

[Cite as *State v Reed*, 2004-Ohio-393.]

**IN THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
VAN WERT COUNTY**

STATE OF OHIO

PLAINTIFF-APPELLEE

CASE NO. 15-03-08

v.

MICHAEL W. REED

OPINION

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Criminal Appeal from Municipal Court

JUDGMENT: Judgment Affirmed

DATE OF JUDGMENT ENTRY: February 2, 2004

ATTORNEYS:

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SHAW, J.

{¶1} Defendant-appellant, Michael W. Reed, appeals a judgment of the Van Wert County Municipal Court, finding him guilty of driving under the influence of alcohol. Reed claims that the trial court erred in not suppressing the results of his breathalyzer test because the state failed to show that the test was administered in substantial compliance with the Ohio Department of Health (“ODH”) regulations governing alcohol testing. After reviewing the record, we find that the state met its burden in showing substantial compliance with ODH regulations. Accordingly, we overrule Reed’s assignment of error and affirm the decision of the trial court.

{¶2} In the early morning hours of February 3, 2003, Officer Robert Black observed Reed driving a vehicle in a consistent lane of travel on top of the double yellow centerline. Consequently, Officer Black effectuated a traffic stop of Reed. During the traffic stop, Officer Black observed the strong odor of alcohol in

the car and had Reed exit the vehicle. Officer Black then administered several sobriety tests to Reed, and, based upon his observations, placed Reed under arrest for driving while under the influence of alcohol. Subsequently, Reed agreed to submit to a BAC Datamaster breathalyzer test. The test was administered by Officer Black and revealed that Reed's blood alcohol level was .159 per 210 liters of breath.

{¶3} Based on Officer Black's observations and the BAC Datamaster test, Reed was charged with driving under the influence of alcohol in violation of R.C. 4511.19(A)(3). Reed entered a plea of not guilty and filed a motion to suppress the results of the BAC Datamaster. The motion to suppress was based on the allegation that the state had not complied with ODH regulations concerning alcohol testing. At the suppression hearing, the trial court found that the BAC Datamaster test had been administered in substantial compliance with ODH regulations and overruled Reed's motion for suppression. Reed then changed his pleas to no contest, and the trial court entered judgment finding him guilty of violating R.C. 4511.19(A)(3). From this judgment Reed appeals presenting the following assignment of error.

The trial court erred in overruling Appellant’s motion to suppress the results of the breath test administered to the Defendant/Appellant as the state of Ohio did not make the requisite showing that there was substantial compliance with Department of Health regulations regarding the blood alcohol content breath test administered to the defendant.

{¶4} Reed maintains that the trial court erred in not excluding the results of the BAC Datamaster test because the state failed to prove that the test had been administered in substantial compliance with ODH regulations. Specifically, Reed complains of seven particular statutory requirements that he claims the state failed to prove at the suppression hearing. In his brief, Reed addresses each statutory requirement under a separate subsection of his assignment of error, and we will address them in the same manner.

Standard of Review

{¶5} An appellate court’s review of a motion to suppress involves mixed questions of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶ 8. We must accept the trial court’s findings of fact as true if they are supported by competent and credible evidence. *Id.*, citing *State v. Fanning* (1982), 1 Ohio St.3d 19, 20. However, with respect to the trial court’s findings of law, we must apply a de novo standard of review and decide, “whether the facts satisfy the

applicable legal standard.” *Burnside*, at ¶ 8, citing *State v. McNamara* (1997), 124 Ohio App.3d 706, 710.

{¶6} To challenge the admissibility of an alcohol test, the defendant must first file a pretrial motion to suppress. *Burnside*, at ¶ 24. This shifts the burden to the state “to show that the test was administered in substantial compliance with the regulations prescribed by the Director of Health.” *Id.* Once the state has met its burden of proving substantial compliance with ODH regulations, then the burden shifts back to the defendant to show how he was prejudiced by the failure of the state to strictly follow ODH regulations. *Id.* In the case herein, Reed filed a motion to suppress the BAC Datamaster on the grounds that it was not administered in substantial compliance with ODH regulations, shifting the burden of production to the state. Therefore, we must decide whether there was competent and credible evidence that the state substantially complied with ODH regulations.

A. No evidence was proffered that the operational manual provided by the manufacturer was on file in the area by the breath testing machine as mandated by OAC 3701-53-01(B).

