



Oklahoma statutes require that, in order to be admissible into evidence, breath tests must be administered or performed in accordance with the rules and regulations of the Board of Tests for Alcohol and Drug Influence (hereinafter the "Board"). 47 O.S.2001, §§ 752(H), 759(B). The State has the burden to prove compliance with the rules and regulations, and to produce the relevant rules at trial if a dispute develops concerning what the rules are. *Browning v. State ex rel. Department of Publications*, 1991 OK CIV APP 19, ¶16, 812 P.2d 1372, 1375-76; *Westerman v. State*, 1974 OK CR 151, ¶¶10-11, 525 P.2d 1359, 1361-62.

Prior to trial in this case, Appellant filed a motion to suppress the results of his breath test claiming the test had not been administered in accordance with rules and regulations of the Board. In support of the motion, Appellant presented as evidence Defendant's exhibit #1, which was a list of requirements issued by the Board for the Intoxilyzer machine used to test Appellant's breath. Appellant claimed that requirements on the list had not been complied with during the test of Appellant's breath. Appellant thereby created a dispute concerning what the rules were, and whether there had been compliance with the relevant rules.

The State did not present other rules and regulations for the Intoxilyzer machine, or refute the relevance of the list of requirements submitted by Appellant. The State merely called officers who testified that the Board's rules and regulations had been complied with, and that the rules Appellant claimed had not been complied with either were only recommendations or had been changed. On the basis on the officers' testimony alone there is insufficient proof

to show what the relevant standards were or whether they had been met. *Westerman*, 1974 OK CR 151 at ¶8, 525 P.2d at 1361. Moreover, the State's brief in this appeal even indicates that the dispute, concerning what the relevant rules and regulations are, was not resolved for Judge Branam or for the jury during the trial proceedings. Before filing the response brief, appellate counsel for the State contacted the Director of Testing to inquire as to what the relevant requirements are for the Intoxilyzer machine used to test Appellant's breath. The State's failure to meet its burden of establishing what the relevant rules and regulations were, and thus its failure to prove compliance with relevant rules and regulations, constitutes error. *Westerman*, 1974 OK CR 151 at ¶¶7-12, 525 P.2d at 1361-62; *Browning*, 1991 OK CIV APP 19 at ¶¶15-29, 812 P.2d at 1375-78.

One of the State's alternative arguments is that there was sufficient evidence of Appellant's impaired ability independent of the Breathalyzer result to sustain the conviction for DWI. While there was fairly strong testimony from two officers that Appellant was intoxicated, we find that the admission into evidence of Appellant's breath test without proof that it was performed in compliance with rules and regulations of the Board, constitutes a substantial violation of Appellant's statutory rights under 47 O.S.2001, §§ 752(H) and 759(B). 20 O.S.2001, § 3001.1.

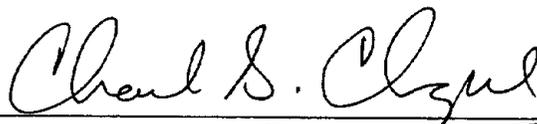
In addition to asking that his conviction be reversed, Appellant asks that this matter be remanded with an order to dismiss. We do not find dismissal to be the proper remedy. This matter should be remanded and the State allowed to retry Appellant. *Westerman*, 1974 OK CR 151 at ¶14, 525 P.2d at 1362. Upon

retrial, if the State can establish the relevant rules and regulations of the Board and establish that they have been complied with, the results of Appellant's breath test will be admissible into evidence. *Westerman*, 1974 OK CR 151 at ¶13, 525 P.2d at 1362.

**IT IS THEREFORE THE ORDER OF THIS COURT** that Appellant's Judgment and Sentence in Case No. CM-2002-282 in the District Court of Coal County should be, and is hereby, **REVERSED** and **REMANDED** for a new trial.

