

IN THE COUNTY COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA

STATE OF FLORIDA,	:	
	:	
Plaintiff	:	
	:	
Vs.	:	CASE NO.
	:	
CHERYL A. BEATON,	:	2008 CT 013858 SC
VINCENT J. VALLE	:	2008 CT 011584 SC
JOHN KOVAL	:	2008 CT 011579 SC
JON C. NYDAM	:	2008 MM 010892 SC
LARRY B. FARZATI	:	2008 CT 011827 SC
BENJAMIN PALMITER,	:	2008 CT 010120 SC
CARL HELLER	:	2008 CT 013032 SC
	:	
Defendants.	:	

ORDER SUPPRESSING BREATH TEST RESULTS

THIS CAUSE having come before the Court on the Defendants' Motion to Suppress Breath Test, after hearing sworn testimony and argument from the State and the Defense, finds as follows:

Each of the above-named defendants was arrested for DUI and submitted to a breath test on Intoxilyzer 8000, No. 80-001346. Before any of the Defendants' breath tests were conducted, this Intoxilyzer developed a problem with its dry gas regulator. Deputy Butler testified that the Intoxilyzer was removed from the mobile testing unit (BAT mobile) and brought to South County Jail to "have it fixed". FDLE and CMI (the

Intoxilyzer manufacturer) were contacted. CMI sent a replacement dry gas regulator, which was installed by FDLE inspector, George Venturi on March 5, 2008. Mr. Venturi instructed Deputy Butler to conduct an agency inspection prior to returning the Intoxilyzer to evidentiary use. After the dry gas regulator was replaced, FDLE did not conduct a Department inspection prior to the time of any of the Defendants' breath test.

The Defendants' filed a Motion to Suppress asserting that Rule 11D-8.004 requires a Department inspection following a repair of an Intoxilyzer machine, before the machine can be returned to evidentiary service. The Defendants' argued that since no department inspection was conducted from the time of this repair until the defendant submitted to a breath test on the machine, the breath tests were obtained in violation of the Implied Consent Statute and Chapter 11D-8 of the Florida Administrative Code. The State asserts that the replacement of the dry gas regulator is merely routine maintenance, not a repair, and as such a department inspection is not required.

Rule 11D-8.004(2) provides in part "Any evidentiary breath test instrument returned from an authorized repair facility shall be inspected by the Department prior to being placed in evidentiary use." Rule 11D-8.002(13) provides: "Authorized Repair Facility – the Department, the

breath test instrument manufacturer, an entity authorized by the breath test instrument manufacturer to service and repair such breath test instrument.” The new dry gas regulator was installed by FDLE, who by rule is considered an authorized repair facility.

The State presented the testimony of Laura Barfield, program director for the FDLE Alcohol Testing Program. Ms. Barfield testified that the dry gas regulator is not necessary for the operation of the Intoxilyzer 8000. On cross-examination, Ms. Barfield conceded that the dry gas regulator is an integral part of the version of the Intoxilyzer 8000 used in Florida. The dry gas regulator is necessary for the control tests that are conducted before and after the administration of all breath tests, and without a dry gas regulator, the Florida version of the Intoxilyzer 8000 will not work. Ms. Barfield also testified that the dry gas regulator is not purchased separately from the Intoxilyzer 8000.

The dry gas regulator is an integral part of the Intoxilyzer 8000 used in the State of Florida. The configuration of the Intoxilyzer 8000 approved for use in this State requires a dry gas regulator. The replacement of the dry gas regulator is more than routine maintenance. “To the extent that chapter 11D-8 requires maintenance of the Intoxilyzer, it is prescribed by rule 11D-8.002(5) and it is performed during the agency inspection.” *Dept. of*

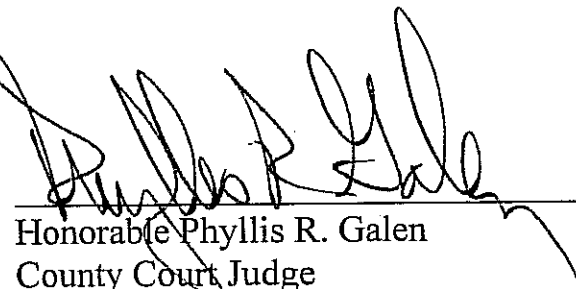
Highway Safety and Motor Vehicles v. Falcone, 983 So.2d 755 (Fla. 2d DCA 2008). The procedures for Agency inspection are contained in FDLE/ATP Form 39; these procedures do not provide for the replacement of the dry gas regulator. Deputy Butler, the agency inspector, and Ms. Barfield both testified that Deputy Butler was not qualified to replace the dry gas regulator.

Ms. Barfield testified that the replacement of the dry gas regulator is not a “repair”, thus there is no requirement for a Department inspection. Chapter 11D-8 does not define what constitutes a “repair.” The Court is aware that great deference is due an agency’s interpretation of its own rules. However, that deference is not absolute. When an agency’s construction of its rules is clearly erroneous or unreasonable it cannot stand. *Osorio v. Board of Surveyors*, 898 So.2d 188 (Fla. 5th DCA 2005). This Court finds that Ms. Barfield’s interpretation of 11D-8, that the replacement of an integral part of the Intoxilyzer 8000 (the dry gas regulator) is not a repair, to be unreasonable. The replacement of the dry gas regulator constitutes a repair that requires a Department inspection. The breath tests administered to the Defendants were not in substantial compliance with Chapter 11D-8.

The breath tests in these cases are inadmissible under Implied Contest. By stipulation of the parties, the Court did not entertain evidence at the

initial hearing as to whether the State could prove any of these defendants voluntarily consented to the breath test if the Court found consent was not implied. If the State wishes to present evidence that any of these Defendants voluntarily consented to a breath test, the State shall notice this Motion for hearing within 30 days of this order.

DONE AND ORDERED in chambers in Sarasota County, Florida,
this 28th day of October, 2008.



Honorable Phyllis R. Galen
County Court Judge

cc: Robert N. Harrison, Esquire
Kerry Mack, Esquire
Ryan Gambert, Assistant State Attorney