

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF THE MOTION FOR)
PERMISSION TO APPEAL)
INTERLOCUTORY ORDER.)

-----)
STATE OF IDAHO.)

Plaintiff,)

v.)

JACK D. CARVER.)

Defendant.)

ORDER DENYING MOTION
FOR PERMISSION TO APPEAL
INTERLOCUTORY ORDER

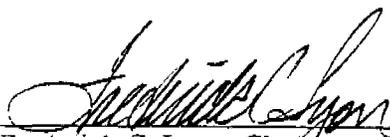
NO. 99462
Ref. No. 01S-384

A MOTION FOR PERMISSION TO APPEAL INTERLOCUTORY ORDER with attachments was filed by Plaintiff December 11, 2001. A STATEMENT IN OPPOSITION TO MOTION FOR PERMISSION TO APPEAL was filed by Defendant December 28, 2001. The Court is fully advised; therefore, after due consideration,

IT IS HEREBY ORDERED that Plaintiff's MOTION FOR PERMISSION TO APPEAL INTERLOCUTORY ORDER be, and hereby is, DENIED.

DATED this 6th day of February 2002.

By Order of the Supreme Court



Frederick C. Lyon, Clerk

cc: Counsel of Record

STATE OF IDAHO
 COUNTY OF KOOTENAI
 FILED: 11-6-01
 4:25 PM
 CLERK OF DISTRICT COURT
 DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO,)	
)	CASE NO. CRF-00-81666
Plaintiff,)	
)	MEMORANDUM DECISION
vs.)	AND ORDER
)	
JACK D. CARVER,)	
)	
Defendant.)	

This is a felony DUI case. The matter before the Court is a Motion in Limine filed on behalf of the defendant. The issue is the admissibility of the breath test result as determined by a preliminary breath testing device known as the Alco-Sensor III. This Court concludes that, based upon the record in this case, the Alco-Sensor III test result in question would be inadmissible at trial, and grants defendant's Motion in Limine.

ISSUE PRESENTED

The admissibility of the Alco-Sensor III test result has been identified by the parties in pretrial briefing as one of importance in this case, in that the State will not be offering any evidence at trial regarding any test results of the defendant's alcohol concentration level other than the result of the Alco-Sensor III test.

Defendant Carver seeks to exclude the arresting officer's testimony and other evidence of the Alco-Sensor III test result for purposes of proving the defendant's alcohol concentration.

Defendant concedes that the Alco-Sensor III test results are sufficient for purposes of probable cause, but argues that the Alco-Sensor III is a preliminary breath testing device and its test result should not be admitted as substantive proof of alcohol concentration levels of .08 or greater.

Many courts have limited test results from preliminary alcohol testing devices to probable cause issues. Case law does indicate that some of these courts have held that admitting a test result of a preliminary breath testing device, such as the Alco-Sensor III, is harmless error, when there is additional evidence from another acceptable test (such as, for example, the Intoximeter 3000 or the Intoxilyzer 5000). However, if there is no evidence of alcohol concentration levels other than a test result from an Alco-Sensor III, and if the test result of an Alco-Sensor III would be admissible only for purposes of probable cause, then to admit evidence of the Alco-Sensor III, and to permit the case to go to the jury on that test result alone, would presumably constitute error other than harmless. Therefore, given the absence of other test results, the issue as to whether this Court should limit the admissibility of the Alco-Sensor III test result to probable cause, and exclude that test result as evidence at trial, is a determinative issue.

ANALYSIS

From a review of case law, it appears to this Court that the near unanimous holdings of Courts in other jurisdictions throughout the nation has been to limit the use of test results of the preliminary breath testing devices to determining the issue of probable cause. There is no dispute in this case that the Alco-Sensor III is utilized by the officer in the field for purposes of making an arrest, and that the Kootenai County Jail is equipped with stationary units to obtain test results, which are undisputedly admissible as evidence under established Idaho case law. Case law from other jurisdictions has treated the Alco-Sensor III as a preliminary breath testing

device. For purposes of this case, this Court finds the Alco-Sensor III to be a preliminary breath testing device.

