

JUN 13 2012

CHRISTOPHER D. RICH, Clerk
By MARTHA LYKE
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,)	
)	
Plaintiff,)	Case No. CR-MD-2012-5979
)	
-vs-)	
)	DECISION AND ORDER
NICOLE CANNON,)	DENYING MOTION IN LIMINE
)	
Defendant.)	
)	

Before the court for decision is defendant Nicole Cannon's Motion in Limine. Evidentiary hearing was held on June 7, 2012. The state was represented by Boise City Attorney, Christine Starr, and defendant Cannon by Douglas Nelson of The Roark Law Firm.

FACTS

On April 18, 2012 defendant Nicole Cannon was stopped and investigated for driving under the influence of alcohol. After conducting field sobriety tests and a breath test indicating a level of intoxication of .239/.221, Ms. Cannon was cited for driving under the influence of alcohol, excessive concentration, in violation of Idaho Code 18-8004C. The issues on the motion in limine challenge the admissibility of the breath test results.

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Prior to taking the breath test, Ms. Cannon was placed in the back seat of the patrol car and Officer Furniss sat in the front. The officer proceeded to implement the 15 minute wait period referred to in the 6.0 Idaho Standard Operating Procedure Breath Alcohol Testing (Defendant's Exhibit a) manual. He told Ms. Cannon not to burp, belch or vomit and he played the ALS recording. Following that, Furniss began the observation period. He was seated about two feet in front of Ms. Cannon with his back to her. He could see her through the rear view mirror. About a minute and a half into the first fifteen minute period, Furniss observed Ms. Cannon to burp. The fifteen minute period was restarted. About ten minutes into the second period, Ms. Cannon again burped. The officer did not hear her but Ms. Cannon informed the officer, and the fifteen minute period was again restarted. About four minutes shy of the third fifteen minute period, Ms. Cannon advised the officer she gurgled but did not burp. When Ms. Cannon gurgled, stomach contents entered her mouth at that time. Furniss did not question her as to whether stomach contents entered her mouth. He assumed that gurgling would not produce that result. Furniss decided to go forward with the testing using the Lifeloc FC20. The two breath tests came back within 0.02 of each other, the acceptable limits for accurate results.

Officer Furniss is and was certified as an operator to conduct Breath Alcohol Examinations using the Lifeloc FC20. (State's Exhibit 2) Furniss' personal LifeLoc FC20 Operations Logs indicate he performed two .08 performance verifications on April 19, 2012 which indicated the machine was operating within normal limits. His log also indicates that he performed two .20 performance verifications on April 5, 2012, also indicating the machine's performance to be within the normal limits.

ANALYSIS

Through the motion in limine, Ms. Cannon is requesting the court to rule the breath tests results inadmissible for two reasons.¹ First, there was no .20 performance verification on the LifeLoc within 24 hours of the breath test in this case. Second, she

¹ Defense initially challenged Furniss' qualification to give the tests, claiming that he did not have the required certification. Proof of that certification (State's Exhibit 2) was made.

was not monitored for the mandatory 15 minute period prior to the breath test being administered.

Preliminary questions concerning the admissibility of evidence shall be determined by the court. Rule 104, Idaho Rules of Evidence.

The Idaho State Police (I.S.P.) is charged with promulgating standards for administering tests for Breath Alcohol content. When breath tests are administered by a method approved by the I.S.P., the results are admissible without the necessity of further evidence to establish the reliability of the testing procedure. I.C. 18-8004(4). The I.S.P. approved the use of the Lifeloc FC20 instrument and issued the 6.0 Idaho Standard Operating Procedure Breath Alcohol Testing (Def Exhibit A) manual.

ISSUE 1. IS A .20 PERFORMANCE EVALUATION REQUIRED WITHIN 24 HOURS OF THE BREATH TEST?

The relevant portions of the manual state the following:

5.1.3 A performance verification of the...Lifeloc FC20 instruments using a 0.08 or 0.20 performance verification solution must be performed within 24 hours, before or after an evidentiary test to be approved for evidentiary use. . . Reference 5.1.4.1 for clarification on the use of the 0.20 solution in this capacity.

5.1.4 A 0.20 performance verification should be run and results logged once per calendar month. . .

NOTE: The 0.20 performance verification was implanted for the sole purpose of supporting the instruments' results for an 18-8004C charge. Failure to timely perform a 0.20 performance verification will not invalidate tests performed that yield results at other levels or in charges other than 18-8004C.

