

IN THE SUPREME COURT OF OHIO

CITY OF COLUMBUS, :

Plaintiff-Appellee, :

vs. :

MILES HORTON, :

Defendant-Appellant. :

Case No. 14-2062

On appeal from the Franklin
County Court of Appeals
Tenth District Court of Appeals

**DEFENDANT-APPELLANT MILES HORTON'S
MEMORANDUM IN SUPPORT OF JURISIDCTION**

D. TIMOTHY HUEY (0023598)
1985 West Henderson Road, #204
Upper Arlington, Ohio 43220
(614) 487-8667

COLUMBUS CITY PROSECUTOR
375 S. High Street
Columbus, Ohio 43215

SARAH M. SCHREGARDUS #0080932
Kura, Wilford & Schregardus Co., L.P.A.
492 City Park Ave.
Columbus, Ohio 43215
(614) 628-0100
(614) 628-0103 (Fax)

COUNSEL FOR PLAINTIFF-APPELLEE,
CITY OF COLUMBUS

COUNSEL FOR DEFENDANT-APPELLANT,
MILES HORTON

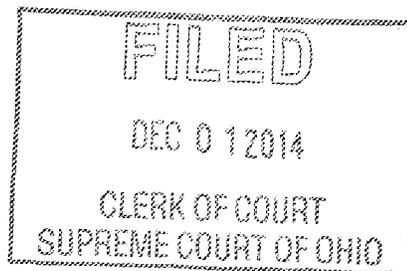


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**EXPLANATION OF WHY THIS IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST**

Over the past three decades, lower courts have developed a mistaken belief that when charged with Operating a Vehicle While Under the Influence, a defendant cannot so much as question much less challenge the results of a breath test at trial. This belief was a result of a misinterpretation of *State v Vega*, 12 Ohio St.3d 185, 465 N.E.2d 1303 (1984) and *State v French*, 72 Ohio St. 3d 446, 650 N.E.2d 887 (1995). The trial court, in this case, adhered to that mistaken view of *Vega* and *French*. Indeed the trial court judge felt that he was required by *Vega* and *French*, as he understood them, to prohibit defense counsel from asking basic questions about how the breath test machine works and ask about certain factors that could affect the results of a test in a given case. Breath temperature was the primary issue counsel wished to discuss. The officer who gave the defendant the breath test admitted that if the temperature of a breath sample was elevated, the results will be erroneously high. The prosecutor's objection to this line of questioning "on *Vega* grounds" was sustained. Thus, the jury was prohibited from learning that the defendant was suffering from the flu that evening and learning how elevated body temperature can affect a breath test result. The accuracy of the breath test was critical in this case as evidenced by a finding of not guilty on the companion charge of driving while impaired.

This Honorable Court's decision in *Cincinnati v. Ilg*, Slip Opinion No. 2014-Ohio-4258, sought to correct the above misinterpretation of *Vega* and *French*. In *Ilg*, the Court reminded the lower courts that a defendant may challenge his individual test result. However, *Ilg* involved pretrial discovery issues and thus only addressed trial issues in the abstract. Since *Ilg* there has been much discussion amongst trial court judges and practitioners as to what *Ilg* really means in so far as questioning and challenges at trial.

This Court's holdings in *Ilg* make clear that the trial court's reading of *Vega* and *French* was wrong. The trial court did not have the advantage of being guided by the *Ilg* decision, but it had been made aware of a similar decision recently rendered by a federal court in Ohio: *Knapke v. Hummer*, S.D. Ohio No. 2:10cv485, 2013 U.S. Dist. LEXIS 21334 (Feb. 15, 2013). In *Knapke* the trial court also applied an incorrect interpretation of *Vega* and prohibited the defendant from challenging the breath test results. However, as just as this Court stated in *Ilg*, the *Knapke* Court found that *Vega* did not prohibit such questioning and challenges, and the prohibition violates an accused's confrontation rights. The trial court in *Knapke* simply misunderstood *Vega*. That misunderstanding is somewhat pervasive. Clearly the prosecutor arguing for the City of Cincinnati in *Ilg* thought it was "the law" and so too did the trial court in this case. Indeed, the trial court was so wed to this mistaken view of *Vega* that it ignored the *Knapke* decision.

This case provides an opportunity for this Court to guide the lower courts and practitioners as to *Ilg*'s application in trial. In addition by weighing in on this issue it would eliminate the necessity of further federal court review, and correction, of Ohio trial courts' improper and unconstitutional interpretation of *Vega*.

It is important that the Court avail itself of this opportunity even if the Court ultimately rules against Mr. Horton. *Cincinnati v Ilg* was an important decision. Lawyers and the media lauded *Ilg* for reaffirming that those who are charged with OVI can challenge their individual breath tests. If lawyers and the public feel that is a false promise (as many have for quite some time) that will ultimately have unintended consequences. In addition to the serious constitutional violations, prohibiting the accused from asking simple question about how the breath machine worked in his case has major public policy implications. As a matter of important public policy it is in the public's best interest for drivers to agree to take breath tests. Indeed, many of this

Honorable Court's decisions are founded upon the assumption that breath testing results will be "reasonably accurate." See, *Westerville v. Cunningham*, 15 Ohio St.2d 121, 239 N.E.2d 40 (1968) (observing that if a person believes that he is innocent of OVI he will submit to a "reasonably accurate" breath test). However, if the public believes that an innocent person can never question the accuracy of his breath test results at trial (a belief engendered by years of misapplication of *Vega*) the default advice of lawyers will continue to be: refuse no matter what.

In the instant case Mr. Horton took a breath test because he did not believe he was guilty of OVI. Indeed, the jury did not believe he was drunk nor remotely impaired and acquitted him of the Impaired Driving charge. The jury that found him guilty of the Prohibited Breath Level charge was not permitted to even consider basic information about the breath testing device and about Mr. Horton (that he was suffering from the flu.) The jury was prohibited from offering this evidence because the trial court, undoubtedly in good faith, was under the mistaken impression that "the law" prohibits any evidence that questions or challenges the breath test at trial. In addition to being an all too common misinterpretation of *Vega*, this deprived Mr. Horton of his constitutional rights to present a defense and confront the witnesses against him.

