NO. 103,563-2

SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

JOHN HENRY SLIGER,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Petitioner John Henry Sliger was arrested for driving under the influence following a side-by-side dirt bike collision that resulted in the death of the other rider. At the accident scene, Sliger removed a wad of chewing tobacco from his mouth. Later, in preparation for a breath alcohol test at the jail, the officer asked Sliger if he had anything in his mouth. Sliger replied "no," and the deputy visually confirmed that his mouth was empty save for some residual strands of tobacco stuck in his teeth. The deputy noted the residue in his report and administered the breath test, which resulted in two valid samples over the legal limit.

Sliger was charged with vehicular homicide and moved to exclude the breath results based on the presence of tobacco residue in his mouth. After a hearing, the trial court found that the officer's procedure satisfied statutory requirements and ruled that the results would be admissible at trial. At that trial, Sliger would have nonetheless been able to argue that the residue affected the result and created reasonable doubt as to his guilt.

Sliger sought interlocutory review of the trial court's order admitting the results, and the Court of Appeals affirmed the trial court in an unpublished opinion.

This Court should deny review because the Court of Appeals correctly interpreted the relevant statute and accompanying regulations. To admit the test results as evidence, the statute requires only prima facie evidence that Sliger's mouth was free of foreign substances. Legislative intent makes clear that this criterion's goal is to ensure that no foreign object capable of invalidating the results is left in a test taker's mouth prior to the observation period. This balance permits the defense to admit contrary evidence, leaving the jury to ultimately decide whether the result is accurate. This outcome is consistent with the legislative purpose of ensuring the availability of reliable evidence in such cases. Contrary to Sliger's claim, the Court of Appeals entrusted the trial court—not the investigating officer—with the discretion to admit the breath test.

Sliger fails to establish any basis for this Court's review under RAP 13.4(b). The fact-specific, unpublished opinion below does not present an issue of substantial public interest warranting determination by this Court, and review should be denied.

II. IDENTITY OF RESPONDENT

The Respondent is the State of Washington.

III. ISSUE PRESENTED

Did the State meet its burden to show prima facie evidence that Sliger did not have a foreign substance in his mouth and therefore his breath test results were admissible, when he denied having a foreign substance in his mouth, and when no foreign substance capable of invalidating the test was located?

IV. STATEMENT OF THE CASE

John Sliger was investigated for vehicular homicide immediately following a fatal dirt bike collision in Ferry County, Washington, on April 26, 2020. RP at 20. Sliger admitted to the investigating officer, Deputy Kahns, that he had been drinking

before the accident. CP at 21. At the scene, Sliger removed chewing tobacco from his mouth. RP at 18. The deputy arrested Sliger and transported him to the Stevens County Jail, where the deputy later administered a Draeger breath test[1]. RP at 16.

Before the breath test, Deputy Kahns asked Sliger if he had any foreign substances in his mouth, and Sliger answered that he did not. RP at 18. Deputy Kahns then visually inspected Sliger's mouth and noted that there were a few tiny strands of tobacco stuck between Sliger's teeth—remnants of the removed chewing tobacco. RP at 19. He checked the box in the DUI packet indicating there was a foreign substance and wrote that he saw tiny tobacco strands in Sliger's teeth. RP at 19. Deputy Kahns observed Sliger for the required fifteen minutes and verified that

[1] The Draeger Alcotest is the current machine used by law enforcement statewide to measure the amount of alcohol in an individual's deep lung breath. One of the requirements is that officers have a fifteen-minute observation period where individuals do not eat, drink, or smoke before administering the test. RCW 46.61.506(4)(ii) to abate the likelihood of measuring mouth alcohol instead of deep lung breath as addressed below.

he did not eat, drink, vomit, or smoke during that time frame. RP at 19. Sliger provided two valid breath samples, meaning no error or issue was detected by the breath testing device. RP at 21. Both samples were above the legal limit. CP at 44.

Sliger was charged with vehicular homicide and filed a motion to exclude the breath samples based on the residual tobacco strands. CP at 1. At the evidentiary hearing, Deputy Kahns testified, based on his training and experience, that although he checked the box that Sliger had a foreign substance in his mouth, he did not believe the strands to be a foreign substance under the statute, but he saw them and documented his observations. RP at 25-27. He described the remnants of the removed chewing tobacco as "small, thin, really short," akin to a piece of "basil" stuck in one's teeth after eating. RP at 29. This debris, as he described it, was just in a few of the teeth, not in all of them. RP at 33.

The State also called an expert: Breath Test Technician Trooper Axtman. RP at 36. He testified that it was important for

the test machine to measure alcohol from the lungs, rather than mouth alcohol. RP at 46. The purpose of the fifteen-minute observation period and removal of foreign substances is to make sure that any mouth alcohol dissipates before the measurement is taken. RP at 47. As a safeguard, the Draeger device is equipped with a "slope detector" to test for mouth alcohol. RP at 46 and 51. The detector would trigger, and the machine would report an "invalid sample," if alcohol readings rise in a manner consistent with mouth alcohol. *Id.*

Trooper Axtman testified that a lump of tobacco, which could produce an invalid mouth alcohol sample, is different from flecks and grits stuck in one's teeth. RP at 49-50. He further testified that the presence of residual strands of chewing tobacco in Sliger's teeth would not render the sample invalid. RP at 49-50. He elaborated that case studies have shown that small strands of chewing tobacco residue do not affect the validity of breath testing. *Id.* In this case, the machine produced

two valid samples without error. RP at 21, CP at 44. Sliger presented no evidence at the hearing.

After hearing testimony and argument from the parties, the trial court concluded the State had met its prima facie burden for admissibility of the breath test and denied Sliger's motion to suppress the breath test. CP at 79. The Court of Appeals granted discretionary review and affirmed the trial court's ruling, holding that the State proved the statutory requirements for admissibility by prima facie evidence, and the weight of those results was a question for the trier of fact. *State v. Sliger*, No. 39315-1-III, 2024 WL 3617255 (Wash. Ct. App. August 1, 2024) (unpublished). The court denied Sliger's motion for reconsideration. Petition, App. B1.

V. ARGUMENT

Sliger has not met his burden to show that review is warranted under RAP 13.4(b)(4) (*see* Pet. at 9-10). He asserts in conclusory fashion that because "[t]his case is grounded in interpretation of the statute to establish prima facie evidence for

the admissibility of the Draeger breath alcohol test results" it is an issue of substantial public interest. Pet. Rev. at 9-10. An issue is one of substantial public importance if it is likely to recur and it is desirable to provide an authoritative determination for the future. *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004).

Here, the Court of Appeals issued an unpublished opinion upholding the trial court's case-specific discretionary finding permitting the admissibility of Sliger's breath test results despite the presence of remnant stands of chewing tobacco. *See State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001) (decisions to admit evidence are reviewed for abuse of discretion and trial courts are given considerable discretion). This does not present an issue of substantial public interest, particularly where the statute, regulation, and case law provide clear guidance for a court to determine whether the State has met its prima facie burden that an alcohol breath test result is sufficiently reliable for a trier of fact to consider as evidence. The trial court and the

Court of Appeals properly followed that guidance here, and review is not warranted under RAP 13.4(b)(4).

