

[Cite as *State v. Musick*, 2002-Ohio-2890.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| STATE OF OHIO | : | JUDGES: |
| | : | Hon. W. Scott Gwin, P. J. |
| | : | Hon. Sheila G. Farmer, J. |
| Plaintiff-Appellee | : | Hon. John W. Wise, J. |
| | : | |
| -vs- | : | |
| | : | Case No. 01 CA 77 |
| REGINA L. MUSICK | : | |
| | : | |
| Defendant-Appellant | : | <u>OPINION</u> |

CHARACTER OF PROCEEDING: Criminal Appeal from the Municipal Court,
Case No. 01 TRC 01123

JUDGMENT: Reversed and Remanded

DATE OF JUDGMENT ENTRY: June 4, 2002

APPEARANCES:

For Plaintiff-Appellee

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Gwin, P.J.,

{¶1} Appellant Regina Musick appeals the decision of the Licking County Municipal Court overruling her motion to suppress. Appellant also appeals her conviction based on the jury finding her guilty of violating R.C. 4511.19(A)(1) and R.C. 4511.19(A)(6) as being against the manifest weight and sufficiency of the evidence. The following facts give rise to this appeal.

{¶2} On January 27, 2001, at approximately 9:31 p.m., Trooper Eric Damron of the Ohio State Highway Patrol stopped appellant for speeding on Interstate 70. After further investigation, Trooper Damron arrested appellant for violating sections (A)(1) and (A)(6) of R.C. 4511.19. Appellant appeared at her arraignment on January 31, 2001, and entered a plea of not guilty. On February 22, 2001, appellant filed a motion to suppress and, among other things, argued that the state failed to substantially comply with the Ohio Department of Health regulations regarding breath alcohol testing.

{¶3} The trial court conducted a hearing on appellant's motion on April 13, 2001. The trial court denied appellant's motion and concluded the state substantially complied with the Ohio Department of Health's regulations regarding breath alcohol testing. Thereafter, this matter proceeded to trial on June 7, 2001. Prior to the commencement of trial, defense counsel made a number of motions in an attempt to prevent the jury from being influenced by the chemical breath test result on the R.C. 4511.19(A)(1) charge. The trial court denied the motions.

{¶4} Following deliberations, the jury found appellant guilty of violating both R.C. 4511.19(A)(1) and R.C. 4511.19(A)(6). The trial court found appellant guilty of the

speeding charge. On July 12, 2001, the trial court sentenced appellant to six days of incarceration, with three days credit for time served in a residential treatment program.

{¶5} Appellant timely filed her notice of appeal and sets forth the following assignments of error for our consideration:

{¶6} "I. THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT BY OVERRULING DEFENDANT'S MOTION TO SUPPRESS.

{¶7} "II. THE ERRONEOUS ADMISSION OF THE CHEMICAL BREATH TEST RESULT CONTRIBUTED TO DEFENDANT'S CONVICTION FOR VIOLATING R.C. §4511.19(A)(1) AND, WITHOUT EXPERT TESTIMONY, ERRONEOUSLY INFLUENCED THE JURY.

{¶8} "III. THE JURY VERDICT CONVICTING DEFENDANT OF VIOLATING R.C. §4511.19(A)(1) WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND NOT SUPPORTED BY SUFFICIENT EVIDENCE."

I

{¶9} In her First Assignment of Error, appellant maintains the trial court erred when it denied her motion to suppress because the state failed to show substantial compliance with the Ohio Department of Health's regulations regarding alcohol testing. We agree.

{¶10} Appellant maintains the trial court committed an error at law when it permitted the state to establish the target value for the instrument check solution by an uncertified copy from the Ohio Department of Health and through the testimony of the Ohio State

Highway Patrolman who performed the instrument check. Pursuant to this type of a challenge, we can reverse the trial court for committing an error of law. *State v. Williams* (1993), 86 Ohio App.3d 37, overruled on other grounds.