As stated earlier, whether the Court ultimately rules against Mr. Horton¹ or in his favor, this Court should take this opportunity help practitioners and the lower courts further understand what the *Vega* and *Ilg* decisions mean in terms of the practicalities of trial.

¹ At trial, every State's objection asserted to any defense question related to the breath test evidence was based on *Vega* and *French*. The State and court understood that if the jury convicted Horton, the matter would be appealed. The State offered no other objections at trial to that line of questioning. On appeal, for the first time the State claimed there was a "lack of foundation" for the questions. There was a sufficient foundation (via an uncommonly extensive proffer). Based upon the *Vega* objection, the trial court made it clear that challenges to the breath test results would be forbidden. However, the possibility that this Honorable Court might similarly find a lack of foundation should not dissuade this Court from accepting this case and

Finally, this Court should accept jurisdiction to assist the lower appellate courts appropriately address this issue. In this case, the lower court ignored the constitutional arguments, this Court's recent decision in *Ilg*, and a federal case directly on point out of the same court. This Court should accept jurisdiction to guard Mr. Horton's, and others similarly situated, fundamental constitutional rights.

STATEMENT OF THE CASE AND FACTS

Miles Horton was charged with one count of OVI- impaired in violation of Columbus City Code 2133.01(A)(1)(A), one count of OVI – per se in violation of Columbus City Code 2133.01(A)(1)(D), both first degree misdemeanors, and one count of slow speed in violation of Columbus City Code 2133.04(A), a minor misdemeanor, on January 21, 2013.

On March 7, 2013, Appellant filed a Motion to Suppress and the State responded. On September 6, 2013, a hearing was held on the motion. On September 13, 2013, 2013, the Appellant filed a Supplemental Motion to Suppress and the State responded. On October 1, 2013, the trial court denied Appellant's motion.

On October 7, 2013, the case proceeded to a jury trial on the two OVI counts that lasted 5 days. Throughout the trial at any time defense counsel sought to discuss breath testing the prosecution objected asserting that any discussion of breath testing constituted challenging the general accuracy of the breath testing device and therefore was inadmissible as violating *State v Vega*, 12 Ohio St.3d 185, 465 N.E.2d 1303(1984), *State v French*, 72 Ohio St. 3d 446, 650 N.E.2d 887 (1995), or *State v. Edwards*, 107 Ohio St.3d 169, 2005-Ohio-6180.

reviewing these issues which are as important to the lower courts and practitioners as they are to Mr. Horton.

The trial court by and large granted these objections on *Vega* grounds and additionally holding that once the motion hearing is concluded *French* prohibits any mention or discussion of procedures covered by the Department of Health rules and regulations regarding breath testing on numerous occasions stating this was a matter for the motion hearing.

The jury found Mr. Horton not guilty on the charge of OVI - impaired, but guilty of the OVI – per se charge. The slow speed charge was tried to the bench and the trial court found him guilty. On October 15, 2013, the trial court imposed a \$500 fine, a one-year driver's rights suspension, immobilization of the vehicle for 90 days and 180 days in jail, of which 170 days were suspended for a two-year probation period on the charge of OVI- per se, and imposed a \$25 fine on the slow speed charge. The trial court stayed the sentence pending appeal and maintained the previously set bond.

Mr. Horton appealed to the Tenth District Court of Appeals. On October 1, 2014, this Court issued its decision in *City of Cincinnati v. Ilg*. That day, Mr. Horton filed a Notice of Supplemental Authority and Motion for Supplemental Briefing. On October 16, 2014, the Tenth District Court of Appeals affirmed and denied his motion for supplemental briefing.

On January 21, 2013, at 2:00 A.M., Sergeant Timothy Myers stopped Appellant's car after he observed Appellant stopping to pick up passengers in the Short North, although there were two lanes for south bound traffic and very little traffic Myers initialed a stop asserting that Horton was "impeding the flow of traffic." Sgt. Myers turned on his lights and Mr. Horton immediately pulled into a UDF station. Myers approached the car, noticed a moderate odor of alcohol and that Mr. Horton had glassy eyes. Sgt. Myers asked Mr. Horton for his license, which he produced, and then ask him to say his alphabet but changed the rules having him start at a

particular letter "D" and end at a particular letter "X". Miles did as requested but repeated one letter "U".

Myers ordered Mr. Horton to get out of the car. Miles exited the vehicle without any difficulty. In his entire encounter with Mr. Horton, Sgt. Myers observed no signs of impairment of the ability to drive, walk, or perform skills requiring manual dexterity, such as would be exhibited in presenting his driver's license. Sgt. Myers called for back-up and Officers William Scott and Jill Wooley arrived. These officers then administered standardized field sobriety tests.

Mr. Horton passed both of the objective "divided attention" and "motor-skills" tests. On the "One-Leg Stand" test Horton stood as directed for thirty (30) seconds with his arms down to his side, never raising them for balance; he held his leg straight with his foot six (6) inches above and parallel to the ground; he "one-one-thousand, two-one-thousand" etc. to "thirty-one-thousand." During this entire time Miles did not fall, stagger, hop, or modify his stance in anyway except that, in the officer's subjective opinion he at one point "swayed mildly." On the "Walk and Turn Test" he scored 1 out of eight (8) possible clues. The officers admitted he passed the balance and dexterity tests. A more subjective HGN test was conducted off camera wherein 6 clues were purportedly observed. The officers conceded that this test does not measure impairment but felt it provided probable cause to arrest.

