under the influence of alcohol. The defendant was arrested for driving under the influence and was transported to a police district. His breath was tested using Intoxilyzer 8000, serial number 80-004052. The defendant had a concentration of .143 of one gram by weight of alcohol per two hundred ten liters of breath. The defendant was charged with operating a vehicle while under the influence of alcohol, a violation of R.C. 4511.19 (A)(1); operating a vehicle with a prohibited level of alcohol in his breath, a violation of R.C. 4511.19(A)(1)(d); and failing to maintain control of his vehicle, a violation of R.C. 4511.202.

The defendant pled not guilty. After delaying the case for eight months, the defendant issued a subpoena duces tecum to Mary Martin, Ohio Department of Health, in the summer of 2012. (Transcript of the trial court proceedings hereafter T.p.) (T.p. 9.)

The subpoena requested a great deal of information, most of which was not related to the defendant's breath test. The subpoena commanded that Ms. Martin bring a copy of any and all records maintained by the Ohio Department of Health and the Ohio Department of Safety relating to Intoxilyzer 8000, serial number 80-004052 located at Cincinnati Police District Three. The subpoena demanded specifically (a) all computerized online breath archives data ("COBRA" data); (b) any and all log in history, including state employees, the manufacturer's employees, or any other person; (c) any repair records; (d) any maintenance records; (e) any radio frequency interference certification records; (f) any software changes or modifications since the machine had been in use; (g) the number of times the machine had been taken out of service; (h) a statement explaining why the machine had been returned to be re-calibrated; (i) official records of repair and maintenance; (j) the subject test report for the defendant; (k) any and all correspondence regarding the Intoxilyzer 8000 among and between employees of Ohio Department of Health, Ohio Department of Public Safety, and the manufacturer; (l) any and all communications between Ohio Department of Health and the Cincinnati Police Department or prosecuting attorneys about the Intoxilyzer 8000.

The state produced a large number of documents, including all documents related to the defendant's test on Intoxilyzer 80-004052. (Transcript of the docket hereafter T.d.) (T.d. 11.) The defendant was given a copy of the subject test form/operational check list, subject test report, operator access card information, instrument certification report, batch solution certificate, certificate of analysis (EBS-Ethanol Breath Standard), placed in service card, certificate of factory calibration, and factory quality control and tracking form, factory calibration (report of temperature test). The documents provided the defendant with all of the information necessary to specifically attack his breath test results.

The defendant was not satisfied. On August 16, 2012 the defendant filed a motion for sanctions, claiming that the Intoxilyzer breath test results should be suppressed because the Department of Health had not complied with his subpoenas duces tecum. The court conducted a hearing on the motion for sanctions on August 27, 2012 and ordered the Department of Health to produce all the documents requested in the subpoena. The court ordered the items listed in subpoena paragraphs 1 a,b,c,d,e,f,g,h,i and j be produced by September 13, 2012. The court ordered that the Department of Health to produce the items listed in subpoena paragraphs 1k and l by November 5, 2012. The court did not make any orders concerning the items listed in subpoena paragraph 2.

As of September 25, 2012, the Ohio Department of Health produced all of the documents that existed, with the exception of the computerized online breath archives data (COBRA) and the correspondence in paragraphs 1k and l, (i.e. any and all correspondence regarding the Intoxilyzer 8000 among and between the Ohio Department of Health, the Ohio Department of Safety, and the manufacturer and any and all correspondence between the Ohio Department of Health, the Ohio Department of Public Safety, and the Cincinnati Police Department and Prosecuting Attorneys) which were to be produced by November 5. (T.p. 37,113.)

The court held a second hearing on the motion for sanctions on September 25, 2012. Ms. Martin's testimony established that the repair, maintenance, and RFI documents demanded in subpoena paragraph 1c,d,e, did not exist. (T.p. 135, 142.) Although not in the possession of the Department of Health, the manufacturer of the Intoxilyzer created a list of all software changes to the Intoxilyzer 8000. Ms. Martin provided this list to the court and thereby complied with subpoena paragraph 1f. (T.p. 144.) The Intoxilyzer had not been taken out of service, so there was nothing to provide to comply with subpoena paragraph 1g. (T.p. 149.) The document sought

pursuant to subpoena paragraph 1h (i.e. a statement explaining why Intoxilyzer 80-004052 was returned to the factory for recalibration without any taken out of service notice or repair records) does not exist. (T.p. 150.) However, in her testimony, Ms. Martin explained that the Intoxilyzers were delivered with the wrong software. (T.p. 149.) The Intoxilyzers were returned to the manufacturer before they were put into service. (T.p. 150.) Because the Intoxilyzer 8000 had not been put into service, no documents existed to satisfy subpoena paragraph 1h. Likewise, the Intoxilyzer had not been repaired so no documents existed to satisfy subpoena paragraph 1i. (T.p. 151.) The documents concerning the defendant's individual breath test requested in subpoena paragraph 1j were provided in discovery. (T.d. 11.) The Department of Health therefore complied with the court's order concerning the documents demanded in paragraphs 1c-j.

Essentially, the defendant received the information related to his specific breath test — the only information to which he is entitled — plus all of the maintenance, software updates, radio frequency interference, and repair records related to Intoxilyzer 8000 serial number 80-004052. The only information not provided was the COBRA data.

Pursuant to subpoena paragraph 1a, the court ordered the Department of Health to provide the defendant with a copy of the entire Department of Health database (any and all computerized online breath archives data), also known as COBRA data. The defense attorney and trial judge extensively questioned Ms. Martin about the Department of Health's compliance with subpoena paragraph 1a.

Ms. Martin testified that COBRA is the Department of Health's database. (T.p. 15.) While it contains information related to the defendant's test, it also contains information related to every person tested on the Intoxilyzer 8000. This information is in a read-only format. (T.p. 15.) The database has vast amounts of personal information for every person tested that must be

redacted before the other data can be released. (T.p. 15.) Ms. Martin testified that it was impossible for the Department of Health to produce the records that the court ordered her to produce. (T.p. 115.) The Department of Health does not have the ability to copy or get the COBRA information copied. (T.p. 115.) As program administrator for Alcohol and Drug Testing, she had conducted an extensive investigation on whether the information could be provided. (T.p. 116.) She had spoken with 10-20 people in an effort to figure out how to get the ability to obtain the data in a form that it could be provided to others. (T.p. 117.) She concluded that the Department of Health does not have the manpower or the technology to produce the requested information. (T.p. 125.) In order to obtain the COBRA data the Department of Health would have to employ an additional IT (information technology) person. (T.p. 120.) Hiring this person would cost approximately \$100,000. (T.p. 120.) The Department of Health does not have the ability to fund this position. It was therefore impossible to comply with the court's order.

The trial court found that the Department of Health must provide documents that do not exist. The trial court held that lack of manpower, prohibitive costs, and the lack of technology were insufficient grounds to fail to comply with the court's order and the subpoena duces tecum. (T.d. 51.) As a sanction for the nonparty, Department of Health's, failure to comply with the court's order, the court ruled that the City of Cincinnati could not use the Intoxilyzer 8000 test results in the OVI prosecution.

