IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO,	CASE NO.: 2019 CR 02193
Plaintiff,	JUDGE STEVEN K. DANKOF
-vs-	
ABBY MARIE MICHAELS,	**DECISION, ENTRY AND ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS**
Defendant.	

This matter is before the Court on Defendant Abby Michaels' ("Ms. Michaels") February 18, 2020 Motion to Suppress ("Motion"). The Court held evidentiary hearings on: April 30, 2020, June 5, 2020 and January 7, 2021 ("the Hearings") and, on February 5, 2021, the parties filed simultaneous briefs in support of their respective positions.

For the following reasons, the Court **GRANTS** Ms. Michaels' Motion.

I. FACTS

The Court expressly makes the following findings of fact[1]:

Around 8 p.m. on St. Patrick's Day, March 17, 2019, Ms. Michaels, driving a 2015 Kia Forte, traveled the wrong way (heading north in the south bound lanes) on Interstate I 75, causing a head-on collision with

[1] Based on the following evidence presented at the Hearings including the testimony of Moraine Police Officer Steven Harrison ("Ofc. Harrison"), Miami Valley Hospital Registered Nurse Alisha Marlene Hamrich ("Nurse Hamrich"), City of Moraine Sergeant Andrew Parish (Sgt. Parish"), City of Moraine Firefighter Paramedic Derek Montgomery ("EMT Montgomery"), Ohio State Highway Patrol Crime Lab Forensic Toxicologist Eric Fashano-Soltis ("Mr. Fashano-Soltis"), Doctor Robert John Belloto, R.Ph., Ph.D., M.S. ("Dr. Belloto"),and the following Exhibits: State's Exhibit 1 – Affidavit for Blood Draw; State's Exhibit 2 – Search Warrant for 2015 Kia Forte ***issued 2 days after the accident*** on March 19, 2019; State's Exhibit 3 – Photograph of 2 tubes of blood; State's Exhibit 4 – Photograph of 2 tubes of blood; State's Exhibit 5 – four (4) photographs (including 3 photographs of plastic handled Fireball Whisky bucket discussed more fully below), State's Exhibit 6 – Ohio Department of Health Certificate for Mr. Fashano-Soltis Alcohol and Drug Testing Certification expiring February 13, 2020; State's Exhibit 7 - Ohio Department of Health Certificate for Mr. Fashano-Soltis Alcohol and Drug Testing Certification expiring February 13, 2021; State's Exhibit 8 – Ohio State Highway Patrol Crime Lab Certificate of Accreditation; State's Exhibit 9 - Ohio State Highway Patrol Crime Lab Certificate for Forensic Testing; State's Exhibit 10 - Ohio State Highway Patrol Crime Lab Property (blood) Submission; State's Exhibit 11 – Chain of Custody Report for 2 Sealed Blood Tubes; State's Exhibit 12 – Bureau of Motor Vehicles (BMV) 2255 Form and Defendant's Exhibit A - Traffic Crash Witness Statement of Amanda Dietz; Defendant's Exhibit B - Curriculum Vitae of Dr. Belloto; Defendant's Exhibit C - Dr. Belloto Summary of Data and Defendant's Exhibit 4 – Qualitative Analysis Tables, generated either by Mr. Fashano-Soltis and/or the Ohio State Patrol. In any event, Defendant's Exhibit 4 was NOT generated by Dr. Belloto.

The Court ***expressly finds Dr. Belloto CREDIBLE in every material respect*** and that ***Mr. Fashano-Soltis IS NOT CREDIBLE*** on the issues of fermentation and the resulting unreliability of his opinions and report on Ms. Michaels' blood alcohol levels. ***The Court expressly finds Nurse Hamrich, EMT Montgomery and Sgt. Parish credible in every material respect***.

The Court expressly finds NONE of Ofc. Harrison's testimony credible, based upon the inherent inconsistences in that testimony, and his admissions under cross examination as to falsehoods and inaccuracies in his affidavit for warrant for Ms. Michaels' blood draw. Additionally, Ofc. Harrison's admitted resignation from the Moraine Police Department under allegations of the falsification and destruction of evidence most certainly supports the Court's finding in this respect but was not necessary for the Court to reach its conclusion that Ofc. Harrison was not credible in any material respect.

another car[2] occupied by three people and killing all three: Timmy and Karen Thompson and their minor child, T.T.

EMT Montgomery and Ofc. Harrison, among others, immediately dispatched to the scene where Ms. Michaels was laying on the ground ***outside of her car***, unconscious and not breathing. EMT Montgomery immediately began life-saving measures on Ms. Michaels, including forcing a tube through her nasal cavity to assist her breathing, whereupon a mix of vomit and foam came up through the tube which EMT Montgomery testified smelled of ethanol ***but expressly testified did NOT smell of beer.*** No one assisted EMT Montgomery,[3] and he alone smelled the odor of ethanol coming from the mix of vomit and foam.[4] As a matter of fact, the Court finds expressly, based upon EMT Montgomery's admissions during the Hearing, that his detection of the odor of ethanol from the nasal tube was in no way quantitative, and he could not opine when Ms. Michaels had ingested ethanol nor in what amount. Ultimately, EMT Montgomery performed a tracheotomy on Ms. Michaels and successfully obtained an open airway for her before Miami Valley Hospital's Care Flight arrived.