{¶7} Ohio Adm.Code 3701-53-01(B) requires that “[i]n the case of breath tests *** the operational manual provided by the instrument’s manufacturer shall

be on file in the area where the breath tests are performed.” Reed maintains that the state failed to provide evidence that such a manual was present in the area where his BAC Datamaster test was administered.

{¶8} However, a review of the record shows that testimony clearly established there was a manual located in the same room Reed performed his breath test. Officer Black testified that the manual is kept in a drawer below the machine, but that he did not physically see it the day he administered the test to Reed. We find that this is competent and credible evidence that the manual was kept on file in the area where the test was performed as required under Ohio law. Therefore, we overrule the first subpart of Reed’s assignment of error.

B. No evidence was proffered that the instrument used on the appellant was a properly approved instrument as mandated by OAC 3701-53-02.

{¶9} Ohio Adm.Code 3701-53-02 lists the approved devices that may be used to determine a person’s blood alcohol level through breath testing. One of the listed devices is the BAC Datamaster. Ohio Adm.Code 3701-53-02(A)(1).

{¶10} The testimony of Officer Black showed that a BAC Datamaster was used to determine Reed’s blood alcohol level, and it is not the role of this court to reevaluate the truthfulness of witnesses. Finding that Officer Black’s testimony is

competent and credible evidence establishing substantial compliance by the state, we overrule the second subpart of Reed's assignment of error.

C. No evidence was proffered that the test administered to the appellant was analyzed according to the operational checklist for the instrument being used and that checklist forms were retained as mandated by OAC 3701-53-02(C).

{¶11} Ohio Adm.Code 3701-53-02(C) states that breath samples taken for the purpose of determining a person's blood alcohol level "shall be analyzed according to the operational checklist for the instrument being used." After Officer Black's testimony, the state moved to enter into evidence state's exhibit four consisting of several attached documents. One of the attached documents was the operational checklist Officer Black had filled out while administering the BAC Datamaster to Reed. Reed objected to the operational checklist being admitted on the grounds that it was hearsay and had not been properly authenticated.

{¶12} Looking at the operational checklist in question, it is clear that it was filled out by Officer Black in connection with Reed's BAC Datamaster test. It contains the date of the infraction, Reed's name, social security number, address, and driver's licensee number. It also contains Officer Black's name, signature,

and senior operator permit number. Further, it references OAC 3701-53-02, the statute requiring an operational checklist. Therefore, if it is admissible, this checklist would be competent and credible evidence showing that the state had substantially complied with Ohio Adm.Code 3701-53-02(C).

{¶13} Evidence is inadmissible as hearsay if it is an out of court statement being offered for the truth of the matter asserted in the evidence. Evid.R. 801(C); Evid.R. 802. However, Evid.R. 803(8) establishes the public records and reports exception to the hearsay rule as:

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, unless the sources of information or other circumstances indicate lack of trustworthiness.

The Ohio Supreme Court has interpreted this language to allow the, “introduction of records of a routine, intra-police, or machine maintenance nature, such as intoxilyzer calibration logs. Such routine records are highly likely to be reliable, and are precisely the type contemplated as admissible by the public records

exception to the rule against hearsay.” *State v. Ward* (1984), 15 Ohio St.3d 355, 358.

{¶14} The operational checklist in question herein is just such a public record. It is not a recordation of criminal activity observed by an officer, but rather a recordation of the routine steps he took in administering the BAC Datamaster. Accordingly, we find that the operational checklist fell under the public records hearsay exception and was properly allowed into evidence.

{¶15} Reed also asserts that the state failed to properly authenticate the operational checklist. Evid.R. 901(A) requires evidence to be properly authenticated before it can become admissible. The purpose of authentication is to prove that the matter is what its proponent claims it to be. Authenticity is usually proven by extrinsic evidence unless the evidence is self-authenticating under Evid.R. 902. *State v. Lake*, 151 Ohio App.3d 378, 2003-Ohio-332, at ¶ 16.

{¶16} The sections of Evid.R. 902 pertinent to the current case are as follows:

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

- (1) Domestic public documents under seal.**

A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(4) Certified copies of public records.

A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any law of a jurisdiction, state or federal, or rule prescribed by the Supreme Court of Ohio.

{¶17} The operational checklist in question was one of several other documents entered into evidence collectively as state's exhibit four. The cover sheet for state's exhibit four was a signed statement by Sergeant Jon Cross, acting commander of the Van Wert, Ohio Highway Patrol Post, that the attached documents were kept under his authority and were true and accurate copies of the original records on file at the Van Wert Highway Patrol Post. The cover sheet was notarized and signed under seal.

