IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : 99-10,156

VS :

RONALD G. STROBLE :

OPINION AND ORDER

This matter is before the Court for the Defendant's Motion to Suppress the results of his blood alcohol test. On November 13, 1998, at 2:20 a.m., the Defendant's vehicle was stopped after making an improper turn onto Market Street. After noticing glassy, bloodshot eyes, and the odor of an alcoholic beverage, the officer requested that the Defendant perform field sobriety tests. After the completion of the tests, it was the officer's impression that the Defendant was incapable of safe driving. The Defendant was transported to the DUI Processing Center where he agreed to a blood alcohol test. The blood was tested at the Williamsport Hospital using a Beckman ALC CX4 Enzymatic machine. The blood test results revealed that the Defendant had a Blood Alcohol content of .18. On September 23, 1998, the Defendant was charged with various sections of the Vehicle Code, including driving under the influence of alcohol.

The Defendant now argues that the results of the blood alcohol test should be suppressed. The Defendant presents two arguments in support of his claim. The Defendant first asserts that the operator's manual for the Beckman machine requires that daily, weekly, two week, monthly, two month and six month maintenance be performed. The Defendant asserts that the records for the machine reflect that the two-week maintenance had not been performed for the past six months. The Defendant argues that the results cannot, therefore, be sufficiently scientifically reliable and they should suppressed. The Commonwealth argues that the fact that the two-week test has

not been performed is a weight issue and not an issue of admissibility. The Court agrees. The legislature has established in 75 Pa.C.S.A.§ 1547(c) that the amount of alcohol in a defendant's blood as shown by tests conducted by qualified persons using qualified equipment shall be admissible in evidence. The Beckman machine used to test blood samples is an approved device. The qualifications of the person using the equipment in this case was not challenged. The Court would find that under subsection 1547, the qualifications for the admissibility of the blood tests are met in this case. Moreover, the Superior Court in Commonwealth v. Sesler, 358 Pa.Super.582, 518 A.2d 292 (1986) held that the failure to make a recent test of the equipment's calibration, if such was the case, was relevant with respect to the weight to be given the test results, but it did not render the results incompetent or inadmissible. [1] 518 A.2d at 295. *See also,* Commonwealth v. Trefry, 249 Pa.Super. 117, 375 A.2d 786 (1977), (At trial, the results of a test, as indicative of intoxication at a relevant point in time, may be attacked or contradicted by any competent evidence. The weight to be accorded test results then properly rests with the finder of fact.) The Defendant's motion to dismiss on this basis is therefore denied.

The Defendant next argues that the results of the blood test must be suppressed, as the method used by the Williamsport Hospital, specifically with the Beckman Enzymatic machine, does not use whole blood. Instantly, this Court has specifically held in Commonwealth v. Kevin Beatty, et. al. 97-11,916, that the testing procedures at the Williamsport Hospital with the Beckman Enzymatic machine utilizes whole blood.

[1] We should point out that the Superior Court ruled in Commonwealth v. Mabrey, 406 Pa.Super 437, 594 A.2d 700 (1991) that reliance on Sesler, supra, on the issue of admissibility on intoxilizer results, when the issue of failure to properly calibrate is raised, is misplaced. The Superior Court found that the changes in the Pa. Code since Sesler governed the admissibility of the results of a machine that was not calibrated "in a manner specified by the regulations" 67 Pa.Code § 77.24. As no comparable section exists with regard to blood alcohol testing equipment, Mabrey is inapplicable here.

The Court would find under the doctrine of collateral estoppel that the Defendant is bound by the Court's ruling with regard to that issue. The doctrine of collateral estoppel applies if 1) the issue decided in the prior adjudication was identical with the one presented in the later action; 2) there was final judgment on the merits; 3) the party against whom the claim asserted was a party or in privity with a party to the prior adjudication; and 4) the party against whom it is asserted has had a full and fair opportunity to litigate the issue in question in a prior action. Safeguard Mutual Ins. Co. v. Williams, 463 Pa 567, 345 A.2d 664 (1975).

Instantly, the Defendant asserts that he should not be collaterally estopped from bringing the argument in his case, as he was not present for cross-examination of the witnesses, and did not, therefore, have a full and fair opportunity to litigate the issue in question. In an effort to determine whether the issue had been fully and fairly litigated, the Court requested a transcription of the hearing. The Court then asked the Defense to prepare a list of questions or areas of questioning that were not flushed out in the hearing, which may have impacted on his case. To date, the Defense has not provided the Court with specific examples of questions that he would have asked had he been present for the cross-examination.

Instantly, the Court finds that the issue was fully and fairly litigated in the Beatty case. The Court held two hearings in the Beatty matter. After the initial hearing, the Court agreed with the defense counsel's argument that the Beckman machine utilizes supernatant as opposed to whole blood. During the hearing on the Commonwealth's reconsideration of the matter, however, they presented an additional witness who more fully explained the operation of the Beckman machine. It was after the second hearing

that the Court confidently found that the Beckman machine utilizes a whole blood sample. During both hearings, defense counsel made compelling arguments with regard to the testing procedure. After hearing the expert testimony in the second hearing, however, the Court could not agree that the machine utilizes supernatant blood. The Court therefore finds the Defendant's argument without merit.

ORDER

AND NOW, this _____day of January, 2000, based upon the foregoing opinion, it is ORDERED and DIRECTED that the Defendant's Motion to Suppress is DENIED.

BY THE COURT,

_____
Nancy L. Butts, Judge

xc: Lori Rexroth, Esquire
Eric Linhardt, Esquire
CA
Honorable Nancy L. Butts
Judges
Law Clerk
Gary Weber, Esquire