Supreme Court of Ohio Clerk of Court - Filed May 18, 2015 - Case No. 2014-1295

IN THE SUPREME COURT OF OHIO
COLUMBUS, OHIO

STATE OF OHIO,	)	OHIO SUPREME COURT
	)	CASE NO. 2014-1295
Plaintiff-Appellant,	)	
	)	On Appeal from the Ashtabula County
-vs-	)	Court of Appeals, Eleventh Appellate
	)	District
MICHAEL D. BAKER,	)	
	)	Ashtabula County Court of Appeals
Defendant-Appellee.	)	Case No. 2013-A-0020

REPLY BRIEF OF APPELLANT, STATE OF OHIO

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ARGUMENT

PROPOSITION OF LAW

> THE STATE SUBSTANTIALLY COMPLIED WITH OHIO ADM. CODE 3701-53-05 WHERE APPELLEE'S BLOOD SAMPLE REMAINED UNREFRIGERATED PRIOR TO MAILING FOR A FOUR HOUR AND TEN MINUTE PERIOD, THUS, ABSENT A SHOWING OF PREJUDICE BY APPELLEE THE BLOOD SAMPLE WAS ADMISSIBLE.

In his Merit brief appellee relies on this Honorable Court's decision in *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, as well as, lower court decisions in *State v. Falconer,* 5th Dist. No. 2011 CA 00233, 2012-Ohio-2293 and *State v. Troyer*, 5th Dist. No. 2013 CA 00038, 2013-Ohio-3697 to support his argument that the State was not in substantial compliance with the refrigeration requirement contained in Ohio Admin. Code 3701-53-05 where appellee's blood was left unrefrigerated for a period of four hours and ten minutes while not in transit. Appellee fails to aknowledge this court's decisions in *State v. Plummer*, 22 Ohio St.3d 292, 490 N.E.2d 902 (1986) and *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629.

While the decision in *Burnside* is relevant to the present case, appellee misinterprets its holding. Appellee argues that *Burnside* requires the State to present evidence that the failure to refrigerate the blood sample did not affect the reliability of the test results. Appellee argues that the State was required to present expert testimony to show that the Trooper's failure to refrigerate the blood sample was in substantial compliance with Ohio Admin. Code 3701-53-05. This position is contrary to the holding in *Burnside*, which rejected judicial interpretation of Department of Health regulations.

In *Burnside* this Court discussed two approaches used by Ohio appellate courts in

determining substantial compliance. *Id.* at 157. The first approach considers whether "the noncompliance rendered the test results unreliable." *Id.* at 158. "Under this approach, a court will conclude that the state has substantially complied with the Department of Health regulations if the alleged deviation did not affect the reliability of the test results." *Id.* The other approach considers "whether the alleged deviation prejudiced the defendant." *Id.* "Under this approach, a court will conclude that the state has substantially complied with the Department of Health regulations so long as the alleged deviation did not cause an erroneously higher test result." *Id.*

This Honorable Court found that both of these methods required a judicial determination which required judges to speculate as to why the Director of Health adopted certain regulations. *Id.* This Court held that "a judicial determination that an alcohol test, although not administered in strict compliance with the alcohol-testing regulations, is reliable and therefore admissible may subvert the rule-making authority and the statutory mandate of the Director of Health. 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." *Id.*

This court limited the substantial compliance standard it set forth earlier in *Plummer* to errors that are clearly de minimis. *Burnside* at 159. This court defined de minimis errors as "'minor procedural deviations.'" *Id.* This court refused to extend this definition to situations where the State fails to completely comply with a regulation, such as, the failure to use a solid anti coagulant in a blood test. *Id.* at 158-159.

The text of Ohio Admin. Code 3701-53-05(F) shows that the holding in *Plummer* applies to the present case. Strict compliance with this statute is nearly impossible. The statue requires blood

specimens to be refrigerated at all times while not in transit or under examination. A sample cannot be refrigerated while it is collected, labeled, sealed or handled before and after testing and transit.

In *Plummer* this Court found that the State substantially complied with Ohio Department of Health regulations where the defendant's urine sample was unrefrigerated for one hour and twenty-five minutes between collection and being placed in transit and for three or four hours after it arrived at the lab. *Id.* at 294. This court reasoned that "there is leeway for substantial, though not literal compliance with such regulations." *Id.* This court stated that "strict compliance is not always realistically or humanly possible." *Id.*

This Court reasoned that "the storage temperature requirement of Ohio Adm. Code 3701-53-05 contemplates cases involving longer periods of specimen retention, rather than a relatively slight delay between receipt and testing as in this case." *Id.* This Court noted that failure to refrigerate a urine sample may benefit a defendant as it would result in a lower alcohol level test result. *Id.* fn. 2. Accordingly, this Court found that the defendant was unable to demonstrate prejudice from the lack of refrigeration of his urine sample. *Id.*

This Court's decision in *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629 is also applicable to the present case. In *Mayl* this court applied the substantial compliance standard in *Plummer* to the failure to refrigerate a blood sample while not in transit. This Court found that "[f]ailure to refrigerate a sample for as much as five hours has been determined to substantially comply with Ohio Adm. Code 3701-53-05(F), which states that '[w]hile not in transit or under examination, all blood and urine specimens shall be refrigerated.'" *Mayl* at 214 footnote 2 citing *State v. Plummer*, 22 Ohio St.3d 292, 294-295, 490 N.E.2d 902.

