

## BAR NEWS ITEM

At its annual meeting, on Friday, December 16, 1994, assembled at a conference room of the Lighthouse Restaurant, on U.S. Route 11, North, just outside Chambersburg, the Franklin County Bar Association received the professional reporting services of Susan O'Hara, Registered Professional Reporter, of Central Pennsylvania Court Reporting Services (CPCRS), *gratis*. Ms. O'Hara informed this reporter, in an interview, afterwards, that she had volunteered to do this, in order to become more widely known, as such a reporter, and so that people who might have a need for reporting services, could see a sample of her work. When asked if copies of her transcript of the day's proceedings would be available, for purchase, Ms. O'Hara said, "Oh--I am not doing this for monetary payment. What I shall do is furnish the transcript to your Bar Association's Executive Director, free of charge. Then, she can make them available, at whatever charge the Bar Association wants. I do not want any part of such charge, whatsoever." Ms. O'Hara went on to say that her reward was whatever free advertising the occasion yielded her.

The Bar Association's Executive Director, Marilyn Ross, then informed this reporter that copies of such transcript will be available, at Marilyn's office, for the mere cost of reproduction and any postage or other transportation expenses. The Bar Association's Executive Director's telephone number is: (717) 352-8574, in case you are interested in receiving a copy of such transcript.

As to the Court Reporter, herself, Ms. O'Hara may be reached at: 243 West Pomfret Street, Carlisle, PA 17013. Her telephone number is: (717) 258-3657; or (800) 863-3657. Ms. O'Hara's FAX number is: (717) 258-0383.

## COMMONWEALTH OF PENNSYLVANIA VS CHARLES IRVIN DUDLEY, JR., DEFENDANT, C.P., Cr. Div., Franklin County Branch, No. 396 of 1993

### *Criminal Action- Driving Under The Influence- Suppression of Breath Test Results*

1. Visual reading by the breath test operator provides proper evidence of a breath test result.
2. A printer malfunction, in which the printer failed to properly advance the paper, did not invalidate the breath test where the administering officer could accurately testify to the liquid crystal display reading and where he has handwritten the correct reading on the printed ticket.
3. A lack of a printed test result does not invalidate a breath test where an accurate printed and visual reading were available.

*John F. Nelson, District Attorney, for the Commonwealth*

*H. Anthony Adams, Esquire, Attorney of Defendant.*

## OPINION

Charles Irvin Dudley, Jr. (defendant) has filed an omnibus pre-trial motion in which he seeks to suppress the results of a breath test administered to determine his blood alcohol content. The breath test was administered by Corporal David Secure of the Pennsylvania State Police on April 29, 1993, following the defendant's arrest for driving under the influence of alcohol. A hearing was conducted on the motion on October 14, 1993. For the reasons which follow, we conclude that the suppression motion must be denied.

At hearing, many of the facts surrounding the administration of the breath tests were agreed to by stipulation. Defendant, initially, concedes that he was lawfully arrested by Corporal Secor on April 29, 1993, at 7:30 o'clock p.m. He was subsequently transported to the Pennsylvania State Police barracks in Chambersburg for the test to be conducted. The initial test occurred at 8:28 o'clock p.m., with the second test

following shortly thereafter at 8:32 o'clock p.m.. The required simulator test<sup>1</sup> was conducted at 8:34 o'clock p.m. Defendant concedes that approved and properly calibrated testing equipment was utilized, that Corporal Secor is a qualified breath test operator, and that the defendant received adequate warnings prior to administration of the breath test.

The issue which has been raised by the defendant relates to the numerical results of the breath tests. According to the liquid crystal display panel on the intoxilyzer machine, which reads to the third decimal place, defendant's two breath test results were .152% and .171%, respectively, with a difference between the two results of .019%. The printed test record which is produced by the unit, however, only records to the second decimal place. The printed results, therefore, reflected readings of .15% and .17%, with a difference of .02%. Corporal Secor inserted the third decimal place in his own writing on the printed intoxilyzer test record. (Commonwealth Exhibit 1.)

The dilemma produced by the .001% difference between the results as printed and the results as displayed by the liquid crystal reading is revealed by the following Department of Transportation regulation:

The procedures for alcohol breath testing shall include, at a minimum:

(1) Two consecutive actual breath tests, without a required waiting period between the two tests.

(2) One simulator test using a simulator solution designed to give a reading of .10%, to be conducted immediately after the second actual alcohol breath test has been completed. The lower of the two actual breath test results will be the result used for prosecution. *The tests results will be disregarded*, and the breath test device will be removed from service... if one of the following occurs:

(i) *If the difference between the results of the two actual alcohol breath tests is .02 or more, for machines read to the second decimal place, or .020 or more for machines read to the third decimal place.*

67 Pa. Code §77.24(b) (emphasis added).

Thus, if the unaltered printed test record is viewed as controlling, the test results must be disregarded since a test differential of .02% is recorded thereon. If, however, the intoxilyzer display as observed by Corporal Secor to the third decimal place is viewed as controlling, then the lower test result of .152% would be admissible against the defendant as evidence for the prosecution since it varied by only .019% from the second reading of .171%.

