**[Cite as *State v. Miller,* 2012-Ohio-5585.]**

**IN THE COURT OF APPEALS**

**ELEVENTH APPELLATE DISTRICT**

**PORTAGE COUNTY, OHIO**

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| STATE OF OHIO, | : | **O P I N I O N** |
| Plaintiff-Appellant, | : | **CASE NO. 2012-P-0032** |
| - vs - | : | |
| JUSTIN C. MILLER, | : | |
| Defendant-Appellee. | : | |

Criminal Appeal from the Portage County Municipal Court, Ravenna Division, Case No. R2011 TRC 15234.

Judgment: Reversed and remanded.

*Victor V. Vigluicci*, Portage County Prosecutor, *Pamela J. Holder*, Assistant Prosecutor, and *Theresa M. Scahill,* Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellant).

*J. Chris Sestak* and *Jamison A. Offineer*, Student Legal Services, Inc., Kent State University, 164 East Main Street, #203, Kent, OH 44240 (For Defendant-Appellee).

DIANE V. GRENDELL, J.

**{¶1}** Plaintiff-appellant, the State of Ohio, appeals the judgment of the Portage County Municipal Court, Ravenna Division, granting defendant-appellee, Justin C. Miller's, Motion to Suppress/Motion in Limine. The issue before this court is whether a trial court, in the performance of its role as gatekeeper, may require the State to demonstrate the general scientific reliability of a breath testing instrument where the Ohio director of health has approved such instrument for determining the concentration

of alcohol in a person's breath. For the following reasons, we reverse the decision of the court below.

**{¶2}** On November 24, 2011, Miller was issued a traffic ticket, charging him with Speeding, a minor misdemeanor in violation of R.C. 4511.21(C); Operating a Vehicle while under the Influence ("OVI"), a misdemeanor of the first degree in violation of R.C. 4511.19(A)(1)(d) (operating a vehicle with "a concentration of eight-hundredths of one gram or more but less than seventeen-hundredths of one gram by weight of alcohol per two hundred ten liters of the person's breath"); and OVI, a misdemeanor of the first degree in violation of R.C. 4511.19(A)(1)(a) (operating a vehicle "under the influence of alcohol").

**{¶3}** On November 28, 2011, Miller entered a plea of "not guilty."

**{¶4}** On January 17, 2012, Miller filed a Motion to Suppress/Motion in Limine, challenging, inter alia, the results of a breath test taken by Miller at the time of the citation.

**{¶5}** On April 13, 2012, a hearing was held on the Motion to Suppress/Motion in Limine. Counsel for Miller argued that the State was required to demonstrate the scientific reliability of the Intoxilyzer 8000, the breath test instrument used to determine the concentration of alcohol in Miller's breath. The State presented no testimony, but maintained that a general challenge to the scientific reliability of the Intoxilyzer 8000 was impermissible under the authority of *State v. Vega*, 12 Ohio St.3d 185, 465 N.E.2d 1303 (1984).

**{¶6}** On April 16, 2012, the municipal court issued a Journal Entry granting Miller's Motion with respect to the results of the Intoxilyzer 8000. The court stated that

"the Defendant's breath test shall not be admitted during the trial in this matter," and, "[t]herefore, Count 2, a violation of ORC 4511.19(A)(1)(d), is dismissed."

**{¶7}** On April 18, 2012, the State filed its Notice of Appeal.

**{¶8}** On May 15, 2012, the municipal court stayed all proceedings pending appeal.

**{¶9}** On appeal, the State raises the following assignments of error:

**{¶10}** "[1.] The Portage County Municipal Court erred in permitting a general attack on the scientific reliability of the Intoxilyzer 8000 contrary to Ohio statutes and well-established case law."

**{¶11}** "[2.] The Portage County Municipal Court erred in sua sponte dismissing the per se violation under R.C. 4511.19(A)(1)(d) in count two."

**{¶12}** The appropriate standard of review where the lower court's judgment is challenged on a purported misconstruction of the law is de novo. *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 16. "In determining a pure question of law, an appellate court may properly substitute its judgment for that of the trial court." (Citation omitted.) *Id.*

**{¶13}** We must first address Miller's argument that the municipal court's April 16, 2012 Journal Entry is not a final order. Miller's argument is based on the distinction between a motion to suppress and a motion in limine.

