

IN THE CIRCUIT COURT FOR THE
NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY,
FLORIDA

STATE OF FLORIDA,

Appellant,

v.

MATTHEW SCOTT WILLIAMS,

Appellee.

CASE NO. 2014-AP-26-A-O

Lower Case No.: 2014-CT-2053-A-O

On Appeal from the County Court
for Orange County
Judge Wilfredo Martinez

Jeffrey L. Ashton, State Attorney
Marco Andres Farah, Assistant State Attorney
Attorney for Appellant

Stuart Hyman, Esq.
Attorney for Appellee

Before LEBLANC, MYERS, LAUTEN, J.J.

PER CURIAM.

FINAL ORDER REVERSING TRIAL COURT

The State appeals an order granting Appellee's motion to suppress breath test results from his DUI arrest. Where a motion to suppress involves mixed questions of fact and law, the standard of review for the trial court's factual findings is whether competent substantial evidence supports the findings; the court's application of the law to the facts is reviewed de novo. *Hawley v. State*, 913 So. 2d 98, 100 (Fla. 5th DCA 2005).

Appellee was arrested for driving under the influence on March 8, 2014. A hearing on a motion to suppress the results of his breath test was held on June 23, 2014.

The focus of the hearing was on whether the 20-minute pre-breathalyzer observation period was properly conducted. After hearing the testimony of the breath test operator, the trial court found that the test was not done in compliance with the applicable administrative rule and therefore was not shown to be valid. It granted the motion to suppress.

Under Florida Administrative Code 11D-8.007(3), a breath test operator or other designated person “shall reasonably ensure that the subject has not taken anything by mouth or has not regurgitated for at least twenty (20) minutes before administering the test.” For a breath test to be admissible in a criminal trial or an administrative hearing, there must be “probative evidence that the test was performed substantially in accordance with methods approved by [the agency]. Minor deviations in compliance will not render the test results invalid.” *Kaiser v. State*, 609 So. 2d 768, 770 (Fla. 2d DCA 1992) (internal citation omitted). Similarly, *State v. Friedrich*, 681 So. 2d 1157, 1163 (Fla. 5th DCA 1996):

In order to establish the admissibility of breath test results, the state must establish the fact that the tests were made in substantial conformity with the applicable administrative rules and the statutes. *See State v. Donaldson*, 579 So.2d 728 (Fla.1991); *Department of Highway Safety Motor Vehicles v. Farley*, 633 So.2d 69 (Fla. 5th DCA 1994); *State v. Reisner*, 584 So.2d 141 (Fla. 5th DCA 1991). Insubstantial differences or variation from approved techniques and actual testing procedures in any individual case do not render the test nor test results invalid.

Likewise, *Dep't of Highway Safety & Motor Vehicles v. Russell*, 793 So. 2d 1073 (Fla. 5th DCA 2001).

The breath test operator testified that she began her observation of Appellee at 9:56 p.m., after first checking in his mouth to make sure he had nothing in it. She observed him for 20 minutes at her desk, until 10:16. She said she did not observe him regurgitating, vomiting or burping. She did not observe him ingest anything. She said she

sat at a desk facing Appellee, who was within arm's reach, his back against a wall. He was handcuffed, with his hands behind him. She testified that as she sat there, she was filling out a form related to Appellee's arrest and had to look at her computer screen to do so, thus admitting that she did not stare at Appellee's mouth for the entire 20 minutes. She then walked him to the test room and waited with him for the test to begin. She walked behind him. She said she did not hear him burp or regurgitate. The first breath test was logged in as having occurred at 10:20, four minutes from the time the operator formally logged the completion of her seated observation.

In its oral ruling granting suppression, the trial court was particularly concerned about the walk, during which time the operator could not observe Appellee's face, although it also expressed concern about the fact that the operator was performing other tasks while sitting at her desk. In its brief written order, it cited to *Department of Highway Safety Motor Vehicles v. Farley*, 633 So.2d 69 (Fla. 5th DCA 1994) as supporting the suppression. In *Farley*, there was evidence of only a 17-minute observation period and no evidence at all of what happened during the missing three minutes. While this gap was sufficient to bar the test results, the court noted that

The state could have called the lay witness (assuming he was such) who was with Farley for the crucial three minute period to testify that he did not notice any ingestion or regurgitation by Farley during that period, even though he was not specifically observing Farley for that purpose.

Farley, 633 So. 2d at 71.

Here, the trial court did have evidence of what happened between 10:16 and 10:20. The breath test operator testified that Appellee walked in front of her, within arm's reach; they then waited briefly in the test room. It was highly unlikely Appellee ingested anything during this time as his hands here still cuffed behind him. As for Appellee

possibly regurgitating, the court had the testimony of the operator that she did not hear anything during this period. “Observation” is defined by the Merriam Webster Dictionary online as “the act of careful watching and listening, the activity of paying close attention to someone or something in order to get information.” Auditory observation is a form of observation and witnesses routinely testify as to what they have heard or not heard.

The administrative rule requires only that the observer reasonably ensure that regurgitation has not occurred, not absolutely guarantee it. Only substantial conformity with the rule is necessary and, most importantly, “continuous face to face observation for twenty minutes is not required to achieve substantial compliance.” *Kaiser v. State*, 609 So. 2d at 770. See also *Perze v. Dep’t of Highway Safety and Motor Vehicles*, 20 Fla. L. Weekly Supp. 464a (Fla. 9th Cir. Ct. 2013); *Hamann v. Dep’t of Highway Safety and Motor Vehicles*, 20 Fla. L. Weekly Supp. 315a (Fla. 9th Cir. Ct. 2012).

The trial court expressed concern about the “gap” between the formal 20-minute observation and the the breath test. It found that the four-minute “gap” was a long period without observation. The rule, however, does not require that the observation be done formally at a desk or in a single room. It may be conducted anywhere so long as the person remains under observation for at least 20 minutes. The observation in this case lasted from 9:56 to 10:20, when the test was started. Appellee was in the operator’s custody that whole period; his face was observable to her almost the entire time, and he was always approximately within arm’s length and within earshot. There was no gap in the observation period.

As there was probative evidence that the observation period was conducted in substantial compliance with Florida Administrative Code 11D-8.007(3), the court erred in

granting the motion to suppress. Whether the breath test operator was able to make certain Appellee did not ingest any substance or regurgitate “is an issue going to the weight of the evidence presented. As such, this is a question to be determined by the jury, rather than a matter of law to be decided by the court.” *Kaiser v. State*, 609 So. 2d at 769.

IT IS THEREFORE **ORDERED AND ADJUDGED** that the Order of the trial court is **REVERSED** and the matter **REMANDED** for further proceedings.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this the 27th day of April, 2015.

/S/

BOB LEBLANC
Presiding Circuit Judge

MYERS and LAUTEN, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was furnished to **the Honorable Wilfredo Martinez**, Orange County Courthouse, Orlando, Florida; **Marco Andres Farah**, Assistant State Attorney, Office of the State Attorney, 415 North Orange Avenue, Orlando, Florida 32801 and **Stuart Hyman, Esq.**, 1520 East Amelia Street, Orlando, Florida 32803 on the 27th day of April, 2015.

/S/

Judicial Assistant