

State v. Roush, Not Reported in N.E.2d (1997)

1997 WL 284634

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CHECK OHIO SUPREME COURT RULES  
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WEIGHT OF LEGAL AUTHORITY.

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

STATE of Ohio, Plaintiff-Appellant,

v.

Steven M. ROUSH, Defendant-Appellee.

No. 96APC10-1389. | May 27, 1997.

APPEAL from the Franklin County Municipal Court.

**Attorneys and Law Firms**

Janet Jackson, City Attorney, and Steven L. McIntosh, City  
Prosecutor, for appellant.

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

**Opinion**

DESHLER, J.

\*1 Defendant-appellee, Steven M. Roush, was arrested on April 23, 1996, and charged with failure to drive within marked lanes of traffic pursuant to R.C. 4511.33, operating a motor vehicle under the influence of alcohol under R.C. 4511.19(A)(1), and 4511.19(A)(3). Appellee entered a plea of not guilty at his initial appearance, and appealed his administrative license suspension (ALS), which was stayed by the court. Appellee then filed a motion to suppress the results of his breath test, claiming that the arresting officer did not have probable cause for the initial stop and subsequent arrest, and that the testing procedure did not comply with applicable Ohio Department of Health (ODH) regulations on calibration of breath testing machines.

The parties stipulated that a calibration test of the machine used to test appellee's blood alcohol level conducted prior to the test of appellee, gave a result of .095, for a test solution target value of .100. The first calibration of the machine subsequent to appellee's test, conducted on April 22, 1996,

had a result of .094, outside of the permissible range. A calibration conducted on April 22, 1996, using a different bottle from the same batch of test solution yielded a test result of .097, within the permissible range of .095-.105.

Appellee also argued in support of his motion to suppress that the bottle of calibration solution used to perform the second post-test calibration on April 22, 1996, did not have a calibration certificate that complied with applicable ODH regulations, because the certificate did not state a valid target value. The calibration certificate gave a target value as “.100 plus or minus .005,” which appellee argued did not comply with ODH regulations requiring a specific target value of, for example, .100.

The trial court held a hearing on October 16, 1996, and based upon the stipulated evidence and arguments of the parties, concluded that the arrest of appellee was made pursuant to adequate probable cause. The court also held that the calibration solution certificate properly stated a target value of .100, but proceeded to suppress appellee's test results based upon the first post-test calibration of .094, outside the permissible plus or minus .005 range. The court consequently lifted the ALS suspension, since the test result had been suppressed.

The state has timely appealed and brings the following two assignments of error:

“FIRST ASSIGNMENT OF ERROR

“THE TRIAL COURT ERRED AS A MATTER OF LAW IN SUPPRESSING THE RESULTS OF APPELLEE'S BREATH TEST ON THE BASIS OF NONCOMPLIANCE WITH OHIO ADMINISTRATIVE CODE 3701-53-04(A) (2).

“SECOND ASSIGNMENT OF ERROR

“THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING ERROR IN THE ADMINISTRATIVE LICENSE SUSPENSION AND IN TERMINATING THAT SUSPENSION BASED UPON AN ERRONEOUS READING OF THE OHIO ADMINISTRATIVE CODE.”

Appellee has filed a notice of cross-appeal; although no statement of a specific assignment of error with respect to

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his cross-appeal is present in appellee's brief, from the notice of cross-appeal and the arguments in appellee's brief, it is plainly discernable that appellee assigns as error the trial court's determination that the calibration solution certificate stated a target value of .100, and thus complied with ODH regulations. From the procedural posture of this case, it is clear that appellee's cross-appeal is conditional, as it could only affect the outcome of the case if one or both appellant's assignments of error are sustained.

\*2 The issue raised by appellant's first assignment of error is whether the calibration procedures employed on the machine used to test appellee's breath complied with applicable regulations. Generally, pursuant to [Ohio Adm.Code 3701-53-04](#), a breath test machine is validly calibrated when the result of the calibration check is within plus or minus .005 grams of alcohol per two hundred ten liters of breath. [Ohio Adm.Code 3701-53-04\(A\)\(1\)](#). "Approved evidential breath testing instruments shall be checked for calibration no less frequently than once every seven days"; when a machine produces a valid calibration result within this seven day period, all breath tests administered in between valid calibration proceedings will be deemed analyzed by a properly calibrated machine. If a machine fails to produce a proper calibration result in the calibration check, either immediately preceding or immediately subsequent to a defendant's breath test, the test results shall be suppressed because of the possibility that the malfunction could have occurred at any time subsequent to the previous calibration. [Upper Arlington v. Kimball \(1994\), 95 Ohio App.3d 630, 633, 643 N.E.2d 177](#).

