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BREATH-TEST FLAP SPARKS LEGAL QUAGMIRE RELIABILITY OF INSTRUMENT, CERTIFICATION QUESTIONED

Brent Whiting, The Arizona Republic

Authorities started getting suspicious when the Intoxilyzer 5000, a breath-test machine used by police in drunken-driving cases, began acting haywire.

Officer Tim Reardon, a quality-control specialist for the Glendale Police Department, reported that because of a worn-out motor, blood-alcohol readings obtained from nine people accused of driving under the influence were questionable.

"In short, we . . . cannot testify that the instrument was working properly," Reardon wrote in a Feb. 18 memorandum to city prosecutors.

Yet an opposite story was told in quality-assurance reports later issued by the Arizona Department of Public Safety for the nine cases.

The DPS crime laboratory certified the machine to be in proper working order, according to lawyers who have gone to court trying to take the agency to task. The DPS claims that the machine, in fact, was functioning right.

Whether working or not, it sets the stage for a legal mess that is raging in courts throughout the state.

The controversy focuses on hundreds of old and current cases that have been filed since 1995, when the DPS started using a computer-based reporting system that has come under judicial scrutiny.

The debate boiled over Tuesday when Glendale Judge John Burkholder issued a 41-page order that tossed out Intoxilyzer 5000 results in 89 DUI cases, not including the nine flagged by Reardon.

Burkholder, a former DUI prosecutor for the Maricopa County Attorney's Office, also accused the DPS of "bad faith" dealings that violated the rights of suspects.

Craig Penrod, a Phoenix defense lawyer, said Thursday that other Arizona judges who are weighing the same issues in thousands of pending cases are likely to take notice of Burkholder's ruling.

The decision isn't binding on the other judges, but they may be persuaded by some of the conclusions, **Penrod** said.

"The bottom line is that he found the government was acting in bad faith by sifting out things that they didn't want people to see," **Penrod** said. "The judge should have gone a step further by throwing out the cases entirely."

Meanwhile, he cautioned against a rush to the courthouse by people convicted of drunken driving since 1995 because Chester Flaxmayer, a former DPS criminalist now working for defense lawyers, is examining thousands of cases to determine whether they may have been based on flawed Intoxilyzer 5000 readings.

Flaxmayer's findings are expected to be aired during yet-unscheduled hearings before judges in Maricopa County Superior Court who are considering legal challenges involving the device, **Penrod** said.

Nancy Khiel, the Glendale city prosecutor, said she is not aware of any petitions filed in Glendale City Court by people seeking to overturn an old drunken-driving conviction.

"If it comes to our attention that there has been a problem, then we will review a case and decide what to do with it," she said.

Khiel also said there has been no decision by her office whether to appeal Burkholder's ruling.

Joe Albo, the DPS director, said Thursday that he's disappointed in Burkholder's ruling, especially the finding that the state agency had engaged in bad-faith dealings.

He said outside experts have been consulted to make sure that DPS testing and reporting procedures meet the nation's standards.

Under state law, authorities must conduct periodic checks to verify that a breath-testing machine is properly calibrated and in good working order. Those tests, as well as actual breath test results, are stored in a DPS database called ADAMS, or Alcohol Data Acquisition Management System.

Defense lawyers have dubbed the issue "Data Dump" and have accused the DPS crime of maintaining a secret file of errors and failed tests that has been deliberately withheld from the database.