

2 Fla. L. Weekly Supp. 439a

Criminal law -- Driving under influence -- Evidence -- Breath test -- Low sample volume breath alcohol result is not facially invalid reading -- If LSV reading is relevant to impairment and does not prejudice defendant by raising legitimate question regarding scientific reliability of test results, state has substantially complied with rules of Department of Health and Rehabilitative Services -- Trooper's testimony that, except in rare situation where mouth alcohol is present and duration component is not met, a LSV reading will always be equal to or less than actual alcohol content in defendant's breath or blood established lack of prejudice and substantial compliance -- Motion to exclude LSV reading denied

STATE OF FLORIDA, Plaintiff, v. WILLIAM CONYERS, Defendant. County Court of the 11th Judicial Circuit in and for Dade County. Case No. 45046-WD. September 2, 1994. Jeri B. Cohen, Judge.

ORDER DENYING DEFENDANT'S MOTION
TO EXCLUDE THE LOW SAMPLE VOLUME
BREATH ALCOHOL READING

THIS CAUSE came to be heard on the Defendant's Motion to Exclude the Low Sample Volume Breath Alcohol Reading in the above-captioned case. The Court having heard extensive testimony and argument of counsel on February 18, 1994, and being otherwise fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED that the defendant's motion is DENIED. In so ruling, the Court makes the following findings of fact and conclusions of law:

I

On April 14, 1991, the defendant was stopped for violating a right of way. Upon being stopped, the defendant was observed to have an odor of alcohol on his breath, bloodshot eyes and slurred speech. After performing poorly on the field sobriety tests, the defendant was arrested and transported to the police station. After complying with the twenty minute waiting period, the defendant was asked to blow into the Intoxilyzer 5000-R. The defendant complied, and blew a .233 at 1:36 a.m. and a .235 at 1:42 a.m. Although these readings were within .02 compliance as required by H.R.S. Rule 10D-42.0211(4) and 10D-42.024(5)(a), the instrument printed an asterisk next to both readings indicating ``LOW SAMPLE VOLUME PRINTED WAS HIGHEST OBTAINED". There was no testimony by the breath test officer that the defendant refused to properly blow into the intoxilyzer or that there was anything unusual about the defendant's behavior relative to the breath test. The annual and monthly maintenance documents for intoxilyzer 66-001711 indicate that the instrument was properly maintained and in working order on April 14, 1991.

The defendant has moved to exclude the breath alcohol reading based on the fact that the low sample volume (hereinafter ``LSV"), is a facially invalid reading pursuant to H.R.S. Rule 10D-42.022(1) and 10D-42.0211(4), which require two valid deep lung air breath samples.¹

II

State Trooper Raymond Addison testified for the state. Trooper Addison is a certified breath technician and intoxilyzer instructor. He is also the preventive maintenance officer for the Florida Highway Patrol and an expert on the operation and functioning of the Intoxilyzer 5000-R. The Trooper's testimony can be summarized as follows:

The Intoxilyzer 5000-R will designate a breath alcohol reading as LSV where a defendant fails to blow into the instrument for a minimum of six seconds, fails to blow hard enough to push the pressure switch and/or fails to blow long enough so that the breath reading stops fluctuating and slopes off. The instrument will reflect a LSV reading if either time, pressure or slope is not satisfied or if any combination of these components is not satisfied. Satisfaction of these components assures that the instrument is analyzing deep lung air, which contains the most accurate reflection of the alcohol content of the defendant's blood.² The deeper the sample, the higher the breath alcohol reading.

A LSV may or may not contain deep lung air. Where a defendant blows out all the air in his lungs in order to satisfy the pressure component, but fails to blow for the requisite six seconds the reading will reflect a LSV. Likewise, the reading will reflect a LSV if a defendant blows for six seconds but fails to blow hard enough to push the pressure switch. In the latter situation, the breath sample may or may not contain deep lung air. In both situations, the actual alcohol content in the defendant's blood or breath will be equal to or less than the LSV breath alcohol reading.³

Trooper Addison identified one scenario where a breath card may reflect a LSV reading that is higher than the actual alcohol content in a defendant's breath or blood. The Intoxilyzer 5000-R is equipped with a slope detector designed to detect breath samples containing mouth alcohol. The slope detector identifies mouth alcohol by plotting breath samples over time. Where mouth alcohol is present, the reading goes up and then drastically drops off. The slope detector will reject the latter sample. Where a defendant blows into the intoxilyzer with mouth alcohol present and with enough pressure to push the pressure switch but not long enough to allow for a drastic drop off in the breath alcohol reading, a drastic fluctuation is not detected by the intoxilyzer. In such a case, the slope detector will fail to detect mouth alcohol. Instead of rejecting the sample, the intoxilyzer will provide an artificially high LSV reading.

Except in extremely rare situations, the above situation can be easily flagged and remedied by the breath test operator. First, mouth alcohol dissipates within seconds. Therefore, any second reading will be outside of the required .02 compliance and so divergent as to require a third reading. In no case, where mouth alcohol is present, will a second reading, provided immediately before or after, be within .02 compliance. And, where the breath operator has reason to believe that mouth alcohol is present, an additional twenty minute waiting period is required before a second or third breath alcohol test may be administered. *See* H.R.S. Rule 10D-42.024(1)(e).

