

IN THE SUPREME COURT OF OHIO

CITY OF COLUMBUS	:	Case No. 14-2062
	:	
Plaintiff-Appellee,	:	On Appeal from the
	:	Franklin County Court
vs.	:	of Appeals, Tenth
	:	Appellate District
MILES HORTON,	:	
	:	
Defendant-Appellant.	:	

PLAINTIFF-APPELLEE'S MEMORANDUM IN OPPOSITION OF JURISDICTION

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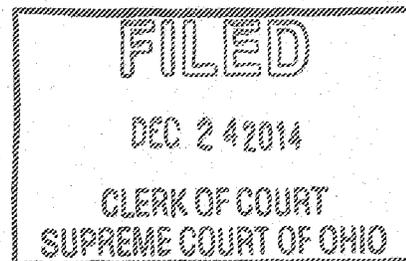


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**STATEMENT OF WHY THIS CASE DOES NOT INVOLVE A SUBSTANTIAL
CONSTITUTIONAL QUESTION AND IS NOT OF PUBLIC OR GREAT GENERAL
INTEREST**

The sole issue presented is whether the trial court abused its discretion by not allowing questions for which Appellant failed to lay a proper foundation. This Court will not resolve any unique or unsettled area of the law by considering this argument because it hinges upon factual determinations that will have minimal impact on future cases.

On appeal, Appellant argued that the trial court erred by prohibiting questions relating to whether Appellant had the flu on the night of his arrest and whether the flu would have caused a fever. Appellant argued that a fever could have impacted the accuracy of his specific test results. However, Appellant did not proffer any evidentiary support for his argument. Appellant failed to proffer: (1) he had a fever or an elevated body temperature when he took a breath test, and (2) the specific body temperature that could affect the accuracy of a breath test. In fact, the officer testified during Appellant's proffer that he did not know how an elevated temperature would have affected Appellant's breath alcohol test results. *Columbus v. Horton*, 10th Dist. No. 13AP-966, 2014-Ohio-4584, ¶31; Tr. 439. Because no proffer was made that Appellant had an elevated temperature when he took a breath test and that such elevated temperature was high enough to have yielded an inaccurate breath test result, the Tenth District properly found that the trial court did not abuse its discretion by limiting cross-examination of Officer Scott.

Appellant also argued on appeal that the trial court erred by prohibiting questions on whether Appellant's cell phone was in the breath testing room which could have compromised his breath test results due to radio frequency interference. Again, Appellant failed to lay a proper foundation. Appellant did not proffer the exact location of the cell phone in relation to the breath testing machine. *Id.* at ¶32. The Tenth District noted that the location of the cell phone during

the test was unclear, and Appellant did not present any specific evidence that the cell phone was in the room where the test was conducted. *Id.* Moreover, the officer testified that he is “very clear to make sure there are no radio signals there.” *Id.*; Tr. 444. Because Appellant failed to lay a proper foundation or evidentiary support for the questions he claims were erroneously prohibited, this Court should not accept jurisdiction.

Appellant attempts to evade his failure to lay a proper foundation by arguing that this case involves an incorrect interpretation of *State v. Vega*, 12 Ohio St.3d 185, 190, 465 N.E.2d 1303 (1984). To be clear, this case does not involve *Vega* being misinterpreted to preclude a defendant from attacking his specific breath test results. Rather, this case involves a defendant’s failure to lay the evidentiary foundation necessary to properly attack his specific test results. Evidence that an elevated body temperature could have affected the accuracy of Appellant’s breath test results is irrelevant if there is no proffer that Appellant had an elevated body temperature. Evidence that radio frequency interference from a cell phone could have affected the accuracy of Appellant’s breath test results is irrelevant if there is no evidence as to the location of the cell phone in relation to the breath testing machine.

In support of his argument that he was improperly precluded from attacking his specific test results, Appellant relies on *Knapke v. Hummer*, S.D. Ohio No. 2:10-CV-485, 2012 U.S. Dist. LEXIS 70940 (May 21, 2012). However, *Knapke* is inapposite because it did not involve a defendant’s failure to lay a proper foundation when attacking his specific breath test results. Rather, it involved the trial court prohibiting defense counsel from inquiring on cross examination about the validity of the specific test results or the procedure followed by the officer in administering the test, including whether the officer had run a diagnostic test on the machine prior to testing. *Id.* at *25. Unlike the trial court in *Knapke*, the trial court, in this case,

permitted questioning on the validity of Appellant's specific test results, including whether Officer Scott ran a diagnostic test on the machine prior to Appellant's breath test.