In this case, it is undisputed that the first post-test calibration produced a result outside of the permissible range, *i.e.*, .094. Appellant argues, however, that since the rechecked calibration performed immediately thereafter with a fresh container of calibration solution produced a result within the accepted range, this complied with calibration regulations. [Ohio Adm.Code 3701-53-04\(A\)\(2\)](#) provides as follows:

"Results of a calibration check which are outside the range specified in paragraph (A)(1) of this rule shall be confirmed by the senior operator using another bottle of calibration solution, which may be from any approved lot. If this calibration check also is out of the range, the instrument

shall be taken out of service until the problem has been corrected."

It is undisputed in this matter that the second, rechecked, calibration of the machine produced an acceptable result. The clear implication of [Ohio Adm.Code 3701-53-04](#) is that if the recheck produces a result which is *within* the specified range, the instrument will *not* be taken out of service. We therefore find that the trial court did err in concluding that the calibration checks performed after appellant's breath test produced results warranting suppression. Appellant's first assignment of error is accordingly sustained.

We shall next address the issues raised in appellee's cross-appeal. Appellee argues that the "Approval of Calibration Solution" certificate for the test solution batch used in the second recheck of the breath test machine stated an impermissible "target range," rather than "target value" as specified by the regulations. The calibration test solutions contain a mixture of ethyl alcohol and water in a proportion which gives a "target value" for the breath test machine results when the calibration solution is blown into the machine in a manner similar to which a breath test is performed. The Approval of Calibration Solution certificate contains a specified target value for the solution. Pursuant to a calibration test, if the machine registers a result within plus or minus .005 of the solution target value, the machine is deemed validly calibrated. In the case before us, the certificate for the test solution batch employed in the calibration check stated, "[t]his calibration solution contains 1.21 ±2% mg/mL ethyl alcohol in distilled water. When used according to calibration checklists, it will produce a reading of .100 g/210L ±.005 in the approved breath testing instrument, when that instrument is in proper working condition."

\*3 Appellee argues that this stated "target range" rather than a "target value" impermissibly expands the acceptable range of calibration test results when the machine is checked, due to the cumulating effect of both the plus or minus .005 range of the solution's target range and the plus or minus .005 range provided for in the Ohio Administrative Code testing procedure. The certificate as labeled would thus provide a tolerance for the machine calibration test results of between .090 and .110, an excessively wide permissible margin of error. Appellee cites a trial court decision, *City of*

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*Sidney v. Goodrich* (1996), 81 Ohio Misc.2d 5, 673 N.E.2d 695, in support of this proposition.

We agree with appellee that the calibration test solution certificate as written contains potential to introduce error into the calibration proceedings; however, the inquiry does not end there. Simply because the test solution was mislabeled with a “target range” rather than a “target value,” does not establish that a miscalibration of the machine ensued. Appellee concedes that test solution certificates are correctly and typically labeled with a target value rather than a target range. If the testing officer performs the calibration test using only the initially stated value of .100, and ignored the “plus or minus .005” surplus included thereafter, the calibration test would then have been conducted in accordance with applicable regulations. Unfortunately, the transcript does not reveal that any inquiry on this basis was made, and it is impossible to ascertain whether or not the calibration process was affected by the mislabeled solution.

Accordingly, we find that appellee's cross-assignment of error has merit, but that further inquiry must be made into the effect that the erroneously labeled certificate affected the calibration process. We therefore remand the matter to the trial court for an evidentiary determination as to what effect the incorrectly labeled calibration solution certificate had upon the actual procedures employed to test the machine used in appellee's

breath test; specifically, whether the machine was tested using a “target range” as stated on the test solution certificate, or a “target value” as would normally be employed.

Finally, we address appellant's second assignment of error, which asserts that the trial court erred in terminating appellee's administrative license suspension. Because the suppression of appellee's breath test result is reversed pursuant to our determination on appellant's first assignment of error, and the matter is remanded for further proceedings with respect to appellee's cross-assignment of error, appellant's second assignment of error is well-taken, and the matter of the administrative license suspension shall be addressed by the trial court upon remand.

In accordance with the foregoing, appellant's first and second assignments of error are sustained, and appellee's cross-assignment of error is sustained in part. The matter is remanded to the Franklin County Municipal Court for further proceedings consistent with this decision.

*\*4 Judgment sustained in part, reversed in part, and cause remanded.*

PETREE and CLOSE, JJ., concur.