The First District Court of Appeals upheld the trial court's decision. The appellate court limited its review to whether the COBRA database had to be disclosed in discovery. *Cincinnati v. Ilg*, 1st Dist. No. C-120667, 2013 Ohio 2191, at ¶7. The court held that the entire Department of Health database was relevant to the defendant's defense. *Cincinnati v. Ilg* at ¶14. The court further held that the trial court did not abuse its discretion when it suppressed the breath test

result as a sanction for failure to disclose the entire database in discovery. *Cincinnati v. Ilg* at ¶9. The city appealed to this Court, which accepted jurisdiction for the city's first proposition of law.

ARGUMENT

Proposition of Law:

***State v. Vega* prohibits defendants in OVI cases from making attacks on the 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 reliability of the breath testing instrument**

The courts below erred when they required the production of information to which the defendant has no right under the United States Constitution, the Criminal Rules of Procedure, or *State v. Vega*. First, the COBRA database is not discoverable because it is not within the scope of Criminal Rule 16, nor is it material to the prosecution of an OVI. Second, the COBRA database is only relevant to make a general attack of the reliability of the breath test instrument—a tactic forbidden by *State v. Vega*. Third, because the COBRA database is only relevant for a general attack of the instrument's reliability, a defendant may not use Criminal Rule 17 to subpoena the database.

If the lower court's decision stands, the result will be that hundreds of OVI cases across the state of Ohio will be decided not upon their merits, but by the limitations of the resources of the Ohio Department of Health. It is for these reasons that the lower court should be reversed.

I. The COBRA database is not discoverable

It is settled law that the defendant in a criminal case does not enjoy an absolute right to all evidence which may be in the possession of the state. *United States v. Agurs*, 427 U.S. 97, 108, 96 S.Ct. 2392 (1976); *Columbus v. Forest*, 36 Ohio App.3d 169, 173, 522 N.E.2d 52 (10th Dist. 1988). There is no constitutional right to discovery in a criminal case. *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837 (1977); *State v. Craft*, 149 Ohio App.3d 176, 2002-Ohio-

4481, 776 N.E.2d 546, ¶11 (12th Dist.); *State v. Today's Bookstore*, 86 Ohio App.3d 810, 821, 621 N.E.2d 1283 (2nd Dist. 1993). The Constitution does not place a duty upon the prosecutor to disclose the contents of his entire files. *Id.* Whatever rights the defendant may enjoy as to pretrial discovery flow from state laws and rules which govern criminal procedure and not from the federal constitution. *Forest* at 173.

A. The COBRA database is not within the scope of Criminal Rule 16

Criminal Rule 16 identifies what information is discoverable in a criminal case. *State ex rel Steckman v. Jackson*, 70 Ohio St.3d 420, 428, 639 N.E.2d 83 (1994); *Craft* at ¶12. Crim. R. 16 is a time-tested standard which promotes regularity and efficiency in discovery. *State v. Stutts*, 9th Dist. No. 90 CA 004879, 1991 Ohio App. LEXIS 88 (Jan. 2, 1991); *State v. Gray*, 1st Dist. No. C-940276, 1995 Ohio App. LEXIS 2818, (June 28, 1995). Crim. R. 16 is the preferred mechanism to obtain discovery from the state, and a criminal defendant may only use Crim. R. 16 to obtain discovery. *State v. Athon*, 136 Ohio St.3d 43, 2013-Ohio-1956, 989 N.E.2d 1006; *Steckman* at 428; *Craft* at ¶12.

While a trial court is given great latitude in supervision of pretrial discovery, this latitude must be limited by some boundaries. These boundaries are prescribed in Crim. R. 16. *State v. Sandin*, 11 Ohio App.3d 84, 463 N.E.2d 85 (6th Dist. 1983). A trial court abuses its discretion when it expands an area of discovery addressed by Crim. R. 16. *Craft* at ¶14. Even when courts permit discovery beyond that specifically provided in Crim. R. 16, the defendant does not have an unlimited right of discovery. Those courts require defendants seeking discovery beyond that specifically provided in Crim.R. 16 to present evidence justifying a departure from the standard practice. *Gray* at *19.

Crim. R. 16(B) provides that the prosecuting attorney shall provide the following items within the possession of, or reasonably available to the state that are related to the particular case and which are material to the preparation of a defense; or are intended for use by the prosecuting attorney as evidence at the trial; or were obtained from or belong to the defendant:

1. Any written or recorded statement of the defendant
2. Criminal record of the defendant, any criminal conviction that could be used for impeachment of a witness
3. All laboratory or hospital reports, books, paper documents, photographs tangible objects, buildings or places
4. Results of physical or mental examinations, experiments, or scientific tests
5. Any evidence favorable to the defendant and material to guilt or punishment
6. All reports from peace officers, state patrol, and federal law enforcement agents
7. Any written or recorded statement by a witness in the state's case-in-chief or that it reasonably anticipates calling as a witness in rebuttal.

The COBRA database does not fall within any of the items listed in Crim. R. 16. COBRA (computerized on-line breath archives) is the Department of Health's database. It contains information related to every person tested on the Intoxilyzer 8000. The database contains vast amounts of personal information on every person tested including their name, age, and sex. The COBRA database also contains information specific to other persons' OVI arrest such as the date of offense, the location of the offense, the arresting officer, and the other persons' breath alcohol content.

The defendant received the information within the scope of Crim.R. 16 in discovery. (T.d. 11.) The COBRA database does not concern the defendant's breath test: it was not related to the defendant's particular case; it is not material to the preparation of a defense; it is not intended for use by the prosecuting attorney at trial; and it was not obtained from and does not belong to the defendant. Because the COBRA database is not among the types of documents listed in Crim. R. 16 it is not subject to discovery. The trial court abused its discretion when it

ordered discovery of the COBRA database. The appellate court likewise erred when it affirmed the decision of the trial court.

B. The COBRA database is not material to guilt or punishment

The lower court's finding that the COBRA data is material to guilt or punishment is incorrect. The requirement for the disclosure of evidence favorable to the defendant that is material to either guilt or punishment comes directly from *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194 (1963). The Ohio Supreme Court has held that this phrase in Crim. R. 16 has the same meaning as it does in *Brady* and its progeny. *State v. Keene*, 81 Ohio St.3d 646, 1998-Ohio-342, 693 N.E.2d 246. The principles of *Brady* require the state to disclose evidence favorable to an accused where the evidence is material to either guilt or punishment. *Id.* at 650. The test of materiality is whether there is a reasonable probability, not a mere possibility, that the evidence would alter the outcome of the proceeding. *State v. Today's Bookstore, Inc.*, 86 Ohio App.3d 810, 821, 621 N.E.2d 1283; *State v. Johnston*, 39 Ohio St.3d 48, 62 529 N.E.2d 898 (1988). To be able to alter the outcome of the proceeding, evidence must be admissible. *Id.*; *Today's Bookstore* at 821; *State v. Aldridge*, 120 Ohio App.3d 122, 148, 697 N.E.2d 228 (2nd Dist. 1997). Materiality pertains to the issue of guilt or innocence and not to the defendant's ability to prepare for trial. *United States v. Bencs*, 28 F.3d 555, 560 (6th Cir.1994). In the present case the COBRA data is not admissible in an OVI prosecution pursuant to *State v. Vega*, 12 Ohio St.3d 185, 465 N.E.2d 1303 (1984). It is therefore not material.