Ofc. Harrison testified that, when he arrived on scene, he needed to identify all of the crash victims including information on their next of kin and any medical issues, and thus he, ***without*** benefit of a warrant, looked in Ms. Michaels' vehicle and found her purse[5] on the front passenger floorboard. As confirmed by this Court's careful review of State's Exhibit 5 (the photographs of the Fireball Whisky bucket), and ***as a matter of fact***, the plastic handled bucket was empty, ***and contained no liquid whatsoever, much less a dry, brownish substance stuck to its bottom.***[6]

At some point, Ofc. Matt Berry[7] told Ofc. Harrison they had been ordered to obtain a warrant for Ms. Michaels' blood and to go to the hospital to read her the BMV 2255 form. Upon arriving at the Hospital around 9:49 p.m., Ofc. Harrison read the BMV 2255 form to Ms. Michaels ***even though she remained unconscious***.

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[2] A Toyota Camry.

[3] As he clearly and credibly testified on cross-examination at the motion to suppress hearing, ***thereby expressly contradicting Ofc. Harrison's testimony*** that he, Harrison, was in close proximity to Ms. Michaels while EMT Montgomery ministered to her. In short, the Court ***expressly finds*** that Ofc. Harrison's testimony and/or statements contained in any source that he, Harrison, was in Ms. Michaels' proximity and *somehow* smelled any aroma about her person are flatly untrue.

[4] The Court ***expressly finds*** that EMT Montgomery never told Ofc. Harrison that EMT Montgomery had smelled ethanol from the nasal tube.

[5] From which he removed her driver's license and the Fireball Whisky bucket discussed more fully below.

[6] Further underscoring Ofc. Harrison's incredible and flatly untrue Hearing testimony concerning a brownish substance that conveniently smelled of cinnamon, or his sworn affidavit statement during the Hearings and/or his Affidavit for the blood draw warrant.

[7] Ofc. Harrison's training Officer and superior at the time.

Thereafter, Ofcs. Harrison and Berry returned to the Moraine P.D. where Ofc. Harrison completed his affidavit[8] for a search warrant for Ms. Michaels' blood draw. In the affidavit's "probable cause" section, Ofc. Harrison typed: "vehicle was driving NB on SB I-75, causing a head on collision. [Ms. Michaels] had a strong odor of an alcoholic beverage coming from her person and was unconscious being treated by Moraine Medics."[9] Regarding Ms. Michaels' appearance and manner, Ofc. Harrison typed: "was ***aspirating beer, as observed by affiant and Moraine Medics***[10] on scene."[11] Regarding the "other information" section of the Affidavit, Ofc. Harrison typed "inside of her vehicle was a Fireball Whiskey brand ***cup with an unknown liquid***."[12]

Ultimately, based on the information contained in Ofc. Harrison's affidavit, Judge Long of the Kettering Municipal Court signed the warrant for Ms. Michaels' blood at 10:45 p.m. and e-mailed it back to Ofc. Harrison.

Now armed with the warrant, Ofcs. Harrison and Berry returned to Miami Valley Hospital and served it on the still unconscious Ms. Michaels and showed it to her ICU Primary Care Nurse Hamrich who then completed the blood draw at **12:50 a.m.**, ***NEARLY FIVE (5) HOURS AFTER THE ACCIDENT.***

This blood draw was Nurse Hamrich's very first OVI blood draw, and to complete it, Nurse Hamrich used an OVI kit which she got from *somewhere*, but the Court has no testimony before it as to from whence or whom the OVI kit came. It is crystal clear, however, that 1) instead of ***percutaneously*** drawing Ms. Michaels' blood, Nurse Hamrich used the Kit's iodine swab to clean the hub of the central line earlier placed in Ms. Michaels' arm, using a needle and 2 tubes (not prepackaged vacutainers[13] as are contained in OVI kits) ***from the Hospital's stock*** to draw Ms. Michaels' blood[14] after flushing the indwelling line with saline solution, 2)

[8] State's Exhibit 1.
[9] The Court ***expressly finds as a matter of fact*** that Ofc. Harrison's affidavit statement of a strong odor of an alcoholic beverage about Ms. Michaels' person flatly untrue. Why? Because Ofc. Harrison was never in Ms. Michaels' proximity, per EMT Montgomery, for Ofc. Harrison to make that observation and EMT Montgomery never told Ofc. Harrison that Ms. Michaels had a strong odor of an "alcoholic beverage" about her person; indeed, Ofc. Harrison never wrote such a claim in his police report, as he admitted. Again, EMT Montgomery testified credibly that he was alone in Ms. Michaels' proximity as he treated her on scene.
[10] As noted earlier, EMT Montgomery expressly and credibly denied Ms. Michaels aspirated beer, thus belying Ofc. Harrison's affidavit in this regard.
[11] As noted earlier, the Court expressly finds this statement by Ofc. Harrison flatly untrue – Ms. Michaels wasn't aspirating beer and neither Ofc. Harrison nor Moraine Medics observed her doing so.
[12] The Court expressly finds this statement was flatly untrue as admitted by Ofc. Harrison on cross examination: because the container was not a cup, but rather a bucket, not typically a drinking utensil, and contained no liquid of any kind.
[13] A vacutainer is a blood collection devise, such as a tube or vial, with indwelling needles already installed.
[14] The Court expressly finds, from Nurse Hamrich's entirely credible testimony, that the OVI kit's vacutainers, which would have contained the requisite solid anticoagulant, ***were not used in this case***.

