

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 08AP-933
v.	:	(M.C. No. 2008 TR C 119506)
	:	
Rachel C. Knapke,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on June 23, 2009

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*Richard C. Pfeiffer, Jr.*, City Attorney, *Lara N. Baker*, Chief Prosecutor, and *Orly Ahroni*, for appellee.

*Samuel H. Shamansky Co., LPA*, *Samuel H. Shamansky*, and *Lisa M. Tome*, for appellant.

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APPEAL from the Franklin County Municipal Court.

SADLER, J.

{¶1} Appellant, Rachel C. Knapke ("appellant"), filed this appeal seeking reversal of a judgment by the Franklin County Municipal Court convicting her on charges of operating a vehicle under the influence of alcohol ("OVI") and operating a vehicle with a

prohibited level of alcohol in the breath ("OVI per se"). For the reasons that follow, we affirm.

{¶2} On March 3, 2008, appellant was pulled over by Staff Lt. Brian Landis of the Ohio Highway Patrol, who observed appellant's vehicle driving erratically. Lt. Landis smelled alcohol upon approaching appellant's vehicle, and called Trooper Rustun Schack to complete the traffic stop. Trooper Schack conducted field sobriety tests on appellant, after which she was placed under arrest and transported to the Grove City Police Department for the purpose of obtaining a breath test. Trooper Schack conducted the breath test, which showed that appellant had an alcohol level of .284 grams per 210 liters of breath. Appellant was charged with OVI in violation of R.C. 4511.19(A)(1)(a) and OVI per se in violation of R.C. 4511.19(A)(1)(h).

{¶3} Before trial, appellant filed a motion to suppress the results of the breath test, arguing that the test was not conducted in accordance with R.C. 4511.19 and Ohio Adm.Code 3701-53-02. On August 20, 2008, the court held a hearing on the motion to suppress, after which the court denied the motion. In the entry denying the motion, the court stated, "All portions of the motion were withdrawn with the exception of the validity of the calibration and specific test results on the day alleged. The court finds that the breath testing instrument was properly calibrated and that the test was properly administered."

{¶4} During trial, while appellant's counsel was cross-examining Trooper Schack, the following exchange occurred:

Q. You're a person that knows about the [breath testing] machine, correct?

A. Yes.

Q.: All right. Now, you're also able to calibrate the machine, correct?

A. Yes.

Q. Now, you personally didn't calibrate this machine, right?

A. No.

Q. But you are aware that the machine has - - this machine upon which you tested Ms. Knapke has an internal diagnostic function that prior to each test, if you hit a button, it will run through all the internal diagnostics and give you a printout as to whether or not it's in working order, correct?

MR. STEINBERG: Objection; lack of foundation and relevance.

THE COURT: Please approach.

(Tr. 76-77.)

{¶5} At sidebar, the following discussion was held:

THE COURT: Where are we going with this?

MR. SHAMANSKY: I'm asking about what he did on the test. I'm following up to the questions about how he ran the test. The reality is there is an internal diagnostic button he can push to see if everything is working. I'm asking if he did it.

THE COURT: Here's the problem: You filed a motion to suppress.

\* \* \*

THE COURT: Okay. The Court's placed an entry on saying that your motion was overruled - -

MR. SHAMANSKY: Uh-huh, that's correct.

THE COURT: - - that all portions of the motion were withdrawn with the exception of validity of the calibration - -

MR. SHAMANSKY: Uh-huh.

THE COURT: - - and specific test results on the day alleged.

MR. SHAMANSKY: Right.

THE COURT: The Court finds that the breath testing instrument was properly calibrated and that the test was properly administered. That's the rule and the law of this case now.

\* \* \*

THE COURT: That's the law of this case. So if you want to raise questions about the validity of the test - -

MR. SHAMANSKY: Uh-huh.

THE COURT: - - and the procedure used, you really can't.

MR. SHAMANSKY: Well, no, actually, I disagree. And, again, I'll follow whatever you tell me to do.

So you don't get angry with me again, the reality is I'm allowed to ask this man about the specifics of this test. And if he didn't run the diagnostic check, what would be the harm in me asking him? There is absolutely no case law that precludes me from asking about this specific test. Vega goes to the general reliability of the test. I can ask him specifically what he did on this test. The Government asked him - -

THE COURT: You had your opportunity and there was a finding which is now the law of this case.

MR. SHAMANSKY: Okay.

THE COURT: That the testing instrument was properly calibrated and the test was properly administered.

\* \* \*

MR. SHAMANSKY: Okay. Just so everybody is clear, I'm not allowed to ask any questions about the manner in which he administered the test? That's your ruling, correct?

THE COURT: Since you won't answer the question, where are you going with that?