At this point the officers had observed no impaired driving, no impaired motor function, and throughout protracted discussions there was not the slightest indication of impairment other than one (1) clue on each of the motor skills test, which the officer's own training would indicate a lack of impairment by alcohol - however, the officers arrested Mr. Horton.

Mr. Horton was transported to the Columbus Police Headquarters where the officers ask him a number of questions including questions listed on an "Alcohol Influence Report." One of

the questions was “are you ill?” and “If so, in what way?” Mr. Horton advised them that he was suffering from the flu. He was not asked whether he was experiencing a fever nor was his temperature taken. Mr. Horton did not have access to a doctor at this point, was not able to take his own temperature and had no reason to know that temperature was important in breath testing. Officer Scott did know that a person’s temperature can be an important factor.

Officer Scott conducted a test of Mr. Horton’s breath using a breath analyzer. The device provided a reading of .108. When questioned by defense counsel officer Scott admitted “that if a person's temperature is higher than a certain level, it will raise the result of the sample.” (Tr. 393.) That exchange was followed by an objection from the prosecution citing *State v Vega*. The trial court sustained the objection and barred the line of questioning as well as argument to the jury about the issue.

Counsel for defendant asked the trial court to question the officer outside the presence of the jury so that he could show that temperature is important as are other matters at issue in this instant case. During the proffer it was established that Officer Scott is a certified Senior Operator and thus has had at least the minimum training required to perform breath tests and do weekly instrument checks. In such training he would have learned the basic theory and operation of the machine. Thus he would have learned that the temperature of the sample (whether during an instrument check or during a subject test) is important. He also would know from experience that when performing an instrument check if the sample is heated too high, even by a fraction of a degree, the result will be falsely high. He would be able to tell this as there is a thermometer that shows the temperature of a sample during an instrument check. There is no thermometer that shows the temperature of a human’s breath sample but, from his training officer Scott knew that

if the human breath sample was higher than the assumed 98.6 degrees it “would affect the breath results.”

In truth Officer Scott admitted that he had forgotten a lot that he had learned in his Senior Operator training as he really was not called upon to use it. Thus he testified that the “thought” that somehow the breath analyzer would alert him if the sample temperature was too high. But he admitted that he really could not recall what he had learned about that. Officer Scott was wrong, no error message appears if a subject's breath temperature is too high (perhaps accounting for why the officers' forms ask for such information.) This is clear from review of the instrument manual as well as the ODH training material which is published on their website. Officer Scott testified that another Senior Operator, Officer David Griffith, maintains the breath analyzer in question.

Officer Griffith had been subpoenaed as a possible witness. However, the court had ruled, based upon the State's *Vega* objections, that all matters touching upon the operation of the machine as well as the procedures for instrument checks and any knowledge the officers might have obtained by virtue of their training and experience as Senior Operators could not be presented to the jury. Thus the defense did not call Officer Griffith to explain these matters further –and to explain that there was no such error message- because the defense had been precluded from asking the most relevant question about Mr. Horton having the flu. Without that testimony (which had been proffered) any other testimony about temperature would have –indeed- been irrelevant.

On appeal the State for the first time argued that there was a lack of foundation for evidence about temperature, notwithstanding the officer's admission that breath temperature matters. (See also Horton's extensive proffer.) Any lack of foundation was due to the fact –made

clear by the trial court and understood by all- that the trial court believed all such evidence was barred by *Vega*.

ARGUMENT

PROPOSITION OF LAW

A defendant has the constitutional right to present evidence and challenge the accuracy of the specific breath test results at trial.

The officer who conducted the breath analysis of the accused breath testified “that if a person's temperature is higher than a certain level, it will raise the result of the sample.” The Defendant sought to introduce the fact that he was suffering from the flu and reported that to the officer immediately before the breath test. His counsel also sought to ask questions designed to show the jury how the officer came about his knowledge that breath temperature matters. All of that was thoroughly detailed in the off the record proffer. If counsel was permitted to ask such questions before the jury and the officer provided erroneous information which the accused wished to correct, counsel would have further cross-examined him using the operational and training manuals for the breath analyzer or call the supervising Senior Operator to further explain the breath testing and instrument process. However, the prosecution objected to any and all such testimony based upon *Vega*. The trial court sustained the objection on that ground. The accused was therefore forbidden from asking the questions outlined in his proffer, from presenting any additional testimony or information on the issue and from even bringing the matter up before the jury. Similarly the Defendant was barred from discussing Radio Frequency Interference (“RFI”), even though the officer admitted that RFI from a cell phone can affect a breath test and he was uncertain if the Defendant’s cell phone was removed from the area prior to testing.

The trial court unconstitutionally limited Mr. Horton in presenting his defense to the jury and in particular unconstitutionally limited him from effectively cross-examining Officer Wood.

Appellant attempted to inquire into issues relating the officer's training and his knowledge of the breath testing machine and in particular his knowledge how "Instrument Checks" are conducted in order to give jurors a basic understanding as to how the breath machine works to have a basis for understanding how the particular machine used to test Mr. Horton might have provided inaccurate results based on the facts and circumstances surrounding that particular machine.

Specifically, the State was able to question Officer Wood about the procedures he followed when administering the breath test. The defense however was prohibited from inquiring about two factors specific to Miles Horton that Officer agreed would make a difference: (1) the fact that Miles Horton had the flu at the time, and therefore would have a fever and (2) the fact that Miles Horton's cell phone was in the room with the Datamaster at the time of the test, something the officers are trained to make sure does not happen to avoid RFI.

Moreover, Appellee constantly and repeatedly objected anytime Appellant began to get into these matters both as he was outlining them in Opening Statements and as he began to get into them on cross-examination. In making these objections, State's counsel cited a prohibition against "questioning of the general reliability" of the breath test, a proposition originating in *Vega*, and *French* and the trial court sustained the majority of these objections.