Nurse Hamrich was unable to testify that an alcohol swab hadn't been used on Ms. Michaels' skin for placement of the central line[15], and 3) Nurse Hamrich failed to discard or expel the first 10 ml. of blood she drew before filling the blood vials.[16] Nurse Hamrich testified that, ***IF*** the hospital tubes "either had a powder or liquid substance"[17] in the bottom of them, she necessarily mixed the blood in the hospital's tubes to be sure that ***"if"*** there was preservative or anticoagulant in the tubes, the same was mixed with Ms. Michaels' blood. But Nurse Hamrich never testified that the two hospital stock tubes/vials she used did in fact contain a solid anticoagulant as required by Admin. Code 3701-53-05(C). In any event, after the blood draw, Nurse Hamrich sealed the vials which were marked and the OVI kit paperwork was completed.

Thereafter, Ofc. Harrison left the Hospital and returned to MPD but***, rather than placing Ms. Michaels' sealed OVI kit containing her blood samples in an evidence room refrigerator,*** Ofc. Harrison, at approximately 1:15 a.m., put Ms. Michaels' OVI kit in the outgoing mail to await USPS pick up later that morning between the hours of 0900-1000. In short, Ms. Michaels' blood samples ***were never refrigerated*** by Ofc. Harrison or MPD from the time they were drawn,[18] but rather languished at room temperature until pick up by USPS later that morning – ***at least 8 hours from the time of the draw- construing the evidence most favorably to the State***.

Indeed, on March 19, 2019 at 11:22 a.m., ***NEARLY THIRTY FIVE (35) HOURS after they were drawn by Nurse Hamrich***, Ms. Michaels' blood samples arrived by USPS at the Ohio State Highway Patrol (OSHP) Crime Lab in London, Ohio for testing where, finally, they were logged into BCI and ***refrigerated for the very first time***[19] until testing by Mr. Fashano-Soltis on March 25, 2019 – ***8 days after the accident***.

Mr. Fashano-Soltis testified that Ms. Michaels' blood alcohol level was 0.099 grams by weight of alcohol per 100 milliliters of whole blood plus or minus the 0.006 variable. The Court expressly finds this testimony utterly incredible and unworthy of belief, and finds Ms. Michaels' blood alcohol levels reported by Mr. Fashano-Soltis to be inaccurately and artificially elevated.

[15] Had this been done, the alcohol swab could have tainted Ms. Michaels' blood samples.
[16] This is important because Dr. Belloto testified credibly her failure to do so necessarily and inaccurately elevated Ms. Michaels' blood alcohol levels reported by Mr. Fashano-Soltis.
[17] Nurse Hamrich couldn't be sure.
[18] As we shall see, those samples were not refrigerated until their delivery ***nearly 35 hours after they were drawn*** upon arrival at BCI in London, Ohio.
[19] The Court does not have the time the blood samples were placed into the OSHP refrigerator; however, it was presumably somewhere close in time to 11:22 a.m. on March 19, 2019.

Why?

Because Ms. Michaels' forensic expert, Dr. Belloto, reviewed Mr. Fashano-Soltis' analysis and report, and Dr. Belloto opined entirely credibly that the same were utterly unreliable and fatally flawed because Dr. Bellotto found ***definitive evidence of fermentation***[20] which ***necessarily elevated*** Ms. Michaels' blood alcohol levels, thereby making them unreliable. Dr. Belloto also attributed the inaccurate and artificially elevated and unreliable blood alcohol levels found by Mr. Fashano-Soltis to 1) the blood not being drawn percutaneously but rather through the indwelling central line, and 2) Nurse Hamrich's failure to discard/flush the first 10 milliliters of blood drawn before filling the two vials.[21] Specific to the fermentation of Ms. Michaels' unrefrigerated blood samples, Dr. Belloto testified entirely credibly that Ms. Michaels' blood results showed affirmative evidence of fermentation based upon the presence of Acetone, Isopropyl and Acidelihyde, all byproducts of fermentation present in Ms. Michaels' blood as shown in Mr. Fashano-Soltis' reports.

Ms. Michaels was indicted on July 18, 2019, and this Motion followed in which she urges her blood alcohol results should be suppressed because: 1) application of *Franks* to Ofc. Harrison's demonstrably false Affidavit necessarily results in the conclusion that Judge Long granted the blood draw warrant in the absence of probable cause; 2) the State's serial abject failures of substantial compliance with Admin. Code 3701-53-05; and 3) Mr. Fashano-Soltis' blood alcohol results are so unreliable that they must be excluded if she is to have actual, authentic, real due process at trial of this matter based upon the application of Ohio Evid.R. 403 and *Daubert*.

Indeed.