MR. SHAMANSKY: Judge, I did answer the question. He's going to say he didn't run that diagnostic check.

THE COURT: 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.

MR. SHAMANSKY: Well, Judge, I'll follow whatever you tell me to do, but where I'm going with this is independent of the calibration, it's a test he could have run and didn't. I should be able to ask him about that. I've got a right to confront this witness, but I recognize your ruling and I'll proffer it afterwards if you're telling me I can't ask the question.

THE COURT: Was your line of questioning that it was improper, he didn't do - -

MR. SHAMANSKY: Not that it's improper. It was he could have done it and didn't. I'll argue in closing he didn't take every step necessary to make sure this test was valid.

THE COURT: You can't argue that.

MR. SHAMANSKY: Okay. Then, I'll proffer later.

THE COURT: You want to proffer it right now?

MR. SHAMANSKY: I think I - -

THE COURT: You're right here.

MR. SHAMANSKY: I think I've done a good job - -

THE COURT: All right. Thank you.

(Tr. 77-81.)

{¶6} No formal proffer was subsequently made.<sup>1</sup> The trial proceeded, and the jury returned verdicts of guilty on both the OVI and OVI per se charges. The court merged the two charges for sentencing. The court imposed a \$250 fine, a five-year driver's license suspension, and imposed a sentence of 60 days of incarceration, 53 days of which were suspended. Appellant then filed this appeal, alleging a single assignment of error:

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT OF CONFRONTATION AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY PROHIBITING CROSS-EXAMINATION OF THE STATE'S WITNESS REGARDING THE BAC DATA MASTER THAT PRODUCED HER BREATH TEST RESULT.

{¶7} The Confrontation Clause of the Sixth Amendment to the United States Constitution guarantees the right of a criminal defendant to confront and cross-examine witnesses testifying against him or her. *State v. Parsons*, 10th Dist. No. 06AP-410, 2007-Ohio-1204, citing *Pointer v. Texas* (1965), 380 U.S. 400, 85 S.Ct. 1065. However, a trial court retains wide latitude under the Confrontation Clause to impose reasonable limits on cross-examination based on concerns about issues such as harassment, prejudice, confusion of issues, witness safety or interrogation that is repetitive or irrelevant. *Delaware v. Van Arsdall* (1986), 475 U.S. 673, 106 S.Ct. 1431. "[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (Emphasis sic.) *Delaware v. Fensterer* (1985), 474 U.S. 15, 20, 106 S.Ct. 292, 294. The

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<sup>1</sup> We will assume for the sake of argument that counsel's statements during the sidebar discussion were sufficient to preserve the issue for appeal, even in the absence of a more formal proffer.

trial court's discretion in such matters is broad, and a trial court's decision will not be disturbed absent an abuse of discretion. *State v. Myers*, 97 Ohio St.3d 335, 2002-Ohio-6658.

{¶8} Initially, we note, and appellant concedes, that the evidence appellant sought to introduce regarding the existence of a diagnostic feature on the breath testing machine would only have been relevant to the OVI per se charge. In OVI per se cases, the trier of fact is not required to determine whether the defendant was under the influence of alcohol or drugs at the time of the offense; rather, the trier of fact must only determine whether the defendant had a prohibited level of alcohol while operating a motor vehicle. *State v. Sabo*, 10th Dist. No. 04AP-1114, 2006-Ohio-1521, citing *Defiance v. Kretz* (1991), 60 Ohio St.3d 1. Admissibility into evidence of the test results offered to show that a defendant had a prohibited alcohol level turns on whether the test was conducted in substantial compliance with regulations established by the Ohio Department of Health. *Id.*

{¶9} A defendant may not use expert testimony to attack the general reliability of the breath testing procedure, but may attack the reliability of the specific testing procedure. *State v. Vega* (1984), 12 Ohio St.3d 185. See also *State v. Tanner* (1984), 15 Ohio St.3d 1, 13 ("[t]he defendant may \* \* \* 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").

{¶10} In this case, appellant argues that the question regarding the diagnostic switch was intended to challenge the reliability of the specific result in her case, not the

general validity of the testing procedure. However, during the above quoted discussion regarding this issue, appellant's counsel stated that it was his intention to argue that Trooper Schack could have pressed the diagnostic button, and that doing so would have resulted in a more reliable test result, but that this action was not taken. Thus, the line of questioning did constitute a challenge to the validity of the testing procedure, because appellant would have been asking the jury to conclude that the testing procedure should have included the step of pressing the diagnostic switch.

{¶11} Consequently, the trial court did not abuse its discretion when it limited appellant from questioning the validity of the testing procedure. Accordingly, appellant's assignment of error is overruled.

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

*Judgment affirmed.*

FRENCH, P.J., and TYACK, J. concur.

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