The State in this case did not submit any citation of legal authority holding that the Alco-Sensor III had been adopted in any jurisdiction for use as substantive evidence. Defendant Carver submitted a list of authorities supporting defendant's position, the bulk of which is nicely summarized in U.S. v. Iron Cloud, 171 F.3d 587 (8th Cir. 1999). While recognizing this Court's research may be something less than exhaustive, this Court was able to find only one case which has admitted test results of an Alco-Sensor III as substantive evidence of levels of alcohol concentration. Allen v. Kentucky, 817 S.W. 2nd 458, (Ct. App. Kentucky 1991). A recent California case, although dealing with the Alco-Sensor IV rather than the Alco-Sensor III, does hold that a preliminary alcohol screening test may be admitted, under California law, as substantive evidence of alcohol concentration. People v. Williams, 107 CA Reporter 2d 135 (Ct. App. Third District CA 2001). However, because of foundational inadequacies, the court in People v. Williams excluded the Alco-Sensor IV test results from evidence at trial.

The history of the Alco-Sensor III in the State of Idaho is basically unknown on the record in this case before this Court. It does appear that the Idaho State Patrol may have been using the Alco-Sensor III, at least as a field testing device to establish probable cause, from as far back as perhaps 1984. It is the assumption of this Court, based upon admittedly anecdotal information, that for many years after 1984 the Idaho State Patrol or law enforcement relied at trial upon alcohol concentration test results from testing devices that are not portable, but are rather maintained in an environment such as a law enforcement facility, (e.g. the Intoximeter 3000 or the Intoxilyzer 5000), as evidence of alcohol concentration levels, and did not utilize Alco-Sensor III test results as substantive evidence of alcohol concentration levels.

There is nothing in the record indicating whether the Idaho State Patrol is now utilizing Alco-Sensor III test results as substantive evidence of alcohol concentration levels at DUI trials around the State of Idaho. Counsel have represented that there may have been court cases within the State of Idaho where a court has permitted Alco-Sensor III test results as substantive evidence, but no decisions or other evidence has been presented to this Court.

From the rather sparse record before it, this Court concludes (or, more accurately, assumes) that the Alco-Sensor III was at least initially utilized by the Idaho State Patrol exclusively as a preliminary breath test for purposes of probable cause, and not for substantive evidence of alcohol concentration. Nonetheless, it appears the Idaho State Patrol is, at least in this case, choosing to rely upon the Alco-Sensor III.

The Alco-Sensor III as a preliminary breath testing device for probable cause purposes and use in field tests is well-established, but its acceptance in the case law as substantive proof of an alcohol concentration level appears minimal. Therefore, this Court finds itself in what it considers to be the rather anomalous position of hearing a case, arguably of first impression, regarding the admissibility of a test result from a machine which has probably been around for approximately 20 years, but apparently has not been previously relied upon as evidence at trial.

STATUTE AS CONSTITUTIONAL

Defendant's threshold attack is upon the constitutionality of the statute. Pursuant to §18-8004(4), tests for alcohol concentration performed by any method approved by the Idaho State Police are admissible without any witness testimony regarding the reliability of the testing procedure. Defendant argues that the statute is unconstitutional.

This Court does not find the statute to be unconstitutional. Existing Idaho cases uphold the statute. Indeed, the defendant in his briefing concedes that the Trial Court would have to

disregard established Idaho Appellate cases if it were not to enforce the statute. In State v. Nickerson, 132 Idaho 406 (Ct. App. 1999), the statute was specifically discussed and upheld. Essentially the same language in earlier versions of §18-8004(4), Idaho Code, withstood judicial scrutiny in State v. Hartwig, 112 Idaho 370 (Ct. App. 1987), and in State v. Vansickle, 120 Idaho 99 (Ct. App. 1991).

APPROVAL OF AGENCY AS A PREREQUISITE FOR ADMITTING TEST RESULTS

The threshold issue is whether there is evidence that the Idaho State Police has in fact approved the Alco-Sensor III for substantive evidentiary purposes. The evidence in the record is an unsigned Memorandum dated March 26, 1992, stating that the Alco-Sensor III has been approved for use in the State of Idaho according to §18-8004(4), Idaho Code. (Exhibit "A" attached hereto.) The State has also submitted a Department of Health & Welfare Memorandum of September 10, 1984, stating that the Department of Health & Welfare has approved the Alco-Sensor III for evidential use in Idaho. As part of that exhibit, the State has attached a Memorandum of July 26, 1989, from the Department of Law Enforcement (Idaho State Police) approving the Alco-Sensor III for evidential breath alcohol testing. (Ex. "B" attached).