` II. LAW AND ANALYSIS

Ms. Michaels is charged with 3 counts of Aggravated Vehicular Homicide in violation of R.C. 2903.06(A)(1), 3 counts of Aggravated Vehicular Homicide in violation of R.C. 2903.06(A)(2)(a), and OVI in violation of R.C. 4911.19(A)(1)(a) and (G)(1)(a) together with 6 counts of Murder. In a prosecution for a violation of R.C. 4511.19(A)(1)(a) or an equivalent vehicle-related offense, R.C. 4511.19(D)(1)(a) provides

[20] Owing to 35 hours of un-refrigeration. Indeed, the entire purpose of refrigeration is to prevent and/or retard fermentation because fermentation elevates blood alcohol test results to the point of unreliability.
[21] Which if not done, falsely elevates the results.

that "the result of any test of any blood or urine withdrawn and analyzed at any health care provider * * * may be admitted with expert testimony".

In a prosecution for a violation of R.C. 4511.19(A) or (B) or an equivalent vehicle-related offense, R.C. 4511.19(D)(1)(b) provides that "the court may admit evidence on the concentration of alcohol [or] drugs * * * in the defendant's [bodily substance] at the time of the alleged violation as shown by chemical analysis of the substance ***withdrawn within three hours*** of the time of the alleged violation." R.C. 4511.19(D)(1)(b) further provides that if the chemical analysis is performed on a blood sample, the sample must be withdrawn by certain individuals, including a phlebotomist, and "analyzed in accordance with the methods approved by the director of health by an individual possessing a valid permit issued by the director pursuant to R.C. 3701.143 of the Revised Code."

Pursuant to R.C. 3701.143, the Ohio Director of Health has promulgated regulations governing the collection, handling, and analysis of bodily substances, which are set forth in Ohio Adm. Code 3701-53-01 *et seq*.[22] Of relevance here, Ohio Adm. Code 3701-53-05, governing the collection and handling of blood samples, requires as follows:

> (A) All samples shall be collected in accordance with section 4511.19, or section 1547.11 of the Revised Code, as applicable.
>
> (B) When collecting a blood sample, an aqueous solution of a non-volatile antiseptic shall be ***used on the skin***. No alcohols shall be used as a skin antiseptic.
>
> (C) Blood shall be drawn with a sterile dry needle into a vacuum container with ***a solid anticoagulant,*** or according to the laboratory protocol as written in the laboratory procedure manual based on the type of specimen being tested.
>
> (F) ***While not in transit*** or under examination, all blood…***specimens shall be refrigerated***.[23]

"Generally, the exclusionary rule is reserved for constitutional violations. * * * But, in the context of R.C. 4511.19, the rule has been applied to chemical test results 'illegally obtained'—those obtained without compliance with Department of Health testing regulations or in violation of statutory mandates requiring suppression."[24] In order to exclude test results, a defendant "must first challenge the validity of the [chemical] test by way of a pretrial motion to suppress evidence * * *. The ***state then has the burden*** to show that it

[22] *State v. Owens*, 6th Dist. No. L-15-1215, 2016-Ohio-3092, ¶ 16; *State v. Waldock*, 2015-Ohio-1079, 33 N.E.3d 505, ¶ 51 (3d Dist.).
[23] Emphasis added.
[24] *State v. Vasquez*, 1st Dist. Hamilton Nos. C-160784-C-160787, 2017-Ohio-7255, ¶ 18.

substantially complied with regulations prescribed by the director of health in the Ohio Administrative Code."[25] "The substantial compliance standard is limited 'to excusing only errors that are clearly *de minimis*,' which include irregularities amounting to '*minor procedural deviations*.'"[26] When more than '*de minimis'* procedural deviations occur, ***substantial compliance is not shown and suppression is warranted***.[27]

The purpose of substantial compliance with the Ohio Department of Health regulations is "to ensure the accuracy of bodily substance test results."[28]

No kidding.

Unless providing actual, authentic, real due process of law to defendants is no longer required by the Ohio and United States Constitutions…

A. **WARRANTLESS SEARCH OF MS. MICHAELS' CAR**

Ms. Michaels argues the March 17, 2019 warrantless search of her vehicle immediately following the accident was unconstitutional, and thus any evidence discovered in her vehicle by Ofc. Harrison (i.e., the plastic handled "Fireball Whisky" logo bucket) was unlawfully obtained and must be suppressed and mention of it should be stricken from the affidavit.

The Court agrees.

Both the Fourteenth Amendment to the United States Constitution and Article I, Section 14, Ohio Constitution protect persons from unreasonable searches and seizures.[29] "Under the Fourth Amendment to the United States Constitution, a search conducted without prior approval of a judge or magistrate is ***per se*** unreasonable, subject to certain well-established exceptions."[30]

Certainly, one such exception involves inventories "conducted in the service of law enforcement's community-caretaking function, which results from the government's extensive regulation of motor vehicles and traffic." But to be constitutionally valid, an inventory must be "reasonable": that is, it must be conducted in good faith, not as a pretext for an investigative search, and in accordance with standardized police procedures

[25] *State v. Baker*, 146 Ohio St.3d 456, 2016-Ohio-451, 58 N.E.3d 1114, ¶ 23, emphasis added.
[26] *Owens*, 2016-Ohio-3092, ¶ 17 (quoting *Burnside*, 2003-Ohio-5372, ¶ 34), emphasis added.
[27] E.g.'s, *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71; *State v. Harper*, 2018-Ohio-690, 107 N.E.3d 709 (8th Dist.); *State v. Oliver*, 9th Dist. No. 25162, 2010-Ohio-6306.
[28] *State v. Mayl*, 106 Ohio St.3d 207, 212, 2005-Ohio-4629, 833 N.E.2d 1216.
[29] *State v. Leak*, 145 Ohio St.3d 165, 2016-Ohio-154, 47 N.E.3d 821, ¶ 13.
[30] *State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, 45 N.E.3d 127, ¶ 181 (citing *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

or established routine.[31] It is incumbent upon the State to prove such exception.[32] ***There was not a shred of evidence presented by the State in this regard*** and no tow and inventory policy offered or admitted as an exhibit. As a result, the State failed to meet its burden of proof that any tow and inventory exception to the warrant requirement was met.