Defendant contends that the printed test record, prior to its alteration by Corporal Secor, should be controlling as evidence of the breath test result. He argues that to rely on the transcription of the three-digit liquid crystal display by Corporal Secor improperly introduces the potential for human error. Defendant has not, however, directly challenged the credibility of Corporal Secor. The Commonwealth, on the other hand, emphasizes that the language of the regulation at issue refers to machines which either "read to" the second or third decimal place and makes no reference to the "printed" test result. Since Corporal Secor was able to "read" the test result to the third decimal place, it is argued that the .020% standard should apply.

The case of *Department of Transportation v. Wixon*, 116 Pa Cmwlth. 418, 541 A2d 853 (1988) provides authority for the proposition that the visual reading by the breath test operator provides proper evidence of a breath test result. *Wixon* involved the suspension of a motorist's driving privileges by the Department of Transportation (DOT) for refusal to submit to a breathalyzer test. The defendant in *Wixon* originally agreed to submit to a breath test, but twice failed to *blow* hard enough to

<sup>1</sup> See 67 Pa. Code §77.24(b)(2).

activate the machine. On his third attempt, the machine was activated and provided a visual readout of .197% blood alcohol content. The administering officer, however, had not properly set the equipment and the reading was not printed out. The officer then reset the machine and requested that the defendant retake the test. His refusal to do so resulted in the suspension of his driver's license pursuant to Section 1547 of the Vehicle Code, 75 Pa. C.S. §1547.

Commonwealth Court agreed with the trial court's determination that Wixon's license had been improperly suspended, concluding that he had substantially complied with the requirement to submit to a breathalyzer test.<sup>2</sup> The Court reasoned as follows:

Here, the error was not in the visual reading of the result of the test, which was accurate, but it was in the machine's printout. *An accurate machine printout is not necessary for the test to be successful. All that is necessary is that the visual reading of the result is accurate.* Therefore, the request for a second test was unreasonable.

*Id.* at 420, 541 A.2d at 854 (emphasis added).

Similarly, in the case of *Department of Transportation v. Fellmeth*, 108 Pa.Cmwlth. 172, 528 A.2d 1090 (1987), it was determined that a printer malfunction, in which the printer failed to properly advance the paper, did not invalidate the breath test where the administering officer could accurately testify to the liquid crystal display reading and where he had handwritten the correct reading on the printed ticket. The Court noted that the desire of the police to have the breath test result recorded in the best form possible did not provide justification for requiring the defendant to submit to another test.

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<sup>2</sup> Wixon's arrest apparently predated the December 22, 1984 effective date of Section 77.24 of DOT regulations. Therefore, the current requirement of two breath tests was not applicable.

We are cognizant that the foregoing cases are not controlling, in that they did not specifically interpret the regulation here at issue, but rather, dealt with the civil law issue of license suspensions for failure to comply with the Commonwealth's implied consent law. 75 Pa. C.S. §1547. They do stand for the proposition, however, that lack of a printed test result does not invalidate a breath test where an accurate visual reading is available. In the instant case, both an accurate printed and visual reading were available. We do not believe that the existence of a printed result in any way supersedes evidence of the more precise visual reading made by the breath test operator.

Instead, the printed and visual readings constitute alternative methods of recording the intoxilyzer's displayed test result. Moreover, we conclude that the reference in the regulation to machines which are "read to" the second or third decimal place, in fact, refers to the reading on the liquid crystal display. It is the display panel which reveals the actual level of blood alcohol registered by the intoxilyzer. Thus, we believe that it was proper for Corporal Secor to amend the printed test result to include the more accurate third decimal place reading which he observed on the machine's display panel.

We have found no support in the case law for defendant's proposition that human error was intended to be eliminated through exclusive reliance on the printed test result. As the cases which we have cited previously demonstrate, errors in recording a test result may occur from printer malfunctions as well as human error. We have found no indication that the drafters of the regulation intended to require a printed test result, as opposed to a result recorded on the basis of human observation. It is the machine reading, itself, rather than the method of recording that result, which is critical.

Since we conclude that the Commonwealth may properly rely on the visual reading of the intoxilyzer by Corporal

Secor, the breath test result of .152% blood alcohol content will be ruled admissible since it varies by less than .020% from the second test result obtained on April 29, 1993. We will, accordingly, enter the attached order denying the defendant's motion to suppress.

**ORDER OF COURT**

NOW, this 1st day of November, 1993, defendant's Omnibus Pre-trial Motion requesting the suppression of evidence is hereby DENIED.

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