

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NOS. C-060418
		C-060419
Plaintiff-Appellee,	:	C-060420
		TRIAL NOS. C-05TRC-11631A
vs.	:	C-05TRC-11631B
		C-05TRC-11631C
MARK KASH,	:	
		<i>JUDGMENT ENTRY.</i>
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

On March 16, 2005, Evendale police officer David Rudolph was running a stationary laser from his police cruiser on I-75 when he noticed the vehicle driven by defendant-appellant Mark Kash passing vehicles on the right at a high rate of speed. Rudolph clocked Kash's vehicle at 87 m.p.h. in a 55-m.p.h. zone. Rudolph initiated a traffic stop of Kash's vehicle. When Rudolph approached the vehicle, he detected a strong odor of an alcoholic beverage. Rudolph described Kash as disheveled, with watery bloodshot eyes and very slurred speech. Rudolph administered field-sobriety tests to Kash, which he failed. Rudolph arrested Kash and transported him to the Evendale police station, where Kash consented to a breath test. The breath test indicated that Kash had a breath alcohol content of .151 grams by weight of alcohol per 210 liters of breath.

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

Kash was charged with driving under the influence of alcohol, driving with a prohibited concentration of breath alcohol, and speeding. Kash filed a motion to suppress his statements, the observations and opinions of police officers regarding his sobriety, and the results of the field-sobriety and breath tests. The trial court granted the motion as to the results of the horizontal-gaze-nystagmus test and overruled it in all other respects. Kash pleaded no contest to and the trial court found him guilty of all charges. Kash has timely appealed all the convictions. Kash has appealed his speeding conviction under the number C-060420, but he has not raised any assignment of error as to that conviction. Therefore, the appeal numbered C-060420 must be dismissed.

Kash's first assignment of error, which alleges that the trial court erred in refusing to suppress the results of his breath test because the state failed to show substantial compliance with Ohio Adm.Code 3701-53-04(B), which provides that "an instrument check shall be made in accordance with paragraph (A) of this rule when a new evidential breath testing instrument is placed in service or when the instrument is returned after service or repairs, before the instrument is used to test subjects," is overruled on the authority of *State v. Wilson*.² In *Wilson*, we stated that "the instrument check required under Ohio Adm.Code 3701-53-04(B) when the instrument is initially placed in service and when it is returned from repair is identical to the weekly test required under Ohio Adm.Code 3701-53-04(A). The language of Ohio Adm.Code 3701-53-04(B) itself indicates that compliance may be demonstrated upon a showing that the machine had been checked 'before the instrument is used to test subjects.' It is therefore apparent that the requirement regarding initial testing and testing after repair or service is to ensure calibration before the machine is used for evidentiary purposes."³

² 1st Dist. No. C-060363, 2007-Ohio-1174.

³ See *id.* at ¶24.

In this case, the evidence showed that regular checks were performed on the breath-testing machine to ensure that it was working properly. The dates of the test checks were recorded in the “OVI log book.” The evidence further showed that the machine had been checked on the day before Kash’s test and that it had been working properly at that time. Further, there was no evidence that the machine had been sent out for service or repair. We hold, in light of this evidence, that the state amply demonstrated that Kash’s test was reliable.⁴

Kash’s second assignment of error alleges that the trial court erred in overruling his motion to suppress the results of his breath test because the state failed to show substantial compliance with Ohio Adm.Code 3701-53-01(B), which provides that the manufacturer’s operational manual for the breath-testing instrument “shall be on file in the area where the breath tests are performed.”

A motion to suppress must state its legal and factual bases with sufficient particularity to place the prosecutor and the court on notice of the issues to be decided.⁵ The burden of going forward with evidence shifts to the state only when the defendant has satisfied the initial burden of giving the prosecutor and the court sufficient notice of the issues to be determined at a hearing on a motion to suppress.⁶ The state’s burden to establish substantial compliance with the Department of Health regulations only extends to the level at which the defendant takes issue with the legality of the breath test.⁷

We held in *Norwood v. Kahn*⁸ that where the defendant has alleged in a motion to suppress breath-test results that specific health regulations had been violated in the

⁴ See *id.*

⁵ See *State v. Shindler*, 70 Ohio St.3d 54, 1994-Ohio-452, 636 N.E.2d 319, syllabus; *Norwood v. Kahn*, 1st Dist. Nos. C-060497, C-060498, and C-060499, 2007-Ohio-2799.

⁶ See *Xenia v. Wallace* (1988), 37 Ohio St.3d 216, 524 N.E.2d 889.

⁷ See *State v. Johnson* (2000), 137 Ohio App.3d 847, 739 N.E.2d 1249.

⁸ See *Norwood v. Kahn*, *supra*.

administration of the test, he must point to facts, either through discovery or cross-examination at the hearing, to support the allegation that specific regulations were violated. In the absence of such facts, the burden on the state to show compliance with the regulations remains general and slight.⁹ We noted in *Kahn* that it was obvious that Kahn had not attempted to discover factual support for his motion because he had filed his motion to suppress and his request for discovery on the same day.¹⁰

In the instant case, Kash filed his motion to suppress on the same day he filed his discovery request. In his motion, Kash recited a litany of administrative regulations governing breath-alcohol tests with which the state had potentially not complied. However, Kash did not allege a failure to comply with Ohio Adm.Code 3701-53-01(B) or its requirement that the operational manual be kept in the area of the breath-testing machine. At the hearing on the motion to suppress, neither party presented testimony regarding the presence or absence of the operational manual in the area of the breath-testing machine. There was no reference to Ohio Adm.Code 3701-53-01(B) or to the whereabouts of the manual at any point during the evidentiary portion of the hearing. After all the testimony had been presented, the trial court continued the hearing for closing argument. Defense counsel referred to Ohio Adm.Code 3701-53-01(B) for the first time during the subsequent closing argument, briefly stating that no evidence had been presented that the operational manual had been “in the area of the machine.”

During the hearing, the state presented testimony about the administration of Kash’s breath test. The evidence showed that a certified senior operator had administered Kash’s breath test, that the machine had been properly calibrated, that a record had been made of the calibration, that the Ohio Department of Health checklist

⁹ See id. at ¶8.

¹⁰ See id. at ¶9.

had been followed, and that there had been no radio interference. The evidence also showed that regular instrument checks were done, that the dates and results of those tests were recorded in the log book, that an instrument check had been completed on the day before Kash's test, and that the machine was working properly at that time. We hold, given the factless nature of Kash's motion and his failure to specifically allege noncompliance with Ohio Adm.Code 3701-53-01(B), that the state met its burden to demonstrate that Kash's breath test was administered properly and that the result was reliable.¹¹ The second assignment of error is overruled.

Therefore, the judgment of the trial court is affirmed in the appeals numbered C-060418 and C-060419. The appeal numbered C-060420 is hereby dismissed.

A certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

CUNNINGHAM, P.J., DINKELACKER and WINKLER, JJ.

RALPH WINKLER, retired, from the First Appellate District, sitting by assignment.

To the Clerk:

Enter upon the Journal of the Court on June 27, 2007
per order of the Court _____
Presiding Judge

¹¹ See id.