The State attempts to argue that "exigent circumstances" justify Ofc. Harrison's warrantless search of the car; however, Ms. Michaels was laying on the ground ***outside*** of her vehicle and being attended to by medics. As such, Ofc. Harrison did not have exigent circumstances on the facts of this case to justify any search of Ms. Michaels' vehicle. For example, exigent circumstances have been found by courts when a person is unconscious and an officer is attempting to give emergency aid to that person ***before*** medics arrive. But no Ohio court has allowed a search of a vehicle when medical assistance is already in progress or after the emergency medical care.[33]

Additionally, ***in Caniglia v. Strom*** announced on May 17, 2021 the United States Supreme Court held a search must be done ***with a warrant even in a community caretaking situation***[34] - thus the State's exigent circumstances and/or community caretaking argument fails as a matter of law.

The Court **GRANTS** Ms. Michaels' Motion and suppresses the plastic handled bucket with the "Fireball Whisky" logo and strikes any reference to it from Ofc. Harrison's blood draw affidavit as discussed more fully below.

A. FRANKS ISSUE / WARRANT

Pursuant to *Franks v. Delaware*[35], a search violates the Fourth Amendment's prohibition on unreasonable searches if it is conducted pursuant to a warrant that is based upon an affidavit containing ***one or more material misrepresentations,*** and these misrepresentations were ***made knowingly or in reckless disregard for the truth***. "Reckless disregard" means that the affiant had serious doubts of an allegation's

[31] *South Dakota v. Opperman* (1976), 428 U.S. 364, 96 S.Ct. 3092; *State v. Hathman* (1992), 65 Ohio St.3d 403, 604 N.E.2d 743.
[32] *Leak*, supra; *State v. Wilcoxson*, 2d Dist. Case No. 15928, 1997 Ohio App. LEXIS 3566, *9 (July 25, 1997)("A police officer's bare conclusory assertion that an inventory search was done pursuant to police department policy is not sufficient, standing alone, to meet the state's burden of proving that a warrantless search was reasonable because it fits within the inventory search exception to the warrant requirement. Rather, the evidence presented must demonstrate that the police department has a standardized, routine policy, demonstrate what that policy is, and show how the officer's conduct conformed to that standardized policy."); *State v. Myrick*, 2d Dist. No. 21287, 2006-Ohio-580.
[33] See e.g.'s, *Brigham City, Utah v. Stuart* (2006), 547 U.S. 398, 126 S.Ct. 194; *State v. Minear*, 191 Ohio App.3d 774, 2010-Ohio-6577, 947 N.E.2d 751; *State v. Paidousis*, 10th Dist. No. 00AP-1118, 2001 Ohio App. LEXIS 1924 (May 1, 2001).
[34] 593 U. S. ____ (May 17, 2021).
[35] 438 U.S. 154, 171-172, 98 S.Ct. 2674 (1964).

truth.[36] Under the procedure set forth in *Franks*, a court faced with a warrant affidavit which includes deliberately or reckless false statements must set aside those false statements and determine whether the remaining information in the affidavit sets forth sufficient facts to support a finding of probable cause.[37]

If, when the trial court sets aside the false information in the affidavit, and "the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit."[38]

1. Ofc. Harrison's Knowing or Reckless Misrepresentations in the Blood Draw Warrant Affidavit

Ofc. Harrison's affidavit for Ms. Michaels' blood draw states: "vehicle was driving NB on SB I-75, causing a head on collision…. and [Ms. Michaels] was unconscious being treated by Moraine Medics." These statements are uncontested, correct ***and the only truth contained in Ofc. Harrison's affidavit***. The balance of Ofc. Harrison's statements in the affidavit are patently false, utterly misleading, and this Court finds, ***as a matter of fact***, that they were made with a complete disregard for the truth and for the purpose of misleading Judge Long into signing the warrant.

As to his statement: "[Ms. Michaels] had a strong odor of an alcoholic beverage coming from her person," this Court expressly finds as a matter of fact that Ofc. Harrison never detected any odor from Ms. Michaels.[39] The only person on scene who smelled any odor of ethanol was EMT Montgomery, ***and he only smelled it after he placed a nasal tube in Ms. Michaels*** and then, only when vomit and foam came out of the tube. This Court expressly finds as a matter of fact that Ofc. Harrison did not himself detect any odor of ethanol from the nasal tube, nor was Ofc. Harrison advised of the odor by EMT Montgomery. Underscoring the Court's ***express factual finding*** in this regard, ***nowhere in Ofc. Harrison's written police report*** did he write that he smelled a strong odor of ethanol coming from Ms. Michaels while she was on-scene. The Court expressly finds as a fact that Ofc. Harrison's statement that "[Ms. Michaels] had a strong odor of an alcoholic beverage coming from her person" was flatly untrue and made knowingly and/or with reckless disregard for

[36] *State v. Waddy*, 63 Ohio St.3d 424, 441, 588 N.E.2d 819 (1992)(citing *United States v. Williams*, 737 F.2d 594, 602 (7th Cir.1984).
[37] *Franks*, 438 U.S. at 171-172.
[38] Id at 155-156.
[39] Based upon the credible testimony of EMT Montgomery.

the truth for the purpose of misleading Judge Long into signing the blood draw warrant. ***Pursuant to Franks, the Court strikes this statement from the affidavit***.