A. The Court of Appeals Properly Applied Statutory Authority and Affirmed the Trial Court's Admission of the Breath Sample

The admissibility of breath alcohol test results in driving under the influence cases is governed by RCW 46.61.506. Breath test results are admissible at trial if the prosecution produces prima facie evidence of eight criteria. RCW 46.61.506(4)(a)(i)-(viii). Only one of these is at issue in this case: whether the State presented prima facie evidence that Sliger did not have "any foreign substances, not to include dental work or piercings, fixed or removable, in his or her mouth at the beginning of the fifteen-minute observation period." RCW 46.61.506(4)(a)(iii).

Subsection (3) of the statute expressly provides that breath test measurements "shall have been performed according to methods approved by the state toxicologist and by an individual possessing a valid permit issued by the state toxicologist for this purpose." RCW 46.61.506(3). Consistent with the Legislature's

command, the state toxicologist promulgated regulations prescribing those methods in WAC 448-16-040. Here, the breath test complied with the regulations. Sliger's contention that the test should nonetheless have been deemed inadmissible ignores the plain language of the statute, legislative intent, and case law.

1. To admit breath evidence, the relevant statute requires only prima facie evidence that the subject's mouth was free of foreign substances

Sliger's argument ignores that the plain language of the statute requires only a prima facie showing of evidence to satisfy admissibility requirements. RCW 46.61.506(4)(a). Once this threshold is met, the results are admitted, and a defendant may attack the reliability of the results before the jury. RCW 46.61.506(4)(c). That threshold was met here because the test complied with the methods set forth by the state toxicologist, as required by statute.

Under RCW 46.61.506, breath alcohol evidence is admissible if the State presents "prima facie evidence" of the requisite criteria. RCW 46.61.506(4)(a). The statute defines

"prima facie evidence" as "evidence of sufficient circumstances that would support a logical and reasonable inference of the facts sought to be proved." *Id.* at (4)(b). The trial court "is to assume the truth of the prosecution's…evidence and all reasonable inferences from it in a light most favorable to the prosecution." RCW 46.61.506(4)(b).

Once the foundational threshold is met and the results admitted, a defendant may attack the results by challenging the reliability or validity of the results to a trier of fact. *City of Seattle v. Allison*, 148 Wn.2d 75, 80, 59 P.3d 85 (2002); RCW 46.61.506(c). Thus, the statute strikes a careful balance: once evidence has met certain minimum safeguards that favor admissibility, the probative weight of the measurements—in the context of all the evidence—is left in the hands of the jury.

To this end, the Legislature specifically delegated authority to the state toxicologist to promulgate regulations that ensure accuracy. RCW 46.61.506(3). Subsection (3) of the statute expressly requires that "all [breath analyses] have been performed

according to methods approved by the state toxicologist." *Id.* Those regulations prescribe two possible methods to establish prima facie evidence that a person's mouth is free of foreign substances that could affect the results. WAC 448-16-040.

Specifically, the officer may either 1) ask and receive a denial from the test taker that any foreign substances are present or 2) perform a visual inspection of the test taker's mouth. *Id.* Here, the deputy used both methods. He asked Sliger whether he had any foreign substance in his mouth, which Sliger denied, thereby expressly meeting the requirement of WAC 448-16-040, and satisfying the eighth criterion. RP at 18. The deputy additionally performed a visual inspection of Sliger's mouth where he ensured no foreign object was present that would invalidate the results. RP at 19, 26-27. Thus, both prongs of WAC 448-16-040 were satisfied, even though only one was required. Indeed, Sliger conceded the first prong was met and the conditions satisfied. *Sliger*, 2024 WL 3617255 at *5. The only issue that remains is whether, but for the deputy also employing

the second option and observing scientifically insignificant remnants of removed chewing tobacco, prong one is still satisfied.

Sliger asserts, contrary to legislative intent, his previous concession, and existing case law, that RCW 46.61.506(3) only granted "limited" authority for the state toxicologist with respect to the test administrator's "credentials" or "competence," rendering the methodology of how to interpret "any foreign substance" under RCW 46.61.506(4)(a)(iii) irrelevant. Petition at 15; *Sliger*, 2024 WL 3617255 at *5.

However, the law is well settled that the legislature granted authority to the state toxicologist to approve methods for maintaining breath alcohol testing instruments and administering breath alcohol tests. *State v. Peterson*, 100 Wn.2d 788, 789-90, 674 P.2d 1251 (1984); *State v. Keller*, 2 Wn.3d 887, 545 P.3d 790 (2024); RCW 46.61.506(3).

Sliger's argument ignores the first part of RCW 46.61.506(3), which provides that "[a]nalysis of the person's blood or breath to be considered *valid* under the

provisions of this section . . . shall have been performed according to methods approved by the state toxicologist and by an individual possessing a valid permit issued by the state toxicologist for this purpose." RCW 46.61.506(3) (emphasis added). As this Court has observed, "the Legislature has mandated that the analysis of breath or blood is valid if it is performed 'according to methods approved by the state toxicologist'." *State v. Ford*, 110 Wn.2d 827, 833, 755 P.2d 806 (1988) (quoting RCW 46.61.506(3)); *State v. Straka*, 116 Wn.2d 859, 870, 810 P.2d 888 (1991) ("When the protocols ... and existing Code provisions are followed, there is sufficient assurance of accuracy and reliability of the test results to allow for general admissibility of test results.")

Because it is undisputed the Deputy followed the state toxicologist's methods as set forth in the WAC, and that Sliger denied any foreign substance in his mouth, the statutory criterion for admissibility was met. As the Court of Appeals properly held,

any challenge to the test's reliability would therefore properly be determined by the trier of fact.

2. The Court of Appeals correctly interpreted "foreign substance" by focusing on the statute's legislative purpose: ensuring the availability of reliable breath alcohol evidence

The Court of Appeals also properly determined that the officer's observation of tiny remnant strands of tobacco did not prevent the trial court from relying on Sliger's denial as prima facie evidence of the absence of a foreign substance. In doing so, the court correctly focused on the legislative purpose of ensuring the availability of reliable breath evidence, while reserving the ultimate determination of their probative value to the jury. *Sliger*, 2024 WL 3617255 at *2. This conclusion is shared by many sister states who have addressed similar issues and does not warrant review by this Court.

Construction of a statute is a question of law reviewed de novo. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). In statutory interpretation, the "fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's

meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002) (citing *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001)).

Plain meaning is determined by "considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole." *Ass'n of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 350, 340 P.3d 849 (2015) (citing *Campbell & Gwinn*, 146 Wn.2d at 9-10). The same "rules of statutory construction apply to administrative rules and regulations, particularly where…they are adopted pursuant to express legislative authority." *Dep't of Licensing v. Cannon*, 147 Wn.2d 41, 56, 50 P.3d 627 (2002) (internal citations and quotations omitted).

