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CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth District, Franklin County.

CITY OF COLUMBUS, plaintiff-Appellee,
v.
Donald L. ACREE, Defendant-Appellant.

No. 96APC01-11. | June 20, 1996.

Appeal from the Franklin County Municipal Court.

Attorneys and Law Firms

Ronald J. O'Brien, City Attorney, David M. Buchman and Brenda J. Keltner, for appellee.

Koffel & Jump, and Bradley P. Koffel, for appellant.

Opinion

BRYANT, J.

***1** Defendant-appellant, Donald L. Acree, appeals from a judgment of the Franklin County Municipal Court denying his motion to suppress evidence and finding him guilty on his no contest plea. Defendant assigns a single error:
"THE TRIAL COURT ERRED WHEN IT FAILED TO SUPPRESS THE RESULTS OF THE APPELLANT'S URINE TEST UNDER CIRCUMSTANCES WHICH INDICATED THAT THE CITY OF COLUMBUS DID NOT SUBSTANTIALLY COMPLY WITH OHIO DEPARTMENT OF HEALTH REGULATIONS REGARDING THE PROPER HANDLING OF THE APPELLANT'S URINE SAMPLE.

"A. THE CITY OF COLUMBUS FAILED TO PROVE THAT IT SUBSTANTIALLY COMPLIED WITH OAC 3701-53-05(F) MANDATING THAT URINE SAMPLES BE REFRIGERATED AT A TEMPERATURE OF FORTY-TWO (42) DEGREES FAHRENHEIT OR BELOW WHILE NOT IN TRANSIT OR UNDER EXAMINATION.

"B. THE CITY OF COLUMBUS FAILED TO PROVE THAT IT SUBSTANTIALLY COMPLIED WITH OAC 3701-53-05(D) MANDATING THAT THE INDIVIDUAL WHO COLLECTS THE URINE SAMPLE SHALL ADD ONE 'CAMBRIDGE CHEMICAL PRODUCTS SODIUM FLUORIDE-THYMOL (SFT)' TABLET TO THE SAMPLE AT THE TIME OF COLLECTION."

On July 15, 1995, Columbus Police Officers stopped defendant for operating his vehicle left of center. After defendant performed field sobriety tests, the officers arrested defendant and requested he provide a urine sample. Defendant agreed, and within two hours of his arrest defendant submitted his sample. Arresting Officer Robby L. Warnick and police BAC Room Supervisor Officer Richard Schirtzinger added a preservative SFT tablet to the sample and placed the sample in the BAC room refrigerator.

On July 17, 1995, defendant's sample was delivered to the Columbus Police Crime Lab, and on July 24, 1995, a police chemist analyzed it to find a concentration of .14 of one gram or more by weight of alcohol per one hundred milliliters urine. After the police chemist submitted her report, a complaint was filed with the Franklin County Municipal Court alleging defendant operated a motor vehicle with a prohibited urine alcohol concentration in violation of Columbus City Code ("C.C.C.") 2133.01(B)(3).

Pertinent to this appeal, defendant submitted a motion to suppress the urine test results. On November 25, 1995, the trial court held a hearing, and on December 7, 1995, the court overruled defendant's motion to suppress. On December 13, 1995, defendant entered a no contest plea to a charge of operating a vehicle with a prohibited urine alcohol concentration and he was sentenced accordingly.

Defendant timely appealed to this court, challenging the admissibility of the urine test results. Specifically, defendant alleges the Columbus Police Department failed to comply with Department of Health regulations governing the collection of blood and urine specimens, Ohio Adm.Code 3701-53-05, rendering the test results inadmissible. See R.C. 4511.19(D)(1). Such test results, however, may be admissible even without literal regulatory compliance. *State v. Plummer* (1986), 22 Ohio St.3d 292, 294. Absent a showing of

prejudice to the defendant, chemical analysis results remain admissible when police procedures substantially comply with the pertinent regulations. *Id.*

***2** Under the first prong of his assignment of error, defendant argues his urine sample should be suppressed because no evidence established the exact temperature of the police BAC room refrigerator or the Columbus Police Crime Lab refrigerator. [1] Ohio Adm.Code 3701-53-05(F) requires, "[w]hile not in transit to a laboratory or under examination all urine and blood specimens shall be refrigerated at a temperature of forty-two (42) degrees Fahrenheit or below." According to *Plummer, supra,* absent prejudice to defendant, his test results remain admissible if the department substantially complied with the refrigerator temperature requirement.

