

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellant,	:	
- vs -	:	CASE NO. 2012-P-0027
JESSE A. CARTER,	:	
Defendant-Appellee.	:	

Criminal Appeal from the Portage County Municipal Court, Ravenna Division, Case No. R2011 TRC 14422.

Judgment: Reversed and remanded.

Victor V. Viglucci, Portage County Prosecutor, and *Theresa M. Scahill*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellant).

William A. Lefaiver, 8010 McGhee Lane, Hudson, OH 44236 (For Defendant-Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, the state of Ohio, appeals the judgment of the Portage County Municipal Court, Ravenna Division, granting the motion in limine of appellee, Jesse Carter, to exclude evidence of the result of an Intoxilyzer 8000 test. At issue is whether the trial court erred in requiring the state to present evidence of the reliability of the Intoxilyzer 8000 as a predicate for the admission of the result of Carter’s test. For the reasons that follow, we reverse and remand.

{¶2} On November 2, 2011, at about 2:30 a.m., Carter was stopped by a Streetsboro police officer driving 45 mph in a 35 mph zone without a required license plate light. The result of an Intoxilyzer 8000 breath test revealed Carter's blood alcohol concentration was .148, nearly twice the legal limit. He was charged by citation with speeding and a license plate violation, both minor misdemeanors, and with driving under the influence of alcohol and driving with a prohibited blood alcohol concentration, in violation of R.C. 4511.19(A)(1)(a) and 4511.19(A)(1)(d), respectively, both misdemeanors of the first degree. Carter pled not guilty.

{¶3} On January 30, 2012, Carter filed a motion in limine to exclude any testimony regarding the result of his blood alcohol test. Carter argued the reading was based on a test administered by the Streetsboro Police using the Intoxilyzer 8000, which, Carter alleged, is scientifically unreliable.

{¶4} The trial court held a hearing on the motion in limine on March 12, 2012. Carter's counsel argued that he was challenging "the general scientific reliability" of the Intoxilyzer 8000. The trial court offered to give the state a continuance to present testimony regarding the general reliability of the machine. The state responded that, pursuant to *State v. Vega*, 12 Ohio St.3d 185 (1984), it was not required to present such evidence because the reliability of the Intoxilyzer 8000 had already been determined by the Director of the Ohio Department of Health.

{¶5} Following the hearing, on March 12, 2012, the trial court granted Carter's motion in limine; ordered that his breath test result not be admitted at trial; and dismissed the per se OVI charge.

{¶6} The state filed a motion to stay the court's March 12, 2012 judgment entry, which the trial court granted. The state now appeals the trial court's ruling on Carter's motion in limine, asserting two assignments of error. For its first assigned error, the state alleges:

{¶7} "The relief sought and obtained from Carter's January 30, 2012 motion establishes the trial court's March 12, 2012 decision was a ruling on a motion to suppress and therefore automatically appealable by the state."

{¶8} The state argues that, while Carter referred to his motion as a motion in limine, a ruling on which is generally not a final, appealable order, in effect his motion was a motion to suppress evidence, and the court's ruling granting same was a final order. In contrast, Carter argues that, because he only argued the Intoxilyzer 8000 is unreliable and did not assert any constitutional argument, the court's ruling on his motion in limine was merely a preliminary evidentiary ruling and thus not a final order. This court in *State v. Davis*, 11th Dist. No. 2008-L-021, 2008-Ohio-6991, stated:

{¶9} The Supreme Court of Ohio has explained that "any motion, however labeled, which, if granted, restricts the state in the presentation of certain evidence and, thereby, renders the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed, is, in effect, a motion to suppress. The granting of such order is a final order and may be appealed pursuant to R.C. 2945.67 and Crim.R. 12(J) [since renumbered as Crim.R. 12(K)]."

Id. at ¶22, quoting *State v. Davidson*, 17 Ohio St.3d 132 (1985), syllabus.

{¶10} Here, the trial court, in granting Carter’s motion in limine, not only ordered that his breath test result not be admitted in evidence, but also dismissed the per se OVI charge, which depended on that excluded evidence. In dismissing this charge, the trial court eliminated its ability to revise its ruling. Further, by its dismissal, the court acknowledged that its ruling excluding the breath test result rendered the state’s proof with respect to the per se OVI charge so weak that any reasonable possibility of effective prosecution had been destroyed.