Not having the COBRA data did not hinder the defendant from presenting evidence of his own sobriety. *Vega* at 189. He could present his own testimony, testimony of other witnesses, and any other tests performed which might rebut his test results.

Furthermore, the materiality of the COBRA data is further called into question as the Ohio Department of Health is not required to keep this information. Ohio Adm. Code 3701-53-01(A) places some record keeping requirements on the Ohio Department of Health, specifically that the “results of the tests shall be retained for not less than three years.” “Results of the test” does not include the COBRA data, but rather, it is the lower value of the two breath tests. *State v. Muchmore*, 2013-Ohio-5100, ¶¶ 30-31. In fact, in *Muchmore*, the First District declined to suppress the breath test results when the COBRA data had been lost through a computer server error. The court held that because the defendant had not demonstrated how the failure to keep the data compromised the accuracy or evidentiary value of his test or a causal relationship between others’ test results and his own results. *Id.* at ¶ 35. Similarly, the defendant has failed to make any connection between the COBRA data and his test results. Because the defendant can properly prepare for his defense without the COBRA data just as the defendant in *Muchmore*, he has failed to show the database is material.

II. *State v. Vega* instructs that the COBRA database is not relevant

The Ohio General Assembly recognized the expertise of the Department of Health in determining suitable methods for breath alcohol analysis when it legislatively provided for the admission of various alcohol determinative tests in R.C. 4511.19. *State v. Vega*, 12 Ohio St.3d at 186-87. And while a defendant may “attack the reliability of a specific testing procedure and the qualifications of the operator,” he “may not make a general attack upon the reliability and validity of the breath testing instrument.” *Id.* at 189-90. This Court has consistently upheld and explained the distinction between permissibly attacking the reliability of a specific procedure or operator and impermissibly attacking the reliability and validity of the breath testing instrument. *See, e.g., State v. Tanner*, 15 Ohio St.3d 1, 6, 472 N.E.2d 689 (1984) (“The defendant may still

challenge the accuracy of his specific test results, although he may not challenge the general accuracy of the legislatively determined test procedure as a valid scientific means of determining blood alcohol levels.”). Courts are to defer to the Director of Health’s determinations in this area. “Indeed, 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.” *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 32.

Pursuant to *State v. Vega* an accused may not make a general attack on the reliability of the breath testing instrument. *Vega* at 190. The Intoxilyzer 8000 which was used in this case is one of the instruments approved by the Ohio Department of Health. Ohio Adm.Code 3701-53-02(A)(3). The documents requested in the defendant’s subpoena were not specific to the defendant or the defendant’s test. Instead, the database contained information on every person who had taken the Intoxilyzer 8000 breath test. The documents could not, in any way, be used to attack the validity of the defendant’s specific breath test as set forth in *Vega*.

States across the country have adopted a similar legislative scheme regarding the presumptive admissibility of breath test results when the tests are conducted according to the procedures set out by the legislature. *See, e.g., State v. King*, 291 P.3d 160, 2012-NMCA-119 (N.M. 2012), ¶ 10; *State v. Bender*, 382 So.2d 697, 699 (Fla. 1980); *Slagle v. State*, 570 S.W.2d 916, 917 (Tex. 1978). Not only does this approach further judicial economy by eliminating the need for repetitive testimony from experts on behalf of the state in OVI cases, but it also represents sound policy as the department with the most expertise – the Ohio Department of Health – creates a uniform set of procedures across the state. Because a defendant may not make general attacks challenging the validity of the breath testing instrument under the solid rationale

of *Vega* and its progeny, it follows that evidence that only tends to make general attacks is not admissible and not relevant.

The defendant admits that he was seeking the information for an impermissible general attack of the reliability of the Intoxilizer 8000. The defendant's intention to use the subpoenaed documents for a general attack on the reliability of the Intoxilyzer was set forth in his motion for sanctions. He stated that he had retained a forensic toxicologist as an expert to assist in his defense. (T.d. 27.) He alleged that the documents the defendant sought through the subpoena duces tecum were necessary to "assess the reliability of the test, the machine, and the testing procedures in the suppression hearing." (T.d. 27.) It is clear that the defendant's demand for the COBRA data – the entire department of health database – was to challenge the reliability of the Intoxilyzer 8000 itself. But, the defendant may not attack the reliability of the instrument at the suppression hearing or at the trial.

Instead, pursuant to *State v. Vega* a defendant may introduce any competent evidence bearing upon the question of whether he was under the influence of an intoxicating liquor. *Vega* at 189. The Supreme Court noted this could include technical or non-technical evidence of sobriety. In the present case through discovery the defendant was given the documents in the state's possession related to this issue.

Through discovery the defendant was given the documents in the state's possession related to this issue. The defendant was given copies of the traffic ticket, the ALS form, the arrest/intoxication report, the traffic crash report, the Miranda notification of rights form, a DVD of the incident, a CAD printout and a CAD CD, defendant's subject test form/operational checklist, defendant's test report, the testing officer's operator access card information, instrument certification report, Lot/Batch Solution Certificate, Certificate of Analysis (EBS-

Ethanol Breath Standard), Placed in Service Card, Certificate of Factory Calibration, Factory Quality Control and Tracking Form and Factory Calibration (Report of Temperature Test). These documents related to the defendant's particular testing instrument, testing procedure and the testing operator. The documents requested in the defendant's subpoena did not relate to the defendant's particular testing instrument, testing procedure or testing operator. The documents that the trial court ordered disclosed during discovery, including the COBRA database, are not competent evidence of reliability of the specific testing procedure or the qualifications of the testing operator.

The information sought through the subpoena in this case is similar to the requests that courts across the country rejected regarding discovery in OVI cases. *People v. Robinson*, 53 A.D.3d 63, 70 (N.Y. 2008) (holding that the source code for the Intoxilyzer 5000 is not relevant to challenge the accuracy of the test); *State v. Hsu*, 301 P.3d 1267, 129 Haw. 426 (2013) (declining to find a due process violation when COBRA data was not provided in discovery).

In *People v. Robinson*, a defendant requested the source code for the particular instrument used to test him. 53 A.D.3d 63, 70 (NY 2008). Like Ohio, New York's Department of Health created a list of approved breath test instruments, and the Intoxilyzer 5000 was on that list. *Id.* The court recognized that the Intoxilyzer 5000 was a reliable instrument because it was included on the Department of Health's list. *Id.* In denying the defendant's discovery request for the source code, the court explained, "Although a defendant is permitted to challenge the accuracy of the test results generated by a specific machine by showing that the machine was not properly maintained, or that the test was not properly administered, the defendant here was provided with all of the documentation associated with the Intoxilyzer machine that was used to measure and calculate his BAC, including field inspection reports, the certificate of calibration,

and the certificate of analysis for the simulator solution. . . . Thus, the defendant was able to challenge the accuracy of the Intoxilyzer's determination that his BAC was .196%.” *Id.* (internal citations omitted). The defendant in this case, similarly to Robinson, received all the information he needed to challenge the accuracy of his test.