Two experts testified for the defendant. Mr. Wayne Morris is a forensic consultant. While he is not certified on the intoxilyzer, he is an expert in infrared spectrometry -- the technology utilized by the Intoxilyzer 5000-R in analyzing breath samples. Mr. Rick Swope is a former Broward County Sheriff and an expert on the functioning and operation of the Intoxilyzer 5000-R. Both of the defendant's experts testified that although a LSV accurately reflects the alcohol content in the sample the intoxilyzer is analyzing, it does not reflect the actual alcohol content in the defendant's blood or breath. Given the fact that the actual alcohol content in the defendant's breath or blood is not reflected in the LSV, both experts testified that the reading is not reliable, even though it may be an accurate reflection of the alcohol content in the sample analyzed. Neither expert could testify as to whether the actual alcohol content in the defendant's blood or breath was higher or lower than that reflected in the

LSV. Nor could they offer any explanation for why a breath card may reflect a higher LSV reading than the facially valid reading. Mr. **Swope**, however, conceded that Trooper Addison's explanation for a LSV reading appearing higher than a facially valid reading was possible.

III

In determining whether LSV breath readings are sufficiently accurate for evidential purposes, this Court must determine whether the state has met its initial burden of showing that a LSV reading is in substantial compliance with H.R.S. Rules. *See Robertson v. State*, 602 So.2d 783 (Fla. 1992); and *State v. Donaldson*, 579 So.2d 728 (Fla. 1991). In this case, if the LSV breath alcohol reading is relevant to impairment and does not prejudice the defendant by raising a legitimate question regarding the scientific reliability of the tests results, than the state has substantially complied with the H.R.S. Rules. *See State v. Hill*, 26 FLW Supp. 2d 82 (Palm Beach County 1987).

Trooper Addison testified that -- except in the rare situation explained above where mouth alcohol is present and the duration component is not met -- a LSV reading will always be equal to or less than the actual alcohol content in the defendant's breath or blood. And, when providing a LSV reading, the intoxilyzer will accurately reflect the alcohol content in the breath sample analyzed. Thus, rather than being prejudicial to the defendant, a LSV reading will inure to the defendant's benefit. Accordingly, this Court finds that the state has met its initial burden of showing that LSV readings are in substantial compliance with the H.R.S. Rules. *See State v. Willis*, 1 FLW Supp. 118 (Palm Beach County 1992).

The defendant has provided no evidence to refute the state's showing of substantial compliance. Moreover, the defendant has failed to convince the Court that when analyzing a LSV, the intoxilyzer does not accurately reflect the alcohol content in the defendant's breath sample. In fact, the defendant was unable to convince the Court of any prejudice resulting from the admission at trial of LSV breath results. The most the defendant could testify to was that the actual alcohol content of the defendant's breath or blood was something different than the LSV reading. This, however, does not effect the reliability of the LSV readings for evidential purposes at trial.

Accordingly, this Court finds that as long as the LSV results are within .02 compliance, they are an accurate reflection of the alcohol content of the defendant's breath sample and, except in rare circumstances, the LSV reading is always equal to or lower than the actual alcohol content in the defendant's breath or blood. Therefore, the reading should not be excluded from admission at trial.

Accordingly, it is, hereby, ORDERED AND ADJUDGED that the defendant's Motion to Exclude the LSV Breath Results is DENIED.

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¹H.R.S. Rule 10D-42.0221(1) provides, in relevant part:

...(e)vidential breath testing involves methods which measure that alcohol content of deep lung samples of breath with sufficient accuracy to be used for evidential purposes.

H.R.S. Rule 10D-0221(4) provides, in relevant part:

Determining -- Shall mean, when using breath, the analyzing of a minimum of two samples of breath.

²The reason for testing deep lung air is to get the most accurate reflection of the actual alcohol content in the defendant's blood. Deep lung air is alveolar air from the bottom third of the lungs. Alveolar air is closest in physical proximity to the defendant's blood.

³The defendant presented the Court with breath alcohol cards that reflected LSV readings that were higher than the facially valid readings. The defendant argued that this provided proof that LSV readings are not necessarily lower than those readings where LSV is not indicated. Trooper Addison explained, however, that a defendant can provide a deep lung air sample but fail to blow for the requisite six seconds. This reading would be reflected as LSV. If on the second blow, the defendant satisfies the time requirement and blows just hard enough to push the pressure switch, the defendant will not have provided a deep lung air sample but the reading will appear facially valid and be lower than the LSV reading. Nonetheless, the LSV reading is more reflective of the actual alcohol content in the defendant's blood than the facially valid reading and lower than the actual alcohol content in the defendant's blood.

The manufacturer of the Intoxilyzer 5000-R appears to support Trooper Addison's testimony concerning the value of a LSV reading. In an October 30, 1990 letter, which was made part of the record, CMI explained that "[t]he value printed on a "LOW SAMPLE VOL" test is always lower than or equal to the result had the subject cooperated and supplied enough breath. This message is used because it shows the result of alcohol in the subject's breath even if the subject supplied a short puff."

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