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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

BOSTON MUNICIPAL COURT
#1206CR1626

COMMONWEALTH OF MASSACHUSETTS

V.

CHRISTOPHER C

**RULING ON DEFENDANT'S MOTION TO EXCLUDE THE RESULTS OF THE
BREATHALYZER TEST**

Defendant's motion to exclude the results of the Breathalyzer test in the above matter is **ALLOWED** based on the failure of the BTO (Breath Test Operator) to comply with the provisions of 501CMR 2:13 (3) which mandates an observation period of no less than fifteen (15) minutes immediately prior to the administration of the breath test.

Trooper Healey testified that the observation period began when Defendant signed the statutory rights and consent form which was at 2:02AM. Transcript of the motion hearing, p. 25, lines 18-20; See also Exhibit 1.

He further testified that the test began at 2:13AM. Transcript, p. 26, lines 7-14. See also Exhibit 2. Thus the observation period was eleven (11) minutes and not fifteen (15) as required.

Commonwealth argues in its post-hearing submission that since the BTO was also the arresting trooper that he actually observed Defendant for a longer period than fifteen minutes. Although Defendant was in the presence of the BTO from the time of the arrest until at least the conclusion of the breath test given the fact that he was the arresting and booking officer, there was no testimony that he was actually "observing" Defendant the entire time in conformity with the purpose of the regulation, namely, to ensure that an arrestee does not ingest, nor bring up any substance into the mouth that could adversely affect the results of the test.

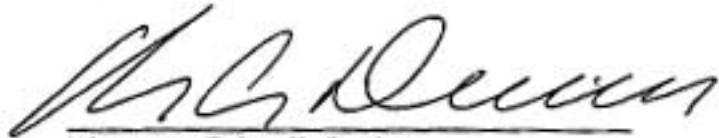
This case is on all fours with *Commonwealth v. Pierre*, 72 Mass. App. Ct., 230 (2008). To quote from *Pierre*,

"We view the record in this case as showing substantial deviation from regulatory compliance and that there is a limit as to how much deviation may occur before rendering test results inadmissible. Whatever the precise limit may be, we believe it was exceeded in this case. Admission of breathalyzer test results in the circumstances represented in this record would undermine the express purpose of

501 Code Mass. Regs. § 2.55 (2004), and represents more than a mere "deviation [] from meticulous [regulatory] compliance." *Pierre*, at 235, quoting from *Commonwealth v. Kelley*, 39 Mass. App. Ct. at 453.

Motion **ALLOWED**.

So ordered.
By the Court,

A handwritten signature in cursive script, appearing to read "Mary Ann Driscoll", written over a horizontal line.

Mary Ann Driscoll, Justice
Boston Municipal Court

February 15, 2013