

STATE OF MICHIGAN

IN THE 55TH DISTRICT COURT FOR THE COUNTY OF INGHAM

PEOPLE OF THE STATE OF MICHIGAN,

v

File No. [REDACTED]
HON THOMAS P. BOYD

[REDACTED]
Defendant.

OPINION AND ORDER

This case is before the Court on defendant's motions to suppress evidence.

Relevant Facts

On or about [REDACTED], Deputy Jacob Newton of the Ingham County Sheriff's Office was dispatched to WB I-96 near [REDACTED] Road in response to a hit-and-run accident. While Deputy Newton was en route, Officer Kevin Stewart of the Williamston Police Department advised Deputy Newton that he had possibly located the suspect vehicle at [REDACTED] [REDACTED] Road.

Witnesses informed Deputy Newton of a dark-colored SUV traveling 85-90 miles an hour westbound on I-96. This vehicle crashed (rear-ended) into another vehicle traveling in the same direction and then left the scene. Descriptions provided matched the description of the vehicle being held by Officer Stewart.

After securing the accident scene, Deputy Newton made contact with Officer Stewart and defendant. Officer Stewart had already placed defendant in the back of his patrol vehicle. Deputy Newton did not witness defendant in or about his own vehicle. At the request of paramedics from the Northeast Ingham Emergency Service Authority (NIESA), Deputy Newton asked defendant to complete a preliminary breath test (PBT).

The paramedics transported defendant to Ingham Regional Medical Center (IRMC) to be evaluated. While at IRMC, Deputy Newton read defendant the chemical test rights pursuant to Michigan's implied consent law. MCL 257.625a. Deputy Newton had defendant execute a chemical test rights form and blood was drawn from defendant. A chemical analysis was subsequently performed on defendant's blood by the Michigan State Police Crime Forensic Laboratory (MSP Lab).

Deputy Newton also conducted a warrantless search of defendant's vehicle. He testified that defendant consented to this search. While conducting the search, Deputy Newton discovered a small amount of marijuana and a marijuana pipe.

Defendant's motions raise two questions. First, was there probable cause to arrest defendant (along with associated issues concerning suppression of evidence obtained) and, second, will results of the test performed on the blood sample taken from defendant be admitted.

Analysis

The dispositive issue for defendant's first motion (to suppress evidence flowing from the unlawful search of defendant's vehicle and to suppress the results of blood analysis because of lack of probable cause) is whether or not the defendant was lawfully arrested. Deputy Newton had probable cause to arrest defendant based on the following: information he received at the scene of the accident (including statements from witnesses); the information provided by Officer Stewart (including the defendant apparently hiding his vehicle); observations he personally made of the defendant; PBT results; the marijuana found in defendant's vehicle and defendant's own statements. Based on the totality of circumstances and the information available to Deputy Newton at the time of defendant's arrest, the Court finds that defendant was lawfully arrested.

The search of defendant's car is authorized incident to his arrest as long as law enforcement has reason to believe the vehicle contains evidence of the offense for which defendant was being arrested. In this case, defendant was being held for a driving offense (causing and leaving the scene of a high-speed collision) and there was reason to believe he was under the influence of some substance. It was reasonable to search the passenger compartment of the vehicle to determine the nature of that substance (or substances). The Court does not find Deputy Newton's subjective understanding of when defendant was under arrest to be helpful. An individual is under arrest when he is being held by police and is not free to go. This was true at the time of the search in this case.

Defendant's second motion is not as easily resolved. This motion challenges the admissibility of the report of the MSP Lab concerning defendant's blood. The MSP Lab was given defendant's blood samples to be tested for the chemical compound THC. The results were positive. The contention here is that the test was not done consistent with currently accepted scientific standards. Defendant does not challenge the use of mass spectrometry. Rather, the challenge is to the validity of the protocols and procedures used by the MSP Lab. Defendant argues that test results in this case can not be validated due to the presence of discrepancies in control testing and an absence of documentation explaining these discrepancies.

Michigan Rule of Evidence 702 provides:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

It is the trial court's responsibility to assure that all evidence submitted complies with this rule. This is not a novel issue. Appellate courts have provided guidance as to how trial courts should determine the admissibility of scientific evidence supported by expert testimony.

Daubert v. Merrell Dow Pharmaceuticals discusses the requirements for the admission of scientific evidence:

Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a),¹⁰ whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.¹¹ This entails a preliminary assessment of whether the reasoning or methodology *593 underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93 (1993).

The court in *Daubert* then proceeded to provide a short list of things that courts should look for when determining the authenticity of the scientific principles and methodology of the potential evidence. The court states that the list is not comprehensive by any means, but among the specifically listed details, the most relevant and applicable to this case are that the margins of error and maintenance of existing standards that control the operation should be considered:

Additionally, in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error, see, e.g., *United States v. Smith*, 869 F.2d 348, 353-354 (CA7 1989) (surveying studies of the error rate of spectrographic voice identification technique), and the existence and maintenance of standards controlling the technique's operation, See *United States v. Williams*, 583 F.2d 1194, 1198 (CA2 1978) (noting professional organization's standard governing spectrographic analysis), cert. denied, 439 U.S. 1117, 99 S.Ct. 1025, 59 L.Ed.2d 77 (1979). *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 594 (1993).

The burden of proof that a particular procedure is scientifically accepted rests with the party presenting the evidence. In *United States v. Bonds*, the FBI had run DNA testing and plaintiff was attempting to utilize that data as evidence against defendant. In that case, the court stated that, "the Government had met its burden of showing that the FBI's protocol and procedures were accepted by "the general scientific community." *United States v. Bonds*, 12

F.3d 540, 557 (6th Cir. 1993). Thus, here the burden lies with the People to show that the evidence being offered is accepted by the general scientific community. Again, defendant does not challenge the general acceptability of the tests used in this case (mass spectrometry). Rather, the challenge is to the MSP Lab's procedures for validation and use of a technology that is or would be otherwise acceptable. It is the People's burden to prove the soundness of the procedures used.

The *Bonds* court held that "(t)his Circuit has found the absence of general acceptance only where the evidence 'has been manifestly unsupported outside the proponent's own laboratory.'" *Id.* at 556. Therefore, in order for the Court to find the absence of acceptance, there must be proof that the general scientific community would not support the procedure's results being proposed as evidence.

The People presented testimony from Mr. Geoffrey French, Supervisor of the Toxicology Unit at the MSP Lab. Mr. French explained MSP Lab procedures in general as well as the procedures utilized in this case. Mr. French did not create nor was he able to explain the tests and protocols utilized within the MSP Lab to assure the validity of test results. Mr. French also lacked the academic credentials of his predecessors who did create these protocols. Rather, Mr. French resorted to non-scientific terms and repeatedly referenced the conclusions reached by his predecessors without explanation.

Defendant offered the testimony of Dr. Andreas Stolz. Dr. Stolz is highly credentialed and currently serves as the department head for operations at the National Superconducting Cyclotron at Michigan State University. Dr. Stolz testified that he and others in the scientific community would not accept the results of the MSP's mass spectrometry tests for THC for a number of reasons. He indicates that the method of describing the data at low levels was

improper, and that the procedure has failed to provide the necessary documentation that would support the deviation of positive control tests from the expected results.

First, Dr. Stolz calls into question the margins of error used by the MSP. Margins of error limits the validity of results from scientific procedures and is on the *Daubert* list of things to examine when determining the scientific validity of potential evidence. Dr. Stolz explained that the MSP has determined the margin of error for the testing of THC to be 8%. However, he stated that the MSP Lab does not articulate this acceptable margin for error in terms of nanograms per milliliter (ng/ml). Further, three out of the four sample tests were outside of the acceptable margin of error. The three tests out of that range were testing samples with lower amounts of THC. The results of the test at issue in this case (expert testimony and results for defendant's blood sample) fall within the same range of low-level positive test for THC. The result, according to Dr. Stolz, is to call into question the determination of a level of THC for this sample.

