

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Court File No. [REDACTED]
Case Type: Implied Consent

[REDACTED]
Petitioner,

vs.

ORDER

Commissioner of Public Safety,
Respondent.

APPEARANCES

The above-entitled matter came before the Honorable [REDACTED] Judge of District Court, on February 20, 2018, pursuant to a Petition for Judicial Review of License Revocation.

Charles Ramsay, Esq., and Ramsay Law Firm, P.L.L.C., appeared on behalf of the Petitioner, [REDACTED]

Assistant Attorney General [REDACTED] Esq., appeared on behalf of the Respondent, the Commissioner of Public Safety (the "Commissioner").

Prior to the hearing, the Commissioner moved to suppress any testimony relating to the uncertainty of measurement associated with Petitioner's test results on the grounds that it is irrelevant as a matter of law in an implied consent hearing.

At the hearing, Petitioner agreed on the record not to offer testimony regarding the uncertainty of measurement and indicated that the issues would be limited to (1) whether the Commissioner could meet her burden of proving that Petitioner's blood alcohol tested at an alcohol concentration at or above the relevant legal threshold (i.e. 0.16, or more), (2) whether the testing method was valid and reliable as required by Minn. Stat. § 169A.53, subd. 3(b)(10), and (3) whether the Petitioner was afforded due process.

Based upon the testimony provided by witnesses at the hearing, the admitted exhibits and the arguments of counsel, the Court makes the following:

FINDINGS OF FACT

1. On November 19, 2017, Minnesota State Trooper [REDACTED] arrested Petitioner in the City of Minneapolis, County of Hennepin, for DWI. She was taken to the Hennepin County Jail.

2. After Trooper [REDACTED] read Petitioner the Implied Consent Advisory, she consented to administration of a breath test.

3. Trooper [REDACTED] has been a certified datamaster ("DMT") operator for approximately five years.

4. Before administering the DMT, he performed diagnostic tests including running air blanks and a control. He noted no errors or flags suggesting problems with the operation of the machine. It was his conclusion that the DMT was functioning properly.

5. After conducting a 15 minute observation period, he administered the test. Petitioner was cooperative and the machine did not indicate that the breaths provided were inadequate or otherwise deficient.

6. Two readings were obtained: a sample at 2:07 a.m. was recorded at 0.160, and a sample at 2:11 a.m. was recorded at 0.162. The final test result of 0.16 g/201L at 2.07 a.m. was recorded in Exhibit 1, which was signed by Trooper [REDACTED] and received into evidence.

7. [REDACTED] a forensic scientist employed by the Bureau of Criminal Apprehension ("BCA") provided his opinion regarding the validity and accuracy of the breath alcohol test results reflected in the report, received into evidence as Exhibit 1, and also explained how Petitioner derives the reported value (here, 0.16) based on the two subject samples.

8. Mr. [REDACTED] explained that the reported value is derived by using the lower of the two test results, rather than by averaging them, and that the third digit to the right of the decimal point is dropped or "truncated" rather than rounding it to the nearest value. He noted that averaging the two test results may be more scientifically accurate than simply using the lower of the two results as the reported value, but the current method benefits the driver.

9. Mr. [REDACTED] also explained how the DMT operates, including its use of infrared light, and filters, calculation of flow rates, breath alcohol concentration and the ratio derived from the size of the chamber through which a person's breath travels. He noted that the instrument analyzes alcohol content in the chamber 4 times per second and that in his opinion, each of these analyses is an accurate measurement of alcohol content. These values are recorded and saved on

the instrument, and the alcohol content is measured in parts per million. These values are referred to as “data points.”

10. In connection with Petitioner’s testing, the BCA provided her with a letter identifying the mathematical formula for converting raw breath alcohol concentration from parts per million to grams per 210 liters. This formula is $\text{ppm} \div 2605 = \text{g}/210\text{L}$. See BCA Correspondence, which was received into evidence as Exhibit 2.

