

Death Blow? Ruling rejects Ohio's newest Breath Testing Device - Again.

Verdict - the defense *proved* the Intoxilyzer 8000 results "are not scientifically reliable" a judge recently ruled in [State of Ohio v Chelsea Lancaster](#).¹

Defense lawyers believe this will be a landmark case setting a precedent that will be followed statewide in challenges to Ohio DUI chemical tests now and in the future, in part because it advances a new interpretation of *State v Vega*,² an old case prosecutors have relied heavily on in trying to stymie such challenges.

In a lengthy, multi-day hearing, held over several months and featuring six (6) experts, the Intoxilyzer 8000 breath testing device itself was put on trial. In support of the Intoxilyzer 8000 the State of Ohio put on its top experts including; the head engineer for the breath machine manufacturer, a highly respected toxicologist and the head of the Ohio alcohol testing program. And yet, in a recently released ruling the Intoxilyzer 8000 was the big loser.

The Intoxilyzer 8000 results "are not scientifically reliable,"³ ruled Judge Teresa Liston who heard several cases, combined for purposes of challenging the device, at the request of Marietta Municipal Court Judge Janet Dyar Welch. Lawyers believe the decision will carry a lot of weight because Judge Liston, assigned to hear only these cases, was able to devote extensive time to the case and allowed each side an ample opportunity to present its case. Additionally, Liston, a retired judge currently on the faculty of the National and Ohio Judicial Colleges and Capital University Law School, is well known and highly respected by her colleagues throughout the state.⁴

The Defense Attacks the I-8000

The defense lawyers leading the attack were, OACDL Immediate Past President, [D. Timothy "Tim" Huey](#) and OACDL member [Shawn Dominy](#), were not surprised; they had experts of their own. The defense presented the testimony of three of the top experts in the nation: Dr. Alfred Staubus a forensic toxicologist who owns and does experiments with Intoxilyzer 8000 devices, Professor Thomas Workman a former Electrical Engineer and computer specialist who teaches law school classes on science and the law and Dr. Michael Hlastala a world renowned pulmonary expert who testified about inaccurate assumptions the Intoxilyzer 8000 devices make about alcohol in the lungs and breath.⁵

Documented Problems with the Machine

The defense experts documented numerous problems with the results from the Intoxilyzer 8000 devices and may have had a leg up as Huey has successfully cross-examined each of the state's experts before. This case involved many witness and dozens of notebooks full of exhibits. Huey and Dominy took turns taking on the state's experts and in presenting the defense experts. Dominy said the defense documented many problems with the machine and raised questions about the manner in which the manufacturer and the state of Ohio were trying to hide the problems. He said the evidence established that there were, among other things, problems with radio frequency interference (RFI) affecting the tests; a design flaw that invites officer manipulation and/or defeats the purpose of requiring two tests to

agree with a set range and; the devices inability to adequately ensure that alcohol from the mouth, esophagus and other non-lung sources or other substances in the blood / breath won't be read as alcohol. These were deficiencies ⁶

Huey and Dominy both felt that that the manufacturer was hiding even more significant problems. The evidence showed that the software that controls the devices can be changed remotely by the manufacturer – and has been several times since he devices were approve for use in Ohio. The manufacturer has refused to provide the “source code” to Professor Workman and the State has refused to allow him access to the database Ohio maintains, which contains information not disclosed to lawyers for Ohioians accused by the machines of being guilty of DUI.

Biggest Blow to the Intoxilyzer 8000 Yet

Huey says this is the biggest victory yet and believes this case is bound for the Ohio Supreme Court because even though the state was relieved of the burden of showing that the devices are reliable *the defense still prevailed*.

In the previous successful I-8000 “reliability” challenges trial courts have put the burden on the prosecution to show the device is reliable. In those cases the prosecution generally failed to meet this burden and often refused to try; opting, instead, to appeal the trial court rulings. Generally, the two Ohio appellate panels that have heard these appeals have tended to hold that there is a “presumption of reliability” when the state chooses a breath test device.⁷ However, these appellate decisions have ruled that trial courts can still act as “scientific gatekeepers” but held the burden should be placed the defense to establish that a particular device is unreliable.