Next, Ofc. Harrison falsely stated that "[Ms. Michaels] was aspirating beer, as observed by affiant and Moraine Medics on scene." Ofc. Harrison did not smell any alcohol emanating from Ms. Michaels. And as the credible testimony of EMT Montgomery made perfectly clear and as a matter of fact, there was certainly no odor of beer about Ms. Michaels. The Court expressly finds as a fact that Ofc. Harrison's statement that "[Ms. Michaels] was aspirating beer, as observed by affiant and Moraine Medics on scene" was flatly untrue and made knowingly or recklessly for the purpose of misleading Judge Long into signing the blood draw warrant. ***Pursuant to Franks, the Court strikes this statement from the affidavit.***

Finally, Ofc. Harrison completely misrepresented the statement "inside of her [Ms. Michaels] vehicle was a Fireball Whiskey brand cup with an unknown liquid." First, the "cup" was in fact a small plastic handled bucket. The use of the word "cup" inferred the bucket was a drinking container – as a matter of fact it was not, as Ofc. Harrison admitted on cross examination during the Hearing. Second, as a matter of fact, the plastic bucket contained no liquid at all, much less an "unknown liquid", and was falsely, knowingly and/or recklessly included by Ofc. Harrison to make it appear to Judge Long that a drinking cup with a liquid, thus inferring whisky, was in Ms. Michaels' car. The Court expressly finds as a fact that Ofc. Harrison's statement of "inside of her [Ms. Michaels] vehicle was a Fireball Whiskey brand cup with an unknown liquid" was flatly untrue and made knowingly and/or recklessly to mislead Judge Long into signing the blood draw warrant. ***Pursuant to Franks, the Court strikes this statement from the affidavit***. Even were the Court to permit "a Fireball Whisky plastic handled bucket" to remain in the affidavit, the fact that an empty, plastic handled bucket with a "Fireball Whisky" logo was in Ms. Michaels' car would be of no value[40] to any probable cause determination.

[40] Recall, if the reader will, that Ofc. Harrison, ***during his Hearing testimony***, illegally inferred something sinister about the empty Fireball Whisky logo bucket by falsely describing it as a "cup" with an unidentified brown substance. As a matter of fact, the container was a small bucket, not a cup, and had nothing in it – either unidentified liquid (Ofc. Harrison affidavit) or brown substance smelling of cinnamon (Harrison Hearing testimony). And, of course, none of this was in Ofc. Harrison's report.

2. **No Probable Cause**

Having stricken from the affidavit the serial, material misrepresentations and illegally obtained evidence used to secure the warrant, the Court must now determine whether the remaining information in the affidavit supports a probable cause finding.

It does not.

Because what remains in the affidavit are only these facts: "vehicle was driving NB on SB I-75, causing a head on collision…. and [Ms. Michaels] was unconscious being treated by Moraine Medics."

A search warrant may only be issued upon probable cause, usually supported by an affidavit, that contraband or evidence of a crime will be found.[41] In "determining the sufficiency of probable cause in an affidavit submitted in support of a search warrant, '[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, there is a fair probability that contraband or evidence of a crime will be found in a particular place.'"[42] Here, the fact that a car accident happened at around 8 p.m., without more, does not remotely establish probable cause for a blood draw warrant.

As such, the Court SUPPRESSES any evidence from the blood draw as the warrant for the same was not supported by probable cause.[43]

B. NO SUBSTANTIAL COMPLIANCE WITH OHIO ADMIN. CODE 3701-53-05

Even had the blood draw warrant been supported by probable cause, which it was not, the State utterly failed to establish ***substantial compliance*** with Ohio Admin. Code 3701-53-05.

Ohio Adm. Code 3701-53-05(A) specifies that "all samples shall be collected in accordance with section 4511.19," which requires blood be "withdrawn ***within three hours*** of the time of the alleged violation." Ms. Michaels' accident occurred around 8:00 p.m.; but Nurse Hamrich didn't draw the blood until 12:50 a.m., ***almost 5 hours after the accident***. And although blood samples taken outside of the 3-hour limit have been allowed, the Ohio Supreme Court has made it abundantly clear that such will be permitted only upon a showing

[41] *State v. Jones*, 143 Ohio St.3d 266, 2015-Ohio-483, 37 N.E.3d 123, ¶ 11.
[42] *State v. George*, 45 Ohio St.3d 325, 544 N.E.2d 640 (1989), *paragraph one of the syllabus*; *Illinois v. Gates*, 462 U.S. 213, 238-239, 103 S.Ct. 2317 (1983).
[43] And the "good faith" exception cannot save the illegally obtained blood draw because the Court's express factual findings that Ofc. Harrison's serial misrepresentations in his affidavit were knowingly and/or recklessly made precludes application of that exception. *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405 (1984)(It is unreasonable for an officer to rely on a warrant (1) when the warrant affidavit contains knowing or reckless falsehoods).

that "the administrative requirements of R.C. 4511.19(D) ***were substantially complied with*** and expert testimony was offered."[44]

Here, the several requirements of Ohio Admin. Code 3701-53-05 discussed throughout this opinion, and as matters of fact expressly found by this Court, were not substantially complied with, and the blood draw nearly five (5) hours after the accident must be suppressed if actual, authentic, real due process is to be afforded Ms. Michaels.

