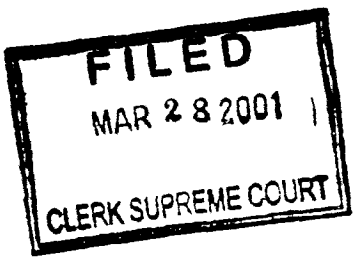
IN THE COURT OF APPEALS OF IOWA

No. 1-088 / 00-0443
Filed March 28, 2001



STATE OF IOWA,
Plaintiff-Appellee,

vs.

DENNIS RONALD MILLER,
Defendant-Appellant.

Appeal from the Iowa District Court for Story County, Thomas R. Hronek, District Associate Judge.

Defendant appeals from his conviction for operating while intoxicated, first offense. **AFFIRMED.**

John G. Martens of Terrill & Martens Law Offices, Ames, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Stephen Holmes, County Attorney, and Mary Howell Sirna, Assistant County Attorney, for appellee.

Considered by Streit, P.J., and Hecht and Vaitheswaran, JJ.

VAITHESWARAN, J.

On appeal of this OWI conviction, we must decide (1) whether a breath alcohol reading taken with a device not expressly approved by the commissioner of public safety is admissible; and (2) whether Miller's test result was accurate and reliable. We answer yes to both questions. Accordingly, we affirm.

I. Background Facts and Proceedings

An Iowa State trooper arrested Dennis Miller for driving while under the influence. After taking a preliminary breath test, Miller consented to an intoxilyzer test. The trooper administered the test using a NPAS DataMaster cdm intoxilyzer ("DataMaster"). The device showed an alcohol concentration of .166.

The State charged Miller with operating a motor vehicle while under the influence, in violation of Iowa Code section 321J.2 (1999). Miller moved to suppress the test result on the ground the commissioner of public safety had not approved the use of the DataMaster. The district court denied the motion. A jury returned a guilty verdict and Miller appealed following imposition of judgment and sentence.

II. Scope of Review

Miller filed a motion in limine and motion to suppress the test result based on claimed constitutional and statutory violations. On appeal, he pursues only the statutory claim, asserting the State failed to establish a sufficient foundation for admission of the test result. Miller challenges the sufficiency of the

foundational evidence presented by the State. Therefore, our review is for abuse of discretion. *State v. Taylor*, 587 N.W.2d 604, 605-6 (Iowa 1998).

III. Foundation for Admission of Chemical Test

A. Approval by State. Miller first contends the test result is inadmissible because the DataMaster was not a device "approved by the commissioner of public safety." *See* Iowa Code §§ 321J.11 and 321J.15.[1]; *State v. Bechtel*, 434 N.W.2d 892, 894 (Iowa Ct. App. 1988). The implementing administrative rule for these code sections outlines the approval requirements:

> A peace officer desiring to perform direct testing of a subject's breath for the purpose of determining the alcohol concentration shall employ, or cause to be used, a breath testing device of a type meeting the minimum performance requirements established by Highway Safety Programs; Standard for Devices to Measure Breath Alcohol, Federal Register/Vol. 49, No. 242 (December 14, 1984), pp. 48854-48855, or by Highway Safety Programs; Model Specifications for Devices to Measure Breath Alcohol, Federal Register, Volume 58, No. 179 (September 17, 1993), pp. 48705-48708.

Iowa Admin. Code r. 661-7.2(1). The rule specifies certain devices as "approved" but notes:

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[1] Iowa Code section 321J.11 states in pertinent part:

[A]ny peace officer, using devices and methods approved by the commissioner of public safety, may take a specimen of a person's breath or urine for the purpose of determining the alcohol concentration, or may take a specimen of a person's urine for the purpose of determining the presence of a controlled substance or other drugs.

Iowa Code section 321J.15 states in pertinent part:

If it is established at trial that an analysis of a breath specimen was performed by a certified operator using a device intended to determine alcohol concentration and methods approved by the commissioner of public safety, no further foundation is necessary for introduction of the evidence.

> [A]ny breath testing device that meets the minimum performance requirements established by the National Highway Traffic Safety Administration, and cited in subrule 7.2(1), is authorized by the commissioner to be employed or to be caused to be used to determine the alcohol concentration . . .

