

DUI – BREATH TESTING – VARIATION BETWEEN SAMPLES

Docket No. 78-12-02 Bncs

STATE OF VERMONT

v.

MICHAEL MORGEN, Sr.

Bennington District Court

January 31, 2003

HOWARD, J. This matter came before the court for a merits bearing on a civil suspension procedure under 23 V.S.A. § 1205.

Findings

The defendant was found in his vehicle by Officer Dean after a phone call by a concerned person who had seen some erratic operation. The vehicle was improperly parked at an angle with passenger side wheels up on the curb. The engine was still running and the lights were on. The defendant was in the operator's seat. He had difficulty getting out of the car and there was a strong odor of alcohol. The defendant had balance problems. He admitted to consuming alcohol. The officer did not have the defendant do field sobriety tests due to his apparent level of intoxication except for the horizontal gaze nystagmus test, which he scored several points or "clues" on.

The defendant was taken to the station for processing. He answered questions, admitting he had been operating and that he had consumed four or five beers that evening. He indicated that he had been "slightly" under the influence of alcohol while driving. He was then properly and fully advised of his rights under the implied consent law, including his right to counsel, the effects of taking an evidentiary breath test, and of refusing to take one. The defendant declined to speak to an attorney. He then took an evidentiary breath test at 0017 hours on December 15, 2002. This was within two hours of operation, which had been at 23:31 hours the on the 14th.

The officer operated the machine properly. The defendant produced a sample of breath that the machine accepted, and it produced a result of .185%. Three minutes later the defendant took a second breath sample at his request. This produced a result of .206%. Again, the officer operated the machine properly, and the machine accepted the defendant's breath sample.

The Datamaster has been determined to be able to accurately analyze a breath sample to within 10%. Each machine is also tested three times during a year using a known sample and an accuracy result to within 5% is required. Each time the machine runs to test a sample, it must first accurately determine an external sample to within 10%. The two tests taken in this matter vary by slightly more than 10% to 11%.

The state's expert would be concerned about two such separate samples differing by too large a degree, but believed the 10 to 11% variation here was not a problem. He did not go into detail about what degree of variation would be of concern to him or try to explain how this difference might have occurred except that two separate samples could simply differ. He testified that the regulations of the

state do not require such separate tests be within 10% of each other and the court agrees and finds this is correct.

The defense expert claims that the state regulations indicate such a variation as exists here means the test results are per se unreliable. The court does not find this interpretation of the regulations correct. Regardless of the interpretation of the regulations, the expert does claim the variation is "unusually wide" but he does not offer further evidence on this issue aside from the claim it violates the regulations and thus is not reliable or accurate.

Analysis and Decision

The court finds that the officer had reasonable grounds to stop and process the defendant. The defendant was properly advised of his rights under 23 V.S.A. § 1202(d) and understood them. The officer operated the machine properly and obtained a result of over .08% within two hours of operation. The general testing methods were valid and reliable.

The issue then is whether this result was accurate and accurately evaluated. The defendant argues that it was not, pointing out that the second breath test taken within three minutes varied from the first by slightly more than 10%. He argues that under the regulations for breath testing, this demonstrates the machine could not accurately analyze a sample to within 10%. Since the samples were from the same person within minutes of each other and the machine accepted both of them, the defendant argues the two results had to be within 10% under the regulations.

The state argues the defendant's interpretation of the regulations is incorrect. It argues that the regulation does not apply to separate samples taken from a person, but rather simply to whether the machine is demonstrated to be able to analyze each sample to that degree of accuracy. Its expert evidence supports this claim. The defendant's expert evidence supports his claim that such a difference between two samples taken under such circumstances violates the regulation.

The regulation does not specify that the 10% rule applies to two samples from one defendant taken during a processing. While it does not clearly have language that the state's interpretation is correct, the court finds a reasonable reading of the regulation requires this result. The portion in question reads:

Analytical instrumentation shall be capable of determining the blood or breath alcohol concentration of the person sampled with an accuracy of plus or minus 10%.

The sample difference involved here does not show this regulation has been violated, but it does require a determination of whether the difference between samples in this particular case prevents the state from showing it has an accurate and reliable result in this specific matter. This is what was involved in *State v. Flynn*, No. 98-230 (April 1999) (three judge mem.), an opinion to which both parties have referred. The trial judge found there that two results from the same defendant of .169% and .143% indicated an unreliability that required a find-

ing for the defendant in the civil suspension procedure. The panel affirmed without having to reach the issue of whether the disparity violated the regulation. It noted the trial judge always has to make a factual determination of reliability and the widely disparate results justified the finding there was no reliable result. See *State v. Rolfe*, 166 Vt. 1, 13 (1996) (defendant may argue court gives test result no weight even where instrument is found to meet regulatory performance standards).

The test results herein are not as disparate. They were a .185% and .206%. There was testimony the defendant may have blown slightly differently during the two samplings even though the machine accepted both samples. There is no expert evidence, though, as to how that might effect the results or cause the difference of 10 to 11%. The state presented evidence that the difference in the two samples was not critical in the opinion of its expert. The witness would be concerned about a greater variation even if this was not a violation of the regulation set out above. This is because even though they are two totally separate samples, they should not vary too much when taken minutes apart. This witness did not testify about the officer's evidence of the slight difference in how the defendant gave his samples. He did not indicate any particular degree of difference that he would consider per se unreliable or where the line is at which he would start having concerns.

The defense presented evidence that such a result was not reliable or trustworthy. Even though its witness relied on the regulation in stating the two results were per se invalid, he still asserted that the 10% to 11% variation in the samples was unusually disparate regardless of the regulations. This witness did not opine either on the limited testimony about how the defendant gave the two samples.*

The burden is on the state in this proceeding. It is a preponderance of the evidence burden. The court does not find it has met that burden as to the element of 23 V.S.A. § 1205(h)(4) due to the variations in the two separate results and the lack of evidence as to how that might have occurred or why this degree of variation is not a problem but a larger degree might be. This finding is not based on an interpretation of the regulations that such tests must be within 10% of each other. The court does not find that is per se required under the regulations for a valid test result. It may be in some cases the state could provide evidence that would explain a 10% or 11% variation. The court finds it has not done so under its burden of proof.

Order

Judgment is entered for the defendant in this matter.

Notes to Text:

* The defendant's expert testified by affidavit prepared in advance of the testimony.

Brian Marthage, Deputy Bennington State's Attorney, Bennington, for State
Bradley Myerson, Manchester, for defendant