11. In addition, the BCA provided Petitioner with a chart containing two types of information for her first and lowest breath test sample: the data points for the alcohol concentration in parts/million and the flow rate in liters/minute. This chart was received into evidence as Exhibit 3.

12. In the chart, Column A shows the “time,” Column B shows the “raw alcohol” data in parts per million, Column C shows the “flow rate” calculated for that data point, and Column D shows the “breath alcohol” in parts per million.

13. Exhibit 3 reflects data collected for determination of “acceptance criteria” for Petitioner’s first breath sample. The acceptance criteria are based on the measurement of flow rate, slope and volume. In order for the DMT to accept a breath test, the person tested must blow at a minimum flow rate and volume, the slope must be acceptable, and the flow rate must drop back below a specific amount. If the breath test passes the acceptance criteria, it is considered a good sample.

14. Petitioner’s test met all of the criteria by “time” 158 on Exhibit 3. As shown in Exhibit 3, the measurement of breath alcohol content began at zero, initially rose rapidly and then the rate of increase declined. Toward the end of the test, the highest value recorded by the machine of breath alcohol content was 0.159878767. In Mr. ██████ opinion, these results are accurate measurements of the breath alcohol content in the sample.

15. Mr. ██████ testified that once the acceptance criteria are met, the machine seals the chamber and conducts an analysis of the alcohol concentration in the breath sample. The only thing that the machine does differently at that point is use all three filters rather than a single filter. He does not believe that the additional filters would increase the reported breath alcohol content. After the DMT conducts the analysis of the breath sample, it reports the result in the report as a figure carried out to three digits after the decimal point. See Exhibit 1.

16. The same procedure is then used for the second breath sample. Then, as noted above, the “reported” blood alcohol is derived by using the lower of the two test results, after truncation of the third digit after the decimal point.

17. There was no testimony provided regarding how the machine derives the numeral it reports that is carried out to three decimal places. As noted above, the DMT determines the alcohol value during the acceptance criteria phase to a great degree of accuracy, carrying out the figure to nine digits after the decimal. *See* Exhibit 3. This being the case, it is reasonable to assume that after the machine seals the chamber and conducts the official test of a breath sample, it also detects the alcohol concentration as a figure carried out to nine places after the decimal point, but then reports the result for that particular breath sample using only three digits after the decimal.

18. Although there was no testimony regarding how the DMT converts the nine figures to the right of the decimal, to three figures, the most likely conclusion is that the machine rounds the nine-figure value to the nearest three-figure value. So, for example, if the machine calculated the alcohol content for Petitioner’s breath sample as 0.159878767, it would round the number to 0.160 and report that result. Consequently, the DMT would report an alcohol content of 0.160 for that breath sample despite the fact that the alcohol content detected by the machine in that breath sample never reached 0.160.

19. Although Mr. █████ opined that the DMT machine properly reported Petitioner’s blood alcohol concentration as 0.160 for the breath sample, he also stated that the data points accurately noted the highest value for that sample in the acceptance criteria phase was 0.159878767.

20. A breath test result of 0.16 was reported to the Commissioner and the Commissioner revoked Petitioner’s license for one year pursuant to Minn. Stat. § 169A.52, subs. 2 and 4, and impounded her license plates pursuant to Minn. Stat. § 169A.60, subd. 2.

21. The Court stayed the revocation of Petitioner’s driver’s license on November 28, 2017, and the impoundment of Petitioner’s license plates on December 1, 2017.

CONCLUSIONS OF LAW

1. Petitioner contends that the Commissioner did not meet her burden of proof to establish that her breath tested at 0.160 or more.

2. Minn. Stat. § 169A.52, subd. 4 (a) provides as follows:

Upon certification by the peace officer that there existed probable cause to believe the person had been driving, operating, or in physical control of a motor vehicle in violation of section 169A.20 (driving while impaired) and that the person submitted to a test and the test results indicate an alcohol concentration of 0.08 or more . . . then the commissioner shall revoke the person's license or permit to drive, or nonresident operating privilege . . . for a period of 90 days, or, if the test results indicate an alcohol concentration of twice the legal limit or more, not less than one year.