While defendant admits some of the city's testimony concerned the BAC refrigerator temperature, he asserts the evidence must establish the exact refrigerator temperature at the time his sample was placed inside. Cf. *Canton v. Hickman* (Apr. 15, 1991), Stark App. No. CA-8301, unreported; *State v. Lawless* (Nov. 14, 1989), Fairfield App. No. 23-CA-89, unreported; *State v. Joles* (Feb. 5, 1988), Lake App. No. 12-171, unreported. We disagree.

Even though the city's evidence did not indicate the exact refrigerator temperature, testimony by arresting Officer Warnick and BAC Room Supervisor Officer Schirtzinger established: (1) the refrigerator had a visible thermometer, (2) the officers recognized an appropriate temperature was forty-two degrees Fahrenheit or lower, (3) the specimen was put in the refrigerator within five to fifteen minutes of being collected, (4) the refrigerator typically is set below forty-two degrees, and (5) an administration sergeant is one of those in charge of the refrigerator; he inspects the "BAC room once an evening, and he has to sign off on it." (Tr. 23, 49, 90, 96, 99.) Such testimony arguably established the police department substantially complied with Ohio Adm.Code 3701-53-05(F). See *Cleveland v. Harmon* (Nov. 24, 1993), Cuyahoga App. No. 64139, unreported; *Cleveland v. Smith* (Apr. 2, 1992), Cuyahoga App. No. 60348, unreported (testimony refrigerator kept at constant forty-two degrees satisfies substantial compliance); *State v. Birchfield* (Dec. 4, 1990), Highland App. No. 744, unreported (substantial compliance given testimony regulations followed, refrigerator properly working and no evidence to the contrary); *State v. King* (Nov. 1, 1983), Union App. No. 14-82-18, unreported (substantial compliance given testimony refrigerator was kept at forty-two degrees).

However, even if the BAC refrigerator substantially complied with applicable regulations, the sample was transferred to the crime lab refrigerator, where it was stored for approximately one week. The city presented no evidence regarding the temperature of the crime lab refrigerator. Because the prosecution bears the burden of proving at least substantial compliance with applicable regulations, but failed to set forth any evidence of the crime lab refrigerator temperature, as a matter of law it did not meet its burden. See *State v. Davies* (Aug. 24, 1983), Van Wert App. No. 15-82-6, unreported; *Hickman, supra,* (no testimony as to internal temperature of refrigerator at police headquarters; court may not infer refrigerator set to proper temperature); *Lawless, supra,* (no testimony as to internal temperature; only testimony established refrigerator was operational); *Joles, supra,* (evidence established specimen stored in refrigerator, but exact temperature unknown). Cf. *City v. Kilts* (Sept. 15, 1981), Franklin App. No. 81AP-222, unreported (1981 Opinions 2830) (expert testimony that the failure to keep defendant's specimen properly refrigerated would reduce the percentage of alcohol in it). Without any evidence of at least substantial compliance, R.C. 4511.19(D)(1) dictates defendant's urine alcohol results are inadmissible. See, *e.g.*, *Aurora v. Kepley* (1979), 60 Ohio St.2d 73; *Cincinnati v. Sand* (1975), 43 Ohio St.2d 79 (state must prove specimen taken and analyzed in accordance with Department of Health methods and rules).

***3** For the foregoing reasons, we sustain the first assignment of error issue. Because our disposition of this first issue renders the other issue moot, we decline to address that second issue. See App.R. 12(A).

Having sustained defendant's assignment of error to the extent indicated, we reverse the judgment of the trial court and remand this matter for further proceedings consistent with this opinion.

Judgment reversed and case remanded.

BOWMAN and LAZARUS, JJ., concur.

Footnotes

1 Defendant's brief argues the results should be suppressed because there was no testimony concerning the temperature of the police BAC room refrigerator or the Columbus Police Crime Lab refrigerator. The record does not contain a copy of defendant's motion to suppress, and the trial court entry found the “City of Columbus” substantially complied with the Department of Health regulations. During the suppression hearing closing statements, defense counsel mentioned there was no testimony concerning the lab refrigerator temperature. (Tr. 139.) The state then requested to reopen the evidence as to a chain of custody issue, but did not request to reopen the evidence concerning the lab refrigerator temperature. (See Tr. 143.)