{¶11} Thus, regardless of the label of Carter’s motion, it was a motion to suppress since it resulted in the exclusion of evidence that was essential to prove the per se OVI charge. We therefore hold that the court’s ruling granting the motion was a final, appealable order. However, because the court did not treat its ruling as anything other than a final order, the assignment of error is moot.

{¶12} For its second assignment of error, the state contends:

{¶13} “The Portage County Municipal Court erred in permitting a general attack on the scientific reliability of the Intoxilyzer 8000 contrary to Ohio statutes and well-established case law.”

{¶14} “Appellate review of a motion to suppress presents a mixed question of law and fact.” *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. The appellate court must accept the trial court’s factual findings, provided they are supported by competent, credible evidence. *Id.* Thereafter, the appellate court must determine, without deference to the trial court, whether the applicable legal standard has been met.

Id. Thus, we review the trial court’s application of the law to the facts de novo. *State v. Holnapy*, 194 Ohio App.3d 444, 2011-Ohio-2995, ¶28 (11th Dist.). Here, no evidence was presented. Instead, the court applied the law without making any factual findings. Thus, the court’s ruling was made as a matter of law, which we review de novo. *Id.*

{¶15} The state argues that it was not required to present expert testimony to demonstrate the reliability of the Intoxilyzer 8000 before introducing the result of Carter’s breath test. In support, the state argues that the legislature delegated this determination to the director of health and that the Supreme Court of Ohio in *Vega*, *supra*, upheld this delegation of authority.

{¶16} “R.C. 3701.143 authorizes the Director of Health to determine suitable methods for breath alcohol analysis.” *Vega*, *supra*, at 187. That section provides:

{¶17} For purposes of section[] * * * 4511.19 * * * of the Revised Code, *the director of health shall determine * * * techniques or methods for chemically analyzing a person’s * * * breath * * * in order to ascertain the amount of alcohol * * * in [his] breath * * *. The director shall approve satisfactory techniques or methods * * *. (Emphasis added.)*

{¶18} Further, R.C. 4511.19(D)(1)(b) provides:

{¶19} In any criminal prosecution * * * for a violation of * * * this section * * *, the court may admit evidence on the concentration of alcohol * * * in the defendant’s * * * breath * * * at the time of the alleged violation as shown by chemical analysis of the substance withdrawn * * *.

{¶20} The bodily substance withdrawn under division (D)(1)(b) of this section *shall be analyzed in accordance with methods approved by the director of health.* (Emphasis added.)

{¶21} Pursuant to R.C. 3701.143, the director of health promulgated Ohio Adm.Code 3701-53-02(A), which provides that (1) the BAC DataMaster, the BAC DataMaster K, the BAC DataMaster cdm; (2) the Intoxilyzer 5000 series 66, 68, and 68 EN; and (3) the Intoxilyzer 8000 (OH-5) are approved as evidential breath testing instruments for use in determining whether a person's breath contains a concentration of alcohol prohibited by R.C. 4511.19.

{¶22} Thus, the General Assembly gave the director of health the authority to choose breath testing instruments, and, pursuant to Ohio Adm.Code 3701-53-02, the director approved the Intoxilyzer 8000 as a breath testing instrument.

{¶23} “Administrative rules enacted pursuant to a specific grant of legislative authority are to be given the force and effect of law.” *Doyle v. Ohio Bureau of Motor Vehicles*, 51 Ohio St.3d 46 (1990), paragraph one of the syllabus. Further, “the Director of Health is delegated the authority to adopt regulations for the use of [breath testing] instruments. Once promulgated, these regulations are to be given the force and effect of law.” *State v. Yoder*, 66 Ohio St.3d 515, 519 (1993) (Wright, J., dissenting), citing *Doyle, supra*. Thus, Ohio Adm.Code 3701-53-02, which approved the Intoxilyzer 8000 as an evidential breath testing instrument, has the force and effect of law.