Ohio Adm. Code 3701-53-05(B) requires "[w]hen collecting a blood sample, an aqueous solution of a non-volatile antiseptic shall be used ***on the skin***. No alcohols shall be used as a skin antiseptic." Here, the blood was drawn from an indwelling picc line off the hub of a catheter ***and not from Ms. Michaels' skin*** at all. Further, and as expressly found earlier by the Court as a matter of fact, Nurse Hamrich could not testify that alcohol hadn't been used to clean Ms. Michaels' skin before placement of the indwelling picc line. Although Nurse Hamrich used an iodine swab to clean the hub, the iodine swab was not used to clean Ms. Michaels' skin for a blood draw from her skin as required by this subsection of the Admin Code.

Ohio Adm. Code 3701-53-05(C) requires that "blood shall be drawn with a sterile dry needle into a vacuum container with a ***solid anticoagulant***…" The Ohio Supreme Court stated that "the state does not substantially comply with Ohio Adm. Code 3701-53-05 when it fails to use a solid anticoagulant in a blood test."[45] In affirming the suppression of the blood draw in *Burnside*,[46] the Ohio Supreme Court made clear "Ohio Admin. Code 3701-53-05(C) declares in no uncertain terms that 'blood *shall* be drawn * * * into a vacuum container with a solid anticoagulant.' This language does not *advise* the use of a solid anticoagulant when drawing a blood sample; it ***demands*** it."[47] In this regard, Nurse Hamrich did not know what substance, if any, liquid or solid, was in the hospital's stock vials she used to collect Ms. Michaels' blood, much less whether a solid anti-coagulant was present. The Court expressly finds as a matter of fact, however, based upon her testimony, that Nurse Hamrich did not use the vacutainers in the OVI kit which would have ensured the presence of a solid anticoagulant as mandated by the Ohio Administrative Code. As such, and as a matter

[44] *State v. Hassler*, 115 Ohio St.3d 322, 2007-Ohio-4947, 875 N.E.2d 46 (allowing a 7-hour blood sample into evidence in a non-per se Aggravated Vehicular Homicide case; however, there was no discussion of other administrative regulations not being complied with in the case.); See also, *State v. Moore*, 2d Dist. No. 28640, 2021-Ohio-1114 (affirming the allowance of a 5-hour blood draw; however, the State substantially complied with all other Administrative regulations), emphasis added.
[45] *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71.
[46] Id at 159.
[47] Id.

of fact, the State failed to prove a solid anticoagulant was used as required by subsection (C) of Admin. Code 3701-53-05.

It gets worse.

Ohio Adm. Code 3701-53-05(F) mandates that "while ***not in transit*** or under examination, all blood…specimens ***shall be refrigerated***." A failure to refrigerate blood samples for a period of up to 5-hours has been held to substantially comply with this regulation[48], but Ohio courts have ***not*** found substantial compliance or permitted the use of blood samples unrefrigerated for more than five (5) hours.[49] And for good reason. Refrigeration is mandated to prevent and/or retard fermentation of ethanol present in the blood sample because ongoing fermentation elevates the blood sample's ethanol reading.[50]

Here, ***the parties agree Ms. Michaels' blood sample, while not in transit, went unrefrigerated for 8 to 9 hours*** awaiting pick up by the USPS for transit to BCI in London, Ohio. The Court expressly finds, as a matter of fact and law, that this 8 to 9 hours of un-refrigeration cannot be said to constitute "substantial compliance" with Adm. Code 3701-53-05(F) if Ms. Michaels is to be afforded actual, authentic, real due process of law.

In short, and as a result of the State's serial failings to "substantially comply" with the Ohio Administrative Code, much less the letter of the Code, Ms. Michaels' blood draw and all analysis and reports regarding the same by Mr. Fashano-Soltis are ***HEREBY SUPPRESSED***.

C. EVID.R. 403(A) AND UNFAIR PREJUDUCE

A trial court has broad discretion in determining whether proposed evidence is unfairly prejudicial to a litigant.[51]

"Although relevant, evidence is not admissible if its probative value is substantially outweighed by the ***danger of unfair prejudice, of confusion of the issues, or of misleading the jury***."[52]

[48] *State v. Baker*, 146 Ohio St.3d 456, 2016-Ohio-451, 58 N.E.3d 1114.
[49] See e.g.'s, *State v. Mullins*, 4th Dist. No. 12CA3350, 2013-Ohio-2688 (12 hours of un-refrigeration is not *de minimus*); *State v. DeJohn*, 5th Dist. No. 06-CA-16, 2007-Ohio-163 (same-17 hours).
[50] Which the Court expressly finds as a matter of fact based upon Dr. Belloto's entirely credible testimony to this effect. And need the Court state the obvious in this regard? Why do people in the 21st Century use refrigerators? That's right – to prevent and/or retard fermentation…
[51] *State v. Crotts*, 104 Ohio St.3d 432, 437, 2004-Ohio-6550, 820 N.E.2d 302.
[52] Evid.R. 403(A), emphasis added.

