

[Cite as *Columbus v. Schaaf*, 2012-Ohio-6198.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

City of Columbus, :  
 :  
 Plaintiff-Appellee, :  
 :  
 v. : No. 12AP-254  
 : (M.C. No. 2011 TRC 110031)  
 Michael D. Schaaf, : (REGULAR CALENDAR)  
 :  
 Defendant-Appellant. :

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D E C I S I O N

Rendered on December 28, 2012

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*Richard C. Pfeiffer, Jr.*, City Attorney, and *Melanie R. Tobias*, for appellee.

*R. William Meeks Co., L.P.A.*, and *David H. Thomas; Yavitch & Palmer Co., L.P.A.*, and *Jeffery A. Linn, II*, for appellant.

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APPEAL from the Franklin County Municipal Court.

FRENCH, J.

{¶ 1} Defendant-appellant, Michael D. Schaaf ("appellant"), appeals the judgment of the Franklin County Municipal Court, which denied his motion to suppress. For the following reasons, we affirm.

**I. BACKGROUND**

{¶ 2} On February 6, 2011, appellant was pulled over by Ohio Highway Patrol Trooper Kyle Mackie for driving outside marked lanes. During the traffic stop, Mackie determined that appellant had been driving under the influence of alcohol. Mackie arrested appellant and took him to jail. Mackie asked appellant to take a breath test at the jail, and the test showed that appellant had an alcohol level of .118 grams per 210

liters of breath. Because this result was over the legal limit, which is .08 grams of alcohol per 210 liters of breath, appellant was charged with operating a vehicle under the influence of alcohol with a prohibited amount of alcohol in the breath. He was also charged with operating a vehicle while impaired and a marked-lanes violation.

{¶ 3} Appellant moved to suppress the breath test, and the trial court held a hearing on the motion. Ohio Highway Patrol Sergeant Alice Parks testified as follows at the hearing. Parks is responsible for testing the operability of the breathalyzer at the jail. Parks tested the breathalyzer on February 2 and 9, 2011. She relied on a "checklist" provided by the Ohio Department of Health ("ODH"). (Sept. 1, 2011, Tr. 10.)

{¶ 4} Parks explained how she conducted the tests in February 2011 pursuant to the checklist. First, she examined whether the breathalyzer would automatically shut down upon the detection of radio interference. She placed an alcohol solution in a machine called a simulator, and she heated the simulator. She connected hoses attached to the simulator and the breathalyzer. The alcohol solution enters the breathalyzer through the hoses, and the breathalyzer measures the alcohol content in the solution. The breathalyzer provided accurate measurements on February 2 and 9, 2011.

{¶ 5} On cross-examination, Parks testified that she placed the operational manual in a drawer near the breathalyzer several years ago. She did not check to see whether the manual was in the drawer during her two tests in February 2011. She said that she had no reason to do so because "nobody would take it out." (Sept. 1, 2011, Tr. 29.) Parks also stated that ODH's checklist requires her to heat the simulator to 34 degrees Celsius "plus or minus two." (Sept. 1, 2011, Tr. 33.) But she later corrected herself by acknowledging that, in fact, the checklist requires a temperature range of 34 degrees Celsius "plus or minus .2." (Sept. 1, 2011, Tr. 38.) Nevertheless, Parks said that she heated the simulator to exactly 34 degrees Celsius during her tests in February 2011.

{¶ 6} Next, defense counsel asked Parks about the "Simulator and Instrument Check Notes" ("notes") in a book ODH made for training law enforcement on testing the breathalyzer. (Defendant's exhibit A, 39.) The notes contain information not in ODH's checklist. For instance, the notes state that the simulator must be examined for leaks

and that the hoses attached to the breathalyzer and simulator cannot be connected if they contain condensation. The notes also say that the simulator will take 10 to 20 minutes to heat and that "[a]llowing at least 30 additional minutes warm up time \* \* \* will help distribute heat evenly." (Emphasis deleted.) (Defendant's exhibit A, 39.) Parks said that she waited the additional 30 minutes, but she did not perform the other two items in the notes when she tested the breathalyzer in February 2011.

{¶ 7} During closing argument, the prosecutor asserted that Parks' testimony established that the breathalyzer was working properly when appellant took his breath test. Appellant contended that the trial court should suppress the breath test because Parks did not perform all of the items listed in the notes of ODH's training book. He also argued that the breath test should be suppressed because (1) Parks was unsure about the appropriate temperature range for the simulator, and (2) Parks did not check on whether the operational manual was near the breathalyzer when she tested it in February 2011. The trial court rejected appellant's arguments and denied his motion to suppress.

{¶ 8} Afterward, a jury trial was held on the drunk driving charges. The jury found appellant guilty of operating a vehicle under the influence of alcohol with a prohibited amount of alcohol in the breath. It found appellant not guilty of operating a vehicle while impaired, however. The parties tried the marked-lanes charge to the trial court, and the court found appellant guilty of the charge.