The difficulty with relying upon the Memoranda of July 26, 1989, and March 26, 1992, as satisfactory evidence of approval by the Idaho State Police is posed by the date of each respective memorandum. If the Alco-Sensor III has been used by the Idaho State Patrol for purposes of establishing alcohol concentration in DUI cases throughout the State of Idaho since 1989, it is odd that the first case testing the admissibility of the Alco-Sensor III would not occur until 2001. The Alco-Sensor III would presumably be far more controversial to the DUI defense bar in Idaho than would be the Intoximeter 3000. As noted above, well-established case law from many jurisdictions has excluded preliminary breath test results, such as the Alco-Sensor III,

for evidentiary purposes. Yet the Intoximeter 3000, a stationary, in-house device, was challenged in Idaho, (and found to be reliable by well-established scientific acceptance), as far back as 1987. *State v. Hartwig*, 112 Idaho 370 (Ct. App. 1987). While perhaps a knowledgeable witness on behalf of the Idaho State Patrol could explain the significance of the memoranda and why they constitute an approval by the Idaho State Police as of the respective dates of the memoranda, no witness appeared. The Court did indicate to the State that the existence and manner of any approval by the Idaho State Patrol was an issue about which the Court had concern, and the Court granted the State additional time with leave to call witnesses on that issue, should it choose to do so. The State has advised the Court that no further witnesses would be called.

The State has not drawn the Court's attention to any formally adopted regulation wherein the Idaho State Patrol has by rule approved the Alco-Sensor III for evidentiary purposes for establishing alcohol concentration levels. The most pertinent regulation this Court was able to locate states only that "breath testing instruments shall either have been approved by the Department or shall be listed in the 'Conforming Products List of Evidential Breath Measurement Devices' published in the Federal Register . . ." *ADAPA 11.03.01.013.01*.

It may well be that the 1989 and 1992 Memoranda are the product of an approval of the Alco-Sensor III by the Idaho State Patrol, acting upon the Department of Health & Welfare 1984 Memorandum. The statutory amendment requiring Department of Law Enforcement approval (instead of Health & Welfare) became effective in 1988. However, neither the 1989 Memorandum nor the 1992 Memorandum make any reference to the Health & Welfare 1984 Memorandum. It is also this Court's understanding that the Health & Welfare policy as of 1984 was not to use the Alco-Sensor III test result for substantive evidentiary purposes,

notwithstanding the Department of Health & Welfare 1984 Memorandum. The 1989 and 1992 actions of the Idaho State Patrol in generating memoranda may well be based upon some agency action taken by the Idaho State Patrol, wherein the Idaho State Patrol determined the Alco-Sensor III to be sufficiently reliable to be used for evidentiary purposes. However, the memoranda themselves are insufficient evidence of whatever action might have been taken to constitute an alleged agency approval. An agency needs to develop on the record what action it took to approve testing equipment in order for there to be any judicial review other than a rubber stamp. A memorandum from the agency to itself stating a conclusion is insufficient. Otherwise, the rule of law would become that a test is worthy of agency approval, simply because someone in an agency has at one point in time generated a piece of paper.

The State argues that, under Nickerson, the existence of an approval by the agency is all that is needed. This Court does not disagree, but in Nickerson, the fact of acceptance or approval of the Intoxilyzer 5000 by the agency was not contested. Indeed, the reliability of the Intoxilyzer 5000 test result was not in issue. The claim by the defense in Nickerson was only that, notwithstanding the absence of any challenge to the reliability of the Intoxilyzer 5000, and notwithstanding the undisputed approval by the agency of the Intoxilyzer 5000, the defense would have the State still have to call a witness on reliability, notwithstanding the express provisions of §18-8004(4), Idaho Code. That argument failed. In this case, the reliability of the Alco-Sensor III is in issue, and the manner and method, and even the existence of, statutorily required approval by the Idaho State Patrol of the Alco-Sensor III is disputed. There may be a trend over time towards acceptance of preliminary breath testing devices, including the Alco-Sensor III, in place of laboratory type equipment, such as the Intoximeter 3000 and the Intoxilyzer 5000, to prove alcohol concentration levels at trial. To prove its adoption of that

trend (if any) and its "approval" of the Alco-Sensor III. Idaho State Patrol needs to explain why, when and how it has decided to follow that trend and to approve the Alco-Sensor III. An approval could certainly be established through documentary evidence, in that adoption of a rule, or other agency procedural action formally taken, would presumably be well documented. Here, the Court concludes that the existence of two memoranda is simply insufficient proof of any action taken to constitute the required agency approval.