**{¶14}** The purpose and effect of a motion to suppress and a motion *in limine* are distinct. A "motion to suppress" is defined as a "[d]evice used to eliminate from the trial of a criminal case evidence which has been secured illegally, generally in violation of the Fourth

Amendment (search and seizure), the Fifth Amendment (privilege against self incrimination), or the Sixth Amendment (right to assistance of counsel, right of confrontation etc.), of U.S. Constitution." Black's Law Dictionary (6 Ed.1990) 1014. Thus, a motion to suppress is the proper vehicle for raising constitutional challenges based on the exclusionary rule first enunciated by the United States Supreme Court in *Weeks v. United States* (1914), 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652, and made applicable to the states in *Mapp v. Ohio* (1961), 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081. Further, this court has held that the exclusionary rule will not ordinarily be applied to suppress evidence which is the product of police conduct that violates a statute but falls short of a constitutional violation, unless specifically required by the legislature. *Kettering v. Hollen* (1980), 64 Ohio St.2d 232, 235, 18 O.O.3d 435, 437, 416 N.E.2d 598, 600. An important characteristic of a motion to suppress is that finality attaches so that the ruling of the court at the suppression hearing prevails at trial and is, therefore, automatically appealable by the state. R.C. 2945.67(A); [former] Crim.R. 12(J); see, also, *State v. Davidson* (1985), 17 Ohio St.3d 132, 17 OBR 277, 477 N.E.2d 1141.

**{¶15}** A "motion *in limine*" is defined as "[a] pretrial motion requesting [the] court to prohibit opposing counsel from referring to or offering evidence on matters so highly prejudicial to [the] moving party that

curative instructions cannot prevent [a] predispositional effect on [the] jury." Black's Law Dictionary, *supra*, at 1013. The purpose of a motion *in limine* "is to avoid injection into [the] trial of matters which are irrelevant, inadmissible and prejudicial[,] and granting of [the] motion is not a ruling on evidence and, where properly drawn, granting of [the] motion cannot be error." *Id.* at 1013-1014. See *State v. Maurer* (1984), 15 Ohio St.3d 239, 259, 15 OBR 379, 396, 473 N.E.2d 768, 787.

**{¶16}** A ruling on a motion *in limine* reflects the court's anticipated treatment of an evidentiary issue at trial and, as such, is a tentative, interlocutory, precautionary ruling. Thus, "the trial court is at liberty to change its ruling on the disputed evidence in its actual context at trial. Finality does not attach when the motion is granted." *Defiance v. Kretz* (1991), 60 Ohio St.3d 1, 4, 573 N.E.2d 32, 35, citing *State v. Grubb* (1986), 28 Ohio St.3d 199, 201-202, 28 OBR 285, 288, 503 N.E.2d 142, 145.

*State v. French*, 72 Ohio St.3d 446, 449-450, 650 N.E.2d 887 (1995).

**{¶17}** According to Miller, the municipal court's ruling "is not a *final appealable order* because such an order does not determine the ultimate admissibility of the evidence." Brief of Appellee, at 3. If the court were subsequently satisfied as to the scientific reliability of the Intoxilyzer 8000, "it would be at liberty to change its ruling on the disputed evidence at trial."

**{¶18}** We disagree. The Ohio Supreme Court has held: "Any motion, however labeled, which, if granted, restricts the state in the presentation of certain evidence and, thereby, renders the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed, is, in effect, a motion to suppress. The granting of such a motion is a final order and may be appealed pursuant to R.C. 2945.67 and Crim. R. 12(J) [now (K)]." *Davidson*, 17 Ohio St.3d at syllabus, 477 N.E.2d 1141. Accordingly, "[a] pretrial challenge to a breathalyzer test, if granted, destroys the state's case under [former] R.C. 4511.19(A)(3) [prohibited breath alcohol concentration], and the state is permitted to appeal pursuant to R.C. 2945.67 and Crim. R. 12[(K)(2)]." *Kretz*, 60 Ohio St.3d at 4.

**{¶19}** The municipal court's ruling in the present case was not a tentative or precautionary ruling, but determined that "the Defendant's breath test shall not be admitted during the trial." Any doubt as to the finality of this ruling is removed by the court's dismissal of the charge of operating a vehicle with a prohibited breath alcohol concentration.

**{¶20}** For the foregoing reasons, the municipal court's April 16, 2012 Journal Entry is a final order. R.C. 2945.67(A) ("[a] prosecuting attorney * * * may appeal as a matter of right any decision of a trial court in a criminal case * * *, which decision grants a motion to dismiss all or any part of * * * [a] complaint * * * [or] a motion to suppress evidence") and Crim.R. 12(K)(2) ("[w]hen the state takes an appeal as provided by law from an order suppressing or excluding evidence * * *, the prosecuting attorney shall certify that * * * the ruling on the motion or motions has rendered the state's proof with

respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed").