The trial court's rulings denied Mr. Horton the right of confrontation, the right to present a complete defense and right to have the jury determine his guilt beyond a reasonable doubt based upon all relevant evidence. U.S. Const. Amends. 5, 6 and 14; Ohio Const. Art. I, § 10. Furthermore, if the trial court correctly applied *Vega* and *French* then those decisions separately or together are unconstitutional.

In *State v French*, 72 Ohio St. 3d 446, 650 N.E.2d 887 (1995) this Court held "a defendant charged under R.C. 4511.19(A)(1) through (4) who does not challenge the

admissibility of the chemical test results through a pretrial motion to suppress waives the requirement on the state to lay a foundation for the admissibility of the test results at trial.” *Id.* at 449. That waiver would mean “[t]he chemical test result is admissible at trial.” *Id.* Thus *French* is completely inapplicable and the trial court was in error in relying upon *French* to bar any evidence at trial. Alternatively, if the trial court was correct that *French* bars the introduction of the evidence and or the cross-examination barred in this case then *French* is unconstitutional.

Appellee’s counsel also repeatedly objected to any questioning of the “general reliability” of the breath test, a proposition originating in *Vega*. If the cross-examination of the individual breath test and surrounding circumstances is barred in this case, then *Vega* is also unconstitutional. Indeed, the U.S. District Court for the Southern District of Ohio recently held that such an application of *Vega* would violate the United States Constitution. *Knapke v. Hummer*, S.D. Ohio No. 2:10cv485, 2013 U.S. Dist. LEXIS 21334 (Feb. 15, 2013).²

² It should be noted that in the U.S. District Court, Knapke argued that the ruling in *Vega* violated an accused’s rights under the Confrontation Clause notwithstanding the Sixth Circuit Court of Appeals’ decision in *Miskel v Karnes*, 397 F.3d 446 (6th Cir. 2005.) In *Miskal*, the Sixth Circuit held that *Vega* was not clearly “contrary to or an unreasonable application of clearly established federal law.” *Id.* Knapke argued that since the *Miskal* decision the established federal case law on the Confrontation Clause had changed a great deal with the United States Supreme Court decisions in *Crawford v. Washington*, 541 U.S. 36 (2004), *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) and, most recently, in *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011).

To avoid potential later argument in the instant case, as the state made in *Knapke*, that the accused did not fully present this issue in this Court, Mr. Horton wishes to make it clear that he is asserting that if *Vega* prohibits the line of questioning he sought to advance as setforth in his proffer, *Vega* is unconstitutional. However, Mr. Horton does not base his challenge merely on the Confrontation Clause.

The Appellant asserts that if *Vega* prohibits the line of questioning he sought to pursue then *Vega* violates his right of confrontation, his right to present a complete defense and his right to have the jury determine his guilt beyond a reasonable doubt based upon all relevant evidence; all in violation of United States Constitution, specifically Amendments 5, 6 and 14 as well as the Ohio Const. Art. I, § 10.

The *Knapke* case originated in the Franklin County Municipal Court wherein Ms. Knapke's counsel was similarly limited in questioning the results of her breath test. In the trial court, Ms. Knapke was shutdown in a manner similar to Mr. Horton, and on virtually the same grounds.

As in the instant case, Ms. Knapke was tested on a DataMaster. Ms. Knapke had a motion hearing on issues related to compliance with the ODH rules and lost. *State v. Knapke*, 10th Dist. No. 08AP-933, 2009-Ohio-2989 at ¶5. As discussed in *Knapke*, on every DataMaster the testing officer can push a button to have the machine run a "diagnostic test" and print it out. *Id.* The Ohio Department of Health Rules do not require this.

At trial Ms. Knapke's counsel wanted to inquire about this not in an effort to exclude or bar the result but rather merely as something that goes to weight of the evidence and which the jury could consider. *Id.* Specifically Knapke:

1. Wanted to ask "why didn't you run a diagnostic test when you tested Ms. Knapke?"
2. Wanted to be able to argue in closing that the Trooper should have done a diagnostic test if he wanted the jury to rely on the breath test results.

As to the latter the trial court held "you can't argue that" pursuant to *Vega* and for that reason the trial court would not allow Knapke's counsel to ask the above question. *Id.*

In a ruling that parallels the ruling in this case, the judge in *Knapke* held:

We've had a motion hearing where you had an opportunity to ask all these questions, and the law of this case now is the following, per entry, that the instrument was properly calibrated and the test was properly administered.

Id.

With these rulings the trial court judge in *Knapke* violated her constitutional rights leading to her being improperly convicted. *Knapke v. Hummer*, S.D. Ohio No. 2:10cv485, 2013 U.S. Dist. LEXIS 21334 (Feb. 15, 2013). Moreover, the fact that Knapke's counsel could not

ask this one question required a reversal of that conviction notwithstanding the fact that in addition to the conviction on the per se charge she was also convicted of the impaired charge. In the instant case Mr. Horton was acquitted of the latter charge. Similar principals were reiterated by this Court in *Cincinnati v. Ilg*, Slip Opinion No. 2014-Ohio-4258, subsequent to the trial court's decision, but prior to the court of appeals' decision.

The trial court's prohibition further violated Mr. Horton's right to present a complete defense. The United States Supreme Court in *Crane v. Kentucky*, 476 U.S. 683, 690 (1986), found that "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984.))

It is noteworthy that in *Trombetta* the accused argued that failure to capture and preserve his breath sample violated his Due Process rights. The United States Supreme Court declined to require preservation of such samples because Trombetta had an "alternative means of impeachment" via cross-examination *at trial* at by showing interference from radio waves or chemicals that appear in the blood of those who are dieting or "faulty calibration, extraneous interference with machine measurements, and operator error." *Id.* at 490. This Court itself held, in *Columbus v. Forest*, 36 Ohio App. 3d 169, 522 N.E. 2d 52 (1987), "Although the guarantee of a fair trial does not mean an error-free or perfect trial ... process does require the state to allow the accused to **present a complete defense.**"

In *Greene v. Lambert*, 288 F.3d 1081 (2001), the court held that "where constitutional rights directly affecting the ascertainment of guilt are implicated, [evidentiary rules] may not be applied mechanistically to defeat the ends of justice." (Quoting *Chambers v. Mississippi*, 410

U.S. 284 (1973)). Similarly in *Crane, supra*, the Court held that if state courts rules or decisions “permit the State to exclude competent, reliable evidence when such evidence is central to the defendant's claim of innocence the guarantee of a meaningful opportunity to present complete defense has not been fulfilled. *Crane, supra*, at 690. See also *Holmes vs. North Carolina*, 547 U.S. 319 (2006) *Washington vs. Texas*, 388 U.S. 14 (1967).