3. Citing the statute, the Commissioner revoked Petitioner's license on the grounds that her test results indicated an alcohol concentration of 0.08 or more.

4. The party proffering a chemical test has the initial burden to establish that the test is reliable and that test administration conforms to the procedure necessary to ensure reliability. *State v. Dille*, 258 N.W.2d 565, 567 (Minn. 1977). The burden of production then shifts to the petitioner to show that the test is untrustworthy. *Genung v. Comm'r of Pub. Safety*, 589 N.W.2d 311, 313 (Minn. Ct. App. 1999).

5. Thus, the Commissioner has the burden of demonstrating that the test in this case resulted in a reliable reading of 0.16. Under Minnesota law, a breath test "must consist of analyses in the following sequence: one adequate breath-sample analysis, one control analysis, and a second, adequate breath-sample analysis." Minn. Stat. § 169A.51, subd. 5 (a) (2016). A *prima facie* showing as to the trustworthiness and reliability of the breath test results can include officer testimony regarding his certification to conduct the test, whether the machine was functioning properly, whether internal diagnostic testing occurred, and whether an acceptable control reading was provided. See *State v. Habisch*, 313 N.W.2d 13, 16 (Minn. 1981); *State v. Ards*, 816 N.W.2d 679, 687-88 (Minn. Ct. App. 2012).

6. Here, the Commissioner presented such evidence, through Trooper [REDACTED] testimony, establishing that he was a certified and trained DMT operator and the machine was functioning properly. He testified that he performed the necessary observation period prior to administering the test. He also testified that the DMT was working properly because the unit passed the initial diagnostic tests. The testimony supports a finding that the test result is trustworthy and reliable.

7. Because the Commissioner offered sufficient *prima facie* testimony to establish that the test was trustworthy and the test administration conformed to the procedure necessary to ensure reliability, the burden shifted to Petitioner to rebut the *prima facie* showing.

8. Here, Petitioner contends that the reported test results are not reliable because other evidence shows that the breath sample at issue did not have an alcohol content of 0.16 or above. The data points reflecting the alcohol content of the first breath sample all fell below 0.160. The data point evidence suggests that the alcohol content in Petitioner's breath sample (although measured separately from the measurements done in the acceptance criteria phase) never reached the level of 0.16 or above and that the DMT reported a rounded value for the alcohol content in the breath sample. In other words, the machine rounded the alcohol content of Petitioner's first breath sample (e.g., 0.159878767) to the nearest value, which was 0.160, in order to report the required numeral carried out to only three places after the decimal.

9. Based on this evidence the Court finds that Petitioner has met her burden of proving that it is more likely than not that the alcohol content in the first breath sample did not test at 0.16 or above. Accordingly, the Court must conclude that the evidence does not support the revocation of Petitioner's license for one year.

10. While it is true that the other breath sample was reported to exceed 0.160, the Commissioner's expert testified that the lower value must be used in determining whether revocation of the license is warranted. The Commissioner's practice of using the lower number enhances the reliability of the results. Accordingly, the higher value must be ignored in determining whether Petitioner met her burden of proof.

CONCLUSION

The Commissioner made a *prima facie* showing that the test results were trustworthy and reliable based on the testimony of Officer [REDACTED]. Petitioner met her burden of producing evidence to rebut the *prima facie* showing. The breath test results were not a sufficient basis for revocation of Petitioner's license for one year. However, they were sufficient to sustain a revocation of Petitioner's license for 90 days.

ORDER

Based upon the files, records, exhibits, and arguments of counsel, **IT IS HEREBY ORDERED** that: Petitioner's license revocation is SUSTAINED but only for a 90 day period.

BY THE COURT:

[REDACTED]
JUDGE OF DISTRICT COURT