

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
THE CITY OF COLUMBIA,

V.

 COOK,
DEFENDANT.

IN THE MUNICIPAL COURT
FOR THE CITY OF COLUMBIA

ORDER SUPPRESSING RESULT

This matter was heard before me on January 23, 2013 on defense motion to suppress the breath test in this DUI prosecution. The defense was represented by Joseph McCulloch and the City was represented by David Fernandez. The record consists of the pre-filed defense motion and attachments, exhibits introduced by the defense, testimony of defense witnesses – the accused and Dr. William Brewer, and the City's witness, Bruce Smith of SLED. After due consideration of the motion, attachments, exhibits, testimony, and argument of counsel, I suppress the breath test for the reasons outlined hereinafter.

Introduction

The issue before the Court does not involve a challenge to the Datamaster (DM) machine used in the breath testing of the accused which resulted in a breath test result above .08 or a challenge to the certification of the operator. The defense does not concede the DM machine at the time of the test was operating properly, accurately, or reliably, and reserves those operational issues. The issue presented here is whether the threshold admissibility requirement of

TSB

“proper procedure in the testing process” as required by State v. Parker, 271 S.C. 159, 245 S.E.2d 904 (S.C. 1978), was met in this test, and upon the burden shifting to the City, whether the City can demonstrate that the proper procedure was followed. The evidence shows that the officer while instructing the accused as to the DM test, instructed the accused to “blow hard.” The defense contends that the officer’s instructions during the DM test to “blow hard” – an instruction given several times during the two minute sampling period – is not a proper procedure. The defense argument is based upon the DM manufacturer publication entitled “Owners Guide” and the explicit “Proper Procedure” directives of the SLED/Criminal Justice sanctioned Recertification Training materials as well as the testimony of a defense expert and scientific journals.

During the hearing and testimony, the Defense presented several exhibits including the Defendant’s breath test report, the pertinent segment of Defendant’s breath test video (and a transcription) validating the “blow hard” instruction, the Datamaster Owner Manual, the SLED/Criminal Justice Academy telecourse description describing the recertification course as “procedural and legal matters applicable to the proper operation of the B.A.C. Datamaster Instrument, a DVD copy of the Datamaster Operator Recertification Training Course materials, a screen shot entitled “Conduction a Proper Breath Test” from the training material, and an affidavit and CV of the defense expert, Dr. William Brewer. The defense also presented additional materials as exhibits to the Motion.

The defense concedes the DM Manufacturer's Owners Guide is offered not as a publication of the State of South Carolina, but rather as an illustration of the manufacturer's recommended "best practice." The defense observes that South Carolina Code §56-5-2950 imposes upon SLED the duty to administer the breath testing practices of the State and to do so by the enactment of Regulations, which the defense asserts SLED has failed to do- further asserting that SLED has no regulation or policy among its "Policies and Procedures" describing or proscribing the procedure for actually instructing a test subject how to give a breath sample. It is interesting to note that SLED Regulations 73-2 used to provide that the approved method of operating a breathalyzer shall be as "set forth in the manufacturer's instructional manual and in accordance with any supplementary written instructions governing operation or maintenance issued by the South Carolina Law Enforcement Division." State v. Newton, 274 S.C. 287, 262 S.E.2d 906 (1980)(emphasis added). The fact that SLED has no regulation or policy addressing the actual proper/improper method of giving a breath sample, except the manual and the recertification video are facts not disputed by the City or by SLED through its SLED witness, Bruce Smith, presented by the City.

The defense primarily relies upon the official "publication," the BAC Datamaster Recertification Training Program and video, a joint SLED/Criminal Justice Academy training requirement for all those certified as breath testing operators, pursuant to SLED Policy §8.12.4. The defense argues, and I agree, that the recertification video prescribes the proper process for instructing and

obtaining a breath test and proscribes specifically a practice of advising a test subject to "blow hard", as was demonstrably done here on the breath testing video, published in Court, and in the transcription of that video portion, entered as a defense exhibit. There simply is no way to avoid the unavoidable conclusion that instructing a subject to "blow hard" is not a proper procedure. The affidavit and testimony of Dr. William Brewer, a PhD chemist and former SLED toxicologist familiar with SLED's Implied Consent laws, regulations and procedures further reinforces this conclusion, which was his testimony. During the presentation of evidence and argument by the City, no evidence or explanation was made as to the proper procedure nor that the practice of the blow hard instruction was an improper procedure, leaving the presentation of the defense position as an unchallenged fact. Based upon the use of an improper procedure, I find the prima facie showing of admissibility by the City's reliance upon the breath test report and the fact the machine produced a test result was effectively rebutted by the defense and the burden shifted to the City (Parker at page 906) to establish a proper foundation for the test result's admission. The City failed to meet this burden.

The Remedy

Having determined that the proper breath sample collection process was not employed in this test by reason of the officer's improper "blow hard" instruction, the Court then must turn to the remedy of suppression requested by the defense.