Although RCW 46.61.506 uses the term "any," it does not define it. Nevertheless, the statute's legislative intent makes clear that the term "any" refers to any kind of substance which would interfere with the accuracy of the results. *City of Sunnyside v. Fernandez*, 59 Wn. App. 578, 582, 799 P.2d 753, 755 (1990). Any other resolution of this term reads the notion of prima facie evidence out of the statute.

Contrary to case law, statutory construction and legislative intent, Sliger asks the Court to define the word "any" as it relates to "foreign substance" in one's mouth to be any substance regardless of whether the substance or quantity of substance could have an impact on the breath test. Petition at 13-14. This reading of the statute would lead to an absurd result.

As Sliger correctly notes, the *Fernandez* court adopted the dictionary definition of a foreign substance as meaning "belonging to or proceeding from the other persons or things… not belonging to the place or body where found." Sliger argues this means that that any object, however slight, would render the

breath test inadmissible despite the test result being accurate and reliable. Petition at 12-14. In so arguing, Sliger ignores the balance of the opinion and legislative intent. Petition at 13; *Fernandez*, 59 Wn. App. at 582.

The *Fernandez* court, and the *Ford* court before it, made clear the legislative intent of the statute and regulation in question is whether "a reliable and accurate measure of the subject's alcoholic breath content" is competently obtained "so that a defendant is assured that the test results do in fact reflect a reliable and accurate measure of his or her breath content." *Fernandez*, 59 Wn. App. at 582; *State v. Ford,* 110 Wn.2d 827, 833, 755 P.2d 806 (1988). Therefore, the *Fernandez* court, and the Court of Appeals in this case, appropriately determined that "the term 'foreign substance' should, in light of this purpose, involve substances which adversely affect the accuracy of test results." *Fernandez*, 59 Wn. App. at 582. This reading is consistent with the statute and with the regulations which set out the

methodology for the administration of the breath test. Further, this definition is supported by scientific studies demonstrating that tiny amounts of a foreign object do not impact the reliability and accuracy of breath test results. RP at 49-50.

The *Fernandez* and *Ford* courts' reading is also consistent with statutory construction principles, since the plain language of RCW 46.61.506(4)(a)(iii), when read in conjunction with RCW 46.61.506(3), shows the legislature specifically identified two types or kinds of foreign substances as examples of foreign substances that do not effect the validity of the breath test results and therefore do not need to be removed for a test to be valid. In subsection three, the Legislature then asked the state toxicologist to promulgate rules, "satisfactory techniques or methods," to administer tests that meet a prima facie threshold of reliability such that a jury may then consider the results when evaluating all of the evidence and subject to any attacks by defense on the reliability of the results through evidence and argument. Specifically, the legislature identified fixed or removable dental

work and piercings, which are both items that do not belong to or proceed from the body of the test taker, do not need to be removed because they have no effect on the validity of the test results. RCW 46.61.506(4)(a)(iii). When read as a whole, the legislative intent is clear that for a breath test analysis to be "valid," and thereby admissible in criminal cases, items that could impact the breath test results must be removed prior to the observation period. If the legislature intended for all foreign substances, seen or unseen, to be removed, it could have drafted the statute to require test administrators to thoroughly clean a test taker's mouth including mechanisms to remove all remnants, seen or unseen, such as brushing, flossing and dental picks. But the statute does not require this level of detail. Moreover, the statute delegates authority to prescribe methodology to the state toxicologist via regulations; in turn, WAC 448-16-040 provides that a determination as to foreign substances can be made by the subject's simple denial, *or* by the officer's observation. WAC 448-16-040(1). The regulation makes clear that the

purpose of the determination is to ensure that objects that could impact the breath test results are removed, so that the test results are accurate and reliable. *See* WAC 448-16-040(2), (3).

Here, the tiny strands of tobacco left in Sliger's mouth after removing the chewing tobacco were not of sufficient quantity to retain mouth alcohol, would not then affect the accuracy of the test results, and therefore are not "foreign substances" that could render the breath test results inadmissible. RP at 49-50. Not only was there undisputed testimony that the remnants would not impact the validity of the breath test results, but also the slope indicator within the Draeger instrument, the safeguard against foreign substances which interfere with breath test results, did not produce an invalid result. CP at 46-47.

This resolution of the issue is consistent with courts of other jurisdictions that have addressed it. *See e.g. Pasek v. Commissioner of Public Safety*, 383 N.W.2d 1 (1986) (remnants of a pinch of chewing tobacco in driver's mouth did

not affect the validity of the results of the intoxilyzer test); *State v. Fudge*, 62 Kan.App.2d 587, 518 P.3d 1268 (2022) ("Even if having a foreign matter in a subject's mouth may generally cast doubt on the accuracy of the breathalyzer test results, the court's role here is to determine only whether the State has met the minimal foundational requirements for admissibility," and challenges go to weight); *State v. Kemper*, 80 Hawai'i 102, 905 P.2d 77 (1995) (possible presence of tobacco lodged in defendant's throat or mouth goes to weight, not admissibility); *State v. Ghimire*, No. 2024-Ohio-1892, 2024 WL 2005553 (Ohio Ct. App. May 6, 2024)(Appendix A), (although defendant had been chewing and had removed tobacco prior to the test, the test was admissible as substantial compliance only requires that the defendant did not ingest anything that might skew the test result); *State v. Heldt*, 2009 WL 1684438, Not Reported in N.W.2d (Minn. Ct. App. June 16, 2009) (Appendix B) (tobacco flecks observed yet prima facie showing for admissibility of breath test was met); *State v. True*,

324 Or. App. 621, 632, 527 P.3d 42, 49 (2023) (citing *State v. Goddard*, 87 Or. App. 130, 741 P.2d 540 (1987) (holding that a breath test is not invalid because a defendant has bits of chewing tobacco in his mouth).

In short, the Court of Appeals properly upheld the trial court's discretionary ruling that the State met its prima facie burden when the officer received a denial from Sliger that any foreign substance was in his mouth, and when the officer checked Sliger's mouth, saw no foreign object that would have invalidated the test, and sister states review the issue the same. The Court of Appeals opinion does not present an issue of substantial public interest necessitating determination by this Court. Therefore, this petition for review should be denied.

VI. CONCLUSION

This Court should deny Sliger's petition for review.

CERTIFICATE OF COMPLIANCE

This document contains 3,929 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 22nd day of January, 2025.

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ANSWER TO PETITION FOR REVIEW

APPENDIX A

***State v. Ghimire*, Pages 1-6**

THE STATE OF WASHINGTON,
Respondent,
v.

JOHN HENRY SLIGER,
Petitioner.

APPEAL FROM
Court of Appeals Division III No. 39315-1
Re: Ferry County Superior Court No. 20-1-0020-10

2024 WL 2005553

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Fifth District, Fairfield County.

STATE of Ohio, Plaintiff - Appellee

v.

Anish GHIMIRE, Defendant - Appellant

Case No. 2023 CA 00025

|

Date of Judgment: May 6, 2024

Appeal from the Fairfield County Municipal Court, Case No. TRC 2209054.

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JUDGES: Hon. John W. Wise, P.J., Hon. Craig R. Baldwin, J., Hon. Andrew J. King, J.

