

State v. Williams, Not Reported in N.E.2d (1998)

1998 WL 164993

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

STATE of Ohio, City of Columbus, Plaintiff-Appellee,

v.

Jane Ann WILLIAMS, Defendant-Appellant.

No. 97APCO9-1141. | April 7, 1998.

APPEAL from the Franklin County Municipal Court.

Attorneys and Law Firms

Janet E. Jackson, City Attorney, Stephen L. McIntosh, City
Prosecutor, Heather B. Robinson and Brenda J. Keltner, for
appellee.

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

Opinion

OPINION

CLOSE, J.

*1 This is an appeal from a judgment of the Franklin County
Municipal Court overruling the motion to dismiss/motion to
suppress brought by Jane Ann Williams, defendant-appellant.

A Columbus Police Department officer arrested appellant
on February 9, 1997, for violating three Columbus City
Code sections. Appellant gave a breath sample. This breath
sample was analyzed by the Columbus Police Department's
BAC Verifier. The analyzed breath sample yielded a result
of .116 grams of alcohol per 210 liters of breath. Appellant
was charged with operating a motor vehicle while under the
influence of alcohol or drugs; with operating a motor vehicle
having a concentration of .10 of one gram or more by weight
of alcohol per 210 liters of breath, which is a violation of a
per se provision; and with failing to control her motor vehicle

and striking a concrete center wall. On February 14, 1997,
appellant entered a not-guilty plea to all charges.

On March 19, 1997, appellant moved to suppress evidence
obtained from her warrantless arrest and to dismiss. The
issues for consideration raised in the motion to suppress/
motion to dismiss were narrowed after the parties submitted
ten written stipulations to the trial court on June 10, 1997.
The specific issue raised by appellant was that the city of
Columbus, plaintiff-appellee, failed to comply with [Ohio
Adm.Code 3701-53-04\(C\)](#) as issued by the Ohio Department
of Health, which requires the retention of the calibration
records for BAC Verifiers, because it did not retain the failed
calibration checks. In fact, appellee stipulated that "Officer
Reichgott would testify that when instrument number
512289 would produce a calibration check result outside the
allowable deviation from the target value, he would not keep
the instrument's receipt showing the calibration check result
nor would he document the calibration check result in the
logbook kept on site." Therefore, appellant wanted the BAC
Verifier's results of her breath test to be suppressed.

The trial court overruled appellant's motion to dismiss/motion
to suppress on August 6, 1997, stating that appellee had
substantially complied with the Ohio Administrative Code
section and that the facts fail to show any prejudice to
appellant from the compliance that was less than strict.
Appellant then changed her plea to no contest on the charge
of operating a motor vehicle with a prohibited breath alcohol
content pursuant to a *per se* code section, and appellee
dismissed the remaining charges.

Appellant has timely appealed and brings one assignment of
error:

“APPELLANT'S CONVICTION MUST
BE REVERSED BECAUSE THE
TRIAL COURT ERRED TO THE
PREJUDICE OF THE APPELLANT
WHEN IT OVERRULED HER
JOINT MOTION TO DISMISS/
SUPPRESS WHEN IT CONCLUDED
THAT THE COLUMBUS POLICE
DEPARTMENT'S FAILURE TO
KEEP RECORDS OF FAILED
CALIBRATION CHECKS

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AMOUNTED TO 'SUBSTANTIAL COMPLIANCE.' ”

Ohio Adm.Code 3701-53-04 was amended effective July 7, 1997; however, we will refer to the former version for our review. Ohio Adm.Code 3701-53-04(A)(1) directs that “[t]he results of a calibration check shall be recorded on a calibration checklist.” Ohio Adm.Code 3701-53-04(C) states: “Results of calibration checks and records of calibration, maintenance and repairs shall be identified and retained, in accordance with paragraph (A) of rule 3701-53-01 of the Administrative Code.” Ohio Adm.Code 3701-53-01(A) states that the results of the tests shall be retained for not less than three years.