{¶18} Because the operational checklist is certified under seal as an authentic copy of an official record by a person authorized to make such a certification, it is self authenticating under Evid.R. 902(4). Therefore, the state was not required to present extrinsic evidence concerning the authenticity of the operational checklist.

{¶19} Because the operational checklist is a self authenticating public record excepted from the hearsay rule, we find that it was properly entered into evidence. Accordingly, we find that the operational checklist is competent and credible evidence that the state substantially complied with Ohio Adm.Code 3701-53-02(C), and we overrule the third subpart of Reed's assignment of error.

D. No evidence was proffered that a proper instrument check was conducted by a senior operator as mandated by OAC 3701-53-04.

E. No evidence was proffered that the instrument used on the appellant had a radio frequency interference check properly conducted within the past seven days as mandated by OAC 3701-53-04(A)(1).

Ohio Adm.Code 3701-53-04 states that:

(A) A senior operator shall perform an instrument check on approved evidential breath testing instruments and a radio frequency interference (RFI) check no less frequently than once every seven days in accordance with the appropriate instrument checklist for the instrument being used. The instrument check

may be performed anytime up to one hundred and ninety-two hours after the last instrument check.

(1) The instrument shall be checked to detect RFI using a hand-held radio normally used by the law enforcement agency. The RFI detector check is valid when the evidential breath testing instrument detects RFI or aborts a subject test. If the RFI detector check is not valid, the instrument shall not be used until the instrument is serviced.

{¶20} Reed asserts that the state failed to present any admissible evidence that a senior operator had performed either the instrument check or the radio frequency interference check. In support of its contention that both of the required checks had been appropriately performed, the state introduced into evidence two instrument checklist forms. The forms were dated February 2 and 9, 2003. Both were filled out by Jonathon Gray, who signed each form with his name and senior operator license number, and each form contained a detailed description of the process involved in performing the instrument check and the radio frequency interference check. Further, the face of the instrument checklists referenced Ohio Adm.Code 3701-53-04, the statute requiring an instrument and radio frequency interference check.

{¶21} Reed argues that the instrument checklists were inadmissible because they were hearsay and were not properly authenticated. Relying on the

discussion of evidence law above, the checklists fall within the public records exception to the general hearsay rule. They are records of “routine, intra-police, or machine maintenance nature.” *Ward*, 15 Ohio St.3d at 358. Therefore, they were properly admitted into evidence under the public records hearsay exception.

{¶22} Furthermore, the checklists were entered into evidence as part of the previously mentioned package of documents making up state’s exhibit four. The instrument checklists were self authenticating under Evid.R. 902(4) because they were copies of public documents that were certified, under seal, as a true and accurate copies. Therefore, we do not find that it was error for the trial court to allow the instrument checklists to be entered into evidence. Moreover, we find that the checklists were competent and credible evidence that the instrument check and radio frequency interference check were performed as required by Ohio Adm.Code 3701-53-04.

{¶23} However, in order to prove substantial compliance with Ohio Adm.Code 3701-53-04, the state also had the burden of proving that the person performing the required checks was a senior operator. To prove this, the state entered the original of Gray’s senior operator’s license into evidence. However, the license was entered into evidence separately as state’s exhibit one, not as part

of the package of documents in state's exhibit four. Reed challenges the admissibility of Gray's operator's license as not being properly authenticated.

{¶24} Under Evid.R. 902(1), a domestic public document is self authenticating when it bears the seal of “the United States, or of any State, district, Commonwealth, *** or of a political subdivision, *department*, officer, or agency thereof, and a signature purporting to be an attestation or execution.” (Emphasis added.) Other courts have considered whether a senior operator's permit is self authenticating and have concluded that because it contains the seal of the Department of health and the signature of the Director of Health, it is a self authenticating document under Evid.R. 902(1). *State v. Farris* (1989), 62 Ohio App.3d 189, 193; *State v. Smith* (1989), 63 Ohio App.3d 71, 78. We agree with the reasoning behind these cases, and find that Gray's senior operator's permit, having both the seal of the Department of Health and the signature of the Director of Health, is a self authenticating document. Thus, we find that the trial court did not err by entering the permit into evidence.