**{¶21}** In its first assignment of error, the State contends the municipal court erred by allowing Miller to challenge the scientific reliability of the Intoxilyzer 8000, contrary to Ohio statutory law and the Ohio Supreme Court's decision in *Vega*, 12 Ohio St.3d 185, 465 N.E.2d 1303.

**{¶22}** "In any criminal prosecution * * * for a violation of division (A) or (B) of [R.C. 4511.19] * * *, the court may admit evidence on the concentration of alcohol * * * in the defendant's * * * breath * * * at the time of the alleged violation as shown by chemical analysis of the substance withdrawn within three hours of the time of the alleged violation." R.C. 4511.19(D)(1)(b). "The bodily substance withdrawn under division (D)(1)(b) of this section shall be analyzed in accordance with methods approved by the director of health by an individual possessing a valid permit issued by the director pursuant to section 3701.143 of the Revised Code." *Id.*

**{¶23}** "For purposes of section[] * * * 4511.19 * * * of the Revised Code, the director of health shall determine, or cause to be determined, techniques or methods for chemically analyzing a person's * * * breath * * * in order to ascertain the amount of alcohol * * * in the person's * * * breath * * *." R.C. 3701.143.

**{¶24}** The Ohio director of health has approved the "Intoxilyzer model 8000 (OH-5)" as an "evidential breath testing instrument[] for use in determining whether a person's breath contains a concentration of alcohol prohibited or defined by section[] 4511.19 * * * of the Revised Code." Ohio Adm.Code 3701-53-02(A)(3).

**{¶25}** In *Vega*, the Ohio Supreme Court addressed the issue of "whether an accused may use expert testimony to attack the general reliability of intoxilyzers as valid, reliable breath testing machines in view of the fact that the General Assembly has legislatively provided for the admission of such tests in R.C. 4511.19 if analyzed in accordance with methods approved by the Director of Health." *Vega*, 12 Ohio St.3d at 186, 465 N.E.2d 1303.

**{¶26}** The court held that, by enacting R.C. 4511.19, the General Assembly "ha[s] legislatively resolved the questions of the reliability and relevancy of intoxilyzer tests." *Id.* at 188. "[The judiciary must recognize] the necessary legislative determination that breath tests, properly conducted, are reliable irrespective that not all experts wholly agree and that the common law foundational evidence has, for admissibility, been replaced by statute and rule; and that the legislative delegation was to the Director of Health, not the court, the discretionary authority for adoption of appropriate tests and procedures, including breath test devices." *Id.* at 188-189, citing *State v. Brockway*, 2 Ohio App.3d 227, 232, 441 N.E.2d 602 (4th Dist.1981). Thus, "an accused may not make a general attack upon the reliability and validity of the breath testing instrument." *Id.* at 190.

**{¶27}** In subsequent decisions, the Ohio Supreme Court reaffirmed its holding in *Vega*. The court has emphasized that, when regulations are promulgated pursuant to R.C. 4511.19 and 3701.143, "it must be presumed that the Director of Health acted upon adequate investigation," and that the courts "must defer to the department's authority and * * * not substitute our judgment for that of the Director of Health." *State v. Yoder*, 66 Ohio St.3d 515, 518, 613 N.E.2d 626 (1993).

**{¶28}** Despite these rulings, Miller contends that trial courts nevertheless retain the discretion to hear argument on the general or scientific reliability of a breath testing instrument. Miller relies on the statement in *French*, that "[e]videntiary objections challenging the competency, admissibility, relevancy, authenticity, and credibility of the chemical test results may still be raised." 72 Ohio St.3d at 452, 650 N.E.2d 887. Miller's citation from *French* is taken out of context. In the relevant paragraph of the *French* opinion, the court was discussing that a defendant "who does not challenge the admissibility of the chemical test results through a pretrial motion to suppress waives the requirement on the state to lay a foundation for the admissibility of the test results at trial." *Id.* Such a defendant could, nevertheless, challenge the evidence, in certain respects, based on the Rules of Evidence. *Id.* Many courts, including this one, have rejected Miller's argument that *French* created an exception to the rule prohibiting challenges to the general scientific reliability of breath testing instruments. *State v. Urso*, 195 Ohio App.3d 665, 2011-Ohio-4702, 961 N.E.2d 689, ¶ 90 (11th Dist.) (cases cited).

