

Criminal law -- Driving under influence -- Evidence -- Breath test -- Substantial compliance with administrative rules -- Where Intoxilyzer failed two simulator tests but was not taken out of service as required by administrative rules, Intoxilyzer failed two simulator tests on next day and again was not taken out of service, and two days later Intoxilyzer passed simulator test, defendant's breath test performed day after successful simulator test was devoid of evidentiary value -- Error to deny motion to suppress test results

VICTORIA BRUNS, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 8th Judicial Circuit (Appellate) Court in and for Alachua County. Case No. 2007-AP-38. L.C. Case No. 01-2007-CT-403-A. August 14, 2008. An Appeal from the Alachua County Court, Judge Mary Day Coker. Counsel: M. Stephen Stanfield, Gainesville, for Appellant. Andrew Morey, Assistant State Attorney, Gainesville, for Appellee.

ORDER ON APPEAL

(PER CURIAM.) Appellant asks this Court to find reversible error in three rulings made below. Appellant argues that (1) the breath alcohol test used in evidence at trial should have been suppressed because the Intoxilyzer 8000 used by law enforcement was not in substantial compliance with Florida Department of Law Enforcement regulations, (2) Rick Swope should have been qualified as an expert and allowed to testify as such regarding the Intoxilyzer 8000, and (3) that Swope should have been allowed to proffer his testimony. Because the first issue is determinative of the result here, this Court declines to reach the latter two.

A breath test result may not be used for evidentiary purposes unless it is obtained in substantial compliance with Florida Department of Law Enforcement (“FDLE”) regulations. § 316.1932(1)(b)(2), Fla. Stat. (2006). Those regulations require that the machine used to test breath alcohol, in this case the Intoxilyzer 8000, must be inspected once per month in accordance with the procedures detailed in “Agency Inspection Procedures -- Intoxilyzer 8000 FDLE/ATP Form 39.” F.A.C. 11D-8.006 (2006). Substantial deviation from the inspection procedures in Form 39 will cause breath tests performed on that machine to likewise be out of substantial compliance. See [Florida Dep't of Highway Safety and Motor Vehicles v. Wejebe](#), 954 So. 2d 1245, 1249 (Fla. 3rd DCA 2007).

The Intoxilyzer 8000 at issue here was inspected on 23 January 2007, but did not pass the simulator test. The test was tried again, and the machine failed a second time. According to Form 39, the machine should have been immediately removed from service at that point, and the Department Inspector notified. This was not done. Instead, the machine was left in service and the testing procedure was repeated the next day, 24 January 2007. Again, the machine failed the first test as well as the re-test. Again, the directive in Form 39 was not followed, and the machine was left in service. Two days later, on 26 January 2007, the testing procedure was performed successfully. However, by that time, the machine's accuracy was in substantial doubt and breath tests results obtained with that machine were not in substantial compliance with FDLE regulations. When Appellant's breath alcohol was measured on 27 January 2007, the machine had still not been taken out of service, and the breath test was therefore devoid of evidentiary value.

Accordingly, it is

ADJUDGED that the judgment and sentence herein is REVERSED. The case is REMANDED with instructions to suppress the breath test result obtained from Appellant. (STAN R. MORRIS, TOBY S. MONACO and PETER K. SIEG, JJ.)

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