{¶25} Having found that the state properly entered into evidence a valid senior operator's permit and two valid instrument checklists, we hold that the state met its burden of proving substantial compliance with Ohio Adm.Code 3701-53-

04. Therefore, the fourth and fifth subparts of Reed's assignment of error are overruled.

F. No evidence was proffered that the calibration solutions used to conduct the check were approved by the director of health, used more than three months after first use, containing ethyl alcohol, used after the expiration date, or that such solutions were kept under proper refrigeration as mandated by OAC 3701-53-04.

Ohio Adm.Code 3701-53-04 requires that:

(A)(2) An instrument shall be checked using an instrument check solution containing ethyl alcohol approved by the director of health. An instrument check result is valid when the result of the instrument check is at or within five one-thousandths (0.005) grams per two hundred ten liters of the target value for that instrument check solution. An instrument check result which is outside the range specified in this paragraph shall be confirmed by the senior operator using another bottle of approved instrument check solution. If this instrument check result is also out of range, the instrument shall not be used until the instrument is serviced.

(C) An instrument check solution shall not be used more than three months after its date of first use, or after the manufacturer's expiration date (one year after manufacture) whichever comes first. After first use, instrument check solutions shall be kept under refrigeration when not being used. The instrument check solution container shall be retained for reference until the instrument check solution is discarded.

{¶26} Reed claims that the calibration solution used in the instrument check was not in substantial compliance with ODH regulations. To prove that the calibration solution met all of the statutory regulations, the state entered into evidence, as state's exhibit three, an original calibration solution certificate. The certificate contained the seal of the Department of Health and the signature of the Director of Health. It also contained the batch number, the amount of ethyl alcohol the solution contained, and the dates the solution was manufactured on and first used. The solution was manufactured on July 12, 2002, and first used on February 2, 2003. The date of the arrest, February 3, 2003, is well within the statutory lifespan of calibration solution as specified in Ohio Adm.Code 3701-53-04. Reed asserts that the certificate is inadmissible because it is hearsay and was not properly authenticated.

{¶27} As discussed in previous subparts, the calibration solution certificate is a public document concerning routine machine maintenance nature and not hearsay under Evid.R. 803(8). The Ohio Supreme Court has specifically held that properly authenticated calibration documents are admissible despite the absence of the calibrating officer at the trial. *Ward*, 15 Ohio St.3d at paragraph one of the

syllabus. Therefore, it was proper for the trial court to find that the certificate was not hearsay.

{¶28} Furthermore, this court and several other courts have found that an original calibration solution certificate is self authenticating under Evid.R. 902(1). *State v. O'Reilly* (Nov. 5, 1986), 3rd Dist. No. 2-85-4, unreported; *Lake*, at ¶ 16; *State v. Kurtz* (June 13, 2001), 9th Dist. No. 00CA0092, unreported; *State v. Monsour* (Dec. 5, 1997), 11 Dist. No. 96-P-0274, unreported. The calibration solution certificate herein contained the seal of the Department of Health and the signature of the Director of Health. Thus, the certificate was properly authenticated and entered into evidence.

{¶29} Consequently, we find that the authenticated calibration certificate was competent and credible evidence that the state substantially complied with Ohio Adm.Code 3701-53-04. Therefore, the sixth subpart of Reed's assignment of error is overruled.

G. No evidence was proffered that the arresting officer who administered the test to the appellant was properly certified senior operator, was a high school graduate, or had taken an operator training course as mandated by OAC 3701-53-07.

{¶30} In the last subpart of his assignment of error, Reed maintains the state failed to show that Officer Black was a senior operator as required by Ohio Adm.Code 3701-53-07(C). However, at trial the state entered into evidence, without objection, Officer Black's senior operator's permit as state's exhibit two. Under Evid.R. 103(A)(1), an appellant can not predicate error upon a ruling which admits evidence when there has been no objection made at the trial court level. *White v. Devore* (May 13, 1999), 3rd Dist. No. 9-98-71, unreported.

{¶31} Accordingly, we find that Officer Black's senior operator's permit was properly entered into evidence, and that it is competent and credible evidence that the state substantially complied with Ohio Adm.Code 3701-53-07(C).

{¶32} Having reviewed the entire record, we find that the state substantially complied with the ODH regulations governing the testing of blood alcohol levels. Consequently, we overrule Reed's assignment of error and affirm the decision of the trial court.

{¶33} Having found no error prejudicial to the appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment affirmed.

BRYANT and CUPP, JJ., concur.