RULE 702 INDICIA OF RELIABILITY AS GROUNDS FOR ADMITTING TEST RESULT

This Court assumes that the Idaho State Patrol has become more comfortable with the reliability of the Alco-Sensor III test results over the years, and that the Idaho State Patrol now believes that the Alco-Sensor III test results should be relied upon as substantive proof of alcohol concentrations. That approval process is entirely open to the Idaho State Patrol. Perhaps the approval has in fact occurred. Based upon this record, this Court simply cannot say whether that process has or has not been undertaken by the Idaho State Patrol. The 1989 and 1992 memoranda are, at best, even if admissible, self-serving, conclusory and unpersuasive, at least to this Court, given this Court's (admittedly anecdotal) knowledge of the history since 1984 of the use of the Alco-Sensor III test results in the State of Idaho, and the weight of case law from other jurisdictions regarding preliminary breath tests.

Because §18-8004(4), Idaho Code, makes approval by the agency of the testing instrument a threshold grounds for the admitting an alcohol concentration test result, the actual reliability of the Alco-Sensor III is an issue that is not reached in this decision. Under Nickerson, the agency approval of a testing procedure creates a rebuttable presumption of reliability, but this presumption is subject to refutation. Nickerson states that the trial court does have the duty to consider other evidence on the reliability of an approved testing procedure, which language

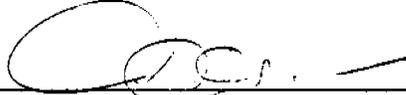
suggests to this Court that an approved, but unreliable, test result could properly be excluded. However, by statute, agency approval is required as a prerequisite, and reliability, without agency approval, would be insufficient to establish the admissibility of a test result. Since this Court has concluded the State has failed to prove what the Idaho State Police did to constitute an approval, even undisputed reliability of an Alco-Sensor III would not be a sufficient basis to admit the test result, and the issue of reliability is therefore not addressed herein.

In essence, this Court holds that the Idaho State Patrol must introduce sufficient proof of the action taken by the agency in deciding to begin to use an Alco-Sensor III test result for evidentiary proof of alcohol concentration levels. This Court concludes the showing on the record in this case is insufficient.

ORDER

Defendant's Motion in Limine seeking to exclude the Alco-Sensor III test result in question from evidence at trial is hereby granted.

DATED this 23 day of November, 2001.



CHARLES W. HOSACK
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 6 day of November, 2001, a true and correct copy of the foregoing Memorandum Decision was mailed in the U.S. Mails, postage prepaid, sent by interoffice mail, or faxed to the following:

fax Kootenai County Prosecuting Attorney
fax Kootenai County Public Defender

DANIEL ENGLISH
CLERK OF THE DISTRICT COURT

By Barbara Duda
Deputy Clerk



MACK W. RICHARDSON, JR.
Director

STATE OF IDAHO
DEPARTMENT OF LAW ENFORCEMENT
BUREAU OF FORENSIC SERVICES



CECIL D. ANDRUS
Governor

July 26, 1989

MEMO TO: Whom It May Concern

FROM: Charles H. Duke, Chief *chd*
Bureau of Forensic Services

SUBJECT: Approval of Direct Breath Testing Instrument for Evidential
Use in Idaho

The Alco-Sensor III is approved for evidential breath alcohol testing
by the Department of Law Enforcement in accordance with Idaho Code
18-8004 (4) and the department rules and regulations.

DS:dkf





RICHARD L. CADE
Director

STATE OF IDAHO

DEPARTMENT OF LAW ENFORCEMENT
BUREAU OF FORENSIC SERVICES



CECIL D. ANDRUS
Governor

March 26, 1992

According to Idaho Code Section 18-8004 (4) and the Department of Law Enforcement Rules & Regulations, the following breath testing instruments are approved for use in the State of Idaho:

- Intoximeter 3000
- Intoxilyzer 5000
- ✓ Alco-Sensor III
- Alco-Sensor IIIA



~~RECEIVED~~ ^{5/16/92}
EXHIBIT NO. 2
IDENTIFICATION/EVIDENCE
CASE NO. CR-00-
DATE: 5/16/92