In the present case appellee's blood sample went unrefrigerated for a period of four hours and

ten minutes before being placed in transit. Ohio Admin. Code 3701-53-06(A) provides that blood samples must be retained in accordance with Ohio Admin. Code 3701-53-05 for one year. Appellee's sample went unrefrigerated for only four hours and ten minutes of the one year period it was required to remain refrigerated pursuant to the statute. Based upon this Court's reasoning in *Plummer*, *Burnside*, and *Mayl,* the State substantially complied with the requirements of the statute despite the brief period when appellee's blood sample went unrefrigerated.

Neither *Plummer*, *Burnside*, nor *Mayl* require the use of expert testimony to determine if there was substantial compliance with Department of Health regulations. This court has determined, as a matter of law, that lack of refrigeration of a blood or urine sample for a brief period during the course of the one year period during which the State is required to retain the sample amounts to substantial compliance with Ohio Admin. Code 3701-53-05. See, *Plummer* and *Mayl*. Accordingly, the State was in substantial compliance with Ohio Admin. Code 3701-53-05 despite the fact that appellee's blood sample was not refrigerated for a period of four hours and ten minutes while not in transit or being tested.

CONCLUSION

For the foregoing reasons, the State of Ohio respectfully requests this Honorable Court to reverse the decision of the Eleventh District Court of Appeals.

Respectfully submitted,

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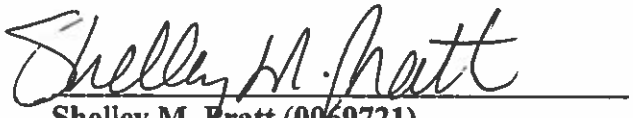
PROSECUTING ATTORNEY



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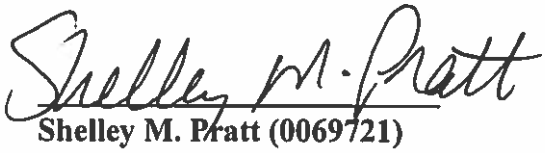
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Merit Brief of Appellant, State of Ohio has been served via ordinary U.S. Mail, postage prepaid, this 18th day of May, 2015 upon William P. Bobulsky, 1612 East Prospect Road, Ashtabula, Ohio 44004, Cuyahoga County Prosecutor's Office, Katherine Mullin and Daniel T. Van, The Justice Center, 8th Floor, 1200 Ontario Street, Cleveland, Ohio 44113, Office of the Ohio Public Defender, Stephen P. Hardwick, 250 E. Broad Street, Suite 1400, Columbus, Ohio 43215, Office of the Ohio Attorney General, Michael Dewine, Attorney General, Eric E. Murphy, State Solicitor, Peter T. Reed, Deputy Solicitor, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215.



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APPENDIX

OAC Ann. 3701-53-06

This document is current through the *Ohio* Register for the week of April 17, 2015 through April 30, 2015

Ohio Administrative *Code* > *3701 Department of Health - Administration and Director* > *Chapter 3701-53* Alcohol Testing

3701-53 -*06*. Laboratory requirements.

(A) Chain of custody and the tests results for evidential alcohol and drugs of abuse shall be identified and retained for not less than three years, after which time the documents may be discarded unless otherwise directed in writing from a court. All positive blood, urine and other bodily substances shall be retained in accordance with rule *3701-53*-05 of the Administrative *Code* for a period of not less than one year, after which time the specimens may be discarded unless otherwise directed in writing from a court.

(B) The laboratory shall successfully complete a national proficiency testing program using the applicable technique or method for which the laboratory personnel seek a permit under rule *3701-53*-09 of the Administrative *Code*.

(C) The laboratory shall have a written procedure manual of all analytical techniques or methods used for testing ofalcohol or drugs of abuse in bodily substances. Textbooks and package inserts or operator manuals from the manufacturer may be used to supplement, but may not be used in lieu of the laboratory's own procedure manual for testing specimens.

(D) The designated laboratory director shall review, sign, and date the procedure manual as certifying that the manual is in compliance with this rule. The designated laboratory director shall ensure that:

(1) Any changes in a procedure be approved, signed, and dated by the designated laboratory director;

(2) The date the procedure was first used and the date the procedure was revised or discontinued is recorded;

(3) A procedure shall be retained for not less than three years after the procedure was revised or discontinued, or in accordance with a written order issued by any court to the laboratory to save a specimen that was analyzed under that procedure;

(4) Laboratory personnel are adequately trained and experienced to perform testing of blood, urine and other bodily substances for alcohol and drugs of abuse and shall ensure, maintain and document the competency of laboratory personnel. The designated laboratory director shall also monitor the work performance and verify the skills of laboratory personnel;

(5) The procedures manual includes the criteria the laboratory shall use in developing standards, controls, and calibrations for the technique or method involved; and

(6) A complete and timely procedure manual is available and followed by laboratory personnel.

(E) Any time the designated laboratory director is replaced, another permitted laboratory director or applicant shall be designated and approved by the director.