Defense contends that these sections require a performance evaluation using a 0.20 solution within 24 hours of her breath testing which was not done in her case. However, the plain reading of these sections is that a performance verification using a solution of 0.08 or 0.20 must be performed within 24 hours of the evidentiary test. In this case, the officer did a performance evaluation using a 0.08 solution within 24 hours. The manual only requires that a performance verification using a 0.20 solution be performed

and the results logged once per calendar month to support the instrument's results for an 18-8004C charge. The operations log (State's Exhibit 1) indicates a .20 performance verification was done on April 5, 2012 which would be within the calendar month of the testing.

ISSUE 2: ARE THE RESULTS INVALID BECAUSE DEFENDANT WAS NOT PROPERLY MONITORED?

The relevant portions of the manual state the following:

6. Evidentiary Testing Procedure

Proper testing procedure by certified Operators is necessary in order to provide accurate results. . .

6.1 Prior to evidentiary breath alcohol testing, the subject/individual should be monitored for at least fifteen (15) minutes. . . During the monitoring period the subject/individual should not be allowed to smoke, drink, eat, or belch/burp/vomit/regurgitate. . .

6.1.4 During the monitoring period, the Operator must be alert for any event that might influence the accuracy of the breath alcohol test.

6.1.4.1 The operator must be aware of the possible presence of mouth alcohol as indicated by the testing instrument. If mouth alcohol is suspected or indicated, the Operator should begin another 15-minute waiting period before repeating the testing sequence.

6.1.4.2 If, during the 15-minute waiting period, the subject/individual vomits or regurgitates material from the stomach into the subject/individual's breath pathway, the 15-minute waiting period must begin again.

6.1.4.3 If there is doubt as to the events occurring during the 15 minute monitoring period, the officer should look at results of the duplicate breath samples for evidence of potential alcohol contamination. For clarification see section 6.2.2.2. . . .

6.2.2.2. The results for duplicate breath samples should correlate within 0.02 to indicate the absence of alcohol contamination in the subject/individual's breath pathway. . . .

The facts indicate that toward the end of the final 15 minute monitoring, stomach contents entered the mouth of Ms. Cannon. The breath test was performed and each result was within .02 of the other. According to Rachel Cutler of the ISP forensic services the result is valid and would indicate a lack of stomach mouth alcohol contamination in the breath sample. She also testified that the ISP recommends a wait period of 15 minutes, but that there are other safeguards in place if the 15 minute wait does not occur. A .02 or closer of the two results is a safeguard indicating the machine produced a valid result.

In *State v. DeFranco*, 143 Idaho 335, 144 P.3d 40 (2006), the issue before the court was whether the officer complied with the foundational requirement for admission of the breath test. The I.S.P. manual in that case required the subject be monitored for 15 minutes. The court found the 15 minute monitoring to be insufficient and held the results of the breath test inadmissible because the foundational requirement had not been met.

The manual applicable here, does not require the 15 minute waiting period as in *DeFranco*. It states that the officer "should" monitor the subject/individual for at least 15 minutes, and if mouth alcohol is suspected the 15 minutes "must" begin again. It is reasonable that the officer should have suspected mouth alcohol when defendant indicated she had gurgled. He did not ask her follow up questions as to whether alcohol had entered her mouth. He assumed because she did not burp that alcohol would not be present. The facts indicate stomach contents entered her mouth.

The state has the burden to satisfy the foundational requirements for admissibility of the breath test. The manual requires proper testing procedure in order to provide accurate results. Here, the proper testing procedure for the 15 minute waiting period would have been to restart the final 15 minute period. The state has failed to lay sufficient foundation based on the waiting period. The defendant requests the court to prohibit the introduction of her BAC results. However, because the manual does not make the waiting period a requirement to foundation as in the *DeFranco* case, the court must deny defendant's motion. The State will have to lay sufficient foundation for the admissibility of the breath test without the benefit of the 15 minute waiting period. If the results are admitted at trial, the jury will determine the weight to give such evidence.

CONCLUSION

A .20 performance evaluation was timely performed within the calendar month. A .20 performance evaluation is not required within 24 hours before or after the evidentiary test.

Defendant was not properly monitored within the fifteen minutes prior to the breath test as recommended by the manual. However, because the manual does not make the fifteen minute wait period a requirement for admissibility of the results, the court must deny defendant's motion to exclude the results of the breath test. The state will have to lay foundation through other evidence for the admissibility of the results.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED that defendant's motion in limine to prohibit the introduction of the BAC results is denied.



Darla Williamson, District Judge

I hereby certify that I mailed a true and correct copy of the foregoing Decision and Order Denying Motion to Suppress to the following:

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THE ROARK LAW FIRM
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Interdepartmental Mail

Dated this 14th day of June, 2012



Deputy Court Clerk