{¶24} In *Vega, supra*, the defendant argued that he should not be bound by the health director's determination that the intoxilyzer is generally a reliable breath testing instrument. The Supreme Court stated that in making this argument, Vega had

misconstrued the impact of R.C. 4511.19. *Vega* at 188. The Supreme Court stated that R.C. 4511.19 represented a legislative determination that breath testing devices adopted by the Director of the Ohio Department of Health are generally reliable. *Id.*, citing McCormick, *Evidence* (2 Ed.Cleary Ed.1972), 511, 513. The court further stated that, “[i]n Ohio, the *General Assembly has legislatively provided for the admission of various alcohol determinative tests in R.C. 4511.19.*” (Emphasis added.) *Vega* at 186-187. Thus, the Supreme Court of Ohio stated that the judiciary must recognize the legislative determination that breath tests, properly conducted, are reliable irrespective that not all experts agree. *Vega* at 188. The court stated that the judiciary must also recognize that R.C. 4511.19 has replaced the common law foundational requirements for admissibility. *Id.* at 188-189. The Supreme Court also stated the judiciary must recognize that, in enacting R.C. 4511.19, the legislature delegated to the director of health, not the courts, “the discretionary authority” to determine which breath testing devices are reliable. *Id.* at 189.

{¶25} Thus, the Supreme Court of Ohio in *Vega* held that, “in light of R.C. 4511.19, an accused may not make a general attack upon the reliability * * * of a breath testing instrument.” *Id.* at 190. The Supreme Court further held that an accused is not denied his constitutional right to present a defense nor is the state relieved of its burden of proving guilt beyond a reasonable doubt where a trial judge does not permit expert testimony to attack the reliability of intoxilyzers in general.” *Id.* at 186.

{¶26} Further, the Supreme Court in *Vega* stated: “There is no question that the accused may * * * attack the reliability of the *specific testing procedure and the*

*qualifications of the operator. * * * Defense expert testimony as to testing procedures at trial going to weight rather than admissibility is allowed.” Id. at 189. (Emphasis added.)*

{¶27} The Supreme Court reaffirmed its holding in *Vega* in *State v. Tanner*, 15 Ohio St.3d 1 (1984), and applied it to per se OVI violations. The court in *Tanner* held: “[t]he defendant may still challenge the accuracy of his specific test results, although *he may not challenge the general accuracy of the legislatively determined test procedure as a valid scientific means of determining blood alcohol levels.” (Emphasis added.) Id. at 6.*

{¶28} In the years following *Vega, supra*, the Supreme Court of Ohio reaffirmed its teaching. For example, in 1993, in *Yoder, supra*, the Supreme Court stated: “The Director of Health, *not the court*, was delegated the discretionary authority for adoption of breath testing devices and the procedures for their use. *Id. at 518, citing Vega, supra.*

{¶29} Moreover, Ohio Appellate Districts have addressed the specific issue raised by Carter, i.e., whether the state is required to present expert testimony regarding the reliability of breath testing instruments before their results are admissible. In *Dayton v. Futrell*, 2d Dist. No. CA 8615, 1984 Ohio App. LEXIS 11631 (Oct. 26, 1984), the Second District answered this question in the negative, stating:

{¶30} The [Supreme Court in *Vega*] held that the reliability and admissibility of [breath] tests * * * has been legislatively determined and that the accused may not make a general attack upon the reliability and validity of the breath testing instrument. *The judiciary must take notice that such tests,*

*properly conducted, are reliable irrespective of disagreements among experts and that the results of such tests are admissible. Accordingly, judicial notice of this factor dispenses with the necessity for expert testimony by the state in chief for the efficiency of the intoxilyzer machine. Id. at *3-*4. (Emphasis added.)*

{¶31} More recently, in *State v. Luke*, 10th Dist. No. 05AP-371, 2006-Ohio-2306, the defendant filed a motion to suppress the result of his BAC Datamaster breath test. In its entry granting the defendant's motion to suppress, the trial court explained that it was suppressing the test result "pursuant to the court's 'gatekeeper' function, pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)." In holding that the trial court erred in applying *Daubert* in the context of the defendant's motion to suppress, the Tenth District stated:

{¶32} [T]he General Assembly has legislatively provided for the admission into evidence of alcohol test results, including breath tests, from tests conducted upon those accused of violating R.C. 4511.19, so long as such tests were conducted in accordance with procedures adopted by the Director of the Ohio Department of Health.