In *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), the United States Supreme Court pronounced a standard for admissibility of evidence that is viewed as the gold standard for determining whether scientific evidences is reliable or “junk science.” However, even evidence admitted under the *Daubert* standard can be challenged at trial based upon weight of the evidence at trial, indeed, the Court discussed the proper role of the jury stating: “respondent seems to us to be overly pessimistic about the capabilities of the jury, and of the adversary system generally...[v]igorous cross examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking ... [scientific] ... evidence.”

The rulings in the trial court below and/or the holdings in *Vega* and *French* deprived Mr. Horton of a meaningful opportunity to present complete defense.

Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

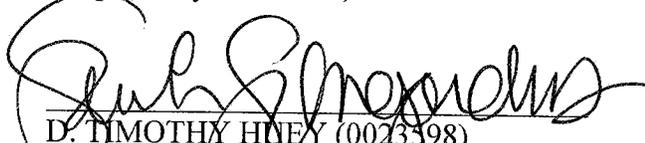
In re Winship, 397 U.S. 358, 364 (1970).

In sum, the trial court’s rulings denied Mr. Horton the right of confrontation, the right to present a complete defense and right to have the jury determine his guilt beyond a reasonable doubt based upon all relevant evidence in violation of the U.S. and Ohio Constitutions and this Court should reverse his conviction.

CONCLUSION

This Court should accept jurisdiction to provide guidance to lower courts and practitioners on the practicalities of challenging breath test at trial and to protect the constitutional rights of Miles Horton.

Respectfully submitted,

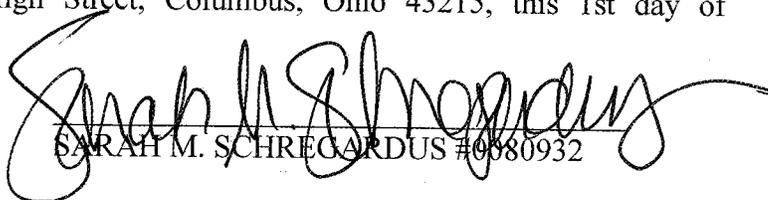


D. TIMOTHY HUEY (0023398)
1985 West Henderson Road, #204
Upper Arlington, Ohio 43220
(614) 487-8667

SARAH M. SCHREGARDUS (0080932)
Kura, Wilford & Schregardus Co., L.P.A.
492 City Park Ave.
Columbus, Ohio 43215
(614) 628-0100
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been sent via U.S. Mail to the Columbus City Prosecutor, 375 S. High Street, Columbus, Ohio 43215, this 1st day of December, 2014.



SARAH M. SCHREGARDUS #0080932

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

City of Columbus,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 13AP-966
v.	:	(M.C. No. 2013 TRC 105492)
	:	
Miles A. Horton,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on October 16, 2014, appellant's assignment of error is overruled, and it is the judgment and order of this court that the judgment of the Franklin County Municipal Court is affirmed. Costs assessed against appellant.

KLATT, CONNOR and LUPER SCHUSTER, JJ.

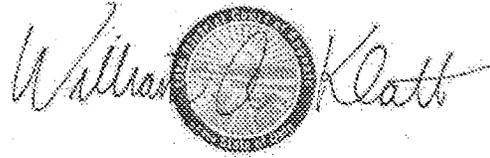
/S/JUDGE

Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Oct 17 2:17 PM-13AP000966

Tenth District Court of Appeals

Date: 10-17-2014
Case Title: CITY OF COLUMBUS -VS- MILES HORTON
Case Number: 13AP000966
Type: JEJ - JUDGMENT ENTRY

So Ordered

The image shows a handwritten signature in cursive that reads "William A. Klatt". To the right of the signature is a circular official seal, which is partially obscured by the signature's ink. The seal appears to be the official seal of the Tenth District Court of Appeals.

/s/ Judge William A. Klatt

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

City of Columbus,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 13AP-966
v.	:	(M.C. No. 2013 TRC 105492)
	:	
Miles A. Horton,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on October 16, 2014

Richard C. Pfeiffer, Jr., City Attorney; *Lara N. Baker*, City Prosecutor, and *Melanie R. Tobias*, for appellee.

D. Timothy Huey; *Kura, Wilford & Schregardus Co., L.P.A.*, and *Sarah M. Schregardus*, for appellant.

APPEAL from the Franklin County Municipal Court

KLATT, J.

{¶ 1} Defendant-appellant, Miles A. Horton, appeals from a judgment of conviction and sentence entered by the Franklin County Municipal Court. For the following reasons, we affirm that judgment.

