

[CAPTION]

DEFENDANT’S MOTION TO SUPPRESS BREATH TEST RESULTS

The Defendant, by counsel, respectfully requests this Court to suppress the B.A.C. Datamaster Evidence Ticket in the above-entitled cause. In support of this Motion, the Defendant states the following:

- 1) On [insert date], the Defendant was arrested for Operating A Vehicle While Intoxicated, a class A misdemeanor, and Operating With an Alcohol Concentration greater than 0.08%, a Class C Misdemeanor.
- 2) An officer from the [insert police department] administered a chemical test to the Defendant on Datamaster [insert #].
- 3) IC 9-30-6-5 sets forth the requirements for admission of results of breath alcohol tests. The test operator, the test equipment, the chemicals used in the test, if any, and the techniques used in the test must have approved in accordance with the rules adopted by the director of the department of toxicology of the Indiana University school of medicine under IC 4-22-2.
- 4) Pursuant to this statutory mandate, the State Department of Toxicology promulgated several rules governing the administration of breathalyzer tests under IAC 260 Article 1.1 Breath Test Operations And Equipment.
- 5)
- 6) Counsel for the Defendant obtained a certified copy of the records as kept by the State Department of Toxicology for Datamaster [insert #].
- 7) [EXPLAIN DEVIATION FROM RULES IN EITHER TESTING PROCEDURES, OPERATOR, EQUIPMENT OR CHEMICALS USED]
- 8) Failure to comply with the regulations has the consequence set out in the statute—inadmissibility of the results of the breath test. The detailed procedures to be followed reflect a determination that the test should be as accurate and free from uncertainty as possible. Bowman v. State, 564 N.E.2d 309, 311 (Ind.Ct.App. 1990), *overruled on other grounds by* 577 N.E.2d

569 (Ind. 1991). The State must strictly comply with the regulations. State v. Johanson, 695 NE.2d 965 (1998).

WHEREFORE, the Defendant, by counsel, respectfully moves this court to suppress the B.A.C. Datamaster Evidence Ticket in the above-entitled cause and for all other relief deemed just and proper.

(Signature)

CASE LAW

Guy v. State, 823 N.E.2d 274 (Ind. 2005) (tongue stud inserted in a person's mouth more than twenty minutes before breath test did not render results of test inadmissible under 260 IAC 1.1-4-8(1)). See also State v. Gilbert, 997 N.E.2d 414 (Ind.Ct.App. 2013) (presence of false teeth in Defendant's mouth during breath test did not render result inadmissible, where false teeth were put in Defendant's mouth more than 20 minutes before administration of test, and were not foreign objects within meaning of testing regulations).

State v. Rumple, 723 N.E.2d 941 (Ind.Ct.App. 2000) (the trial court erred in suppressing results of the Defendant's BAC DataMaster test because simulator solution used to calibrate the machine does not have to be independently tested and certified by Department of Toxicology).

Wray v. State, 751 N.E.2d 679 (Ind.Ct.App. 2001) (where officer unequivocally testified that he had not received training in four of five areas that the regulations require breath test operators to receive, a breath test operator certificate that indicates otherwise is not admissible under statute, thus leading to the suppression of the breath test results), *superseded by regulation*, State v. Lloyd, 800 N.E.2d 196 (Ind.Ct.App. 2003) (the trial court abused its discretion in refusing to admit breath tests and the testifying officer's certification into evidence; administrative rule cited in Wray on which the trial court relied was amended to require only twelve hours of certification training).

Haddin v. State, 812 N.E.2d 1057 (Ind.Ct.App. 2004) (proper procedure required for the admission of breath tests does not require officer to continuously observe Defendant for the twenty minute pre-test waiting period).

State v. Johanson, 695 N.E.2d 965 (Ind.Ct.App. 1998) (where breathalyzer machine malfunctioned and would not print results, officers hand written results were inadmissible; officer did not follow approved procedure).

Bowman v. State, 564 N.E.2d 309 (Ind.Ct.App. 1999) trial court erred in admitting defendant's breath test results where test operator did not record test ampoule control number on test result form as required by approved procedures), *aff'd in part, vacated in part by Bowman v. State*, 577 N.E.2d 569 (Ind. 1991).

Upchurch v. State, 839 N.E.2d 1218 (Ind.Ct.App. 2005) (an evidence ticket stating "SUBJECT SAMPLE INVALID" does not permit officer to enter test as refusal; trial court erred in denying defendant's petition for judicial finding of no refusal).

NOTE: At trial, also keep in mind Confrontation Clause issues, in light of Crawford v. Washington, 541 U.S. 36 (2004) (holding that testimonial statements of witnesses absent from trial are admissible over Confrontation Clause objection only when declarant is unavailable and defendant has had prior opportunity to cross-examine). Napier v. State, 820 N.E.2d 144 (Ind.Ct.App. 2005) (admission of certified documents regarding inspection and compliance issues pertaining to breath test machine did not violate Crawford; but State's failure to present any "live" testimony at trial from law enforcement officer who conducted chemical breath tests on Defendant violated Crawford, where State offered "evidence ticket" into evidence displaying test results, absent any witness to present this exhibit, and thus Defendant precluded not only from cross-examination about operator's qualifications, he was not afforded opportunity to question or attack test results), *aff'd on rehearing*, 827 N.E.2d 565 (Ind.Ct.App. 2005).