{¶33} *This legislative mandate for admissibility obviates the need for trial courts to determine admissibility based upon reliability of the processes and methods underlying the use of breath testing machines. It follows, then, that because the Daubert*

inquiry involves only determinations as to the reliability of the principles and methods upon which a particular scientific test result is based, *the legislative mandate recognized in Vega forestalls the need for any Daubert analysis* in cases such as the present one. That is why we agree with the holding of the Fifth Appellate District that, pursuant to *Vega*, “an attack on the accuracy and credibility of breath test devices in general is prohibited. Therefore, *there is no need to determine the reliability of the machine under a Daubert * * * standard.*” *State v. Birkhold*, 5th Dist. No. 01CA104, 2002-Ohio-2464, ¶19. *Luke, supra*, at ¶23-24. (Emphasis added.)

{¶34} Turning now to the instant case, Carter argues that because his motion challenged the scientific reliability of the Intoxilyzer 8000, the state was required to establish by expert testimony the reliability of this instrument before his test result could be admitted at trial. In contrast, the state argues that it was not required to present evidence of the machine’s reliability due to the legislative determination in R.C. 4511.19 that breath testing instruments approved by the Ohio Department of Health, including the Intoxilyzer 8000, are reliable.

{¶35} As noted above, the court in *Vega* prohibited a “*general* attack on the reliability * * * of a breath instrument.” (Emphasis added.) This holding thus allows for a *specific* challenge to the reliability of the Intoxilyzer 8000. Here, Carter generally alleged in his motion in limine that this device is “scientifically unreliable.” He thus did

not present a specific challenge to the Intoxilyzer 8000, but rather, made a general attack.

{¶36} Further, a motion to suppress must state its legal and factual bases with sufficient particularity to put the prosecutor and the trial court on notice of the issues to be decided. *State v. Perl*, 11th Dist. No. 2006-L-082, 2006-Ohio-6100, ¶15. In *State v. Shindler*, 70 Ohio St.3d 54, (1994), syllabus, the Supreme Court of Ohio found that the defendant's motion to suppress was sufficient when it "stated with particularity the statutes, regulations and constitutional amendments she alleged were violated, set forth some underlying factual basis to warrant a hearing, and gave the prosecutor and court sufficient notice of the basis of her challenge." Here, Carter's motion in limine provided no legal or factual grounds in support. Thus, the state had no notice of any alleged specific defects of the Intoxilyzer 8000, making it virtually impossible for the prosecutor to defend the motion.

{¶37} Since the General Assembly has legislatively determined that the Intoxilyzer 8000 is reliable, it must be presumed this device is reliable. The Supreme Court of Ohio in *Yoder, supra*, acknowledged that director-approved breath-testing instruments, such as the Intoxilyzer 8000, are presumed to be reliable. The court in *Yoder* stated:

{¶38} We cannot undercut the department's rulemaking authority * * *.
The Director of Health, not the court, was delegated the discretionary authority for adoption of breath testing devices * * *.
*Vega, [supra, at] 189. * * * [I]n promulgating this regulation, it must be presumed that the Director of Health acted upon adequate*

*investigation * * *. We must defer to the department's authority and we may not substitute our judgment for that of the Director of Health.* (Emphasis added.) *Yoder, supra*, at 518.

{¶39} As a result, the state did not have the burden to produce evidence of the machine's reliability as a predicate for presenting Carter's breath test results. To the contrary, because the instrument is presumed reliable, Carter had the burden to produce evidence that the Intoxilyzer is not reliable. This he failed to do.

{¶40} Moreover, Carter argues that because his motion challenged the general scientific reliability of the Intoxilyzer 8000, the state was required to comply with *Daubert, supra*, and establish by expert testimony the reliability of this instrument before his test result could be admitted at trial. However, in light of the Second District's holding in *Dayton, supra*, and the Tenth District's holding in *Luke, supra*, we do not agree.

{¶41} As noted above, with respect to a judgment granting a motion to suppress, an appellate court reviews a court's application of the law de novo. See e.g. *State v. Holnapy, supra*, at ¶28. By requiring the state to go forward with evidence of the machine's reliability, the trial court disregarded the legal prohibition on general, unparticularized challenges in motions to suppress as well as the legislative presumption of reliability concerning the Intoxilyzer 8000. The trial court therefore erred, as a matter of law, in requiring the state to make this initial showing.