I. Factual and Procedural Background

{¶ 2} In the early morning hours of January 21, 2013, Sergeant Tim Myers of the Columbus Police Department was driving his police car north on High Street in the Short North area of Columbus, Ohio. Sergeant Myers encountered a car that was stopped in his lane. Sergeant Myers was required to stop. He observed people getting into the car and then the car proceeded northbound on High Street. Because the car impeded Sergeant

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No. 13AP-966

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Myers' ability to drive in the lane, he decided to pull the car over for violating Columbus City Code 2133.04(A) (impeding traffic).¹

{¶ 3} The car, driven by appellant, pulled into a parking lot. Sergeant Myers approached the car and made contact with appellant. Sergeant Myers noticed that appellant's eyes were glassy and bloodshot. He also smelled an odor of alcoholic beverages inside the car. Sergeant Myers suspected that appellant may have been impaired, so he asked him to recite the alphabet, starting at the letter D and ending at the letter X. Appellant attempted to do so but started with the letter E and said the letter U twice. At that point, Sergeant Myers asked appellant to exit the car to determine whether the alcohol smell was from appellant or from other people in the car. Once outside the car, Sergeant Myers could still smell a moderate odor of alcohol coming from appellant. Sergeant Myers asked appellant how many drinks he had that night. Appellant told him that he had two drinks two hours earlier and that he had also taken some anti-anxiety medicine. Sergeant Myers suspected that appellant was driving impaired.

{¶ 4} At some point during the encounter, Columbus Police Officers William Scott and Jill Woolley arrived on the scene to assist Sergeant Myers. Sergeant Myers informed the officers of his observations of appellant before turning appellant over to them. Officers Scott and Woolley performed field sobriety tests ("FST") on appellant. Both officers also thought that appellant's eyes were glassy and bloodshot and that he smelled of alcohol.

{¶ 5} Officer Scott first asked appellant if he would take a portable breath test ("PBT"). He declined but agreed to perform other FSTs. Officer Scott first performed the horizontal gaze nystagmus test ("HGN"). During the test, Officer Scott observed six out of six clues indicating to him that appellant was impaired. Officer Woolley then performed two other FSTs: the walk-and-turn and the one-leg stand. Although appellant passed both of these tests, exhibiting only one clue on each test, Officer Woolley observed him swaying during the one-leg stand. Following these tests, appellant was arrested for OVI and taken to police headquarters. Officer Scott then performed an alcohol breath test on appellant. Appellant's test result was .108, which is over the legal limit.

¹ That charge is not at issue in this appeal.

{¶ 6} As a result of these events, appellant was charged with two counts of operating a vehicle while under the influence in violation of Columbus City Code 2133.01(A)(1)(a) ("OVI impaired") and 2133.01(A)(1)(d) ("OVI per se").² Appellant entered a not guilty plea to the charges and proceeded to a jury trial.

{¶ 7} Before trial, appellant filed a motion to suppress the results of the FSTs he performed during the traffic stop as well as the results of the alcohol breath test he took while at police headquarters. At the motion hearing, appellant argued that the results of the alcohol breath test had to be suppressed because Officer Scott did not properly renew his operator's permit to conduct the test and that the police did not have probable cause to arrest him. The trial court overruled appellant's motion.

{¶ 8} At trial, the officers testified to the above version of events. The video of the traffic stop, which included the walk-and-turn and the one-leg stand FSTs but not the HGN test, was also played to the jury. The jury ultimately acquitted appellant of the OVI impaired charge but found him guilty of the OVI per se charge. The trial court sentenced him accordingly.

II. The Appeal

{¶ 9} Appellant appeals his conviction and sentence and assigns the following errors:

[1.] The trial court violated Appellant's right of confrontation, right to present a complete defense and right to have the jury determine his guilt beyond a reasonable doubt based upon all relevant evidence by prohibiting cross-examination of the State's witness regarding how the breath machine works and regarding the specific breath testing device used to test his breath and regarding matters that could have caused his specific test result to be less than one hundred percent accurate.

[2.] The trial court erred when it found the Officers had probable cause to arrest Miles Horton for OVI.

² OVI charges are commonly referred to as either impaired or per se. *See State v. Brand*, 157 Ohio App.3d 451, ¶ 11-12 (1st Dist.2004), citing *Newark v. Lucas*, 40 Ohio St.3d 100 (1988). The impaired charge generally prohibits impaired driving, while a per se charge prohibits operation of a vehicle with certain concentrations of alcohol and drugs in a person's system. *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, ¶ 18.

[3.] The trial court erred when it found Officer Scott possessed a valid senior operator's permit as required to administer the test to Appellant.

{¶ 10} For ease of analysis, we first address the second and third assignments of error together because they both address the trial court's denial of appellant's motion to suppress.

A. Appellant's Second and Third Assignments of Error—The Motion to Suppress

{¶ 11} " 'Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard.' " (Citations omitted.) *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, ¶ 100, quoting *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8.

1. Did the Police have Probable Cause to Arrest Appellant for OVI?

{¶ 12} Appellant first argues that the trial court erred by concluding that the officers had probable cause to arrest him for OVI. We disagree.

{¶ 13} The standard for determining whether there was probable cause to arrest for OVI is whether, at the moment of arrest, the police had sufficient information, derived from a reasonably trustworthy source of facts and circumstances, sufficient to cause a prudent person to believe that the suspect was driving under the influence. *State v. Miller*, 10th Dist. No. 13AP-1022, 2014-Ohio-3605, ¶ 24, citing *State v. Homan*, 89 Ohio St.3d 421, 427 (2000). That determination is based on the totality of the facts and circumstances surrounding the arrest. *Id.* Whether or not there was probable cause is a legal issue that we review de novo. *State v. Bish*, 191 Ohio App.3d 661, 2010-Ohio-6604, ¶ 47 (7th Dist.)

{¶ 14} Appellant first argues that the officers lacked probable cause to arrest him because he passed two of the three FSTs and the one he failed was the only one not

captured on video that morning. He also argues that his minor traffic offense—impeding traffic—was not indicative of impaired driving. These arguments are unavailing, as they fail to consider the totality of the circumstances. Even though appellant passed two of the three FSTs and committed a minor traffic offense, the totality of the circumstances provided the officers with probable cause to arrest appellant.