TSB

Historically, the admissibility of a breath test result has been controlled by State v. Parker referenced above. Our Supreme Court, relying upon case law from the State of Washington (to wit, State v. Baker, 355 P.2d 806 (1960)), addressed the question "what foundation should be laid for the introduction of the results of the breathalyzer test?" and provided the answer that a proper foundation requires proof among other facts, "that the test was administered by a qualified person in the proper manner." Id. Thereafter, the case required the trial judge to rule upon the admissibility in the light of the entire evidence. Parker at page 906. Based upon the entirety of the evidence presented to me, I find that because the City failed to establish a proper foundation under Parker, and the breath test must be suppressed and is rendered inadmissible.

The City argues that the case of State v. Huntley, 349 S.C. 1, 562 S.E.2d 472 (2002) contrary to the Parker foundation requirement as the admissibility standard, establishes and requires a prejudice analysis. In Huntley, the defense (unlike the present case) conceded that the "breathalyzer machine was operating properly and its results were reliable." Huntley, 562 S.E.2d at 473 (ftn. 5). The defense arguing in support of suppression, asserted that the failure to use the simulation solution required under a recent legal enactment constituted a technical procedural failure. The Court found this technical nonconformity to the statutory requirement, in the face of the concession by the defense of the reliability of the machine's test result, dispositive. As the Court stated: "Exclusion of evidence should be limited to violations of constitutional rights and not to statutory violations, at least where the [defendant] cannot demonstrate

TSB

prejudice at trial resulting from the failure to follow statutory procedures". This Court also takes note of the inclusion in §56-5-2950(F) of a similar statutory standard to the Huntley prejudice analysis, to wit: "exclusion shall result" if the failure to follow policies, procedures or regulations negatively affected the accuracy or reliability of the test results, or the fairness of the testing procedure."

Id. The Court additionally takes note of the Supreme Court's holding in State v.

Landon:

We are aware, however, that information regarding the DataMaster is exclusively within the State's control. Because SLED's failure to provide a detailed record significantly hampers the defendant's ability to show prejudice in this situation, we hold that once a defendant makes a prima facie showing of prejudice, the burden must shift to the State to prove the defendant was not prejudiced, either by providing records to show the machine was working properly at the time of testing or by some other contemporaneous evidence.

Id., 370 S.C. 103, 634 S.E.2d 660 (2006).

While I believe the Parker threshold determination of foundation to be the controlling standard here – upon which I have ruled the test result inadmissible, I now, in consideration of these case made and statutory standards, again rule the breath test inadmissible.

In the defense presentation, the defense offered the manufacturer's best practices recommendation explicit in its manufacturer's Owner's Guide, and the affidavit and testimony of Dr. William Brewer. Dr. Brewer testified persuasively that the published peer review literature in the area of criminal breath testing has rather consistently observed the importance of breathing rhythms and patterns

JSB

and the potential effects upon accurate and reliable results. Particularly telling was Dr. Brewer's acknowledgment of Dr. Michael Hlastala's article ("The Alcohol Breath Test – a review" and references) and the statement therein: "The fact that alcohol is derived from the airways explains why the Breath Analysis can be so easily altered by the breathing pattern. This contributes to the very large variation in Alcohol Breath Test readings obtained from actual subjects."

Dr. Brewer's testimony that the Datamaster and its employment of software and algorithms are dependent upon an analysis of deep alveolar air - a scientific assumption apparently now being challenged as a valid assumption in the breath testing community – renders a "blow hard" air sample likely to produce other than deep lung air due to the DM machines programming dependent upon a smooth exhalation. The instruction to "blow hard" produces an air sample at variance with the essential scientific and software predicates of the datamaster design. Of special importance was the fact testified to by Dr. Brewer and conceded by the SLED witness, that neither SLED nor the manufacturer had conducted, produced or published any scientific study articles on the effect on reliability, accuracy, or fairness of a breath method not in conformity with the "smooth continuous breath sample" the machine is programmed to expect.

Here, the state was unable to offer any admissible substantive argument or evidence addressing the impropriety of "blowing hard" sample collection as an improper procedure, or that the improper method might render the breath result unreliable inaccurate or procedurally unfair. The defense offered substantial, unchallenged evidence of numerous journal articles and the expert testimony of

TSB

Dr. Brewer that the procedure was improper, and likewise testified to a reasonable scientific certainty that the improper procedure might produce an inaccurate result. Upon a totality of evidence review, I find that the accuracy, reliability, and/or fairness of the test and testing procedure were compromised by the improper process used to collect the breath sample, a belief not rebutted by the City or SLED under Landon burden shifting. During the arguments of counsel, Mr. McCulloch requested SLED permit experimentation as to these issues by Dr. Brewer to which the City and SLED declined to respond even in the absence of their own or the manufacturer having done so.

Having concluded under the Parker standard of admissibility that the breath test must be suppressed, I likewise, in an abundance of caution and completeness find, pursuant to the Huntley standards and §2950, that a sufficient showing has been made to justify suppression. This Court is persuaded by all of the evidence, exhibits, and by the testimony of the defense expert that the method of exhalation during the breath sampling process is important to the efficacy, reliability, accuracy, and fairness of the DM's ability to accurately and reliably analyze a sample.

Accordingly, I find the Datamaster evidence should be suppressed.

IT IS SO ORDERED.


J. Steedley Bogan
Municipal Court Judge

March 7, 2013

Columbia, South Carolina