

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

CITY OF CINCINNATI,	:	APPEAL NO. C-070885
	:	TRIAL NO. 07TRC-39567(B)
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
MIRANDA M. AGIN,	:	
Defendant-Appellant.	:	

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

Defendant-appellant Miranda M. Agin was charged with driving under the influence of alcohol² and with driving on the wrong side of the road.³ She filed a motion to suppress the results of a breathalyzer test, claiming that they were unreliable because Cincinnati police had not administered the test in substantial compliance with Ohio Department of Health regulations. In particular, Agin argued that the calibration solution had not been properly refrigerated as required by Ohio Adm.Code 3701-53-04(C). The trial court denied the motion to suppress. Agin pleaded no contest to driving with a prohibited amount of alcohol in her breath,⁴ and she was convicted by the trial court. The remaining charges were dismissed.

In one assignment of error, Agin argues that the trial court improperly denied her motion to suppress. We disagree. During the suppression hearing, the police officer charged with calibrating the Intoxilyzer machines in the five districts of the Cincinnati

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

² R.C. 4511.19(A)(1)(a) and 4511.19(A)(1)(h).

³ Cincinnati Municipal Code 506-75.

⁴ R.C. 4511.19(A)(1)(h).

Police Department testified regarding the procedures he used. The officer testified that the solution was refrigerated while in storage. It was not refrigerated for approximately four hours while he travelled to the five districts to conduct the calibrations of the different machines. The record does not indicate how long it had been before the officer reached District Five—the district where Agin’s breath was tested—but the record indicates that it was his third stop.

Ohio Adm.Code 3701-53-04(C) states, in relevant part, that “[a]fter first use, instrument check solutions shall be kept under refrigeration *when not being used*.”⁵ This court held several years ago, under a similarly worded regulation, “that the phrase ‘while in use’ includes the time reasonably necessary to transport the solution from the refrigerator to the place of calibration.”⁶ Some years later, the Eighth Appellate District reached the same conclusion, noting that “the solution was unrefrigerated only for such time as was reasonably necessary to calibrate the breathalyzer, including the time needed to transport the machine and the solution to Massillon, Ohio.”⁷

Agin asserts that this court’s decision in *Ginocchio* is not instructive because it was rendered prior to the Ohio Supreme Court decision in *State v. Burnside*⁸ and our decision in *State v. Douglas*,⁹ which held that deviation from a mandatory Department of Health regulation does not constitute substantial compliance with that regulation. But *Ginocchio* did not hold that the procedure used in that case was a deviation from the regulation in any way. The decision defined the phrase “in use” as including the time to transport the solution to the testing sites.

⁵ Ohio Adm.Code 3701-53-04(C) (emphasis added).
⁶ *State v. Ginocchio* (May 21, 1985), 1st Dist. No. C-840529.
⁷ *Brook Park v. Seidner* (Nov. 12, 1998), 8th Dist. No. 73648.
⁸ 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71.
⁹ 1st Dist. No. C-030897, 2004-Ohio-5726.

We note that the Ohio Supreme Court has upheld the conclusion that “in use” could include a period of over two months, during which time the calibration solution was being maintained at breath temperature in the calibration machine.¹⁰ In the underlying case, the Sixth Appellate District had rejected the argument that “except for those times when the BAC verifier machine was either being calibrated or was being used to administer a test, the simulator solution was not ‘in use’ and should have been refrigerated.”¹¹ The Ohio Department of Health would certainly have been aware of the Ohio Supreme Court’s determination on this issue,¹² and yet it has chosen not to amend the regulation to include a more strict time requirement for refrigeration. Agin has cited no authority for the proposition that “when not being used” includes transportation time, and we are not inclined to revisit the issue.

Since this court has determined that a calibration solution is “in use” during reasonable transportation time, and since the evidence in this case showed that the solution had been refrigerated at all other times, the state demonstrated at least substantial compliance with Ohio Adm.Code 3701-53-04(C). The trial court properly denied the motion to suppress. Agin’s sole assignment of error is overruled.

We affirm the trial court’s judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

SUNDERMANN, P.J., HENDON and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on September 10, 2008
by order of the Court _____.

Presiding Judge

¹⁰ See *State v. Zapata* (Oct. 4, 1985), 6th Dist. Nos. L-85-117, L-85-118, L-85-119, L-85-120, L-85-121, L-85-122, L-85-123, L-85-166, and L-85-266, affirmed (1986), 25 Ohio St.3d 66, 495 N.E.2d 6.

¹¹ *Id.*

¹² See, also, *State v. Dickerson* (1986), 25 Ohio St.3d 64, 495 N.E.2d 6 (reaching the same conclusion as *State v. Zapata* and released the same day).