**IT IS SO ORDERED.**

**WITNESS OUR HANDS AND THE SEAL OF THIS COURT** this 5<sup>th</sup> day of April, 2005.



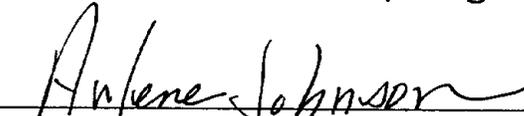
**CHARLES S. CHAPEL, Presiding Judge**



**GARY L. LUMPKIN, Vice Presiding Judge**

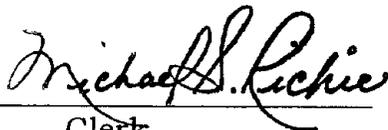


**CHARLES A. JOHNSON, Judge**



**ARLENE JOHNSON, Judge**

ATTEST:



Clerk

**LUMPKIN, VICE-PRESIDING JUDGE: DISSENTING**

The State's evidence showed that when Appellant was stopped for speeding, he had an odor of alcohol coming from his person and his breath. Appellant had red, bloodshot, glassy eyes and walked sluggishly. Appellant admitted he had had a couple of beers, but his speech was only slightly slurred. Officers had Appellant perform three field sobriety tests. The horizontal gaze nystagmus test indicated Appellant had consumed alcohol. Appellant failed the walk and turn test. He also failed the one-legged stand sobriety test. Inside his vehicle Appellant had an unusual amount of homemade beer and beer in cans. It was the opinion of the two officers at the scene that Appellant was intoxicated.

This evidence was sufficient to find Appellant guilty of DUI. A conviction for DUI can be based upon a police officer's testimony regarding his observations of the defendant's actions which indicate an intoxicated state, even in the absence of a chemical or breathalyzer test. *See Berry v. State*, 1992 OK CR 41, ¶ 5, 834 P.2d 1002, 1004; *Harris v. State*, 1989 OK CR 15, ¶ 4, 773 P.2d 1273, 1274; *Gerrard v. State*, 1987 OK CR 5, ¶ 8, 731 P.2d 990, 991; *Roberts v. State*, 1986 OK CR 33, ¶ 9, 715 P.2d 483, 485. Therefore, any error in using an intoxilyzer, regardless of whether it was run in compliance with the Intoxilyzer Requirements promulgated by the State of Oklahoma Board of Tests for Alcohol and Drug Influence, was not only harmless to Appellant's case but actually beneficial. The results of Appellant's 2 breath tests were .10 and .08.

Clearly, Appellant's conviction for the lesser offense of Operating a Motor Vehicle While Under the Influence of Alcohol was due largely in part to the breathalyzer results. Therefore, as Appellant was not prejudiced by the use of the intoxilyzer, any error in its use was harmless and not grounds for reversal.

In addition, the Intoxilyzer Requirements themselves are not statutory, but the State had the burden of proving breath alcohol tests were administered and performed in accordance with the procedures prescribed by the rules and regulations of the Board of Tests for Alcohol and Drug Influence as required by 47 O.S.2001, § 752(7). *Browning v. State ex.rel. DPS*, 1991 OK CIV APP 19, ¶ 15, 812 P.2d 1372,1376. In this case, the Appellant alleges the State did not meet its burden because the Intoxilyzer was plugged into the surge protector and was too near the radio. However, looking through the record, the Requirements provided by Appellant as Defendant's Exhibit 1 were dated 1999. It is not clear from the record whether those were still current in 2002. In particular, whether the prohibition on anything other than a wall plug was still valid. Regardless of whether we label it judicial notice or common sense, in this day and age, electronic devices are protected by surge protectors as a matter of course. If the Intoxilyzer had not been so protected, we would be seeing an allegation of error that due to a lack of a surge protector, line fluctuations discredit the test results. In this case the Appellant was actually benefited by the test results which led to a conviction of a lesser charge. Needless to say, the use of the test results, in light of the sufficiency of the other properly admitted evidence to convict Appellant of the primary charge,

was totally harmless beyond any doubt and the judgment and sentence should be sustained. *See Simpson v. State*, 876 P.2d 690, 702 (Okl.Cr.1994).