*2 The Ninth District has concluded that Ohio Adm.Code 3701-53-01 “requires the calibrating officer to record all calibration tests, successful as well as unsuccessful.” *State v. Griffith* (Sept. 21, 1988), Summit App. No. 13551, unreported. The Ninth District noted that all calibration checks needed to be recorded so that the record of a particular machine was not substantially misleading or prejudicial. *Id.* The Eleventh District, citing the Ninth District’s *Griffith* opinion, has concluded that Ohio Adm.Code 3701-53-04(A) (1) and (C) “state in unqualified terms that results of calibration checks and records of calibration shall be identified and retained * * * [and] that compliance with these provisions requires all calibration checks to be recorded.” *State v. Hominsky* (1995), 107 Ohio App.3d 787, 669 N.E.2d 523.

We agree with the Ninth and Eleventh Districts. In order to comply meticulously with Ohio Adm.Code 3701-53-01 and 3701-53-04, the calibrating officer must record the results of all of the calibration checks, successful as well as unsuccessful. When determining whether a defendant committed the *per se* offense of operating a motor vehicle with a prohibited breath alcohol content, the trier of fact is not required to find that the defendant operated a motor vehicle while under the influence of alcohol or drugs. See *Defiance v. Kretz* (1991), 60 Ohio St.3d 1, 573 N.E.2d 32. The trier of fact only has to find that the defendant’s chemical test reading was at the prescribed level and that the defendant operated a motor vehicle within the state. *Id.* Therefore, the accuracy of the test results is a critical issue in determining a defendant’s guilt or innocence. *Id.* The nearly irrebuttable nature of the

per se offense requires adherence to established procedures to insure the accuracy and reliability of BAC Verifiers. See *Hominsky, supra*, citing *State v. Vega* (1984), 12 Ohio St.3d 185, 465 N.E.2d 1303.

The Ohio Supreme Court, however, has held that “rigid compliance with Department of Health regulations in regard to alcohol testing [is] not necessary in order for test results to be admissible.” *State v. Plummer* (1986), 22 Ohio St.3d 292, 490 N.E.2d 902; see, also, *State v. Steele* (1977), 52 Ohio St.2d 187, 370 N.E.2d 740. Leeway exists for substantial, though not literal, compliance with the Ohio Department of Health regulations because strict compliance is not always realistically possible. *Plummer, supra*. The state must establish substantial compliance with the regulations. See *Defiance* and *Plummer, supra*. Then, the burden shifts to the defendant to show that she would be prejudiced by anything less than literal compliance. See *Plummer, supra*. If prejudice is not shown, then the test results are admissible. *Id.*

*3 We must decide whether appellee adhered substantially to the established procedures by only retaining those calibration results that were successful. See *Defiance, supra*. The stipulated facts submitted in this case sufficiently explain the calibration record for the BAC Verifier used to test appellant. The stipulated facts indicate that, even though the unsuccessful calibration checks were not retained, they were recorded in a manner which ensured that the record was not substantially misleading or prejudicial. Although the recording and retention of the successful and the unsuccessful calibration results is needed to comply strictly with Ohio Adm.Code 3701-53-01 and 3701-53-04, we conclude that, based on these specific facts, appellee did substantially comply with those code sections even though it discarded the unsuccessful calibration results.

The trial court did not err in determining that appellant did not present any evidence that she was prejudiced by appellee’s failure to comply with the literal requirements of Ohio Adm.Code 3701-53-01 and 3701-53-04. We note that the calibration test conducted before and after appellant’s breath test were both within tolerance. Therefore, the results of the breath test are admissible.

Appellant’s assignment of error is overruled, and the judgment of the trial court is affirmed.

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Judgment affirmed.

BRYANT, J., concurs, DESHLER, P.J., concurs separately.

DESHLER, P.J., concurring separately.

While I agree with the majority's reasoning and the judgment entered today, I do so with some reservation. The record here reveals that appellee has not literally complied with the applicable Ohio Administrative Code provisions relating to retention of calibration records for BAC Verifiers. While the convenient concept of "substantive reliance" is present in the instant case, careful attention to appellee's compliance with Ohio Administrative Code provisions in the area of BAC

testing is warranted. It is obvious that other Ohio Courts of Appeals have struggled with this issue, as evidenced by the cases cited by appellant.

In an era in which people are to a large extent convicted by machine, when charged with driving under the influence of alcohol, enforcement of regulations relating to the maintenance and accuracy of machines is of obvious importance. I am also aware, as the majority, that the Ohio Supreme Court has held that "rigid compliance with Department of Health regulations in regard to alcohol testing [is] not necessary in order for test results to be admissible." Perhaps it is time for the Ohio Supreme Court to revisit this issue.

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