"Unfair prejudice is that quality of evidence which might result in an improper basis for a jury decision. Consequently, if the evidence arouses the jury's emotional sympathies, evokes a sense of horror, or appeals to an instinct to punish, the evidence may be unfairly prejudicial. Usually, although not always, unfairly prejudicial evidence appeals to the jury's emotions rather than intellect.'"[53] "Prejudicial evidence, by definition, ***undermines the reliability of the fact-finding process***…[and] the public has an interest in maintaining the reliability of the trial process and the jury system."[54]

And what could undermine the reliability of the fact-finding process more than permitting the introduction of Ms. Michaels' blood samples and Mr. Fashano-Soltis' unreliable analysis and report given the State's utter failure of substantial compliance with the safeguards of the Ohio Administrative Code, including, especially, over thirty-five (35) hours of un-refrigeration from the time of the blood draw by Nurse Hamrich until arrival of the blood samples in London, Ohio?

Frankly, it's hard to come up with something…

The mandate of Evid.R. 403(A) as to 'undue prejudice' "dovetails" with the reliability requirement enshrined in Evid.R. 702(C)[55] which resides the determination regarding the reliability of the methodology and techniques of experts, such as Mr. Fashano-Soltis, with the courts, not juries.[56]

Why?

Because "{e}xpert evidence can be both ***powerful and quite misleading*** because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses."[57] And, of course, the trial court acts as a gatekeeper to ensure that unreliable and prejudicial evidence will not be heard by a jury.[58]

In addition to seeking suppression[59] of her blood draw results including Mr. Fashano-Soltis' analysis and report of the same, Ms. Michaels urges the Court to exclude her blood draw results, etc., based on the clear

[53] *Crotts*, 104 Ohio St.3d at 437 (quoting *Oberlin v. Akron Gen. Med. Ctr*. (2001), 91 Ohio St.3d 169, 172, 2001 Ohio 248, 743 N.E.2d 890); See also, *State v. Urbina*, 2016-Ohio-7009, 72 N.E.3d 105 (10th Dist.).
[54] *State v. Miller*, 2d Dist. No. 15552, *18, 1997 Ohio App. LEXIS 4774 (Oct. 31, 1997), emphasis added.
[55] *Licul v. Swagelok Co*., 8th Dist. No. 86322, 2006-Ohio-711.
[56] E.g., *State v. Clark*, 101 Ohio App.3d 389, 655 N.E.2d 795 (8th Dist.1995).
[57] *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 595, 113 S.Ct. 2786 (1993), emphasis added.
[58] Id.
[59] By reason of the issuance of the blood draw warrant in the absence of probable cause as well as the State's utter failure to substantially comply with the Ohio Administrative Code regarding blood draws.

danger of unfair prejudice that would be visited upon her given the utter lack of reliability of those results, etc., based upon the Court's aforementioned express findings of fact.

The Court absolutely agrees.

Why?

In addition to the foregoing, Dr. Belloto credibly testified that Ms. Michaels' blood draw results, etc., as reported by Mr. Fashano-Soltis were unquestionably, inaccurately and unfairly elevated, and therefore unreliable, based upon a total failure of refrigeration of the blood samples and clearly documented evidence of ongoing fermentation of Ms. Michaels' blood samples, as well as Nurse Hamrich's failure to 1) draw the blood percutaneously and 2) expel or discard the first 10 milliliters before filling the blood vials.[60]

In short, and because the danger of unfair prejudice to Ms. Michaels far outweighs any probative value of her unreliable blood draw results, the Court **GRANTS** Ms. Michaels' Motion *in Limine* and excludes her blood draw and all analysis and reports relating thereto at trial herein, pursuant to Evid.R. 403(A).

III. CONCLUSION

A wrongful conviction should be the greatest fear of any court. Since 1989, over 365 DNA exonerations were won in 37 states involving defendants who served 5,065 years in prison for crimes they definitively did not commit. Of these 365 exonerations, 41 involved false confessions; 65% involved false eyewitness identification, or rather mis-identification, ***and 44% involved junk, bogus science.***[61]

Based upon this Court's express factual findings detailed herein, were this Court to permit introduction of Ms. Michaels' so-called blood alcohol findings, this Court would guarantee the admission of junk, forensic science at trial of this matter.

And this the Court will not do.

The Court grants Ms. Michaels' Motions to Suppress and *In Limine i*n their entirety.

SO ORDERED:

JUDGE STEVEN K. DANKOF

[60] And the Court so expressly finds as a matter of fact. Tellingly, the State's witness, Mr. Fashano-Soltis, admitted on cross-examination that he didn't even look for evidence of fermentation in Ms. Michaels' blood samples because he only looks for fermentation in urine samples. Well, then, why bother to refrigerate blood samples, Mr. Fashano-Soltis?

[61] Blind Injustice: A Former Prosecutor Exposes the Psychology and Politics of Wrongful Convictions, by Mark Godsey.

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Case Number:
2019 CR 02193

Case Title:
STATE OF OHIO vs ABBY MARIE MICHAELS

Type:
Decision

So Ordered,