

**IN THE COUNTY COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA**

STATE OF FLORIDA,

Case No.: XXXXX-X

v.

Div.: Judge XXXXXX

EA
_____ /

DEFENDANT'S MOTION TO SUPPRESS BREATH TEST

COMES NOW, Defendant, EA, by and through his undersigned counsel and submits Defendant's Motion to Suppress Breath Test and in furtherance thereof states as follows:

BACKGROUND FACTS

On August 14, 2007, Defendant was observed by Officer HE driving eastbound on NE 125th Street. Officer HE alleges that Defendant was traveling at a speed of 54 miles per hour in a 35 mile per hour zone. Officer HE followed Defendant, activated her vehicle emergency equipment and Defendant stopped his vehicle.

Based upon a limited observation of Defendant, Officer HE stated that she believed Defendant was impaired and requested that Defendant perform certain roadside sobriety exercises. Defendant complied with Officer HE's request and was subsequently arrested for driving under the influence.

Defendant was transported to the North Miami Police Department and Officer HE requested that Defendant take a breath alcohol test. Again, Defendant complied with Officer HE's request. Officer HE then proceeded to administer five (5) separate tests to Defendant which produced results ranging from .155 to .178. In addition to the range of the tests being greater than .2, all of the tests are invalid as the machine failed its own internal calibration test on two separate occasions within four (4) minutes.

The basis for Defendant's Motion to Suppress is that the breath test results were taken in violation of Florida Administrative Code Section 11D and, due to the fact that the Intoxilyzer machine was clearly malfunctioning, the evidence lacks probative value and is unfairly prejudicial.

ARGUMENT

Florida Administrative Code Section 11D-8.007 regulates the operational procedures for evidentiary breath test instruments. The operational procedures were not followed by Officer HE. Furthermore, documents obtained from the FDLE breath test operator course and agency inspector operator course conclusively show that proper procedure was not followed when the Intoxilyzer failed its own calibration test on two separate occasions. Additionally, after discussion with a state certified agency inspector, the undersigned has obtained information that a department is required to remove a breath test instrument from evidentiary use when the machine shows a control "out of range" on two sequential readings.

Defendant was administered a breath test on an Intoxilyzer 8000. Subsequent to the 20 minutes observation period, the first sample was taken at 5:44am. The first sample registered as "volume not met" meaning that there was not a sufficient sample of air in order to register a valid test. A second sample was taken at 5:47am which registered a .155. A third sample was taken at 5:51am which registered a .177. After the breath tests were complete, the machine conducts two internal calibration checks in order to insure accuracy. The first is an "air blank" test which consists of the machine conducting a test on air with no alcohol in the sample. This test appropriately read .000. The second test is labeled "control test." The control test consists of a dry gas test which, pursuant to the operational testing procedures for the Intoxilyzer 8000, must read between .075 and .085. A copy of the operational procedures is attached and made a part

hereof as Exhibit "A." The control test for Defendant read .073. As such, the Intoxilyzer reported that the test was "outside of tolerance" and the test was invalidated. A copy of the first breath test affidavit is attached and made a part hereof as Exhibit "B."

A second test was initiated at 5:56am. However, the test had to be aborted as the initial "control test" prior to the taking of the breath sample registered a .074 which, again, is outside of tolerance. A copy of the second breath test affidavit is attached and made a part hereof as Exhibit "C."

Pursuant to the FDLE Breath Test Operator Course, a second control outside tolerance reading requires the operator to contact the agency inspector. A copy of the relevant section of the Breath Test Operator Course is attached and made a part hereof as Exhibit "D." Pursuant to the FDLE Agency Inspector Course, the agency inspector is required to contact the FDLE Department Inspector for further instructions. A copy of the relevant section of the Agency Inspector Report is attached and made a part hereof as Exhibit "E." Furthermore, based upon information provided by a certified agency inspector, the machine is required to be removed from evidentiary service until such time as an agency inspection can be performed on the machine. *See Florida Administrative Code Rule 11D-8.006.*

Officer HE failed to follow any of the above procedures and began a third test merely four (4) minutes after the second test was aborted. In the third test, Defendant provided two samples registering .178 and .160 respectively. It is important for the Court to note, that the agency inspection required by 11D-8.006 is not present in the FDLE Public Records regarding breath test instruments. Furthermore, the North Miami Police Department continues to have problems with the machine as it has never been removed from evidentiary service and continues to malfunction. A copy of a breath test aborted on October 5, 2007 is attached and made a part

hereof as Exhibit “F.”

CONCLUSION

The purpose of the rules regarding the administration of evidentiary breath test instruments and the operating procedures for said instruments is to insure the instrument’s scientific accuracy. In the matter at hand, the procedures for a machine malfunction regarding the calibration of the machine, were not even remotely followed. The machine was required to be removed from evidentiary service after the second “outside of tolerance” reading. Due to the procedures not being followed, the scientific accuracy of the instrument cannot be assured and the subsequent results are invalid as a matter of law. Furthermore, the results of the test are misleading, confusing, lack probative value and are unfairly prejudicial as the defense would bear the burden of proving that the machine was inaccurate.

WHEREFORE, Defendant, EA, respectfully requests this honorable court grant Defendant’s Motion to Suppress Breath Test and for such other and further relief as this court may deem just and proper.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was delivered via hand deliver to the Office of the State Attorney this XX day of November, 20XX.

Respectfully submitted,

Daniel Rosenberg, Esq.
Michael A. Dye, Esq.