Additionally, many courts have required defendants to make a preliminary showing that the information they seek is relevant to their guilt or innocence. *State v. Underdahl*, 767 N.W.2d 677, 685-86 (2009); *United States v. French*, D.Nev. No. 2:08MJ726GWF, 2010 U.S. Dist. LEXIS 36814, *17-18 (Mar. 22, 2010); *Commonwealth v. House*, 295 S.W.3d 825, 829 (Ky. 2009) (“[Defendant], as noted above, sought CMI's Intoxilyzer code hoping that his expert might discover flaws in it, but he presented no evidence whatsoever suggesting that the code was flawed. His subpoena was nothing but a classic fishing expedition. . . .”); *State v. Bastos*, 985 So.2d 37, 43 (Fla. App. 2008); *State v. Bernini*, 218 P.3d 1064, 1069 (Ariz. App. 2009). The defendant in this case has made no showing of how the COBRA data could be used to challenge the accuracy of his test beyond the fact that it exists. This Court, like courts around the country, should decline to support the defendant’s fishing expedition for irrelevant evidence.

Ultimately, the COBRA data is irrelevant to the defendant’s individual test because even if the COBRA data were provided, the data would not be admissible in any OVI motion to suppress or trial. The subpoenaed documents could only be used to mount a general attack on the Intoxilyzer. The trial and appellate courts erred when they ordered that the COBRA database be disclosed in discovery so that the defendant could attack the reliability of the Intoxilyzer. The decision of the lower courts must be reversed.

III. A defendant cannot use Criminal Rule 17 to compel any party to produce information that is only relevant for generally attacking the reliability of the breath test instrument

Crim. R. 16 and Crim. R. 17 are modeled on Federal Rules of Criminal Procedure 16 and 17. *In re Subpoena Duces Tecum Served Upon Potts*, 100 Ohio St.3d 97,100, 2003-Ohio-5234, 796 N.E.2d 915, at ¶11. Ohio courts often rely on federal courts' interpretation of the federal rules of criminal procedure for guidance in determining how to apply the Ohio Rules of Criminal Procedure. *State v. Cleveland Plain Dealer*, 8th Dist. Nos. 40531,40532,40533, 1979 Ohio App. LEXIS 10995,16 (June 15, 1979). A review of federal court cases establishes that although Rule 16 and Rule 17 have related purposes, they have different functions and applications. *United States v. O'Connor*, 237 F.2d 466 (2d Cir. 1956).

Crim. R. 17 is not a discovery rule and it was not intended for Rule 17(C) to provide an additional means of discovery. *Bowman Dairy, Co. v. United States*, 341 U.S. 214, 220, 71 S.Ct. 675 (1951); *In re Subpoena Duces Tecum served upon Potts*, at 100. Subpoenas issued pursuant to Rule 17 are not discovery devices and may not be used to expand the scope of Rule 16. *United States v. Cherry*, 876 F. Supp. 547, 552 (S.D. N.Y. 1995). The purpose of Rule 17 was not to grant additional discovery, but merely to facilitate and expedite trials so that a trial would not be delayed while counsel examined voluminous documents. *Bowman Dairy, Co.* at 220; *State v. Hutchins*, 138 A.2d 342,345, 51 Del. 100 (1957). To construe Rule 17 as a discovery rule would render Rule 16 meaningless. *State v. Hutchins* at 346. The United States Supreme Court held that it was not intended for Rule 16 to give a limited right of discovery and for Rule 17 to give a right of discovery in the broadest terms. *Bowman Dairy* at 220.

A court may quash a subpoena duces tecum if compliance with the subpoena would be unreasonable or oppressive. Crim. R. 17(C). The Ohio Supreme Court adopted a four-part test to

determine whether a subpoena duces tecum pursuant to Crim.R. 17(C) is unreasonable or oppressive. *In re Subpoena Duces Tecum Served upon Potts*, 100 Ohio St.3d 97, 2003-Ohio-5234, 796 N.E.2d 915, ¶ 12. The moving party must show “(1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general ‘fishing expedition.’” *Id.* In this case, compliance with the subpoena is oppressive.

Furthermore, the defendant failed to make the requisite showing pursuant to *Potts* because (1) the COBRA data is not relevant; (2) the defendant could properly prepare for trial without the COBRA data; and (3) the breadth and vagueness of the subpoena demonstrates that it was intended as a “fishing expedition.”

First, compliance with the subpoena duces tecum is oppressive because the Program Administrator or the Alcohol and Drug Testing division of the Department of Health testified that it was impossible to comply with the subpoena. (T.p. 125,126). Ms. Martin testified that the COBRA database is in a read-only format. (T.p. 15). She further testified that the Department of Health does not have the ability to copy or get the COBRA database copied. (T.p. 115). Ms. Martin testified that she had conducted extensive research in investigating how to copy the database. She concluded that the Department of Health does not have the manpower or technology to produce the subpoenaed information. (T.p. 115,117,125). In order to produce the information subpoenaed the Department of Health would have to employ an additional IT (information technology) person at a cost of \$100,000. (T.p. 120). The Department of Health

would then have to produce a computer program that does not currently exist. It was therefore impossible to comply with the court's order.

Second, the requested information is not relevant. As discussed above, the COBRA database sought by the defendant is not discoverable pursuant to Crim.R. 16. The defendant impermissibly tried to expand the scope of what is discoverable by issuing a subpoena duces tecum. The defendant's three page subpoena requested documents that are not listed in Crim. R.

16. Documents sought by defendant's subpoena but not covered by Crim. R. 16 include:

A copy of all records maintained by the Department of Health, the Department of Public Safety relating to Intoxilyzer 8000, serial number 80-004052 including:

- (1) Any and all computerized online breath archives data (COBRA);
- (2) Any and all log-ins to the Intoxilyzer 80-004052 including log-in times, dates, duration and identity of the person logging-in, including all Ohio employees, all employees of the manufacturer, and any other persons who have logged-in;
- (3) Any and all software changes or modifications;
- (4) A statement explaining why the machine was returned to the factory for re-calibration without any taken out of service notice or repair records;
- (5) Any and all correspondence related to the Intoxilyzer 8000 among and between Department of Health, Department of Public Safety, and the manufacturer;
- (6) Any and all communications between the Department of Health, the City of Cincinnati Police Department, and Cincinnati Assistant Prosecutors.

The trial court abused its discretion when it used Crim. R. 17 as a device to expand discovery to documents not covered by Crim. R. 16. The trial court further abused its discretion when it suppressed the breath test results as a sanction because the city did not produce documents that are not discoverable. The decision of the lower courts must be reversed.

