

IN THE COUNTY COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,	:	
	:	CASE NO: 11-024131MM10A
Plaintiff,	:	
	:	
vs.	:	JUDGE: BROWN
	:	
DOUGLAS OBRECHT,	:	
	:	
Defendant.	:	

**ORDER GRANTING STATE’S OBJECTION TO AND MOTION TO STRIKE/LIMIT
DEFENSE EXPERT TESTIMONY UNDER DAUBERT STANDARD**

THIS CAUSE having come before this Court upon the State’s Objection to the admissibility of, and Motion to Strike expert testimony based on the Daubert standard, and this Court having heard arguments on the same, reviewed and the State’s and Defendant’s written final arguments, and being otherwise fully advised in the premises, hereby

ORDERS AND ADJUDGES that the State’s Objection and Motion to Strike/Limit is **GRANTED**, for the reasons stated below:

This cause came before the court for hearing on December 4, 2013. The Court was called upon to determine the admissibility of expert testimony of the defendant’s expert, Jay Zager, based upon the *Daubert* standard.

The defendant was arrested for a violation of Fla. Stat. 316.193 – Driving Under the

Influence and submitted to a breath alcohol test on an Intoxilyzer 8000 breath testing instrument. The defendant offered Mr. Zager as an expert to provide opinion testimony in four specific areas regarding the breath test results obtained on the Intoxilyzer 8000 used in this case. These areas, included: the effect of breath temperature on the breath test results, that the instrument would not notify the breath test operator of external ambient fail conditions until the instrument identifies more than .019 in the room's ambient condition, the effect of the .02 agreement between results based on the blood-breath partition ratio, and the affect of instrument's .005 precision variability.

This Court finds that Mr. Zager has relied heavily on articles written, but that he does not have enough experience to rely on that information. Mr. Zager has not conducted any of his own independent research regarding any of the opinions he intends to provide on the effect of these variables on the breath results. This Court finds that Mr. Zager is not well-versed in the scientific, specialized knowledge or skill required in order to be considered an expert in the field of body or breath temperature and how it affects the Intoxilyzer results. Just because he has read on the subject, does not make his opinion reliable. Further, Mr. Zager is lacking in education, experience, skill and training as it relates to the areas for which he was offered as an expert.

In reviewing the law, specifically the *Daubert* case and the Florida evidence code, Fla. Statute 90.702 requires much more than what Mr. Zager has to offer in the way of knowledge and experience. While the subject areas of what he may wish to speak about may be relevant, his lack of scientific and specialized knowledge, and lack of expertise through skill, training and education prevents him from meeting the burden of reliability as required under *Daubert*, and this Court does not find his testimony in those areas to be reliable.

This Court will not allow Mr. Zager to testify regarding the effect of breath temperature

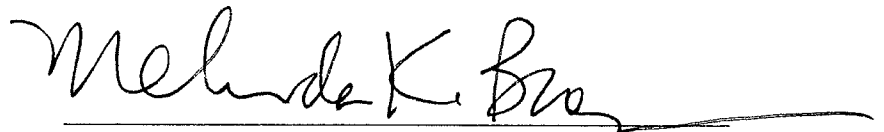
on the breath test results in this case. As to Mr. Zager's opinion testimony regarding the .02 agreement, blood-breath partition ratio and the instrument's inability to notify the operator if ambient conditions are contaminated unless the ambient conditions are greater than .019, this Court finds that Mr. Zager does not have the education, training, experience or scientific knowledge to opine about these subject areas or for his testimony to be reliable.

This Court does not find that just because a witness reads articles on the subject matter on which the witness seeks to opine, the witness becomes an expert. Mr. Zager has done nothing in the way of his own research or studies to validate the opinions he seeks to provide. In fact, the article upon Mr. Zager relies are based on extreme breath temperatures and the submersion of subjects in extreme heat or cold temperatures, neither of which is present in the instant case. Mr. Zager's opinions have not been published or subjected to peer-review, nor have they been scientifically quantified to determine the known or potential rates of error.

The preceding notwithstanding, this Court will allow Mr. Zager to testify regarding the .005 precision variability of the Intoxilyzer 8000. The Court finds that Mr. Zager is familiar with the operation and components of the Intoxilyzer 5000 and Intoxilyzer 8000, as well its maintenance procedures and will allow him to testify in those limited areas. As indicated by the defense, there seem to be no issues with regards to the maintenance of the instrument in this case. Nonetheless, the Court would allow Mr. Zager's testimony in this area, if otherwise relevant. This Court does not find him to be an expert in any other areas.

WHEREFORE, based upon the testimony heard, the arguments made by both parties, and the authority articulated herein, the Court hereby **GRANTS** the State's Objection and Motion to Strike/Limit the Defense Expert Testimony Under *Daubert*.

DONE AND ORDERED in Chambers in Broward County, Florida, on this 10 day of February, 2014, nun pro tunc to January 23, 2014



HONORABLE MELINDA BROWN
JUDGE OF THE COUNTY COURT
17th Judicial Circuit

Copies furnished to:

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