OPINION

Baldwin, J.

***1** {¶1} The appellant appeals the trial court's denial of his motion to suppress evidence. Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND THE CASE

{¶2} On October 25, 2022, at approximately 2:30 a.m., the appellant was operating his motor vehicle northbound in the left hand lane on State Route 256 in Fairfield County, Ohio. Ohio State Trooper Clark Franz was on patrol at the time, heading southbound on State Route 256, when his attention was drawn to the appellant's vehicle due to the appellant's "poor lane position." Trooper Franz made a U-turn and began to follow the appellant, who had shifted to the right hand lane. While following the appellant, Trooper Franz observed the appellant drift to the left and cross the marked dash lane lines separating the two northbound lanes by a tire width. Based upon this violation, Trooper Franz pulled the appellant over.

{¶3} As Trooper Franz approached the appellant's vehicle, and upon interacting with the appellant, he smelled a strong odor of alcohol and observed that the appellant had bloodshot and glassy eyes. Based upon the appellant's marked-lane violation, and the indicia of impairment, Trooper Franz asked the appellant to exit his vehicle and submit to a field sobriety test, to which the appellant agreed. Following the field sobriety tests, Trooper Franz asked the appellant to submit to a portable breathalyzer test, to which the appellant agreed. After the test was completed Trooper Franz noticed that the appellant had something in his mouth. Trooper Franz asked the appellant about the substance in his mouth, and the appellant told Trooper Franz that it was a common Nepalese type of "chew." Trooper Franz asked the appellant to spit out the chew, and then asked him to open his mouth and stick out his tongue to ensure that there were no large chunks of the chew remaining. Trooper Franz placed the appellant under arrest for OVI, and he was placed, handcuffed, into the back of Trooper Franz's cruiser.

{¶4} Approximately forty-five (45) minutes later Trooper Franz obtained another breath sample from the appellant utilizing the Intoxilyzer 8000. The appellant had been in custody for the entire time between the portable breath test and the Intoxilyzer 8000 breath test, and at no time could he have put anything else into his mouth. The results of the Intoxilyzer 8000 breath test indicated that the appellant had a blood alcohol content of .119, which was in excess of legal limits. The appellant was charged with Driving in Marked Lanes in violation of R.C. 4511.33, and with Operating a Vehicle While Under the Influence of Alcohol/Drug of Abuse in violation of R.C. 4511.19(A)(1)(A) and (A)(1)(D), to which he pleaded not guilty.

{¶5} On December 29, 2022, the appellant filed a Motion to Suppress. The appellant argued that all evidence obtained from Trooper Franz's warrantless search should be suppressed because he did not have reasonable suspicion for the stop and detention; and, that the results of the breath test were tainted by the tobacco residue in his mouth and therefore inadmissible. A hearing was conducted on the Motion to Suppress on February 10, 2023, at which Trooper Franz was the only witness to testify.

***2** {¶6} Trooper Franz testified that he observed the appellant violate R.C. 4511.33, marked lane violations. He testified further that R.C. 4511.33 is:

> ... a rule that defines that the vehicle must maintain their intended lane of travel. In this case if you were to try to make a lane change here which he wasn't because he eventually drifts back int o his lane, he would have had to signal a hundred feet prior. This was a violation -- a marked lanes violation which if there was another vehicle there, he would have encroached into their lane and possibly caused a wreck while the vehicle was legal inside of their lane.

{¶7} Trooper Franz's dashcam footage shows the appellant, while in the far right lane, drifting over the marked dash lane lines separating the two northbound lanes into the next lane by a tire width. Trooper Franz testified that after administering the portable breath test on the appellant, he observed that the appellant had something in his mouth. He also testified that he asked the appellant to spit out the substance, and ensured there was nothing remaining in the appellant's mouth. He testified further that approximately forty-five minutes passed before he administered the Intoxilyzer 8000 breath test. Trooper Franz's dashcam and bodycam footage, which was admitted into evidence, supported his testimony. On March 7, 2023, the trial court issued an Entry overruling the appellant's Motion to Suppress.

{¶8} On June 8, 2023, the appellant pleaded no contest to the charge of operating a vehicle while under the influence of alcohol or drugs in violation of R.C. 4511.19(A)(1)(A), and was found guilty by the trial court. The remaining charges were dismissed. The appellant was sentenced on the same day to a ninety-day jail term with eighty-seven days suspended for three days in a Driver Intervention program; a drug and alcohol assessment; a driver's license suspension until October 25, 2023 with limited driving privileges; a $375.00 fine plus court costs; and, one year of non-reporting good behavior probation with no consumption of-alcohol or illegal drugs.

{¶9} The appellant filed a timely appeal in which he sets forth the following assignment of error:

{¶10} "I. THE APPELLANT BELIEVES THE TRIAL COURT ERRED WHEN OVERRULING THE DEFENDANT'S MOTION TO SUPPRESS AS IT RELATED TO THE TRAFFIC STOP. APPELLANT-DEFENDANT GHIMIRE ARGUES THAT THERE WAS NO LAWFUL CAUSE FOR THE TRAFFIC STOP, A FAILURE TO DRIVE WITHIN MARKED LANES. THE FINDING WAS CONTRARY TO THE VIDEO EVIDENCE AND OFFICER TESTIMONY PROVIDED IN THE SUPPRESSION HEARING."

{¶11} In addition, although not set forth in the "Assignments of Error" section of his brief, the appellant sets forth a second assignment of error in the "Argument" section of his brief in which he submits that his breath test was not administered properly.

STANDARD OF REVIEW

{¶12} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 154–155, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. When ruling on a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and to evaluate witness credibility. See *State v. Dunlap*, 73 Ohio St.3d 308, 314, 652 N.E.2d 988 (1995); *State v. Fanning*, 1 Ohio St.3d 19, 20, 437 N.E.2d 583 (1982). Accordingly, a reviewing court must defer to the trial court's factual findings if competent, credible evidence exists to support those findings. See *Burnside, supra*; *Dunlap, supra*; *State v. Long*, 127 Ohio App.3d 328, 332, 713 N.E.2d 1 (4th Dist.1998); *State v. Medcalf*, 111 Ohio App.3d 142, 675 N.E.2d 1268 (4th Dist.1996). However, once this Court has accepted those facts as true, it must independently determine as a matter of law whether the trial court met the applicable legal standard. See *Burnside, supra*, citing *State v. McNamara*, 124 Ohio App.3d 706, 707 N.E.2d 539 (4th Dist.1997); See, generally, *United States v. Arvizu*, 534 U.S. 266, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002); *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d

911 (1996). That is, the application of the law to the trial court's findings of fact is subject to a de novo standard of review. *Ornelas, supra*. However, due weight should be given "to inferences drawn from those facts by resident judges and local law enforcement officers." *Id.* at 698.

ANALYSIS

The Traffic Stop

***3** {¶13} The appellant first argues that the trial court erred in overruling his motion to suppress because Trooper Franz lacked lawful cause for the traffic stop. We disagree.

