

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

STATE OF OHIO,	:	APPEAL NOS. C-070040
		C-070041
Plaintiff-Appellee,	:	
vs.	:	TRIAL NOS. 06TRC-27038A
		06TRC-27038B
MARK W. EGBERT,	:	<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.<sup>1</sup>

Defendant-appellant Mark W. Egbert challenges the trial court’s denial of his automatic-license-suspension (“ALS”) appeal. We affirm the trial court’s decision.

Egbert was arrested for driving under the influence of alcohol (OVI) and speeding in June 2006. The arresting officer completed a sworn Ohio Bureau of Motor Vehicle Form 2255 4/04 (“ALS report”) and indicated that Egbert had refused to submit to a chemical test for alcohol. Egbert’s license was then automatically suspended.

When the arresting officer did not appear for a suppression hearing due to a death in his family, the trial court dismissed the OVI and speeding charges for want of prosecution. Egbert then orally moved for an R.C. 4511.197 appeal of his ALS.

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

Egbert represented to the court that he had also filed a written request for the appeal, but that motion is not a part of the record.

The trial court proceeded with a hearing in accordance with R.C. 4511.197(C). Egbert testified that he had not refused chemical testing; rather, he had attempted to take the breath test three or four times, but the equipment was malfunctioning. On cross-examination, he admitted that the arresting officer had accused him of trying to trick the machine, and he identified the court's pink copy of the ALS report as the document the arresting officer had shown him at the time of his arrest.

Because the arresting officer was not available, the state relied upon the ALS report as prima facie evidence of the propriety of the ALS and offered the report into evidence. The trial court accepted the report into evidence and rejected Egbert's argument that the trial court could not admit the ALS report and rely upon it as prima facie evidence without the testimony of the arresting officer to authenticate the document.

After considering the evidence, the trial court denied Egbert's ALS appeal. This appeal followed.

A person appealing an ALS has the burden of proving, by a preponderance of the evidence, that one or more of the statutory conditions for a valid ALS was not met.<sup>2</sup> Egbert's refusal to take the test was a necessary condition for the ALS. Egbert argues that his testimony at the ALS hearing established that he had not refused to take the test, and, therefore, that he proved that at least one of the conditions to support the ALS was not met. Further, he claims that his testimony was controlling on the issue because the arresting officer did not testify. We find no merit to this argument.

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<sup>2</sup> R.C. 4511.197(D).

R.C. 4511.192(F) mandates that the trial court admit and consider as prima facie proof the information and statements contained within an ALS report completed in accordance with R.C. 4511.192.<sup>3</sup> The arresting officer in this case completed the report in accordance with the statute. The report contained the officer's sworn statement that (1) he had reasonable grounds to believe that Egbert had been operating a vehicle under the influence of alcohol based upon Egbert's "speed; strong odor; glassy, bloodshot eyes; slurred speech; failed SFST's; and PDT .114"; (2) he had arrested and charged Egbert with an OVI offense; (3) he had asked Egbert to take the chemical test and had advised him of the consequences of taking the test or refusing the test; and (4) he had given Egbert the advice form, and Egbert had refused to take the test.

Under the statute, the ALS report was self-authenticating and prima facie proof of a proper ALS.<sup>4</sup> Additionally, Egbert's own testimony identifying the ALS report was sufficient to authenticate the document.<sup>5</sup>

Ultimately, the trial court found that Egbert's testimony was not sufficiently credible to rebut the presumption created by the ALS report. Evaluating the credibility of witnesses and determining the weight to be given the evidence were primarily for the trier of fact.<sup>6</sup> We find no error in the trial court's denial of Egbert's appeal because the denial was supported by competent, credible evidence.

Finally, Egbert raises constitutional challenges to the state's use of the ALS report as a prima facie proof. But Egbert failed to raise these constitutional challenges below. Generally, he has waived all but plain error.<sup>7</sup> ALS hearings are

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<sup>3</sup> R.C. 4511.192(F).

<sup>4</sup> See Evid.R. 902(10).

<sup>5</sup> See Evid.R. 901.

<sup>6</sup> *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.

<sup>7</sup> See *State v. Awan* (1986), 22 Ohio St.3d 120, 489 N.E.2d 277, syllabus; see, also, *In re M.D.* (1988), 38 Ohio St.3d 149, 527 N.E.2d 286, syllabus.

administrative and civil in nature.<sup>8</sup> The plain-error doctrine is not favored in civil cases,<sup>9</sup> and we are not persuaded that this case involves the exceptional circumstances required to invoke the doctrine. We therefore hold that Egbert has waived his right to assert these constitutional challenges on appeal.

Accordingly, we overrule the assignments of error, and we affirm the trial court's judgment.

Further, a certified copy of this Judgment Entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R.24.

**SUNDERMANN, P.J., CUNNINGHAM and DINKELACKER, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on December 5, 2007

per order of the Court \_\_\_\_\_.

Presiding Judge

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<sup>8</sup> See *State v. Gustafson* (1996), 76 Ohio St.3d 425, 668 N.E.2d 435.

<sup>9</sup> *Goldfuss v. Davison* (1997), 79 Ohio St.3d 116, 679 N.E.2d 1099, syllabus.