{¶ 15} Specifically, each of the officers testified that appellant's eyes appeared glassy and bloodshot, that he slurred his speech, and that they smelled an alcohol odor coming from appellant. Appellant also admitted to the officers that he had two drinks before he was stopped. Lastly, Officer Scott testified that appellant failed the HGN test and both Officers Scott and Woolley testified that appellant was swaying as he performed the one-leg stand. Given the totality of these circumstances, the police had probable cause to arrest appellant for OVI. *State v. Morgan*, 10th Dist. No. 05AP-552, 2006-Ohio-5297, ¶ 41 (finding probable cause under essentially identical facts).

{¶ 16} Appellant also argues that the trial court erred by considering his refusal to take the PBT in the probable cause determination. First, it is not clear from the trial court's written decision that it considered appellant's refusal to take the PBT in its probable cause analysis. Second, while there is a split of authority in this state concerning the admissibility of PBT results in a probable cause determination, see *State v. Henry*, 191 Ohio App.3d 151, 2010-Ohio-5171, ¶ 33 (6th Dist.); *Columbus v. Dials*, 10th Dist. No. 04AP-1099, 2006-Ohio-227, ¶ 17, we have found no court that has addressed whether a refusal to take a PBT can be considered in a trial court's probable cause determination. However, even assuming it would be error, the totality of the circumstances addressed above provided probable cause to arrest even without considering appellant's refusal to take the PBT. Therefore, any such error would be harmless. *Morgan* at ¶ 41 (finding probable cause without consideration of PBT results); *Henry* at ¶ 36; *Columbus v. Shepherd*, 10th Dist. No. 10AP-483, 2011-Ohio-3302, ¶ 35.

2. Did Officer Scott Have a Valid Permit to Conduct Appellant's Breath Alcohol Test?

{¶ 17} Appellant also argues that the trial court erred by concluding that the officer who conducted his breath alcohol test had a valid operator's permit to conduct the test. We disagree.

{¶ 18} When a defendant challenges the results of a breath alcohol test by way of a motion to suppress, the state has the burden to show that the test was administered in substantial compliance with the Ohio Department of Health ("ODH") regulations. *State v. Burnside* at ¶ 24; *State v. Plummer*, 22 Ohio St.3d 292, 294 (1986). This substantial compliance standard excuses errors that are clearly de minimis, errors which the Supreme Court of Ohio has characterized as " 'minor procedural deviations.' " *Burnside* at ¶ 34, quoting *Homan* at 426.

{¶ 19} The nature of the city's burden to establish substantial compliance is determined by the degree of specificity with which the defendant challenges the legality of the test. *Columbus v. Morrison*, 10th Dist. No. 08AP-311, 2008-Ohio-5257, ¶ 9, citing *State v. Johnson*, 137 Ohio App.3d 847, 851 (12th Dist.2000). For example, when a defendant's motion to suppress raises only general claims, the burden imposed on the city is general and slight. *Id.*, citing *State v. Embry*, 12th Dist. No. CA2003-11-110, 2004-Ohio-6324, ¶ 29; *State v. Mai*, 2d Dist. No. 2005-CA-115, 2006-Ohio-1430, ¶ 19. The city is only required to present general testimony that there was substantial compliance with the requirements of the regulations; specific evidence is not required unless the defendant raises a specific issue in the motion to suppress. *Morrison*; *State v. Bissaillon*, 2d Dist. No. 06-CA-130, 2007-Ohio-2349, ¶ 12; *State v. Crotty*, 12th Dist. No. CA2004-05-051, 2005-Ohio-2923, ¶ 19.

{¶ 20} In the present case, appellant generally claimed in his motion to suppress that the operator who conducted his breath test "was not licensed to operate the instrument analyzing the Defendant's alcohol level * * * [and] did not have a valid permit that was issued by the director pursuant to [R.C.] 3701.143 [and] OAC 3701-53-09." He did not raise any specific factual issues of noncompliance in the motion. Thus, the city's burden to establish substantial compliance with the regulations was slight, and only required the city to generally prove substantial compliance.

{¶ 21} Officer Scott testified that he first received an operator's permit to conduct alcohol breath tests on a BAC Datamaster instrument in either 2009 or 2010. He further testified that he renewed his operator's permit effective March 31, 2012, approximately ten months prior to the test he performed on appellant on January 21, 2013. At that time,

an individual who held an operator's permit could renew that permit if they satisfied former Ohio Adm.Code 3701-53-09(F),³ which provided, in relevant part:

To qualify for renewal of a permit under paragraph (A) or (B) of this rule:

(1) A permit holder shall present evidence satisfactory to the director that he or she continues to meet the qualifications established by the applicable provisions of rule 3701-53-07 of the Administrative Code for issuance of the type of permit sought.

(3) If the individual seeking a renewal permit currently holds an operator or senior operator permit, the permit holder shall have completed satisfactorily an in-service course for the applicable type of evidential breath testing instrument which meets the requirements of paragraph (B) of this rule, which includes review of self-study materials furnished by the director.

{¶ 22} Appellant alleges that there was no proof that Officer Scott completed an in-service course for the 2012 renewal of his permit. In light of the general and slight burden imposed on the city, however, it was not required to present such specific testimony. Instead, the city met its burden to show substantial compliance by admitting into evidence Officer Scott's valid permit and his testimony that he renewed his permit. *State v. Cromer*, 10th Dist. No. 12AP-943, 2013-Ohio-4054, ¶ 24; *State v. Drake*, 5th Dist. No. 13CA15, 2014-Ohio-509, ¶ 14-15.

3. Conclusion

{¶ 23} For these reasons, the trial court did not err by denying appellant's motion to suppress. Accordingly, we overrule his second and third assignments of error.

B. Appellant's First Assignment of Error—Cross-Examination

{¶ 24} In this assignment of error, appellant argues that the trial court impermissibly limited his right to cross-examine Officer Scott regarding the reliability of the chemical breath test he administered. Specifically, the trial court prohibited questions relating to: (1) whether appellant had the flu on the night of his arrest and whether the flu

³ The current version of that administrative code, effective after Officer Scott's 2012 renewal, eliminated the in-service course as a requirement for renewal.