Third, the defendant could properly prepare for trial without the COBRA data. Ohio Adm. Code 3701-53-04 details how the Intoxilyzer should be maintained, including how often an operator should perform instrument checks for radio frequency interference and accuracy of

results by testing a sample with a known percentage of alcohol, among other checks. It also mandates that there be an automatic dry gas control before and after every subject test. *Id.* In order to successfully challenge the admissibility of a breath test, a defendant must first contest that there was not substantial compliance with the applicable Ohio Administrative Code regulations. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 24. The defendant, with the documents provided by the City and the Ohio Department of Health, through discovery had the information he needed in order to attack whether the Department of Health substantially complied with the regulations. He had the ability to cross-examine the operator of the defendant's individual test. He had the records related to maintenance and calibration. The Subject Test Report provided information regarding whether there were automatic dry gas controls before and after his test.

Finally, the defendant is engaging in a fishing expedition – one with which the Ohio Department of Health cannot participate. The breadth of defendant's subpoena and the vagueness of his arguments as to why he needed the information demonstrate this.

Importantly, compliance with this request for a single instrument in Cincinnati is too costly and requires too much manpower for compliance. The defendant requested *all* of the COBRA data for the Intoxilyzer 8000 used to test him. There was no time limitation to the request and the request broadly included information from any person who had been tested on the instrument since it went into service. If requests like this are permissible, one can imagine the enormity of the data that will accumulate over time once the Intoxilyzer 8000 is in use for years. And the implications are statewide. If requests like this are routinely made by defendants, routinely upheld by courts, and routinely impossible to comply with then hundreds of OVI

defendants across the state could avoid ever having a trial on the merits. Fishing expeditions like this set impossible standards that create bad incentives, and they should not be approved.

Moreover, the defendant cannot articulate why he needs the COBRA data beyond making bare assertions that they are necessary. “Since the defendant offered no factual basis to support his contention that the source code in the Intoxilyzer used to test him might have contained software glitches which made its BAC measurements inaccurate, his request to compel disclosure of the source code on that basis constitutes nothing more than a fishing expedition, similar to judicially-thwarted attempts by other defendants to compel disclosure of breathalyzer training manuals, operating manuals, and internal police operating regulations, none of which contained exculpatory evidence unavailable from other sources.” *Robinson*, 53 A.D.3d at 72. The defendant has not alleged that the data from *other people’s tests* call into question the results of his own test. Just as the court in *Robinson* recognized, this type of request, whether it be for source code or COBRA data, is a fishing expedition that does not produce information that is relevant to challenging the results of the defendant’s test.

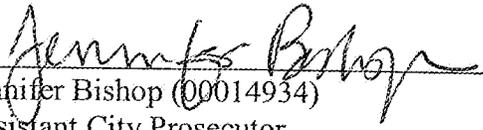
CONCLUSION

The COBRA database is not subject to discovery in OVI prosecutions. The database is not within the scope of Criminal Rule 16, nor is it material to the prosecution of an OVI. The only relevance the COBRA database has is to make a general attack of the reliability of the breath test instrument which is irrelevant pursuant to *State v. Vega*. Moreover, because the COBRA database is only relevant for a general attack of the instrument’s reliability, a defendant may not use Criminal Rule 17 to subpoena the database. It is for these reasons that the city respectfully requests that this Court overturn the decision below.

Respectfully submitted,

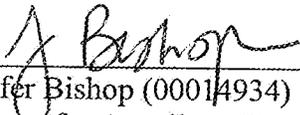
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Acting City Solicitor

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Attorney for Appellant City of Cincinnati

Certificate of Service

I certify that a copy of this Merit Brief of Appellee City of Cincinnati was sent by ordinary U.S. mail to appellee, Steven R. Adams and Marguerite Slagle, The Law Office of Steven R. Adams, 8 W. Ninth Street, Cincinnati, Ohio 45202 on January 24, 2014.


Jennifer Bishop (00014934)
Attorney for Appellant City of Cincinnati

IN THE SUPREME COURT OF OHIO

CITY OF CINCINNATI,
STATE OF OHIO,

Appellant,

v.

DANIEL ILG,

Appellee.

13-1102

On Appeal from the
Hamilton County Court
of Appeals, First
Appellate District

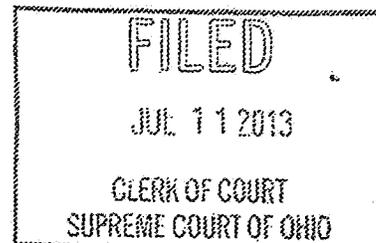
Court of Appeals
Case No. C-120667

NOTICE OF APPEAL OF APPELLANT CITY OF CINCINNATI,
STATE OF OHIO

JOHN P. CURP,
City of Cincinnati Solicitor

CHARLES RUBENSTEIN,
City of Cincinnati Prosecutor

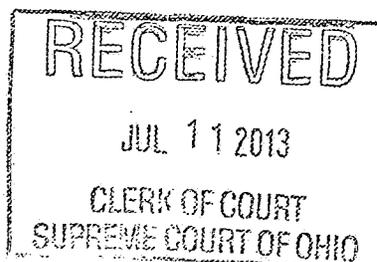
JENNIFER BISHOP (0014934) (COUNSEL OF RECORD)
Assistant Prosecutor
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COUNSEL FOR APPELLANT CITY OF CINCINNATI, STATE OF OHIO

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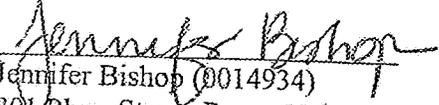
COUNSEL FOR APPELLEE DANIEL ILG



NOTICE OF APPELLANT CITY OF CINCINNATI, STATE OF OHIO

Appellant City of Cincinnati, State of Ohio, hereby gives notice of its appeal to the Supreme Court of Ohio from the judgment of the Hamilton County Court of Appeals, First Appellate District, entered in Court of Appeals Case No. C-120067 on May 31, 2013. This case raises issues and questions of public or great general interest.

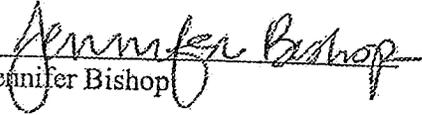
Respectfully submitted,


Jennifer Bishop (0014934)
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COUNSEL FOR APPELLANT,
CITY OF CINCINNATI, STATE OF OHIO

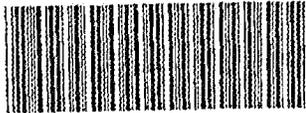
CERTIFICATE OF SERVICE

I hereby certify that a copy of this Notice of Appeal was served by ordinary U.S. Mail to counsel for Appellee, Steven Adams and Marguerite Slagle, 8 W. Ninth Street, Cincinnati, OH 45202 on this ^{10th} day of July 2013.