{¶11} In support of this assignment of error, appellant argues only an original certificate, which is self-authenticating, or a copy certified by the custodian of the Ohio Department of Health is admissible into evidence under Evid.R. 902. Appellant further maintains, in the alternative, that the records custodian from the Ohio Department of Health could testify regarding the authenticity of the certificate or the individual who actually established the target value could testify how the target value for the instrument check solution was established. Specifically, appellant cites the case of *State v. Brown* (Apr. 13, 1992), Clairmont App. No. CA91-07-043, unreported, at 4, which held:

{¶12} "Authentication of a 'batch' certificate is a condition precedent to its admission into evidence at a suppression hearing. *State v. Keating* (Oct. 13, 1987), Stark App. No. CA-7148, unreported. Without a properly authenticated calibration certificate, the results of appellant's BAC verifier test cannot be admitted into evidence. *City of Columbus v. Robbins* (1989), 61 Ohio App.3d 324; see, also, *State v. Ward* (1984), 15 Ohio St.3d 355. Finding that a properly authenticated calibration solution certificate was not offered into evidence by the state, would hold that the BAC verifier results must be excluded."

{¶13} The *Brown* decision referenced a decision rendered by this court in 1987. In the *Keating* case, we held that " * * the "bottle and batch affidavit" sought to be admitted by the appellee was not separately authenticated. This authentication is a condition precedent to its admission at a suppression hearing. The appellee's failure to produce a

properly authenticated document was a foundational requirement necessary for its admittance at the hearing to successfully prosecute the appellant on an R.C. 4511.19(A)(3) violation." *Keating* at 3.

{¶14} We find the trial court should have sustained the motion to suppress the results of the breath test.

{¶15} The first assignment of error is sustained.

II

{¶16} Appellant contends, in her Second Assignment of Error, that the trial court erred when it admitted the chemical breath test result which contributed to her conviction for violating R.C. 4511.19(A)(1). Appellant also maintains the state should have presented expert testimony as to the correlation between the test result of .211 and her impairment. We disagree with both arguments.

{¶17} Because we find the results of the breath test are inadmissible because they are unreliable, we find the trial court should not have admitted the results for the charge of violating R.C. 4511.19 (A)(1).

{¶18} The second assignment of error is sustained.

III

{¶19} In her Third Assignment of Error, appellant maintains the jury's verdict finding her guilty of operating a motor vehicle under the influence of alcohol was against the manifest weight of the evidence and was not supported by the sufficiency of the evidence.

{¶20} In light of our rulings on the admissibility of the evidence, we find a review of the manifest weight and sufficiency of the evidence is premature and unnecessary at this time.

{¶21} The assignment of error is moot.

{¶22} For the foregoing reasons, the judgment of the Licking County Municipal Court, Licking County, Ohio, is hereby reversed and the cause is remanded to that court for further proceedings in accord with law and consistent with this opinion.

Farmer, J., concur.

Wise J., dissents.

WISE, J., dissenting.

{¶23} I respectfully dissent from the majority's decision to affirm appellant's First Assignment of Error. The majority concluded the trial court should have sustained appellant's motion to suppress because the batch certificate was not properly authenticated.

{¶24} Although a line of cases supports appellant's argument, including an unreported case from this court, I find the applicable law is contained in the Ohio Rules of Evidence. Specifically, Evid.R. 101(C)(1) provides that the Rules of Evidence are not binding on admissibility determinations made pursuant to Evid.R. 104(A). Evid.R. 104(A) states as follows:

{¶25} "(A) **Questions of admissibility generally**

{¶26} "Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (B). In making its determination it is not bound by the rules of evidence except those with respect to privileges."

{¶27} The Ohio Rules of Evidence give a trial judge broad discretion concerning the admissibility of evidence presented at a suppression hearing. Accordingly, I find hearsay evidence is not per se barred from use at a suppression hearing. The Eleventh District Court of Appeals reached the same conclusion in *State v. Woodring* (1989), 63 Ohio App.3d 79. In *Woodring*, the court of appeals cited the United States Supreme Court's decision in *United States v. Matlock* (1974), 415 U.S. 164, 172, wherein the Court stated that the Rules of Evidence normally "do not operate with full force at hearings before the judge to determine the admissibility of evidence."

{¶28} Accordingly, I would overrule appellant's First Assignment of Error.