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would have caused a fever; and (2) whether appellant's cell phone was in the room during the breath test. Appellant contends that both of these facts could have impacted his particular test results.

1. Attacks on Breath Test Results

{¶ 25} Ohio has legislatively resolved the question of the general reliability of tests for blood alcohol content. *State v. Vega*, 12 Ohio St.3d 185, 188 (1984), citing R.C. 4511.19; *State v. Luke*, 10th Dist. No. 05AP-371, 2006-Ohio-2306, ¶ 22. Given that legislative determination, the Supreme Court of Ohio in *Vega* concluded that "an accused may not make a general attack upon the reliability and validity of the breath testing instrument" but "may * * * attack the reliability of the specific testing procedure and the qualifications of the operator." *Id.* at 189-90; *Luke* at ¶ 25-26.

2. Officer Scott's Preferred Testimony

{¶ 26} Appellant's counsel questioned Officer Scott during cross-examination about the effect that a sample's temperature would have on a test result. The officer stated that if a person's temperature is higher than a certain level, it will raise the result of the sample. (Tr. 393.) The officer did not know the precise impact an elevated temperature would have on the test result. Officer Scott also testified the machine would provide an error message if the body temperature was too high. (Tr. 393.) At this point in his testimony, the state objected, arguing that the questions were general attacks on the reliability of the testing machine that are prohibited under *Vega*. Appellant's counsel ceased the line of questioning but asked the trial court for permission to make a proffer of the questions he sought to ask. The trial court granted his request.

{¶ 27} During the proffer, appellant's counsel again asked Officer Scott about the effect a person's temperature would have on a sample result. Again, Officer Scott replied that the machine would give an error message if the sample temperature exceeded the acceptable range of value. (Tr. 434.) Officer Scott acknowledged that appellant reported to the police that night that he had the flu and that someone with a flu could have an elevated temperature. However, Officer Scott testified that he did not know how an elevated temperature would affect appellant's individual breath test that evening. (Tr. 439.)

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{¶ 28} Appellant's counsel also asked Officer Scott to identify the location of appellant's cell phone during the breath test that morning. Based upon Officer Scott's testimony, it is unclear whether appellant's cell phone was in the room when Officer Scott administered the breath test. (Tr. 443-44.) The trial court ultimately refused to allow appellant's proffered questions.

3. The Trial Court did not Abuse its Discretion by Limiting Cross-Examination of Officer Scott

{¶ 29} A trial court has the discretion to limit the scope of cross-examination taking into account the particular facts of a case. *State v. Treesh*, 90 Ohio St.3d 460, 480-81 (2001); *State v. Hodge*, 10th Dist. No. 04AP-294, 2004-Ohio-6980, ¶ 10. Therefore, an appellate court will not disturb a trial court's limits on the scope of cross-examination unless the trial court has abused its discretion. *State v. Casner*, 10th Dist. No. 10AP-489, 2011-Ohio-1190, ¶ 11; *Hodge* at ¶ 10. Although an abuse of discretion is typically defined as an unreasonable, arbitrary, or unconscionable decision, *State v. Beavers*, 10th Dist. No. 11AP-1064, 2012-Ohio-3654, ¶ 8, we note that no court has the authority, within its discretion, to commit an error of law. *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶ 70.

{¶ 30} Appellant contends that the trial court erred by prohibiting his questions because they concerned the specific testing procedure Officer Scott used for his breath test. Regardless of whether appellant's proffered questions address the general reliability of the machine used that morning or the specific testing procedure utilized, the trial court did not abuse its discretion by refusing to allow the questions because appellant did not lay the proper foundation for such questions. *State v. Sabo*, 10th Dist. No. 04AP-1114, 2006-Ohio-1521, ¶ 22 (noting that even if challenge was to specific testing procedures, trial court properly excluded testimony based on lack of evidentiary support).

{¶ 31} Specifically, Officer Scott testified during the proffer that he did not know how much an elevated temperature would affect appellant's test results. *Casner* at ¶ 14-15 (no abuse of discretion in limiting cross-examination where witness lacked knowledge to testify about issue). Nor was there any evidence that appellant had an elevated temperature when he took the alcohol breath test. Given the lack of a sufficient

evidentiary basis to challenge appellant's individual breath test, the trial court did not abuse its discretion when it prohibited appellant's proffered questions.

{¶ 32} To the extent that appellant sought to question the officer about the location of appellant's cell phone (which could arguably cause radio frequency interference that can interfere with the accuracy of breath testing equipment),⁴ his argument is premised on the allegation that the cell phone was in the room when the test was conducted. A review of Officer Scott's testimony, however, reveals that the location of the cell phone during the test is unclear. We note, however, that Officer Scott testified he is "very clear to make sure there are no radio signals there." (Tr. 444.) It is appellant's burden to come forward with evidence indicating that prohibited radio interference occurred at the relevant time. *Greenville v. Holzapfel*, 85 Ohio App.3d 383, 389 (2d Dist.1993). Appellant did not present any specific evidence that the cell phone was in the room where the test was conducted.

{¶ 33} For these reasons, the trial court did not abuse its discretion by limiting appellant's cross-examination of Officer Scott because appellant failed to lay the proper foundation for the questions he claims were erroneously prohibited. Accordingly, we overrule appellant's first assignment of error.⁵

III. Conclusion

{¶ 34} Having overruled appellant's three assignments of error, we affirm the judgment of the Franklin County Municipal Court.

Judgment affirmed.

CONNOR and LUPER SCHUSTER, JJ., concur.

⁴ *Greenville v. Holzapfel*, 85 Ohio App.3d 383, 386 (2d Dist.1993).

⁵ In light of our disposition of appellant's first assignment of error, we deny his motion for supplemental briefing and argument in light of the Supreme Court of Ohio's decision in *Cincinnati v. Ilg*, ___ Ohio St.3d ___, 2014-Ohio-4258.