

NOTICE
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2014 IL App (5th) 130271-U

NO. 5-13-0271

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Richland County.
)	
v.)	No. 12-DT-71
)	
JENNIFER DILLARD,)	Honorable
)	Christopher L. Weber,
Defendant-Appellant.)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Presiding Justice Welch and Justice Chapman concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's finding that the arresting officer complied with a requirement that he continuously observe a subject for at least 20 minutes prior to obtaining the subject's breath sample was not manifestly erroneous, and the court did not err in denying the defendant's petition to rescind the summary suspension of her driving privileges.

¶ 2 The defendant, Jennifer Dillard, appeals from an order of the circuit court of Richland County, denying her petition to rescind the statutory summary suspension of her driving privileges. On appeal, the defendant contends that the circuit court erred in denying her petition to rescind because the police officer who administered the breathalyzer test failed to strictly comply with an administrative regulation that requires

an officer to continuously observe the subject for at least 20 minutes prior to obtaining a breath sample from that subject. We affirm.

¶ 3 The defendant was arrested and charged with driving while under the influence of alcohol in violation of sections 11-501(a)(1) and (2) of the Illinois Vehicle Code (625 ILCS 5/11-501(a)(1), (2) (West 2012)). After she submitted to a breathalyzer test that revealed a breath-alcohol concentration in excess of the legal limit, she was served with a notice that her driving privileges would be suspended for a minimum of six months. The defendant filed a petition to rescind the summary suspension, and the matter was set for an evidentiary hearing. The defense called Officer Matthew Clark, a patrol officer employed by the Olney police department, as a witness. The defense also offered a video recording of the traffic stop and an audio-visual recording of the 20-minute period of observation that preceded the breathalyzer test in support of its petition. A summary of the evidence follows.

¶ 4 On November 21, 2012, at approximately 8:03 p.m., Officer Matthew Clark was on patrol when he came into contact with the defendant during a traffic stop. Officer Clark testified that he stopped the defendant for improper signaling and improper lane usage. As he spoke with the defendant, he noticed a faint odor of an alcoholic beverage coming from inside her vehicle. He also noticed that her eyes were red and glassy. Officer Clark testified that he asked the defendant whether she had been drinking any alcoholic beverages that day, and that she stated that she had not. Officer Clark inquired again a few minutes later. This time, the defendant admitted that she had consumed some drinks earlier that evening. Officer Clark asked the defendant to submit to field sobriety

tests. The defendant agreed and exited her vehicle. Officer Clark testified that the defendant's balance was unsteady when she first exited her vehicle. He administered the gaze nystagmus test, the one-leg stand test, and the walk-and-turn test. He noted that the defendant was unable to complete those tests. He then asked the defendant if she would submit to a portable breath test. She declined. At that point, Officer Clark placed the defendant under arrest for driving under the influence of alcohol.

¶ 5 Officer Clark transported the defendant to the police station. He accompanied her to a small office, and then activated an audio-video recorder. The video shows that Officer Clark is seated behind a desk and the defendant is seated in front of the desk. Based on the footage, the camera is stationed behind Officer Clark and above his head. The video shows that Officer Clark read the "Warning to Motorist" to the defendant, and then started the 20-minute period of observation. During this period, Officer Clark and the defendant sat together, facing each other. Officer Clark completed some paperwork and conversed intermittently with the defendant. The video also shows that the defendant opened her purse and began to gather money for her bond. As she was sorting and stacking the bills, she fumbled them and some fell to the floor. Still seated, the defendant bent over at the waist to pick up the money. As she bent over, her face was obscured from the camera's view, partially blocked by the desk for approximately 15 seconds. Several minutes later, the defendant again dropped some money and bent down to pick it up. This time her face was partially obscured for about five seconds. Officer Clark was not asked whether his view of the defendant was obscured on those occasions or at any other time during the observation period. There is no evidence that the defendant placed

anything into her mouth or regurgitated into her mouth during those two periods or at any other time during the observation period. At the expiration of the 20-minute observation period, Officer Clark activated the breathalyzer and the defendant provided a breath sample. The machine analyzed the sample and measured a breath-alcohol concentration of .289.

¶ 6 After considering Officer Clark's testimony and the other evidence, the trial court denied the defendant's petition to rescind her statutory summary suspension. The defendant filed a motion to reconsider the ruling. The defendant claimed that the result of the breath test was invalid because Officer Clark failed to continuously observe her for a period of 20 minutes prior to the administration of the breath test as required in section 1286.310(a) of the Illinois Administrative Code (20 Ill. Adm. Code 1286.310(a) (2012)). The trial court found that Officer Clark complied with the 20-minute observation period and denied the defendant's motion for reconsideration.

¶ 7 On appeal, the defendant contends that the trial court erred in denying her petition to rescind the summary suspension of her driving privileges. The defendant argues that section 1286.310(a) of the Code requires that a subject be continuously observed for a period of 20 minutes prior to the administration of the breathalyzer test, and that any deviation from this procedure constitutes noncompliance and renders the breath test result unreliable. The defendant claims that there were two instances during the 20-minute period when she was not under continuous observation and that this deviation from the regulation renders the breath test result unreliable.