Because this case presents no questions of such constitutional substance or of such great public interest as would warrant further review by this Court, the State respectfully submits that jurisdiction should be declined.

STATEMENT OF THE FACTS

Appellant was arrested for OVI. Officer Scott administered a breath test which resulted in a breath alcohol content of .108 grams of alcohol per 210 liters of breath. Tr. 304. The jury heard Officer Scott testify that Appellant told him that he had the flu. Tr. 430. The jury also heard the following testimony from Officer Scott regarding the BAC DataMaster breath testing machine:

[Defense counsel]: Do you know – Are you familiar – Do you know – You know how to turn it on. You know how to punch in information, correct?

[Officer Scott]: Yes.

[Defense counsel]: Now, you know that – that the temperature of the sample is important; is that correct?

[Officer Scott]: Yes.

[Defense counsel]: Okay. And if the temperature is higher than a certain level, it will raise the result of the sample; is that correct?

[Officer Scott]: Yes.

[Defense counsel]: You don't know how much it will raise it?

[Officer Scott]: No, the machine detects it, and it will give you an error if it's too high.

[Defense counsel]: That's if you're using the simulator jar, using that –

Tr. 393-394.

At this point in Officer Scott's testimony, the State objected, arguing that the questions were general attacks on the reliability of the testing machine that are prohibited under *Vega*. Tr. 395-396. Defense counsel ceased that line of questioning and stated, "I will proffer all the information, all the questions I would ask." Tr. 396. The trial court instructed the jury that defense counsel had withdrawn the question that was beginning to be asked and to disregard that question. Tr. 397.

During defense counsel's proffer, the following testimony was elicited from Officer Scott:

[Defense counsel]: So if you have a temperature – If an individual has a temperature of 100, 101, that's not uncommon.

[Officer Scott]: Yes.

[Defense counsel]: And that's not cause for alarm.

[Officer Scott]: Correct.

[Defense counsel]: And if someone has a flu or a cold, they're likely to have an elevated temperature.

[Officer Scott]: Yes.

[Defense counsel]: Okay. And Miles told you, with that form you read out, that he had a flu that evening, correct?

[Officer Scott]: Correct.

[Defense counsel]: And that would raise his temperature.

[Officer Scott]: It could.

[Defense counsel]: And *you don't know* how that would affect the individual breath test of Miles' breath that evening.

[Officer Scott]: The individual test, correct.

(Emphasis added.) Tr. 439.

The Tenth District found that the trial court did not abuse its discretion by refusing to allow the questions in the above proffer because Appellant failed to lay a proper foundation. *Horton* at ¶30. Appellant did not proffer that he had a fever or elevated body temperature when he took the breath alcohol test. *Id.* at ¶31. He proffered that he told the officer he had the flu, which *could* raise his body temperature, but he made no further proffer that he actually *had* an elevated body temperature at the time of his breath test.

The jury heard the officer testify that if the temperature is higher than a certain level, it will raise the result of the sample. *Id.* at 393. But the officer was not asked at what temperature this would occur. Also, Appellant failed to proffer how much it would raise the result of the sample. Moreover, Appellant did not clarify with Officer Scott on whether he was referring to the temperature of a breath sample or another type of sample.

Appellant did not proffer the range of temperatures that could affect the accuracy of a breath test. Rather, Appellant proffered that Officer Scott would testify that he did not know how an elevated body temperature would affect Appellant's breath test result. *Id.* at 439. Appellant asserts, "[t]here 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.'" Memorandum in support of jurisdiction, p.8. The State is unable to find in the record where Officer Scott allegedly testified that a breath sample higher than 98.6 degrees would affect the accuracy of an individual's breath test results. In fact, there was no proffer or testimony as to what body temperature affects the accuracy of a breath test result.

Appellant had an opportunity to proffer that he had an elevated body temperature at the time of his breath test. He also had an opportunity to proffer the range of body temperatures that

could affect the accuracy of a breath test result. He failed to do either. Because Appellant failed to lay a proper foundation, the trial court did not abuse its discretion by limiting questioning of Officer Scott.

ARGUMENT

Reply to Appellant's Proposition of Law

The trial court did not abuse its discretion by limiting cross-examination of Officer Scott because Appellant failed to lay a proper foundation or proffer evidentiary support for such questions.