Jennifer Bishop

COUNSEL FOR APPELLANT,
CITY OF CINCINNATI, STATE OF OHIO

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

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

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

HAMILTON COUNTY MUNICIPAL COURT
CINCINNATI, OHIO



STATE OF OHIO : CASE NO. 11 TRC 53698 A/B/C
Plaintiff : JUDGE MEGAN E. SHANAHAN
vs. :
DANIEL J. ILG : ENTRY
Defendant :

Now comes the Court, and for good cause shown, hereby orders, the Intoxilyzer breath test result of Mr. Ilg to be suppressed. Mr. Ilg has asked the State to produce relevant information about the Intoxilyzer 8000 that was used to test him. Mr. Ilg has diligently tried to obtain these documents by requesting them through discovery and two subpoenas duces tecum. When the Department of Health failed to produce the documents, Mr. Ilg filed a motion to compel.

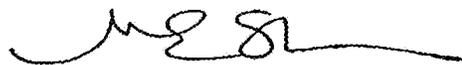
After a hearing with the Department of Health representative, this Court ordered that certain records be produced by September 13, 2012. Although some of the records were forthcoming, the Department of Health failed to produce the relevant COBRA data because gathering the data would be, "too expensive, too time consuming, and require too much manpower."

Mr. Ilg is facing serious criminal charges and has the right to challenge whether this particular machine was operating properly at the time of his breath test. Without the necessary documents, Mr. Ilg will not be afforded that right. Therefore, this Court grants

Mr. Ilg's motion for sanctions and orders that his Intoxilyzer 8000 breath test result be suppressed. The state will not be permitted to introduce the breath test.

Because the breath test will be suppressed, this Court further orders that the Motions to Quash the Subpoenas for correspondence about the Intoxilyzer 8000 filed by the Ohio Department of Public Safety, Assistant Attorney General Barbara Pfeiffer, and Attorney General Mike DeWine are moot.

IT IS SO ORDERED.



Judge Megan E. Shanahan

Date: October 1, 2012

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

CITY OF CINCINNATI,	:	APPEAL NO. C-120667
Plaintiff-Appellant,	:	TRIAL NO. 11TRC-53698
vs.	:	<i>OPINION.</i>
DANIEL ILG,	:	PRESENTED TO THE CLERK
Defendant-Appellee.	:	OF COURTS FOR FILING

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 Jennifer 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.

RULE 16. Discovery and Inspection

(A) **Purpose, Scope and Reciprocity.** 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. All duties and remedies are subject to a standard of due diligence, apply to the defense and the prosecution equally, and are intended to be reciprocal. Once discovery is initiated by demand of the defendant, all parties have a continuing duty to supplement their disclosures.

(B) **Discovery: Right to Copy or Photograph.** Upon receipt of a written demand for discovery by the defendant, and except as provided in division (C), (D), (E), (F), or (J) of this rule, the prosecuting attorney shall provide copies or photographs, or permit counsel for the defendant to copy or photograph, the following items related to the particular case indictment, information, or complaint, and which are material to the preparation of a defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant, within the possession of, or reasonably available to the state, subject to the provisions of this rule:

(1) Any written or recorded statement by the defendant or a co-defendant, including police summaries of such statements, and including grand jury testimony by either the defendant or co-defendant;

(2) Criminal records of the defendant, a co-defendant, and the record of prior convictions that could be admissible under Rule 609 of the Ohio Rules of Evidence of a witness in the state's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal;

(3) Subject to divisions (D)(4) and (E) of this rule, all laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings, or places;

(4) Subject to division (D)(4) and (E) of this rule, results of physical or mental examinations, experiments or scientific tests;

(5) Any evidence favorable to the defendant and material to guilt or punishment;

(6) All reports from peace officers, the Ohio State Highway Patrol, and federal law enforcement agents, provided however, that a document prepared by a person other than the witness testifying will not be considered to be the witness's prior statement for purposes of the cross examination of that particular witness under the Rules of Evidence unless explicitly adopted by the witness;

(7) Any written or recorded statement by a witness in the state's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal.

(C) Prosecuting Attorney's Designation of "Counsel Only" Materials. The prosecuting attorney may designate any material subject to disclosure under this rule as "counsel only" by stamping a prominent notice on each page or thing so designated. "Counsel only" material also includes materials ordered disclosed under division (F) of this rule. Except as otherwise provided, "counsel only" material may not be shown to the defendant or any other person, but may be disclosed only to defense counsel, or the agents or employees of defense counsel, and may not otherwise be reproduced, copied or disseminated in any way. Defense counsel may orally communicate the content of the "counsel only" material to the defendant.

(D) Prosecuting Attorney's Certification of Nondisclosure. If the prosecuting attorney does not disclose materials or portions of materials under this rule, the prosecuting attorney shall certify to the court that the prosecuting attorney is not disclosing material or portions of material otherwise subject to disclosure under this rule for one or more of the following reasons:

- (1) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will compromise the safety of a witness, victim, or third party, or subject them to intimidation or coercion;
- (2) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will subject a witness, victim, or third party to a substantial risk of serious economic harm;
- (3) Disclosure will compromise an ongoing criminal investigation or a confidential law enforcement technique or investigation regardless of whether that investigation involves the pending case or the defendant;
- (4) The statement is of a child victim of sexually oriented offense under the age of thirteen;
- (5) The interests of justice require non-disclosure.

Reasonable, articulable grounds may include, but are not limited to, the nature of the case, the specific course of conduct of one or more parties, threats or prior instances of witness tampering or intimidation, whether or not those instances resulted in criminal charges, whether the defendant is pro se, and any other relevant information.

The prosecuting attorney's certification shall identify the nondisclosed material.

(E) Right of Inspection in Cases of Sexual Assault.

- (1) In cases of sexual assault, defense counsel, or the agents or employees of defense counsel, shall have the right to inspect photographs, results of physical or mental examinations, or hospital reports, related to the indictment, information, or complaint as described in section (B)(3) or (B)(4) of this rule. Hospital records not related to the

information, indictment, or complaint are not subject to inspection or disclosure. Upon motion by defendant, copies of the photographs, results of physical or mental examinations, or hospital reports, shall be provided to defendant's expert under seal and under protection from unauthorized dissemination pursuant to protective order.

(2) In cases involving a victim of a sexually oriented offense less than thirteen years of age, the court, for good cause shown, may order the child's statement be provided, under seal and pursuant to protective order from unauthorized dissemination, to defense counsel and the defendant's expert. Notwithstanding any provision to the contrary, counsel for the defendant shall be permitted to discuss the content of the statement with the expert.

(F) Review of Prosecuting Attorney's Certification of Non-Disclosure. Upon motion of the defendant, the trial court shall review the prosecuting attorney's decision of nondisclosure or designation of "counsel only" material for abuse of discretion during an *in camera* hearing conducted seven days prior to trial, with counsel participating.

(1) Upon a finding of an abuse of discretion by the prosecuting attorney, the trial court may order disclosure, grant a continuance, or other appropriate relief.

(2) Upon a finding by the trial court of an abuse of discretion by the prosecuting attorney, the prosecuting attorney may file an interlocutory appeal pursuant to division (K) of Rule 12 of the Rules of Criminal Procedure.

(3) Unless, for good cause shown, the court orders otherwise, any material disclosed by court order under this section shall be deemed to be "counsel only" material, whether or not it is marked as such.