**{¶29}** Finally, other appellate districts have consistently rejected Miller's position in the same or similar situations. *State v. Klintworth*, 4th Dist. No. 10CA40, 2011-Ohio-3553, ¶ 12 ("this court will not allow the defendant to us[e] expert testimony to attack the general reliability or general accuracy of a legislatively determined test procedure - urine testing - as a valid scientific means of determining blood alcohol levels") (citation omitted); *Columbus v. Aleshire*, 187 Ohio App.3d 660, 2010-Ohio-2773, 933 N.E.2d 317, ¶ 27 (10th Dist.) ("while *French* [, 72 Ohio St.3d 446 (1995),] permits evidentiary objections to the test results challenging issues such as competency, admissibility,

relevancy, authenticity, and credibility, it does not indicate that a challenge to the 'general reliability' is among the permissible challenges"); *State v. Massie*, 2nd Dist. No. 2007 CA 24, 2008-Ohio-1312, ¶ 36 ("Massie's *Daubert* challenge * * * is forestalled by the 'legislative mandate recognized in *Vega,*' and the trial court properly limited Massie to the issue of his own test").

**{¶30}** We emphasize that, although a defendant may not make "a general attack upon the reliability and validity of the breath testing instrument," breath test results are subject to challenge on a variety of grounds.

**{¶31}** When duly challenged, the State must demonstrate that the bodily substance was "analyzed in accordance with methods approved by the director of health" and "by an individual possessing a valid permit." R.C. 4511.19(D)(1)(b). *Vega* recognized that "[t]here is no question that the accused may * * * attack the reliability of the specific testing procedure and the qualifications of the operator," as well as present "expert testimony as to testing procedures at trial going to weight rather than admissibility." *Vega*, 12 Ohio St.3d at 189, 465 N.E.2d 1303. Thus, "[t]he defendant may still challenge the accuracy of his specific test results, although he may not challenge the general accuracy of the legislatively determined test procedure as a valid scientific means of determining blood alcohol levels." *State v. Tanner*, 15 Ohio St.3d 1, 6, 472 N.E.2d 689 (1984); *Aleshire* at ¶ 27.

**{¶32}** In addition to attacks on the specific performance of a particular breath test in an individual defendant's case, a defendant may also make an attack on the reliability of the Intoxilyzer 8000 based on specific reasons. While, as discussed above, the machine is presumed to be generally reliable, a defendant may raise specific issues

related to its reliability in a motion to suppress, as opposed to general assertions that the State failed to prove its reliability, which is prohibited under *Vega*. *See Vega* at 189.

**{¶33}** Accordingly, *Vega* does not circumvent the trial court's role as "gatekeeper" of evidence, as Miller suggests. Rather, a trial court still retains its authority and responsibility to regulate the admission of test results and to evaluate specific challenges to the Intoxilyzer's reliability. Where the State fails to demonstrate that it followed the procedures set forth by the director of health and/or that the operator was properly qualified, test results may be suppressed. A defendant may also challenge the reliability of the Intoxilyzer 8000 with specific arguments, may challenge the accuracy of his specific test results, for example, based on radio frequency interference, at trial and with evidence going to the weight accorded to the test results.

**{¶34}** In the present case, Miller challenged the breath test results of the Intoxilyzer 8000 on several grounds, including that the breath test was "not conducted in accordance with the time limitations and regulations set forth in R.C. 4511.19(D), and the Ohio Department of Health regulations governing such testing and analysis," and that the breath test sample was "not analyzed in accordance with the instrument display for the instrument used and the results were not retained as prescribed by the Ohio Director of Health." Under the statute and cases discussed above, these were valid challenges to the admissibility of breath test results and properly raised in a motion to suppress. The municipal court, however, granted Miller's motion solely on the grounds that the State failed to produce evidence of the Intoxilyzer 8000's general scientific reliability. Accordingly, on remand, it will be necessary for the court to hold another hearing to address the other issues raised in Miller's Motion to Suppress.

**{¶35}** The State's first assignment of error is with merit.

**{¶36}** In the second assignment of error, the State contends the municipal court erred by dismissing the charge of operating a vehicle with a prohibited breath alcohol concentration, R.C. 4511.19(A)(1)(d), following the suppression of the test results of the Intoxilyzer 8000. *State v. Fraternal Order of Eagles Aerie 0337 Buckeye*, 58 Ohio St.3d 166, 169, 569 N.E.2d 478 (1991) (where a motion to suppress has been granted, "it is not for the trial court to determine the sufficiency of the state's evidence to proceed with the prosecution and hence enter a judgment of acquittal").

**{¶37}** Given our disposition of the first assignment of error, the State's second assignment of error, challenging the trial court's sua sponte dismissal of the OVI charge constituting a violation of R.C. 4511.19(A)(1)(d), is rendered moot. The court's dismissal of this charge was based on the erroneous supression of the test results of the Intoxilyzer 8000. App.R. 12(A)(1)(c).

