

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93538

CITY OF EUCLID

PLAINTIFF-APPELLEE

vs.

DAVID L. JACKSON, JR.

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Euclid Municipal Court
Case No. CR 08 TRC 04986

BEFORE: Blackmon, P.J., Dyke, J., and Celebrezze, J.

RELEASED: May 13, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

PATRICIA ANN BLACKMON, P.J.:

{¶ 1} Appellant David L. Jackson, Jr. appeals his conviction for driving under the influence (“DUI”) in violation of Euclid Ord. 331.01(A). He assigns the following error for our review:

“The trial court erred to the prejudice of defendant-appellant when it overruled his motion to suppress.”

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court’s judgment. The apposite facts follow.

{¶ 3} Jackson was charged in Euclid Municipal Court with driving under the influence, having a breath alcohol content in excess of the legal limit, and hit and skip. Jackson entered a not guilty plea at his arraignment. Defense counsel filed a motion to suppress the results of the breath-alcohol test, which was conducted on September 18, 2008. A hearing was conducted on the matter.

Motion to Suppress Hearing

{¶ 4} Jackson argued that the results of his breath-alcohol test should be suppressed because the City failed to comply with Ohio Administrative Code Section (“OAC”) 3701-53-04. He contended that the City must prove that the bottle of solution used in the calibration of the breath-testing machine came from an approved batch solution.

{¶ 5} The City called one witness, Janet Clinton, who is the warden of the Euclid City Jail. Her division is responsible for the calibration of the

breath- testing machine. She testified that the solution for calibrating the machine is received by the jail in a box containing two bottles of solution and a certificate from the Ohio Department of Health verifying the solution meets the department's requirements. The certificate only verifies the batch number. It does not list the bottle numbers related to that particular batch. Clinton explained that a sticker is affixed to each bottle. Both the batch and bottle numbers appear on the sticker.

{¶ 6} Sometimes the department of health provides an extra sticker, which the police department affixes to the certificate. The Euclid Police Department retains the health department certificates; however, expired bottles of the solution are disposed of. Clinton stated that the jail did not receive an extra bottle sticker to affix to the certificate in the instant case; therefore, the certificate only verifies the batch number.

{¶ 7} The police department retains a log detailing the date the machine was tested. The log also lists the number on the bottle of solution used to calibrate the machine, along with the batch number listed on the bottle's sticker. The log from September 2008 showed that the machine was calibrated three days prior to Jackson's arrest. The bottle and batch numbers are also listed.

{¶ 8} The trial court denied Jackson's motion to suppress concluding that the Euclid Police Department's testing log and the copy of the health

department's certificate verifying the batch of solution, was sufficient to show the City substantially complied with the code.

{¶ 9} Jackson entered a no contest plea to one count of driving under the influence, the other charges were nolle. The trial court found him guilty and sentenced him to 45 days in jail, with 42 days suspended. His \$500 fine was also suspended. He was placed on community control for one year and his driving privileges were suspended for nine months. Jackson filed a stay pending appeal, which the trial court granted.

Denial of Motion to Suppress

{¶ 10} In his sole assigned error, Jackson contends the trial court erred by denying his motion to suppress. He argues the City cannot prove it complied with OAC 3701-53-04 because there was no proof that the bottle of solution used to calibrate the machine was from a batch of solution approved by the Ohio Health Department.

{¶ 11} At a hearing on a motion to suppress, the trial court functions as the trier of fact. Accordingly, the trial court is in the best position to weigh the evidence by resolving factual questions and evaluating the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. On review, an appellate court must accept the trial court's findings of fact if those findings are supported by competent, credible evidence. *State v. Retherford* (1994), 93 Ohio App.3d 586, 592, 639 N.E.2d 498. After accepting

such factual findings as true, the reviewing court must then independently determine, as a matter of law, whether or not the applicable legal standard has been met. Id.

{¶ 12} Once a defendant raises the issue of a test's reliability, the state is only required to prove substantial compliance with the Ohio Department of Health regulations. *Defiance v. Kretz* (1991), 60 Ohio St.3d 1, 3, 573 N.E.2d 32. Once the state demonstrates substantial compliance, the burden shifts to the defendant to show he was prejudiced by the state's failure to strictly comply with the regulations. *State v. Plummer* (1986), 22 Ohio St.3d 292, 490 N.E.2d 902, syllabus.

{¶ 13} Pursuant to OAC 3701-53-04(A), the breath-testing machine must be calibrated "no less frequently than once every seven days in accordance with the appropriate instrument checklist * * *." Law enforcement agencies are required to regularly calibrate breath-testing machines using "a solution" containing ethyl alcohol approved by the director of health. OAC 3701-53-04(A)(2). The director of health issues a certificate for each batch of calibration solution distributed to various agencies to certify the accuracy of the solution. If the breath-testing machine processes the solution and produces a result that is too high or too low, the instrument is taken out of service. OAC 3701-53-04(A)(2).

{¶ 14} Jackson contends that because the jail did not retain the expired bottles of solution, and did not receive an extra sticker to affix to the certificate, it was impossible to determine whether the bottle of solution used to calibrate the machine prior to his breath-test was approved by the Ohio Department of Health.

{¶ 15} OAC 3701-53-01(A) does not require the retention of expired bottles of solution. The section only requires that the results from testing the equipment be maintained for not less than three years. Thus, the City's practice of disposing of the expired bottles did not violate the code.

{¶ 16} We also conclude that sufficient evidence was presented that the solution used to test the equipment was from a batch approved by the department of health. The copy of the certificate issued by the health department indicates that "Batch #08170" was verified by the department. The Euclid Police Department's testing log indicates that three days prior to Jackson's arrest, it used "Bottle #1345" that was from "Batch #08170" to calibrate the machine. Therefore, evidence was submitted that the bottle was from a batch verified by the health department.

{¶ 17} Additionally, the warden testified that when the box containing the solution and certificate arrives, the stickers on the bottles are checked to verify they match the certified batch number on the certificate. Moreover, the bottle and batch number are verified again by the person performing the

test because the bottle and batch numbers from the sticker must be transcribed into the log. Based on this evidence, we conclude the City showed that the Euclid Police Department substantially complied with OAC 3701-53-01(A); therefore, the trial court properly denied Jackson's motion to suppress.

{¶ 18} Jackson cited to the Seventh District case of *State v. Pagan* (Nov. 10, 1999), 7th Dist. No. 97 CA 80, in support of his argument. However, *Pagan* is distinguishable because in that case, a certificate approving the batch number was not presented. In the instant case, a certificate was presented for the batch number, which matched the number in the police department's testing log. Although the certificate presented was not a certified copy, this district along with other districts, have held that a certified copy is not necessary. See, *City of Brook Park v. Seidner* (Nov. 12, 1998), Cuyahoga App. No. 78740; *State v. McEwan*, 1st Dist. No. C-030285, 2004-Ohio-1488; *State v. Linz*, 12th Dist. No. CA2003-06-016, 2004-Ohio-2297. Accordingly, Jackson's sole assigned error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction having been affirmed,

any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, PRESIDING JUDGE

ANN DYKE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR