



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Kenneth T. Cuccinelli, II
Attorney General

June 7, 2013

900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

The Honorable La Bravia J. Jenkins
Commonwealth's Attorney
City of Fredericksburg
Post Office Box 886
Fredericksburg, Virginia 22404-0866

Dear Ms. Jenkins:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You have asked whether the results of preliminary breath tests (Alco-Sensor or like device) are admissible evidence for the offenses of underage possession of alcohol,¹ possession, or consumption of alcoholic beverages by an interdicted person,² and public intoxication.³

Response

It is my opinion that the results of the preliminary breath tests you describe may be admissible for the offenses of underage possession of alcohol, possession, or consumption of alcoholic beverages by an interdicted person and public intoxication at the discretion of the trial judge and subject to the proper foundation.

Applicable Law and Discussion

"The admissibility of evidence is within the broad discretion of the trial court."⁴ There are obvious exceptions such as when the legislature has prohibited certain evidence. For example, the law expressly prohibits the admission into evidence of the results of a preliminary breath test when a driver is suspected of certain driving offenses.⁵ No such prohibition exists for underage possession of alcohol, possession or consumption of alcoholic beverages by an interdicted person and public intoxication. When

¹ VA. CODE ANN. § 4.1-305 (Supp. 2012).

² Section 4.1-322 (2010).

³ VA. CODE ANN. §18.2-388 (2009).

⁴ *Bell v. Commonwealth*, 49 Va. App. 570, 576, 643 S.E.2d 497, 500 (2007) (citing *Blain v. Commonwealth*, 7 Va. App. 10, 16, 371 S.E. 2d 838, 842 (1988)).

⁵ Section 18.2-267(E) (2009).

one statute makes a specific prohibition, the lack of such specific prohibition in another statute is evidence that the General Assembly intended that a prohibition not exist where it is not referenced.⁶

Nonetheless, it is also important to have a proper foundation in admitting preliminary breath test analysis into evidence. Even in civil cases the court has required evidence of proper calibration and reliability of the machine used in order to admit the test results.⁷ Therefore, an important element in the admissibility of the preliminary breath test is the foundation that the machine was working properly.

Conclusion

Accordingly, it is my opinion that results of the preliminary breath tests you describe may be admissible for the offenses of underage possession of alcohol, possession or consumption of alcoholic beverages by an interdicted person and public intoxication at the discretion of the trial judge and subject to the proper foundation.

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II
Attorney General

⁶ 2000 Op. Va. Att’y Gen. 136, 138 (stating that “the mention of one thing in a statute implies the exclusion of another.”).

⁷ Santen v. Tuthill, 265 Va. 492, 498, 578 S.E.2d 788, 791 (2003).