Presumption of Reliability Blown Away

In the *Lancaster*, mindful of the appellate cases, Judge Liston did, indeed, put the burden on the defense to show the results produced by the Intoxilyzer 8000 devices used on Ms. Lancaster and the other defendants were not reliable. Huey and Dominy, members of the Ohio Association of Criminal Defense Lawyers (OACDL) DUI Committee, had been looking forward to being involved another case challenging the Intoxilyzer 8000⁸ and accepted this challenge. “We knew it would be a lot of work but we thought we could meet the burden the court placed on the defense” Huey said. Ultimately Huey and Dominy were invited to join attorneys Ray Smith and Shawna Landaker, of the Ohio Public Defenders Office, in defending Ms. Lancaster and the other defendants against the results produced by the I-8000 machines. Marietta attorney Dennis Sipe, who was counsel in several other joined cases, rounded out the defense team.

Ultimately Huey, Dominy, Smith, Landaker and Sipe prevailed and, indeed, made history. The ruling in *State v Lancaster* represents the first time an Ohio court has held that the defense has *proven* that a breath testing device is unreliable. The defense lawyers all expect the prosecution to appeal the ruling.

Bound for the Supreme Court?

Even when, as in the appellate cases discussed above, courts have shifted burden of establishing lack of reliability onto the defense prosecutors have still complained; they assert that under, *State v Vega*,⁹ trial courts **cannot** act as “gatekeepers” in DUI cases. Indeed, in written arguments in *Lancaster* the prosecution asserted that allowing defendants to attack the reliability to the I-8000 would bring Ohio DUI prosecutions “to a screeching halt” resulting in dismissals of what would have been “slam dunk” convictions.¹⁰

A good portion of Judge Liston’s opinion deals with this issue and concludes that the “traditional view” of *Vega* is at odds with the actual decision. For this reason Liston says courts have had trouble applying *Vega* logically and consistently and have had similar difficulty squaring it with cases rendered by the Ohio and US Supreme Courts, such as the landmark case of *Daubert v Merrill Dow*, which hold that courts *must* act as “gatekeepers.” Ultimately, in *Lancaster*, Judge Liston adopted a much more limited interpretation of *Vega*, which, not coincidentally, is very much in line with the recent holdings in the Intoxilyzer 8000 cases decided by the Ohio Eleventh Appellate District -where almost all the I-8000 appellate litigation has occurred.

Judge Liston pointedly observed that “the essential role of the judiciary is not to facilitate ‘slam dunk’ prosecutions” but is to “see that substantial justice is done.”¹¹ It remains to be seen if the higher courts will side lean toward “substantial justice” or “slam dunk convictions.” Ohio citizens who could find themselves accused and falsely convicted by unreliable machines must hope that substantial justice prevails.

¹ *State v Lancaster Marietta Ohio Municipal Court Case No. 12 TRC 1615* and cases combined therewith decision filed August 14, 2013.

² *State v Vega*, 12 Ohio St. 3d 185, 465 N.E.2d 1303 (1984).

³ See *Lancaster* decision page 19.

⁴ See Judge Liston’s listing at http://www.justiceinstitute.net/who_we_are.html

⁵ See decision for further discussion of the experts and their testimony.

⁶ See *Lancaster* decision pages 15-19.

⁷ Ohio appellate courts in the Fourth and Eleventh Districts are the only appellate courts to have addressed challenges to the scientific reliability of these machines.

⁸ The OACDL DUI Committee, led by Huey and fellow member Jon Saia had been involved in an earlier Intoxilyzer 8000 challenge that made headlines throughout the state and led to many agencies discontinuing the use of the Intoxilyzer 8000. See media re *State v Gerome*, (Athens Municipal Court case No. 2011TRC01909, i.e. <http://www.dispatch.com/content/stories/local/2011/07/01/new-breath-tester-under-siege.html>

⁹ *State v Vega*, 12 Ohio St. 3d 185, 465 N.E.2d 1303 (1984).

¹⁰ See *Lancaster* decision page 19.

¹¹ See *Lancaster* decision page 13.

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