(4) Notwithstanding the provisions of (E)(2), in the case of a statement by a victim of a sexually oriented offense less than thirteen years of age, where the trial court finds no abuse of discretion, and the prosecuting attorney has not certified for nondisclosure under (D)(1) or (D)(2) of this rule, or has filed for nondisclosure under (D)(1) or (D)(2) of this rule and the court has found an abuse of discretion in doing so, the prosecuting attorney shall permit defense counsel, or the agents or employees of defense counsel to inspect the statement at that time.

(5) If the court finds no abuse of discretion by the prosecuting attorney, a copy of any discoverable material that was not disclosed before trial shall be provided to the defendant no later than commencement of trial. If the court continues the trial after the disclosure, the testimony of any witness shall be perpetuated on motion of the state subject to further cross-examination for good cause shown.

(G) Perpetuation of Testimony. Where a court has ordered disclosure of material certified by the prosecuting attorney under division (F) of this rule, the prosecuting attorney may move the court to perpetuate the testimony of relevant witnesses in a hearing before the court, in

which hearing the defendant shall have the right of cross-examination. A record of the witness's testimony shall be made and shall be admissible at trial as part of the state's case in chief, in the event the witness has become unavailable through no fault of the state.

(H) Discovery: Right to Copy or Photograph. If the defendant serves a written demand for discovery or any other pleading seeking disclosure of evidence on the prosecuting attorney, a reciprocal duty of disclosure by the defendant arises without further demand by the state. The defendant shall provide copies or photographs, or permit the prosecuting attorney to copy or photograph, the following items related to the particular case indictment, information or complaint, and which are material to the innocence or alibi of the defendant, or are intended for use by the defense as evidence at the trial, or were obtained from or belong to the victim, within the possession of, or reasonably available to the defendant, except as provided in division (J) of this rule:

- (1) All laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings or places;
- (2) Results of physical or mental examinations, experiments or scientific tests;
- (3) Any evidence that tends to negate the guilt of the defendant, or is material to punishment, or tends to support an alibi. However, nothing in this rule shall be construed to require the defendant to disclose information that would tend to incriminate that defendant;
- (4) All investigative reports, except as provided in division (J) of this rule;
- (5) Any written or recorded statement by a witness in the defendant's case-in-chief, or any witness that it reasonably anticipates calling as a witness in surrebuttal.

(I) Witness List. Each party shall provide to opposing counsel a written witness list, including names and addresses of any witness it intends to call in its case-in-chief, or reasonably anticipates calling in rebuttal or surrebuttal. The content of the witness list may not be commented upon or disclosed to the jury by opposing counsel, but during argument, the presence or absence of the witness may be commented upon.

(J) Information Not Subject to Disclosure. The following items are not subject to disclosure under this rule:

- (1) Materials subject to the work product protection. Work product includes, but is not limited to, reports, memoranda, or other internal documents made by the prosecuting attorney or defense counsel, or their agents in connection with the investigation or prosecution or defense of the case;
- (2) Transcripts of grand jury testimony, other than transcripts of the testimony of a defendant or co-defendant. Such transcripts are governed by Crim. R. 6;

(3) Materials that by law are subject to privilege, or confidentiality, or are otherwise prohibited from disclosure.

(K) Expert Witnesses; Reports. An expert witness for either side shall prepare a written report summarizing the expert witness's testimony, findings, analysis, conclusions, or opinion, and shall include a summary of the expert's qualifications. The written report and summary of qualifications shall be subject to disclosure under this rule no later than twenty-one days prior to trial, which period may be modified by the court for good cause shown, which does not prejudice any other party. Failure to disclose the written report to opposing counsel shall preclude the expert's testimony at trial.

(L) Regulation of discovery.

(1) The trial court may make orders regulating discovery not inconsistent with this rule. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.

(2) The trial court specifically may regulate the time, place, and manner of a *pro se* defendant's access to any discoverable material not to exceed the scope of this rule.

(3) In cases in which the attorney-client relationship is terminated prior to trial for any reason, any material that is designated "counsel only", or limited in dissemination by protective order, must be returned to the state. Any work product derived from said material shall not be provided to the defendant.

(M) Time of motions. A defendant shall make his demand for discovery within twenty-one days after arraignment or seven days before the date of trial, whichever is earlier, or at such reasonable time later as the court may permit. A party's motion to compel compliance with this rule shall be made no later than seven days prior to trial, or three days after the opposing party provides discovery, whichever is later. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon showing of cause why such motion would be in the interest of justice.

[Effective: July 1, 1973; amended effective July 1, 2010.]

RULE 17. Subpoena

(A) For attendance of witnesses; form; issuance. Every subpoena issued by the clerk shall be under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in and file a copy thereof with the clerk before service.

(B) Defendants unable to pay. The court shall order at any time that a subpoena be issued for service on a named witness upon an ex parte application of a defendant upon a satisfactory showing that the presence of the witness is necessary to an adequate defense and that the defendant is financially unable to pay the witness fees required by subdivision (D). If the court orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be taxed as costs.

(C) For production of documentary evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein; but the court, upon motion made promptly and in any event made at or before the time specified in the subpoena for compliance therewith, may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that the books, papers, documents or other objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time they are offered in evidence, and may, upon their production, permit them or portions thereof to be inspected by the parties or their attorneys.

(D) Service. A subpoena may be served by a sheriff, bailiff, coroner, clerk of court, constable, marshal, or a deputy of any, by a municipal or township policeman, by an attorney at law or by any person designated by order of the court who is not a party and is not less than eighteen years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person or by reading it to him in person or by leaving it at his usual place of residence, and by tendering to him upon demand the fees for one day's attendance and the mileage allowed by law. The person serving the subpoena shall file a return thereof with the clerk. If the witness being subpoenaed resides outside the county in which the court is located, the fees for one day's attendance and mileage shall be tendered without demand. The return may be forwarded through the postal service, or otherwise.

(E) Subpoena for taking depositions; place of examination. When the attendance of a witness before an official authorized to take depositions is required, the subpoena shall be issued by such person and shall command the person to whom it is directed to attend and give testimony at a time and place specified therein. The subpoena may command the person to whom it is directed to produce designated books, papers, documents, or tangible objects which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 16.

A person whose deposition is to be taken may be required to attend an examination in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court.

(F) Subpoena for a hearing or trial. At the request of any party, subpoenas for attendance at a hearing or trial shall be issued by the clerk of the court in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within this state.

(G) Contempt. 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.

[Effective: July 1, 1973.]

OAC Ann. 3701-53-01

This document is current through the Ohio Register for the week of December 23, 2013 through December 27, 2013

Ohio Administrative Code > 3701 > Chapter 3701-53

3701-53-01. Techniques or methods.

- (A) Tests to determine the concentration of alcohol may be applied to blood, breath, urine, or other bodily substances. Results shall be expressed as equivalent to:
- (1) Grams by weight of alcohol per one hundred milliliters of whole blood, blood serum or plasma (grams per cent by weight);
 - (2) Grams by weight of alcohol per two hundred ten liters of deep lung breath;
 - (3) Grams by weight of alcohol per one hundred milliliters of urine (grams per cent by weight).
 - (4) Nanograms by weight of a controlled substances or a metabolite or a controlled substance per milliliter of blood, urine, or other bodily substance.

