

9 Fla. L. Weekly Supp. 879a

Criminal law -- Driving under influence -- Evidence -- Breath test -- Inspection and maintenance of breath testing machine -- Motion to allow independent testing of Intoxilyzer is denied where proposed testing procedure is theoretical, speculative, and experimental; proposed procedure appears to set different standard than that required by administrative rules and include tests not required by rules; and defendants have failed to show that testing procedures employed by state are flawed and result in potential for inaccurate blood alcohol readings or that sheriff department's procedures are not in substantial compliance with statutes and administrative rules

STATE OF FLORIDA, Plaintiff, vs. SHIRLEY BURKS BURNETT, CARLOS RIOS, RICHARD E. CARANO, EDUARDO RUIZ, Defendants. County Court, 20th Judicial Circuit in and for Hendry County. Case Nos. 2000-448, 2000-986, 2000-1060, 2000-595. January 5, 2001. James D. Sloan, Judge. Counsel: Joseph M. Hendry, III.

ORDER

THIS CAUSE having come on to be heard upon the defendants' Motion to Inspect the Hendry County Sheriff's Department's Breath Intoxilyzer 5000; this Court having heard argument of counsel and having reviewed the procedures for the proposed tests; and, being otherwise duly advised in the premises, it is therefore

ORDERED AND ADJUDGED as follows:

1. The defendants have requested that the Court allow independent testing of the Breathalyzer 5000R located at the Hendry County Sheriff's Department, West District Office in LaBelle. It is that particular breathalyzer that was used in each of the defendant's cases to obtain a blood/alcohol level subsequent to their arrests for DUI.
2. The defendants propose that Rick Swope of Swope Reconstruction in Davie, Florida be permitted to conduct the testing on the intoxilyzer in question. Mr. Swope, in a letter of October 31, 2000 to Attorney Joseph Hendry, outlined the procedure that he would intend to employ if granted permission to test the breathalyzer instrument. A copy of said letter is attached to the Court's order as Exhibit "A".
3. The State has imposed an objection to the testing and has argued that the sole authority for the regulation of testing and administration of breathalyzers is the Florida Department of Law Enforcement who has promulgated standards in the Florida Administrative Code, section 11D-8. The State further argues that those regulations have been properly promulgated and furnish a proper legal basis to determine the accuracy of the Intoxilyzer 5000R.
4. Mr. Swope, in his testimony, testified that he was aware of some tests that had been run by other experts in the field which called into question the slope indicator which measures the presence of alcohol in a subject's mouth. Those test results, articles or treatises were not introduced into the record.
5. Deputy Sheriff Andy Lewis who has sole charge of the maintenance of said breathalyzer, testified that the slope indicator which detects the presence of mouth alcohol is tested on a monthly basis pursuant to the Florida Administrative Code and has never failed to function properly since this particular breathalyzer was placed in service with the Hendry County Sheriff's Department. After consideration of the defendants' motion and having examined Exhibit "A", it is therefore

ORDERED AND ADJUDGED as follows:

1. The procedure proposed by the defendants through Mr. Swope appear to set a different standard than that required by the Florida Administrative Code in that Mr. Swope intends to perform tests on the Intoxilyzer 5000R which are not required by the Florida Administrative Code. The testing procedure proposed in Exhibit "A" is theoretical, speculative and experimental in nature. It appears that the defendants are requesting that the Court allow them to conduct experimentation and research under the guise of challenging the slope detector.
2. The defendants have failed to meet the burden of proof to show that the testing procedures employed by the State of Florida are inadequate, inappropriate or otherwise flawed and result in the potential for inaccurate blood alcohol readings.
3. The defendants further have failed to allege any defect in FDLE procedures for testing and maintaining the Intoxilyzer 5000R and further, have failed to allege or prove that the procedures used by the Hendry County Sheriff's Department are not in substantial compliance with the applicable Florida Statutes or Administrative Codes.
4. Further, the Court expresses concern that allowing "experimentation" in this case would be "Pandoranic" in nature in that every subsequent criminal defendant in a DUI case would then be entitled to run their own tests on the Intoxilyzer 5000R by simply questioning, without sufficient legal basis or scientific proof, the results or accuracy of the Intoxilyzer 5000R. Therefore this Court will necessarily require that any defendant seeking to run independent tests on an intoxilyzer would carry the burden of proof in order for this Court to grant testing outside of that required by the Florida Department of Law Enforcement. It is therefore

ORDERED AND ADJUDGED that the defendants' motion is denied and that these cases are set for docket sounding on Monday, the 12th day of February, 2001.

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