{¶14} The court in *State v. Millard,* 11th Dist. Portage No. 2023-P-0041, 2024-Ohio-1342 recently addressed the issue of whether crossing over marked lanes provides reasonable suspicion to initiate a traffic stop. The defendant in *Millard* was operating a motor vehicle on I-76 when she was observed by a law enforcement officer driving onto the white fog line on the far right side of her lane. The officer observed the defendant cross over the fog line "so much so that she hit the rumble strips and then came back into her lane of travel." The defendant then crossed back into the fast lane. *Id.* at ¶7. The defendant was stopped for the marked lane violation, and was observed to be "disheveled, breathing heavily, digging through her stuff, speaking rapidly, touching her hair, and adjusting her shirt." *Id.* at ¶10. The defendant told the officer that the vehicle did not belong to her. The officer asked her to exit the vehicle in order to get additional information about the vehicle's registration, insurance, and owner's address; and, to conduct an LEADS inquiry. Drugs and other items were found in the vehicle, and the defendant was charged with aggravated possession of drugs and possessing drug abuse instruments.

{¶15} The defendant filed a motion to suppress, arguing that the officer lacked the requisite probable cause to conduct the traffic stop. While there was no dashcam footage of the events leading up to the traffic stop, the officer testified at the suppression hearing that she observed the defendant cross over marked lanes. The trial court overruled the motion to suppress. The defendant thereafter pleaded no contest to the charges, and appealed the trial court's ruling on the motion to suppress, arguing that the trial court erred in not suppressing the evidence obtained during the traffic stop. The court of appeals disagreed, stating:

> "It is well established that '[a]n officer's observation of a traffic violation provides probable cause to stop a vehicle.' " *State v. Brown*, 11th Dist. Lake No. 2021-L-017, 2021-Ohio-3078, ¶ 9, quoting *State v. Freshwater*, 11th Dist. Lake No. 2018-L-117, 2019-Ohio-2968, at ¶ 7.
>
> Crossing over marked lanes is a citable traffic violation under R.C. 4511.33. "Violations of traffic laws not only give rise to a reasonable suspicion that a crime is or about to occur, but can form probable cause for a traffic stop. 'A traffic stop is reasonable when an officer possesses probable cause to believe an individual committed a traffic violation.' " *State v. Armington*, 2019-Ohio-1713, 136 N.E.3d 6, (11th Dist.), ¶ 35 quoting *State v. Davis*, 11th Dist. Portage No. 2005-P-0077, 2006-Ohio-3424, ¶ 23, citing *Whren v. United States*, 517 U.S. 806, 809, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).

Id. at ¶21-22. In *Millard,* the court of appeals found that the testimony alone of the officer was sufficient to establish the marked lane violation. In the case sub judice, however, not only did Trooper Franz testify as to the appellant's marked lane violation, his dashcam footage supports his testimony.

***4** {¶16} The issue of whether reasonable suspicion existed to justify a traffic stop was also discussed by this Court in *State v. Hill,* 5th Dist. Fairfield NO. 2023-CA-00028, 2024-Ohio-522. The Court in *Hill* cited to the Ohio Supreme Court case of *State v. Mays,* 119 Ohio St.3d 406, 2008-Ohio-4538, 894 N.E.2d 1204, in which one of the issues was whether driving across the white edge line was sufficient to constitute a violation of driving within marked lase statute and thus provide justification for a traffic stop. In reviewing the issue, this Court stated:

> ... The Supreme Court concluded that a law-enforcement officer who witnesses a motorist drift over lane markings in violation of a statute that requires a driver to drive a vehicle entirely within a single lane of traffic has reasonable and articulable suspicion sufficient to warrant a traffic stop, even without further evidence of erratic or unsafe driving. Id. at syllabus. In *Mays*, the Ohio Supreme Court made the following observation as it pertains to Ohio law,
>
> > Appellant's reliance on [*Dayton v.*] *Erickson* [76 Ohio St.3d 3, 665 N.E.2d 1091 (1996)], and in *Whren v. United States* (1996), 517 U.S. 806, 116 S.Ct. 1769, 135

> L.Ed.2d 89, is misplaced. Probable cause is certainly a complete justification for a traffic stop, but we have not held that probable cause is required. Probable cause is a stricter standard than reasonable and articulable suspicion. *State v. Evans* (1993), 67 Ohio St.3d 405, 411, 618 N.E.2d 162. The former subsumes the latter. Just as a fact proven beyond a reasonable doubt has by necessity been proven by a preponderance, an officer who has probable cause necessarily has a reasonable and articulable suspicion, which is all the officer needs to justify a stop. *Erickson* and *Whren* do not hold otherwise.
>
> 119 Ohio St.3d 406, 2008-Ohio-4539, 894 N.E.2d 1204, ¶ 23. The Ohio Supreme Court concluded, therefore, if an officer's decision to stop a motorist for a criminal violation, including a traffic violation, is prompted by a reasonable and articulable suspicion considering all the circumstances, then the stop is constitutionally valid. 119 Ohio St.3d 406, ¶8. *See, State v. Marcum*, 5th Dist. Delaware No. 18-CAC-11 0083, 2019-Ohio-2293.

Id. at ¶21. The Court in *Hill* ultimately held:

> Based on our independent review of the cruiser camera video, and in light of Trooper Young's unrefuted testimony found by the trial court to be credible, we find that competent, credible evidence supports the finding that the stop was justified as an investigatory stop because Trooper Young had a reasonable and articulable suspicion that Hill disobeyed a traffic control device. The facts known to the trooper were sufficient under the facts of this case to allow Trooper Young to stop Hill to confirm or refute (i.e., investigate) the suspicion that Hill disobeyed a traffic control device.

Id. at ¶32.

{¶17} We have independently reviewed the dashcam footage of Trooper Franz's stop of the appellant. In light of the footage, together with Trooper Franz's unrefuted testimony during the motion to suppress hearing, which the trial court found to be credible, we find that Trooper Franz had a reasonable and articulable suspicion that the appellant violated a traffic statute. The facts known to Trooper Franz were sufficient under the facts of this case to allow him to stop the appellant. Accordingly, the appellant's assignment of error regarding the traffic stop is without merit.

The Breathalyzer Test

***5** {¶18} The appellant also argues that Trooper Franz did not engage in "proper application of obtaining breath samples" of the appellant, and therefore the results of the appellant's breathalyzer tests should have been suppressed. We disagree.

{¶19} Ohio Administrative Code Section 3701-53-03 addresses breath tests, and states:

> (A) The instruments listed in this paragraph are approved as evidential breath testing instruments for use in determining whether a person's breath contains a concentration of alcohol prohibited or defined by sections 4511.19, and/or 1547.11 of the Revised Code, or any other equivalent statute or local ordinance prescribing a defined or prohibited breath-alcohol concentration. The approved evidential breath testing instruments are:
>
> (1) BAC DataMaster, BAC DataMaster K, BAC DataMaster cdm;
>
> (2) Intoxilyzer model 5000 series 66, 68 and 68 EN;
>
> (3) Intoxilyzer model 8000 (OH-5);
>
> (4) Intox DMT (OH); and
>
> (5) Intoxilyzer model 9000 (OH).
>
> (B) Approval for instruments listed under paragraphs (A)(1) and (A)(2) of this rule will expire two years from the effective date of this rule, unless an exemption is requested by a law enforcement agency and approved by the director.
>
> (C) Breath samples of deep lung air will be analyzed for purposes of determining whether a person has a prohibited breath alcohol concentration with instruments approved under paragraph (A) of this rule.
>
> (D) For instruments listed under paragraphs (A)(1) and (A)(2) of this rule:

(1) Breath samples are to be analyzed according to the operational checklist for the instrument being used; and

(2) Checklist forms prescribed by the director that record the results of subject tests are to be retained in accordance with paragraph (B) of rule 3701-53-01 of the Administrative Code.