**{¶38}** For the foregoing reasons, the judgment of the Portage County Municipal Court, Ravenna Division, granting Miller's Motion to Suppress/Motion in Limine and dismissing the charge of violating R.C. 4511.19(A)(1)(d), is reversed, and this cause is remanded for further proceedings consistent with this opinion. Costs to be taxed against appellee.

TIMOTHY P. CANNON, P.J., concurs,

CYNTHIA WESTCOTT RICE, J., concurs with a Concurring Opinion.

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CYNTHIA WESTCOTT RICE, J., concurs with Concurring Opinion.

**{¶39}** While I concur with the disposition of this case, I write separately to clarify the procedural consequences of the majority's opinion.

**{¶40}** The majority concludes that the appellee could not challenge the general scientific reliability of the Intoxilyzer 8000; it also observes, however, that "a defendant may also make an attack on the reliability of the Intoxilyzer 8000 based on specific reasons." The majority acknowledges that while the machine is presumed reliable, a defendant may raise specific issues related to its reliability in his or her motion to suppress. While I agree with these points, I would expand on the issue.

**{¶41}** In this case, the lower court sustained appellee's motion premised upon the state's failure to produce evidence of the Intoxilyzer 8000's general reliability. Under *Vega*, once suitable methods for breath analysis are established by the Director of Health, pursuant to the legislative directive, a statutory presumption of reliability then attaches to the approved testing devices. "Administrative rules enacted pursuant to a specific grant of legislative authority are to be given the force and effect of law." *Doyle v. Ohio Bureau of Motor Vehicles*, 51 Ohio St.3d 46 (1990), paragraph one of the syllabus. Further, once the Director of Health has promulgated regulations for breath testing instruments, they are to be given the force and effect of law. *State v. Yoder*, 66 Ohio St.3d 515, 519 (1993) (Wright, J., dissenting), citing *Doyle*, *supra*. Thus, Ohio Adm.Code 3701-53-02, which approved the Intoxilyzer 8000 as an evidential breath testing instrument, has the force and effect of law.

**{¶42}** Appellee filed a motion in limine, eventually treated as a motion to suppress, which challenged the general reliability of the Intoxilyzer 8000. Although the

motion lacked any clear specificity as to what legal or factual bases appellee was challenging, the court granted the motion because the state failed to produce any evidence demonstrating the test results were reliable.

**{¶43}** First of all, as discussed above, *Vega* prohibits a "*general* attack upon the reliability * * * of the breath testing instrument*."* (Emphasis added.) *Id*. at 190. This holding, however, allows for a *specific* challenge to the reliability of the Intoxilyzer 8000. *Id*. at 189. The majority appears to acknowledge this point, but does not expand on its procedural implications. Given the interplay of the statutory scheme and the relevant case law, I would additionally hold that once the state establishes an approved breath testing device was used, the presumption of reliability attaches. And, in turn, a defendant, based upon his specific challenges in his motion to suppress, then bears the responsibility to produce evidence of how, in his case, the specific results were unreliable.

**{¶44}** Here, neither party disputes the Intoxilyzer 8000 was used. And since the legislature determined that the Intoxilyzer 8000 is reliable, it must be presumed the device is reliable. *See Yoder*, *supra*, at 518 ("[I]n promulgating this regulation, it must be presumed that the Director of Health acted upon adequate investigation * * *. We must defer to the department's authority and we may not substitute our judgment for that of the Director of Health.") Given these points, the state did not have the burden to produce evidence of the machine's reliability as a predicate for presenting appellee's breath test results. To the contrary, because the instrument is presumed to be a reliable breath testing instrument, appellee had the burden to produce evidence that the Intoxilyzer is not reliable.

**{¶45}** It is necessary to underscore that, even though a general attack on the reliability of the Intoxilyzer 8000 is prohibited, the statutory presumption is nevertheless rebuttable. The court in *Vega* stated that a defendant may still "'notwithstanding the presumption, [establish if he can, that] he was not under the influence of alcohol at the time of his arrest, or that there was something wrong with the test and the results were erroneous.'" *Id.* at 189, quoting Erwin, Defense of Drunk Driving Cases (3 Ed.1971) 26-29, Section 26.03.

**{¶46}** As indicated above, the majority appears to recognize the foregoing points. The majority opinion, however, does not acknowledge that, once the presumption has attached, the defendant has the obligation to go forward with evidence that the machine is unreliable. Thus, while I agree that the trial court erred in requiring the state to produce evidence of the Intoxilyzer 8000's general reliability and in granting appellee's motion to suppress, I write separately to acknowledge that it is the defendant's, not the state's, burden to go forward, once the presumption of reliability has been triggered.