¶ 8 Administrative regulations have the force and effect of law and are construed according to the same standards as statutes. *People v. Bonutti*, 212 Ill. 2d 182, 188-89, 817 N.E.2d 489, 492-93 (2004). The construction of a regulation is a question of law that is reviewed *de novo*. *Bonutti*, 212 Ill. 2d at 188-89, 817 N.E.2d at 492-93.

¶ 9 Section 11-501.2 of the Illinois Vehicle Code provides that in a criminal or civil action arising from a DUI arrest, evidence of the concentration of alcohol or other intoxicating compounds in a person's blood or breath shall be admissible provided that the blood or breath tests are performed in accordance with standards promulgated by the Department of State Police. 625 ILCS 5/11-501.2 (West 2012). A defendant who petitions to rescind a summary suspension of driving privileges bears the burden to present a *prima facie* case that a test was not performed in accordance with the applicable standard and that the test result is unreliable. *People v. Miller*, 219 Ill. App. 3d 246, 248, 583 N.E.2d 10, 12 (1991).

¶ 10 Section 1286.310(a) of the Illinois Administrative Code sets out the procedures for obtaining a breath sample to determine a subject's breath-alcohol concentration. 20 Ill. Adm. Code 1286.310 (2012). Section 1286.310(a) states that:

"a) Prior to obtaining a breath[-]analysis reading from a subject, the BAO or another agency employee shall continuously observe the subject for at least 20 minutes.

(1) During the 20[-]minute observation period the subject shall be deprived of alcohol and foreign substances and shall not have vomited.

(2) If the subject vomits during the observation (deprivation) period, the

process shall be started over by having the individual rinse the oral cavity with water.

(3) If the individual continues to vomit, alternate testing shall be considered." 20 Ill. Adm. Code 1286.310(a) (2012).

¶ 11 The purpose of the 20-minute observation period is to ensure that the breath tests are conducted in a manner that produces reliable results. *Bonutti*, 212 Ill. 2d at 190-91, 817 N.E.2d at 494. The regulation is focused on the subject's actions. *Bonutti*, 212 Ill. 2d at 190, 817 N.E.2d at 494. Illinois courts have concluded that substantial compliance with section 1286.310(a)(1) will serve the administrative purposes of ensuring that the test is conducted in a manner that produces reliable results and that a subject does nothing that might impair the accuracy of the test. See *People v. Ebert*, 401 Ill. App. 3d 958, 965, 931 N.E.2d 279, 284 (2010); *People v. Bergman*, 253 Ill. App. 3d 369, 374, 623 N.E.2d 1052, 1055-56 (1993); *In re Ramos*, 155 Ill. App. 3d 374, 376, 508 N.E.2d 484, 486 (1987). For example, in *People v. Ebert*, the defendant sought to exclude the results of his breath test in his DUI case for a lack of foundation because the officer failed to accompany him to the restroom during the observation period. 401 Ill. App. 3d 958, 931 N.E.2d 279. During a hearing, the defendant admitted that he did not regurgitate, vomit, belch, or put anything into his mouth. The court determined that in order to lay a proper foundation for the admission of the breath test result, it was necessary to establish that the test was performed in substantial compliance with the procedures and the regulations to ensure the reliability of the result. *Ebert*, 401 Ill. App. 3d at 964-65, 931 N.E.2d at 283-84. The court stated that it would be reluctant to relax a standard when a particular

deviation from the mandated procedure pertained to a matter of science or required inquiry into the scientific basis for a particular standard, but determined that strict enforcement of the 20-minute continuous observation requirement would not serve the intended purpose of the regulation where the defendant admitted that he did nothing to impair the accuracy of the breath test. *Ebert*, 401 Ill. App. 3d at 965, 931 N.E.2d at 284.

¶ 12 In the case at bar, the defendant was in the officer's presence during the entire period of observation. There were two instances during this period when the defendant's face was partially obscured from the camera's eye, once for 15 seconds and once for 5 seconds. But Officer Clark was observing the defendant from a different angle and sightline, and the video indicates that the defendant was in his peripheral view, even if her face was obscured for a total of 20 seconds. The defendant did not ask Officer Clark whether he lost sight of her during those two instances, and so her contention that she was not continuously observed is based on an assumption rather than an evidence-based inference. Further, there is no evidence that the defendant regurgitated, vomited or placed any foreign substance in her mouth that would have compromised the result of the breath test, and the defendant has not claimed that she did so. Therefore, even assuming that the defendant dropped out of Officer Clark's line of sight for those two instances, there is no evidence that those deviations compromised the reliability of the breath test result. Under the circumstances, this alleged failure to comply with the 20-minute observation requirement constitutes nothing more than a *de minimis* deviation which does not render the breath test result unreliable. As noted in *Ebert*, a trial court should be reluctant to relax compliance with a mandated procedure where a deviation pertains to

scientific principles or a scientific basis which is beyond the ken of the court. But that is not a matter before us here. We decline the defendant's invitation to require strict compliance with the 20-minute observation period in a case such as this where rigid enforcement would not serve the intended purposes of the regulation.

¶ 13 In this case, the trial court's finding that the police officer complied with the 20-minute observation requirement is supported by the evidence and is not against the manifest weight of the evidence. In addition, the defendant failed to present a *prima facie* case showing that the result of her breath test was unreliable. Accordingly, the trial court did not err in denying the defendant's petition to rescind the statutory summary suspension of her driving privileges, and the judgment of the circuit court is affirmed.

¶ 14 Affirmed.