(E) Breath samples using the instruments listed under paragraphs (A)(3), (A)(4) and (A)(5) of this rule are to be analyzed according to the instrument display for the instrument being used.

In this case Trooper Franz utilized the Intoxilyzer 8000; thus, breath samples must be analyzed according to the Intoxilyzer 8000's display.

{¶20} During his administration of the portable breath test Trooper Franz noticed that the appellant had a substance in his mouth. When asked about the substance the appellant told Trooper Franz that it was a common Nepalese type of chew. Trooper Franz asked the appellant to spit out the chew, and then asked him to open his mouth and stick out his tongue to ensure that there were no large chunks of the chew remaining in the appellant's mouth. Trooper Franz arrested the appellant, placed him in handcuffs behind his back and into the back of the cruiser.

{¶21} Trooper Franz obtained another breath sample from the appellant utilizing the Intoxilyzer 8000 approximately forty-five (45) minutes later. Trooper Franz's bodycam footage documented this breath test, and illustrated the Intoxilyzer 8000 performing an internal self-competence check prior to the appellant's breath sample. Two breath samples were then taken, approximately two minutes apart. Trooper Franz testified that while he noticed some discoloration of the top of the appellant's tongue, there were no bits or pieces of any substance in the appellant's mouth at the time the Intoxilyzer 8000 breath tests were performed. The results of the Intoxilyzer 8000 breath test indicated that the appellant had a blood alcohol content of .119, which was in excess of legal limits.

***6** {¶22} The court in *State v. Aicher,* 2nd Dist. Montgomery No. 27570, 2018-Ohio-1866, 112 N.E.3d 85, addressed the validity of breath test results obtained with the Intoxilyzer 8000:

None of the relevant Ohio Administrative Code provisions specifically provide for a 20 minute observation period; however, we recognize that there is a plethora of case law indicating that the "operational checklist" used for the other types of breath-testing instruments includes a 20 minute observation period before testing. *See* *Bolivar v. Dick,* 76 Ohio St.3d 216, 218, 667 N.E.2d 18 (1996); *State v. Tenney,* 2d Dist. Montgomery No. 24999, 2012-Ohio-3290, 2012 WL 2948498, ¶ 6. Because an Intoxilyzer 8000 was used in this case, Aicher's breath sample was required to be tested in accordance with the machine's "instrument display," not an "operational checklist." The record, however, does not indicate whether the instrument display included a 20 minute observation period. Nevertheless, even if we were to assume that a 20 minute observation period was required, the evidence presented by the State indicates that it substantially complied with such a requirement.

"Substantial compliance only requires evidence that during the 20 minutes before the breath test the defendant did not ingest anything that might skew the test result." *Tenney* at ¶ 7, citing *State v. Adams,* 73 Ohio App.3d 735, 740, 598 N.E.2d 176 (2d Dist.1992), citing *State v. Steele,* 52 Ohio St.2d 187, 370 N.E.2d 740 (1977). " 'A witness who testifies to that foundational fact is not required to show that the subject was constantly in his gaze, but only that during the relevant period the subject was kept in such a location or condition or under such circumstances that one may reasonably infer that his ingestion of any material without the knowledge of the witness is unlikely or improbable.' " *Id.*, quoting *Adams* at 740, 598 N.E.2d 176. It is therefore immaterial whether a subject was observed by several different officers. *See* *Bolivar* at 218, 667 N.E.2d 18 ("[W]hen two or more officers, one of whom is a certified operator of the BAC Verifier, observe a defendant continuously for twenty-minutes or more prior to the administration of a breath-alcohol test, the twenty-minute observation requirement of the BAC Verifier operational checklist has been satisfied.").

Id. at ¶34-35.

{¶23} The issue of whether tobacco residue skewed a breathalyzer test was addressed by the court in *State v. Dierkes,* 11rd Dist. Portage No. 2008-P-0085, 2009-Ohio-2530. The defendant in *Dierkes* argued that the breathalyzer test administered by law enforcement was tainted because he had chewing tobacco in his mouth within the two hour time period prior to administration of the test,

and that the test results were therefore unreliable and should be suppressed. The trial court overruled the defendant's motion to suppress. The court of appeals affirmed, stating that the trial court found the defendant had chewing tobacco in his mouth for one-half hour before he was stopped, but this did not constitute oral intake during the twenty minutes prior to the breathalyzer test. *Id.* at ¶47. The test was therefore valid. The *Dierkes* court went on to state:

> ***7** We hold the trial court did not err in finding that Trooper Lamm substantially complied with the 20–minute observation requirement. We further hold that appellant failed to demonstrate prejudice from any deviation from this requirement.
>
> Appellant suggests the trooper should have asked him whether he had any lingering digestive juices in his mouth during the observation period from something he ingested prior to that time. Appellant has not drawn our attention to any requirement in the Ohio Administrative Code or case law that such question be asked. In a similar context, in *State v. Delarosa,* 11th Dist. No.2003–P–0129, 2005-Ohio-3399, this court held that since the N.H.T.S.A. standards do not require an officer administering the H.G.N. test to ask whether the defendant is wearing contact lenses, there is no such requirement. *Id.* at ¶ 47.
>
> As the Supreme Court held in *Bolivar,* supra, the purpose of the mandatory observation period is to prevent oral intake of any material by the defendant *during that period.* It would be futile to require officers administering breathalyzer tests to ask defendants if they had any digestive juices in their mouth from something previously ingested because the answer could not be verified. The obvious point of the observation requirement is to prevent oral intake by the defendant during the period of time the officer has him under observation.

Id. at ¶50-52.

{¶24} In this case, Trooper Franz observed the appellant with something in his mouth at the time of the portable breathalyzer test. Upon further inquiry he learned that the appellant had Nepalese chew in his mouth. Trooper Franz asked the appellant to spit out the chew, and the appellant did so. Trooper Franz then looked into the appellant's mouth to ensure there were no pieces of chew remaining. He administered the Intoxilyzer 8000 breath test approximately forty-five (45) minutes later.

{¶25} Ohio Administrative Code Section 3701-53-03 requires only that breath samples using the Intoxilyzer 8000 be analyzed according to the instrument display. There is no evidence that Trooper Franz failed to adhere to said requirements. Furthermore, he waited nearly forty-five minutes after the appellant spit out the Nepalese chew before administering the breathalyzer test, well beyond the twenty minute observation period generally recommended for the administration of breathalyzer tests. We find no error in the trial court's decision that the appellant's breathalyzer test results were in compliance with the Ohio Administrative Code, and the appellant's argument regarding the breathalyzer test results is without merit.