Iowa Admin. Code r. 661-7.2(3). This language unambiguously permits the use of devices not expressly listed in the rule, as long as they satisfy federal criteria. *Bruno v. Iowa Dep't. of Transp.*, 603 N.W.2d 596, 598 (Iowa 1999).

There is no question the DataMaster met federal standards. The State introduced a letter from the National Highway Traffic Safety Commission stating the device had been approved under the federal regulations. In addition, the DataMaster was added to the federal conforming products list several months before Miller's arrest. *See* Model Specifications for Devices to Measure Breath Alcohol, 63 Fed. Reg. 10,066 (February 27, 1998). For these reasons, we conclude the State established that the DataMaster was approved by the commissioner of public safety.

B. Accuracy and Reliability of Test Result. Miller also maintains the test result was not reliable or accurate because department personnel: (1) did not approve the device; (2) were not adequately trained; (3) lacked comprehensive written instructions; (4) misused the device; and (5) did not check the calibration of the device when it was installed, and on a monthly basis thereafter. The State argues these contentions go to the weight rather than the admissibility of the test result. We disagree with the State.

Iowa Code section 321J.15 requires officers to use approved methods for administering the test. Iowa Code § 321J.15; Iowa Admin. Code r. 661-7.2(1)

(requiring officer to "proceed in accordance with the instructions furnished by the division of criminal investigation criminalistics laboratory . . ."). Our court has stated this requirement implicates the "accuracy and reliability of the results." *State v. Geinzer*, 406 N.W.2d 457, 458 (Iowa Ct. App. 1987). Additionally, our court has mandated compliance with this requirement "in order to admit the results of a test into evidence." *State v. Wolfe*, 369 N.W.2d 458, 459 (Iowa Ct. App. 1985). Therefore, we conclude Miller's challenges to the methods used by the officer go to the admissibility of the test result. Accordingly, we will address these challenges.

Miller's first contention is essentially a reiteration of his argument that the device was not approved. We have already considered and rejected this argument.

Miller's second contention is that the trooper was trained by Calvin Rayburn, an employee of the Department of Criminal Investigation who himself did not receive formal training until after Miller's arrest. We are not convinced this fact makes a difference, in light of evidence Rayburn had field tested the device for more than two years before it was certified for use in Iowa and visited the manufacturing site for several days before he trained the trooper.

Miller next contends the trooper lacked comprehensive instructions for operating the DataMaster. However, Rayburn testified he trained officers on "going over the instrument, what the various keys mean, what kind of information is requested before the test is started, some of the things to watch out for." Because it is undisputed the trooper who administered Miller's test had

undergone this training before Miller's arrest, we cannot conclude the absence of a current operator's manual rendered the testing process unreliable.

Miller's fourth contention, that the trooper misused the device, finds some support in the record. The trooper initially testified he ordered Miller to "blow hard" into the device, an instruction Miller maintains may have led to skewed results. However, the record reflects the machine would not have registered the sample had there been an error. Rayburn testified "the only problem in blowing too hard is that it might be possible for saliva to get down into the sample cell indicated by a mouth alcohol reading." If that happened, he testified the machine would shut down and would not give a reading. Additionally, Rayburn examined the printout of the test result and concluded the sample was complete and accurate. He elaborated, "[t]his would be a sample that the person blew long enough and hard enough to activate the instrument and to reach the required breath sample." In light of this testimony, we conclude the trooper's instruction to "blow hard" did not affect the accuracy or reliability of the test result.

Finally, we reject Miller's fifth contention that the process for ensuring the accuracy of the device was inadequate. Rayburn testified states were free to deviate from the manufacturer's recommendations for testing and Iowa in fact had done so. *See* 661 Iowa Admin. Code r. 7.2(1) (stating device to be certified within one year immediately preceding use). Therefore, the fact the DataMaster was not checked as often as the manufacturer recommended did not render the test result unreliable.

We conclude the State established a sufficient foundation for admission of Miller's test result. Accordingly, the district court did not abuse its discretion in admitting the test result. We affirm Miller's judgment and sentence.

AFFIRMED.