{¶42} We therefore conclude the trial court erred in requiring the state to produce evidence of the Intoxilyzer 8000's reliability and in granting appellee's motion to suppress; further, pursuant to these erroneous rulings, the trial court erred in excluding

the results of appellee's breath test with no evidence to overcome the presumptive reliability of the Intoxilyzer 8000's results.

{¶43} In light of *Vega* as well as the validity of the legislative presumption, once the prosecution has demonstrated an approved breath testing device was used, a defendant may make specific challenges to the reliability of his or her breath test results. In this case, it is undisputed that the Intoxilyzer 8000 is an approved device. On remand, therefore, Carter is entitled, but has the burden of production, to specifically challenge the results of his breath test.

{¶44} The state's second assignment of error is sustained.

{¶45} For the reasons stated in this opinion, it is the judgment and order of this court that the judgment of the Portage County Municipal Court, Ravenna Division, is reversed, and this matter is remanded to the trial court for further proceedings as set forth in this opinion.

TIMOTHY P. CANNON, P.J., concurs,

DIANE V. GRENDALL, J., concurs in part, and dissents in part, with a Concurring/Dissenting Opinion.

DIANE V. GRENDALL, J., concurs in part, and dissents in part, with a Concurring/Dissenting Opinion.

{¶46} I concur in the judgment of this court, that, pursuant to R.C. 4511.19(D)(1)(b) and R.C. 3701.143, as interpreted by *State v. Vega*, 12 Ohio St.3d

185, 465 N.E.2d 1303 (1984), a defendant may not challenge the general reliability of the Intoxilyzer 8000 as a testing instrument approved by the Ohio director of health.

{¶47} I cannot, however, concur in the majority's assertions that Carter failed to "present a specific challenge to the Intoxilyzer 8000," and "has the burden of production * * * to specifically challenge the results of his breath test."

{¶48} In the present case, the majority faults Carter for not stating the legal and factual bases to suppress the evidence, despite the fact that no motion to suppress was filed. On January 30, 2012, Carter filed a Motion to Bar in Limine the State's use of breath test results, based on the scientific unreliability of the Intoxilyzer 8000 and the State's failure "to respond to the defense's Discovery Request seeking very specific data concerning the City's Intoxilyzer." The municipal court ruled that the State was barred from introducing the Intoxilyzer results, based on its prior ruling in *State v. Johnson*, Portage County Municipal Court, Ravenna Division, Case No. 2011 TRC 4090, and dismissed Carter's requests to compel discovery as moot.

{¶49} The issue of whether Carter, on remand, is entitled to file a proper motion to suppress is for the municipal court to determine pursuant to Criminal Rule 12(D).

{¶50} The majority further states that Carter "had the burden to produce evidence that the Intoxilyzer is not reliable." This statement misconstrues the proper procedures for challenging the results of instruments measuring the concentration of alcohol in bodily substances.

{¶51} The Ohio Supreme Court has recognized that "[t]here is no question that the accused may * * * attack the reliability of the specific testing procedure and the qualifications of the operator," as well as present "expert testimony as to testing

procedures at trial going to weight rather than admissibility.” *Vega*, 12 Ohio St.3d at 189, 465 N.E.2d 1303. When duly challenged, the State must demonstrate that the bodily substance was “analyzed in accordance with methods approved by the director of health” and “by an individual possessing a valid permit.” R.C. 4511.19(D)(1)(b).

{¶52} The Ohio Supreme Court has similarly delineated the “burden-shifting procedure to govern the admissibility of alcohol-test results.” *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 24. “The defendant must first challenge the validity of the alcohol test by way of a pretrial motion to suppress.” *Id.* “After a defendant challenges the validity of test results in a pretrial motion, the state has the burden to show that the test was administered in substantial compliance with the regulations prescribed by the Director of Health. Once the state has satisfied this burden and created a presumption of admissibility, the burden then shifts to the defendant to rebut that presumption by demonstrating that he was prejudiced by anything less than strict compliance.” *Id.*

{¶53} Accordingly, Carter did not bear “the burden of production * * * to specifically challenge the results of his breath test.” Rather, Carter had the obligation to challenge the admissibility of the breath test results in a pretrial motion to suppress, which, as noted above, Carter has yet to do in the present case.

{¶54} For the foregoing reasons, I dissent from the majority’s opinion to the extent discussed above.