CONCLUSION

{¶26} Based upon the foregoing, we find appellant's assignments of error are without merit, and are therefore overruled. The judgment of the Fairfield County Municipal Court Pleas is hereby affirmed.

Wise, John, P.J. and King, J. concur.

All Citations

Slip Copy, 2024 WL 2005553, 2024-Ohio-1829

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ANSWER TO PETITION FOR REVIEW

APPENDIX B

***State v. Heldt*, Pages 1-4**

THE STATE OF WASHINGTON,
Respondent,
v.

JOHN HENRY SLIGER,
Petitioner.

APPEAL FROM
Court of Appeals Division III No. 39315-1
Re: Ferry County Superior Court No. 20-1-0020-10

2009 WL 1684438
Only the Westlaw citation is currently available.

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
David Allen HELDT, Appellant.

No. A08–1150.
|
June 16, 2009.

West KeySummary

1 **Search, Seizure, and Arrest** Particular cases

Police officer had probable cause to arrest defendant for driving while intoxicated. The police officer testified that he observed the defendant speeding and following another vehicle too closely. Defendant struck the curb before stopping in a parking lot. Moreover, defendant had slurred speech, smelled of alcohol, and admitted to consuming alcohol. U.S.C.A.Const.Amend.4 .

McLeod County District Court, File No. 43–CR–06–421.

Attorneys and Law Firms

Lori Swanson, Attorney General, St. Paul, MN, Marc Sebora, Hutchinson City Attorney, Hutchinson, MN, for respondent.

Richard L. Swanson, Chaska, MN, for appellant.

Considered and decided by SHUMAKER, Presiding Judge; JOHNSON, Judge; and COLLINS, Judge.

UNPUBLISHED OPINION

COLLINS, Judge. *

***1** Appealing from his conviction of second-degree driving while impaired (DWI) in violation of Minn.Stat. §§ 169A.20, subd. 1(5), .25 (2006), appellant argues that the district court erred by (1) finding probable cause for his arrest; (2) admitting Intoxilyzer test results; and (3) denying his motion to compel discovery of the Intoxilyzer's source code. We affirm.

FACTS

Appellant David Heldt was stopped by an officer who observed him driving his vehicle erratically at approximately 1:00 a.m. In talking with Heldt, the officer detected an odor of alcohol and noticed that Heldt's speech was slurred. Heldt stated that he had consumed one beer.

The officer conducted a Horizontal Gaze Nystagmus (HGN) test, which he had been trained to administer. The test revealed indicators of intoxication. Heldt performed the "walk and turn" test satisfactorily, and was not asked to perform a "one-legged stand" test after indicating that he had back problems.

Because Heldt was chewing tobacco, the officer waited five minutes after Heldt removed the tobacco from his mouth before completing a Preliminary Breath Test (PBT). According to Heldt, the officer did not change the mouth piece on the device after the first time Heldt blew into it. Heldt testified that there was tobacco present on the mouthpiece when he blew into the device for the second time. The PBT indicated an alcohol concentration of 0.11.

Heldt was arrested for suspected DWI and taken to the police station, where the arresting officer read to him the implied-consent advisory. After Heldt agreed to submit to a breath test, the officer inspected Heldt's mouth and observed flecks of tobacco residue. The officer observed Heldt for approximately 15 minutes before administering the breath test using an Intoxilyzer. The Intoxilyzer indicated an alcohol concentration of 0.11.

An omnibus hearing was held at which a defense expert, Thomas Burr, testified that he believed the Intoxilyzer result was inaccurate due to the tobacco residue in Heldt's mouth. The state's expert, Karen Kierzek, testified that the Intoxilyzer result was accurate and reliable and that the tobacco residue

would not have affected the test result. Kierzek stated that any alcohol retained in tobacco flecks that were in Heldt's mouth would have dissipated within the 15–minute observation period, but added that it is good practice to require a subject with tobacco residue in the mouth to rinse the mouth with water before administering the test.

The district court initially granted Heldt's motion to compel the state's disclosure of the Intoxilyzer's source code in its possession, custody, or control. However, a few months later, the district court denied Heldt's motion to dismiss based on the state's failure to produce the source code and rescinded its prior order for production of the source code. The district court indicated that it had reconsidered its prior decision because evidence had not been produced at the original hearing that disputed the validity or trustworthiness of the test or made a connection between the alleged error and the validity of the test results.

***2** Heldt subsequently waived his right to a jury trial and submitted the case to the district court on stipulated facts pursuant to *State v. Lothenbach,* 296 N.W.2d 854 (Minn.1980). The district court found Heldt guilty of second-degree DWI. This appeal followed.

DECISION

I.

Heldt first argues that the officer lacked probable cause to arrest him for suspected DWI. "Probable cause to arrest exists where the objective facts are such that under the circumstances a person of ordinary care and prudence [would] entertain an honest and strong suspicion that a crime has been committed." *State, Lake Minnetonka Conservation Dist. v. Horner,* 617 N.W.2d 789, 795 (Minn.2000) (quotations omitted) (brackets in original). The inquiry is objective, not subjective. *State v. Riley,* 568 N.W.2d 518, 523 (Minn.1997). In evaluating probable cause, a reviewing court must consider the totality of the circumstances. *Groe v. Comm'r of Pub. Safety,* 615 N.W.2d 837, 840 (Minn.App.2000), *review denied* (Minn. Sept. 13, 2000). While probable cause to arrest requires more than mere suspicion, it requires less than the evidence necessary for conviction. *State v. Camp,* 590 N.W.2d 115, 119 n. 9 (Minn.1999).

The officer testified about the following observations that support Heldt's arrest: Heldt (1) was speeding; (2) was following another vehicle too closely; (3) struck the curb before stopping in a parking lot; (4) had slurred speech; (5) smelled of alcohol; (6) admitted to consuming alcohol; (7) failed the HGN test; and (8) failed the PBT.

Although Heldt was able to perform certain tasks, such as finding his driver's license and satisfactorily completing the "walk and turn" test, it is not necessary that every observation of Heldt's behavior indicate intoxication. *See State v. Grohoski,* 390 N.W.2d 348, 351 (Minn.App.1986), *review denied* (Minn. Aug. 27, 1986) (holding that the district court had "improperly focused on the absence of other indicia of intoxication" and that the "suspect need not exhibit every known sign of intoxication in order to support a determination of probable cause"). Indeed, the Minnesota Supreme Court has clarified that probable cause to believe a person is intoxicated may exist "even if none of the commonly-known physical indicia of intoxication is present." *State v. Lee,* 585 N.W.2d 378, 382 (Minn.1998).

Heldt further implies that the HGN test was administered improperly, arguing that the officer had only one course of training regarding its administration. But nothing in the record suggests that this amount of training is inadequate or that the officer improperly administered the test.

Heldt's argument that the PBT should not be considered because of the presence of tobacco on the mouthpiece also lacks merit. Heldt offered no evidence that the PBT was tainted, only that tobacco may affect Intoxilyzer results. Thus, the district court's consideration of the PBT results, in conjunction with the other indicators of intoxication, was not erroneous.