The results of the tests shall be retained for not less than three years.

- (B) At least one copy of the written procedure manual required by paragraph (D) of rule 3701-53-06 of the Administrative Code for performing blood, urine, or other bodily substance tests shall be on file in the area where the analytical tests are performed.

Statutory Authority

Promulgated Under:
119.03.

Statutory Authority:
3701.143.

Rule amplifies:
15.47.11, 15.47.111, 4511.19, 4511.191, 4511.192

History

History:
Effective: 01/08/2009.
R.C. 119.032 review dates: 10/22/2008 and 01/01/2014.

Prior Effective Dates:
3-1-68; 2-1-76; 3-15-83 (Emer.); 6-13-83; 1-1-87; 7-7-97; 9-30-02.

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OAC Ann. 3701-53-02

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Ohio Administrative Code > 3701 > Chapter 3701-53

3701-53-02. Breath tests.

- (A) The instruments listed in this paragraph are approved as evidential breath testing instruments for use in determining whether a person's breath contains a concentration of alcohol prohibited or defined by sections 4511.19 and/or 1547.11 of the Revised Code, or any other equivalent statute or local ordinance prescribing a defined or prohibited breath-alcohol concentration. The approved evidential breath testing instruments are:
- (1) BAC DataMaster, BAC DataMaster K, BAC DataMaster cdm;
 - (2) Intoxilyzer model 5000 series 66, 68 and 68 EN; and
 - (3) Intoxilyzer model 8000 (OH-5).
- (B) The instruments listed in this paragraph are approved as additional evidential breath testing instruments for use in determining whether a person's breath contains a concentration of alcohol prohibited or defined by section 1547.11 of the Revised Code, or any other equivalent statute or local ordinance prescribing a defined or prohibited breath alcohol concentration. The approved evidential breath testing instrument is;
- (1) Intoxilyzer model 8000 (OH-2).
- (C) Breath samples of deep lung (alveolar) air shall be analyzed for purposes of determining whether a person has a prohibited breath alcohol concentration with instruments approved under paragraphs (A) and (B) of this rule.
- (D) Breath samples using instruments listed under paragraphs (A)(1), (A)(2) and (B) of this rule shall be analyzed according to the operational checklist for the instrument being used and checklist forms recording the results of subject tests shall be retained in accordance with paragraph (A) of rule 3701-53-01 of the Administrative Code. The results shall be recorded on forms prescribed by the director of health.
- (E) Breath samples using the instrument listed under paragraph (A)(3) of this rule shall be analyzed according to the instrument display for the instrument being used. The results of subject tests shall be retained in a manner prescribed by the director of health and shall be retained in accordance with paragraph (A) of rule 3701-53-01 of the Administrative Code.

Statutory Authority

Promulgated Under:
119.03.

Statutory Authority:
3701.143.

Rule Amplifies:
15.47.11, 15.47.111, 4511.19, 4511.191, 4511.192.

History

History:

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OHIO ADMINISTRATIVE CODE

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OAC Ann. 3701-53-04

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Ohio Administrative Code > 3701 > Chapter 3701-53

3701-53-04. Instrument check, controls and certifications.

- (A) A senior operator shall perform an instrument check on approved evidential breath testing instruments listed under paragraphs (A)(1), (A)(2), and (B) of rule 3701-53-02 no less frequently than once every seven days in accordance with the appropriate instrument checklist for the instrument being used. The instrument check may be performed anytime up to one hundred and ninety-two hours after the last instrument check.
- (1) The instrument shall be checked to detect radio frequency interference (RFI) using a hand-held radio normally used by the law enforcement agency performing the instrument check. The RFI detector check is valid when the evidential breath testing instrument detects RFI or aborts a subject test. If the RFI detector check is not valid, the instrument shall not be used until the instrument is serviced.
- (2) An instrument shall be checked using a solution containing ethyl alcohol approved by the director of health. An instrument check result is valid when the result of the instrument check is at or within five one-thousandths (0.005) grams per two hundred ten liters of the target value for that approved solution. An instrument check result which is outside the range specified in this paragraph shall be confirmed by the senior operator using another bottle of approved solution. If this instrument check result is also out of range, the instrument shall not be used until the instrument is serviced or repaired.
- (B) Instruments listed under paragraph (A)(3) of rule 3701-53-02 of the Administrative Code shall automatically perform a dry gas control using a dry gas standard traceable to the national institute of standards and technology (NIST) before and after every subject test. For purposes of an instrument listed under paragraph (A)(3) of rule 3701-53-02 of the Administrative Code, a subject test shall include the collection of two breath samples. A dry gas control is not required between the two breath samples. Dry gas control results are valid when the results are at or within five one-thousandths (0.005) grams per two hundred ten liters of the alcohol concentration on the manufacturer's certificate of analysis for that dry gas standard. A dry gas control result which is outside the range specified in this paragraph will abort the subject test or instrument certification in progress.
- (C) Representatives of the director shall perform an instrument certification on approved evidential breath testing instruments listed under paragraph (A)(3) of rule 3701-53-02 of the Administrative Code using a solution containing ethyl alcohol approved by the director of health according to the instrument display for the instrument being certified. A dry gas control using a dry gas standard traceable to the national institute of standards and technology (NIST) shall also be used when a certification is performed. An instrument shall be certified no less frequently than once every calendar year or when the dry gas standard on the instrument is replaced, whichever comes first. A calendar year means the period of twelve consecutive months, as indicated in section 1.44 of the Revised Code, beginning on the first day of January, and ending on the thirty-first day of December. Instrument certifications are valid when the certification results are at or within five one-thousandths grams per two hundred ten liters of the target value for that approved solution. Instruments with certification results outside the range specified in this paragraph will require the instrument

be removed from service until the instrument is serviced or repaired. Certification results shall be retained in a manner prescribed by the director of health.

- (D) An instrument check or certification shall be made in accordance with paragraphs (A) and (C) of this rule before a new evidential breath testing instrument is placed in service or before the instrument is placed into service following repairs, before the instrument is used to test subjects.
- (E) A bottle of approved solution containing ethyl alcohol shall not be used more than three months after its date of first use, or after the manufacturer's expiration date on the approved solution certificate, whichever comes first. After first use, a bottle of approved solution shall be kept under refrigeration when not being used. The approved solution bottle shall be retained for reference until that bottle of approved solution is discarded.
- (F) Each testing day, the analytical techniques or methods used in rule 3701-53-03 of the Administrative Code shall be checked for proper calibration under the general direction of the designated laboratory director. General direction does not mean that the designated laboratory director must be physically present during the performance of the calibration check.
- (G) Results of instrument checks, controls, certifications, calibration checks and records of service and repairs shall be retained in accordance with paragraph (A) of rule 3701-53-01 of the Administrative Code.

Statutory Authority

Promulgated Under:
119.03.

Statutory Authority:
3701.143.

Rule Amplifies:
3701.143, 4511.19, 4511.191, 4511.192.

History

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