## **II. ASSIGNMENT OF ERROR**

{¶ 9} Appellant filed a timely notice of appeal and now assigns the following as error:

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS THE CHEMICAL BREATH TEST WHEN SERGEANT PARKS DID NOT PERFORM SEVERAL NECESSARY CALIBRATION PROCEDURES, THEREBY FAILING TO PROVE SUBSTANTIAL COMPLIANCE WITH THE OHIO DEPARTMENT OF HEALTH REGULATIONS.

## **III. DISCUSSION**

{¶ 10} In his single assignment of error, appellant contends that the trial court erred by denying his motion to suppress. We disagree.

{¶ 11} When presented with a motion to suppress, the trial court assumes the role of the trier of fact. *State v. Mills*, 62 Ohio St.3d 357, 366 (1992). Therefore, the trial court is in the best position to resolve questions of fact and evaluate witness credibility. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. On review, we must accept the trial court's factual findings if they are supported by competent, credible evidence. *State v. Stokes*, 10th Dist. No. 07AP-960, 2008-Ohio-5222, ¶ 7. Accepting those facts as true, we must then independently determine, as a matter of law and without deference to the trial court's conclusion, whether the facts meet the applicable legal standard. *State v. Coger*, 10th Dist. No. 10AP-320, 2011-Ohio-54, ¶ 10. With this standard in mind, we consider the trial court's decision to deny appellant's motion to suppress his breath test.

{¶ 12} The prosecution has the burden to show that a breath test was administered in substantial compliance with ODH regulations. *Burnside* at ¶ 24. That standard excuses errors that are " 'minor procedural deviations.' " *Id.* at ¶ 34, quoting *State v. Homan*, 89 Ohio St.3d 421, 426 (2000). If the prosecution establishes substantial compliance, the burden shifts to the defendant to demonstrate that he was prejudiced by anything less than strict compliance. *Burnside* at ¶ 24.

{¶ 13} Appellant first contends that Parks failed to comply with a regulation requiring that the operational manual be kept near the breathalyzer. But that requirement no longer exists in the ODH regulations. *See* Ohio Adm.Code 3701-53-01(B). In any event, Parks testified that she placed the manual near the breathalyzer and that she had no indication that anyone removed it.

{¶ 14} Next, appellant notes that Parks was unsure about the appropriate temperature range for the simulator when she testified. But, in spite of Parks' testimony, we find no prejudice to appellant because, when she tested the breathalyzer on February 2 and 9, 2011, she heated the simulator within the range ODH allowed in its checklist.

{¶ 15} Lastly, appellant argues that the February 2011 tests are invalid because Parks failed to perform them in compliance with the notes in ODH's training book. Ohio Adm.Code 3701-53-04(A) states that a breathalyzer must be tested "in accordance with the \* \* \* checklist for the instrument being used." Parks indicated that she followed ODH's checklist when she tested the breathalyzer. Nevertheless, appellant contends that ODH required Parks to comply with the notes in its training manual in addition to the checklist.

{¶ 16} In *State v. Stout*, 5th Dist. No. 07-CA-51, 2008-Ohio-2397, ¶ 113, the defendant, like appellant, argued that a breathalyzer must be tested in compliance with ODH's training book. The court rejected the defendant's argument because the Ohio Administrative Code only required compliance with ODH's checklist. *Id.* at ¶ 120-21. *See also State v. Krumpelman*, 1st Dist. No. C-080137, 2008-Ohio-6689, ¶ 23-24 (recognizing that Ohio Adm.Code 3701-53-04(A) only requires that a breathalyzer be tested in compliance with ODH's checklist).

{¶ 17} Likewise, this court has previously acknowledged that breathalyzers are regulated "in accordance with the methods approved by the Ohio Director of Health as prescribed by Ohio Adm.Code 3701-53-04." *State v. Wojcicki*, 10th Dist. No. 01AP-152 (Sept. 28, 2001), citing R.C. 4511.19. Therefore, we agree with the decisions in *Stout* and *Krumpelman* that, pursuant to the plain language of Ohio Adm.Code 3701-53-04(A), an officer need not comply with the notes in ODH's training book when testing a breathalyzer. Although appellant believes that a test on the operability of the breathalyzer is incomplete without the officer complying with those notes, we defer to ODH's scientific expertise on the regulation of breathalyzers. *See Burnside* at ¶ 32.

{¶ 18} For all these reasons, we hold that Parks did not deviate from ODH's regulations when she tested the breathalyzer in February 2011. Therefore, because Parks strictly complied with those regulations, the trial court did not err by denying appellant's motion to suppress. We overrule appellant's single assignment of error.

#### **IV. CONCLUSION**

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

*Judgment affirmed.*

**BRYANT and KLATT, JJ., concur.**

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