***3** Our careful review of the record reveals ample evidence to support Heldt's arrest, including the PBT results, and thus the district court's finding that there was probable cause to support the arrest is not erroneous.

II.

Heldt next contends that the district court erred by denying his motion to suppress evidence of the Intoxilyzer results. "When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a

matter of law, whether the district court erred in suppressing —or not suppressing—the evidence." *State v. Harris,* 590 N.W.2d 90, 98 (Minn.1999). The results of a breath test, when performed by a trained person, are admissible without expert testimony that an "approved breath-testing instrument provides a trustworthy and reliable measure of the alcohol in the breath." Minn.Stat. § 634.16 (2008).

"Once a prima facie showing of trustworthy administration has occurred, it is incumbent on the opponent to suggest a reason why the test was untrustworthy." *Bond v. Comm'r of Pub. Safety,* 570 N.W.2d 804, 806 (Minn.App.1997) (quotation omitted). "If the prima facie showing of the test's reliability is challenged, the judge must rule upon the admissibility in the light of the entire evidence." *Noren v. Comm'r of Pub. Safety,* 363 N.W.2d 315, 318 (Minn.App.1985) (quotation omitted). Rebuttal of the state's prima facie showing of admissibility of Intoxilyzer results requires more than "speculation that something might have occurred to invalidate those results." *Hounsell v. Comm'r of Pub. Safety,* 401 N.W.2d 94, 96 (Minn.App.1987) (citing *Falaas v. Comm'r of Pub. Safety,* 388 N.W.2d 40, 42 (Minn.App.1986)); *see also Pasek v. Comm'r of Pub. Safety,* 383 N.W.2d 1, 4 (Minn.App.1986) (holding that appellant's speculation that tobacco would affect reliability of test result was insufficient and that he was "obligated to produce evidence that the tobacco would actually exaggerate the test results").

The state met its initial burden by demonstrating that the officer was a certified Intoxilyzer operator, the Intoxilyzer was in working order and was properly calibrated, and the control chemical solutions were not contaminated. Heldt attempted to rebut the state's prima facie evidence by presenting expert testimony regarding the impact of tobacco on Intoxilyzer results.

The district court did not make explicit findings regarding Heldt's rebuttal evidence. While the district court did not address the rebuttal evidence in its analysis of the reliability of an Intoxilyzer machine, it discussed the evidence in its memorandum when it considered in detail the residue of chewing tobacco in Heldt's mouth when he was tested and the expert testimony regarding the tobacco's potential effect on the test results. This discussion summarized the defense expert's testimony that the tobacco could affect the test results and that rinsing the mouth would be the best practice, as well as the state's expert's testimony that the test results would not be affected by the presence of tobacco flecks and that the officer had followed procedure. And although the district court's ruling would have been better supported by express findings on the credibility of Heldt's evidence, the record supports our inference that the district court fully considered the testimony of Heldt's expert in addition to that of the arresting officer and the state's expert, and made its ruling in light of all of the evidence as is required under *Noren.*

***4** We may decide the appeal without remanding for further factual findings if we are "able to infer the findings from the trial court's conclusions." *State v. Kvam,* 336 N.W.2d 525, 528 (Minn.1983). Here, there is adequate content in the district court's memorandum for us to infer that the district court's conclusion was based on its consideration of all the evidence. The district court's discussion of the defense expert's testimony, followed by its finding that the test was reliable, leads to the conclusion that the district court found the state's expert to be more credible and that, although rinsing the mouth after detecting tobacco is the best practice, the failure to do so is not dispositive.

We find these conclusions to be supported by the record. Thus, the district court did not err by denying Heldt's motion to suppress the Intoxilyzer test results.

III.

Heldt also argues that he is entitled to discovery of the Intoxilyzer's source code.[1] A district court has broad discretion to issue discovery orders and, absent a clear abuse of that discretion, its order with respect thereto will not be disturbed. *Shetka v. Kueppers, Kueppers, Von Feldt & Salmen,* 454 N.W.2d 916, 921 (Minn.1990). The district court, in its discretion, is permitted to "require the prosecuting attorney to disclose to defense counsel and to permit the inspection, reproduction or testing of any relevant material and information," not subject to mandated disclosure, "provided, however, a showing is made that the information may relate to the guilt or innocence of the defendant or negate the guilt or reduce the culpability of the defendant as to the offense charged." Minn. R.Crim. P. 9.01, subd. 2(3).

The Minnesota Supreme Court recently affirmed our reversal of a discovery order based on a failure to establish that the source code related to the defendant's guilt or innocence.

State v. Underdahl, —— N.W.2d ——, 2009 WL 1150093, at *7 (Minn. Apr.30, 2009) (*Underdahl II*). Here, the district court determined that the source code was not discoverable because there was no dispute regarding the test's validity or trustworthiness or to connect the alleged error with the validity of the test results. This is consistent with the supreme court's holding in *Underdahl II* and with the evidence in the record. Like in *Underdahl II,* Heldt failed to make any evidentiary showing that the source code would assist him to dispute the charges against him. *See Underdahl II,* 2009 WL 1150093, at *7 (noting that "while [the defendant] argued that challenging the validity of the Intoxilyzer was the only way for him to dispute the charges against him, he failed to demonstrate how the source code ... could be related to [his] defense or why the [source code] was reasonably likely to contain information related to the case.") (quotation omitted). Heldt has not demonstrated that the source code relates to his guilt or innocence, but rather simply asserts that he must have the source code in order to test the machine's reliability, which is insufficient under *Underdahl II.* Therefore, the district court did not abuse its discretion by refusing to compel discovery of the Intoxilyzer's source code.

***5 Affirmed.**

All Citations

Not Reported in N.W.2d, 2009 WL 1684438

Footnotes

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

1 The state argues that Heldt's appeal on the source code issue is not properly before us because the order denying discovery was issued in the implied consent case rather than in this criminal matter. But the implied consent order applies here by reference, as the district court stated that it was modifying its October 3, 2007 evidentiary order issued in the criminal proceeding. The district court's intention to apply its evidentiary ruling to the criminal case is made evident by the fact that, based on the stipulated facts, the district court found that the Intoxilyzer testing indicated that Heldt had a blood alcohol concentration of .11.

NO. 103,563-2

SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. JOHN HENRY SLIGER, Petitioner.	DECLARATION OF SERVICE

I, Michelle Barba, declare as follows:

On January 22, 2025, I sent via the Washington State Appellate Court's Secure Portal, a true and correct copy of Answer to Petition for Review and Declaration of Service, addressed as follows:

BEVAN J. MAXEY
MAXEY LAW OFFICES, PLLC
hollye@maxeylaw.com
lexiem@maxeylaw.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 22nd day of January, 2025, at Seattle, Washington.

Michelle Barba

MICHELLE BARBA

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE – CRIMINAL JUSTICE DIVISION

January 22, 2025 - 1:49 PM

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Appellate Court Case Title:	State of Washington v. John Henry Sliger
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