

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

STATE OF OHIO,	:	APPEAL NO. C-080570
Plaintiff-Appellee,	:	TRIAL NO. C-07-TRC-54935
vs.	:	<i>JUDGMENT ENTRY.</i>
EMILY VONDERHAAR,	:	
Defendant-Appellant.	:	

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

Sergeant Joe Luebbbers, an Ohio State Trooper, pulled over Emily Vonderhaar’s car after he observed her on I-275 in northern Cincinnati driving 50 miles per hour in the fast lane of a 65-mile-per-hour zone and drifting into the center lane. Luebbbers signaled for Vonderhaar to pull over—instead of pulling to the shoulder, she stopped her car in the fast lane.

When Luebbbers approached Vonderhaar’s car, he noticed what looked like fresh vomit on the driver’s door and the passenger window. Luebbbers also noted that Vonderhaar did not have her seatbelt on, that her eyes were bloodshot and glassy, that her breath reeked of alcohol, and that she had vomit on her face and clothes.

When Luebbbers asked Vonderhaar to exit from the car, she had a difficult time staying on her feet. Luebbbers performed a field sobriety test on Vonderhaar called the horizontal gaze nystagmus (“HGN”). He noted six of six possible signs of intoxication. Luebbbers arrested Vonderhaar for operating a vehicle while intoxicated (OVI).² He took Vonderhaar to the trooper post for a breathalyzer test.

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)(d).

Luebbers observed Vonderhaar for 20 minutes prior to the test and testified that he had not seen her put anything in her mouth. Luebbers testified that the breathalyzer machine had operated properly and that it was programmed to abort a test automatically if it had internal problems or problems with radio frequency. The machine was an automatic simulator—unlike older models, there was no need to blow into the machine before administering a breath test. The machine had recently been calibrated and tested. Vonderhaar’s breath alcohol content (BAC) registered .151, almost twice the legal limit.

A jury found Vonderhaar guilty of violating R.C. 4511.19(A)(1)(d)—operating a vehicle with a prohibited concentration of alcohol in her breath—but found her not guilty of R.C. 4511.19(A)(1)(a)—operating a vehicle under the influence of alcohol.

Vonderhaar argues on appeal that the trial court erred by denying her motion to suppress the breathalyzer test results and by convicting her against the manifest weight of the evidence.

At trial, Vonderhaar questioned a trooper about a training manual applicable to a nonautomated breath machine. The manual indicated that the operator had to blow into the machine twice before administering the test. But the machine that the trooper used to test Vonderhaar’s breath was a newer, automated machine. Vonderhaar argues that because the trooper did not blow into the machine, the test was invalid. Not so.

Several Ohio appellate districts have determined that a breath-machine manual is advisory only.³ We agree. And in this case, the manual that Vonderhaar’s attorney used to cross-examine Luebbers was not even the correct manual. The trial court properly admitted the results of Vonderhaar’s breath test.

Vonderhaar argues that her conviction was against the manifest weight of the evidence because the jury found her not guilty of one of the charges. We do not know why

³ *State v. Isbell*, 3rd Dist. No. 17-08-08, 2008-Ohio-6753; *State v. Stout*, 5th Dist. No. 07-CA-51, 2008-Ohio-2397; *State v. Lange*, 12th Dist. No. CA 2007-09-23, 2008-Ohio-3595.

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the jury found her not guilty of that charge. But it had no impact on the charge for which she was found guilty. Her BAC was .151, a clear violation of R.C. 4511.19(A)(1)(d).

Therefore, 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.

HILDEBRANDT, P.J., PAINTER and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on April 29, 2009

per order of the Court _____.

Presiding Judge