Dr. Stolz also challenges the MSP Lab's representation of this data. He claims that it was not done in a manner that was deemed appropriate by the American Society of Crime Laboratory Directors (ASCLD) in their audit of the MSP Lab. ASCLD recognized that the MSP was representing their data using only one calibration and forced their linear representation through the origin. This forces that line to be drawn through a point that is not measured and it gives unnecessary weight to that point (0,0). Only the slope of the line can be changed. The ASCLD suggests that the better method is to draw the line from a different spot on the axis that will allow for a second parameter and a more accurate representation of the data. This is easily correctable and a generally more acceptable method of displaying data in the scientific community.

Regardless of the representation, the suggested margin of error by the MSP is not validated by the data and the general scientific community would not accept this.

Second, Dr. Stolz explained that proper procedure was not followed by the MSP Lab, and that as a consequence, the results of the blood test in question cannot be determined to be valid with any level of certainty. *Daubert* lists following proper testing procedures as a consideration to be made by trial courts. There was a standard procedure in existence that would give explanation for seemingly skewed results, but that procedure was not followed. The goal is to assure that the mass spectrometer is reading all samples accurately. Several tests are regularly performed to meet this goal. Evidence was presented of a variety of such tests. One “positive test” was described by Dr. Stolz to explain flaws in the MSP Lab’s procedures.

This test is conducted by running a known concentration of the substance through the mass spectrometer and reading the result. Proper procedure for this test includes documentation by a supervisor if that test results in a greater variance than 20% from expected. This documentation is to explain why the positive (“control”) test with known values was read incorrectly. This does not prove that the test in the instant case is wrong, but it does suggest that there should be an explanation for why the known substance amount was not measured correctly. In this case, the positive test consisted of THC being added to human blood samples at a known concentration of 5ng/ml. The machine gave the result 2.63 ng/ml. This result does not fall within the standard of 20% variance. It should have been any amount from 4ng/ml to 6ng/ml. It did not, and the procedure calls for a supervisor to determine the cause of this and produce a document explaining why this happened. However, no documentation was provided. As a result, Dr. Stolz asserts that the general scientific community would be left to guess as to how the positive test was measured to be so different.

The level of quantification for THC has been described as 1 ng/ml, but the results of the control tests indicate that this may not be the case. The record in this case does not include an explanation for the MSP Lab's level of quantification. Proof for this standard has not been shown as it should have been. Deviant test results call this level into question. There may be an explanation, but since it was not made available, the proper procedure has not been followed and we are, as a result, left guessing about the level of quantification.

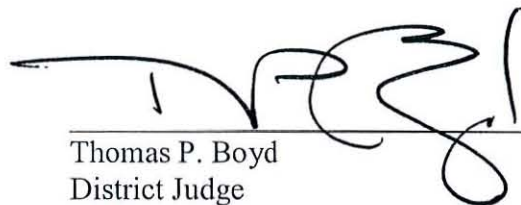
Conclusion

Defendant's motion to suppress evidence seized from defendant's vehicle is DENIED. The People assert that defendant provided consent for this search. Further, without regard to that assertion, there was ample probable cause to search the vehicle.

Defendant's motion to suppress the results of blood test performed by the MSP Lab is GRANTED. The People have not met their burden of proving this evidence meets the standard set out in *Daubert*. The Court does not find that the procedures of the MSP Lab are inadequate or beneath currently accepted scientific standards. Specifically, the Court finds that questions raised by the defense were not answered in such a way that leads the Court to conclude that the offered evidence is scientifically sound.

These conclusions are based on the record created through testimony and evidence presented at hearing on this matter as well as the arguments submitted by the parties.

Dated: December 10, 2012



Thomas P. Boyd
District Judge