Appellant's argument that the trial court's rulings denied him "the 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" should be rejected. Evid.R. 611(B) provides that "[c]ross-examination shall be permitted on all relevant matters and matters affecting credibility." However, a trial court has the sound discretion to limit the scope of cross-examination, viewed in relation to the particular facts of the case. *State v. Treesh*, 90 Ohio St.3d 460, 480, 2001-Ohio-4, 739 N.E.2d 749. "Such exercise of discretion will not be disturbed in the absence of a clear showing of an abuse of discretion." *Id.*

In this case, the trial court did not abuse its discretion by limiting cross-examination of Officer Scott. Defense counsel failed to proffer any evidence that would make his questioning relevant to Appellant's breath test. Appellant claims that he had the flu which could cause an elevated body temperature which, in turn, could have affected the accuracy of his breath test results. However, Appellant did not present evidence that he had an elevated temperature when he took the breath test. The jury heard Officer Scott testify that Appellant told him that he had the flu. Tr. 430. But Appellant failed to proffer that the flu actually caused him to have an elevated body temperature. Without evidence that the flu resulted in Appellant having an

elevated temperature at the time of his breath test, any questions regarding the effect of an elevated temperature on a breath sample is irrelevant.

The jury also heard Officer Scott agree that “if the temperature is higher than a certain level, it will raise the result of the sample.” Tr. 393. Appellant argues that this question refers to a person’s breath sample, but he did not clarify this issue with Officer Scott. Moreover, Appellant failed to offer any evidence regarding how high a person’s body temperature must be before it affects the accuracy of a breath test. Appellant failed to ask Officer Scott this question and did not state that he would present any evidence on this issue. Rather, Officer Scott testified in Appellant’s proffer that he did not know how an elevated body temperature would have affected Appellant’s breath test result. Tr. 439. Without a proffer that Appellant had an elevated temperature and that such elevated temperature was high enough to affect the accuracy of Appellant’s breath test, the trial court did not abuse its discretion by limiting cross-examination of Officer Scott.

Appellant also argues that he was impermissibly barred from discussing the effects of radio frequency interference from his cell phone on the breath testing machine. Similar to Appellant failing to present evidence of his body temperature at the time of his breath test, Appellant failed to present evidence that the cell phone was in the room where the breath test was conducted. *Horton* at ¶32. Accordingly, Appellant failed to lay the proper foundation for the questions he claims were erroneously prohibited.

In support of his argument that the trial court unconstitutionally limited him from effectively cross-examining Officer Scott, Appellant relies on *Knapke*, a federal court decision. However, *Knapke* is inapposite because it did not involve the defendant’s failure to lay the foundation necessary to attack her specific test results. Rather, it involved the trial court

prohibiting defense counsel from asking the officer on cross-examination about the validity of the specific test results or the procedure followed by the officer in administering the test, including whether the officer had run a diagnostic test on the machine prior to testing. *Id.* at *25. Unlike the trial court in *Knapke*, the trial court, in Appellant's case, permitted defense counsel to question Officer Scott on those matters, including whether Officer Scott ran a diagnostic test on the machine prior to Appellant's breath test.

Appellant argues that, "if the trial court correctly applied *Vega* and *French* then those decisions separately or together are unconstitutional." Appellant did not challenge the constitutionality of *Vega* or *French* in the trial court. Moreover, the court in *Knapke* found *Vega* to be constitutional. *Id.* at *24. In finding *Vega* constitutional, the *Knapke* court relied on another federal court case, *Miskel v. Karnes*, 397 F.3d 446 (6th Cir. 2005). The Sixth Circuit in *Miskel* found that *Vega* did not violate a defendant's Sixth Amendment rights to confrontation and compulsory process, the Fourteenth Amendment right to present a complete defense, and right to have a jury determine guilt beyond a reasonable doubt. *Id.* at 452-453, 455.

Furthermore, due process requires only that a criminal defendant be afforded a meaningful opportunity to present a complete defense. *State v. Hale*, 119 Ohio St.3d 118, 2008 Ohio 3426, 892 N.E.2d 864, ¶46. The right to due process does not provide a defendant with the right to present evidence that is otherwise inadmissible under the rules of evidence. *Id.*

Because Appellant failed to lay a sufficient evidentiary foundation regarding Appellant's temperature and cell phone to make his questions relevant to Appellant's breath test, the trial court did not abuse its discretion by limiting cross-examination of Officer Scott on those matters.

CONCLUSION

Appellant does not present unique issues of public or great general interest and does not raise substantial constitutional questions. Accordingly, this Court should decline to exercise jurisdiction.

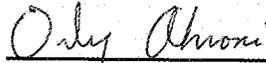
Respectfully submitted,

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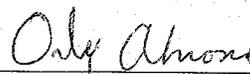


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CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Plaintiff-Appellee's Memorandum in Opposition of Jurisdiction was served by Electronic Mail to D. Timothy Huey and Sarah M. Schregardus, Counsel for Defendant-Appellant, this 24th day of December, 2014.



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