

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF)
CALIFORNIA)
)
Plaintiff/Appellant,)
)
v.)
)
TERRY VANGELDER,)
)
Defendant/Respondent.)
_____)

S195423

**SUPREME COURT
FILED**

APR 26 2013

Frank A. McGuire Clerk

Deputy

RESPONDENT'S SUPPLEMENTAL BRIEF

Fourth Appellate District, Div. One, No. D059012
San Diego Superior Court App. Div. No. CA221258
San Diego Super. Ct. No. M039138, Hon. Gregory W. Pollack, Judge

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Under the Appellate Defenders
Assisted Case Program

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TERRY VANGELDER,)	Respondent's Supplemental
)	Brief
Defendant/Respondent.)	
_____)	

I. INTRODUCTION

On April 17, 2013, the court ordered the parties to file simultaneous supplemental briefs addressing the effect, if any, of the following:

1. Health & Safety Code sections 100700 and 100701;
2. California Code of Regulations, title 17, sections 1221.2 [concerning performance standards for breath-alcohol analysis machines] and 1221.3 [concerning a "Conforming Products List" for approved breath-alcohol analysis machines]; and
3. 58 Federal Register 48705, 48707-48708 (Sept. 17, 1993) ["Model Specifications for Evidential Breath Testing Devices" - providing that no machine can meet federal standards unless it "measure[s] the alcohol content of deep lung breath with sufficient accuracy for evidential purposes"]; 72 Federal Register 71480, 71481-71483 (Dec. 17, 2007) ["Conforming Products List of Evidential Breath Measurement Devices" at time of trial]; 77 Federal Register 35747, 35748-35751 (June 14, 2012) [current "Conforming Products List of Evidential Breath Measurement Devices"].

In short, the above statutory and regulatory measures have no effect. They do not answer the question raised in this case: did the trial court erroneously exclude expert testimony that breath tests are unreliable

measurements of alcohol in expired breath. At best, the federal regulation emphasizes that to be reliable breath machines must measure deep lung air. Appellant may argue that the listing of the machine used in this case on the federally approved list presumptively shows deep lung air is being measured. But this is not so. Whether it be the federal regulation requiring deep lung air to be measured, or the California regulation requiring measurement of “essentially alveolar air,” appellant has the right to show that neither is being measured and that this undermines test reliability.

Although we have referred, as a convenient shorthand, to ‘the presumed reliability of the test,’ what is actually presumed under Evidence Code 664 is compliance with statutory and regulatory standards, which in turn gives rise to an inference of reliability. If the licensee shows, through cross-examination of the officer or by the introduction of affirmative evidence, that official standards were in any respect not observed, the burden shifts to the Department to prove that the test was reliable despite the violation. [Citations.]” (Davenport v. Department of Motor Vehicles (1992) 6 Cal.App.4th 133, 144; *accord* Borger v. Department of Motor Vehicles (2011) 192 Cal. App. 4th 1118, 1122-1123.)

Respondent submits the trial court’s exclusionary error violated Mr. Vangelder’s 14th Amendment due process, compulsory process, and right to confront the evidence brought against him. (Washington v. Texas (1967) 388 U.S. 14, 19 [87 S.Ct. 1920; 18 L.Ed.2d 1019]; People v. Martin (1987) 44 Cal.3d 1, 30.) The appearance of a breath machine on a federal approved list cannot prevent the defendant from challenging the accuracy of the machine involved in his case when he can show both non-compliance with the regulations and unreliability.

Under state and federal law, the cited statutes and regulations are subservient to constitutional imperatives. (Alta-Dena Dairy v. County of

San Diego (1969) 271 Cal.App.2d 66, 77 [“Somewhere along the line appellant is entitled to meet its adversary on equal footing in a full and fair hearing, before an impartial tribunal, with the full and complete right to present evidence and cross-examine witnesses. [Citation].) Unless such right is available to appellant by a trial de novo in the superior court, the very regulation under which respondent Askew acted would violate due process and thus be unconstitutional”]; *see* Vehicle Code section 23610, subdivision (c), which states that presumptions about chemical test results¹ established by other subdivisions in the section "shall not be construed as limiting the introduction of any other competent evidence bearing upon the question of whether the person ingested any alcoholic beverage or was under the influence of an alcoholic beverage at the time of the alleged offense." *See also* Pen. Code section 1020: "All matters of fact tending to establish a defense other than specified in [this section], may be given in evidence under the plea of not guilty.")

Regulatory standards exist to insure scientific reliability of breath testing. (People v. Williams (2002) 28 Cal.4th 408, 414, 415-416 [non-compliance with CCR regulations in administering a breath test constitutes relevant evidence which a defendant may put before the jury because the scientific standards behind breath test accuracy are premised on the regulations embodied in Title 17]; *accord* People v. Adams (1976) 59 Cal.App.3d 559, 567.)

Finally, appellant made no argument at trial, on appeal or in this Court that the federal regulations support the decision of the trial court. It

¹ Section 23610(a)'s permissive presumption instruction was given at CT 120.

argued the proffered evidence was partition ratio evidence. Assuming *arguendo* the regulations have some relevance (*i.e.*, that the version² of the breath machine used in the instant case was tested and listed in the Federal Register), the issue, to the extent appellant may argue it in its supplemental brief, is waived. (*See e.g.*, People v. Nattoli (2011) 199 Cal.App.4th 531, 561 [prosecutor failed to assert the defendant lacked an expectation of privacy, and thus forfeited issue on appeal].)

II. THE STATUTES AND REGULATIONS DO NOT SUPPORT APPELLANT'S ARGUMENT TO EXCLUDE THE PROFFERED EXPERT TESTIMONY.

A. State Statutes and Regulations Cited in the Court's Order.

1. California Health and Safety Code section 100700 states:

(a) Laboratories engaged in the performance of forensic alcohol analysis tests by or for law enforcement agencies on blood, urine, tissue, or breath for the purposes of determining the concentration of ethyl alcohol in persons involved in traffic accidents or in traffic violations shall comply with Group 8 (commencing with Section 1215) of Subchapter 1 of Chapter 2 of Division 1 of Title 17 of the California Code of Regulations, as they exist on December 31, 2004, until the time when those regulations are revised pursuant to Section 100703.

(b) Notwithstanding subdivision (a), the department shall not require laboratories to be licensed.

2. California Health and Safety Code section 100701 states:

All laboratories that are subject to the requirements of Section

² The federal regulations state that if the manufacturer wishes to change the design of its machine it must submit the proposed changes to Office of Alcohol and State Programs for review. The review is to determine if the alterations require retesting. (Federal Register, Vol. 58, No. 179/pp. 48705-48710 / Friday, September 17, 1993.)

100700 shall ensure that breath alcohol instruments and calibrating devices used in testing are listed in the conforming products list in the Federal Register by the National Highway Traffic Safety Administration of the United States Department of Transportation.

These statutes require compliance with the California regulations and that breath alcohol machines be listed as conforming products by the National Highway Traffic Safety Administration (NHTSA).

3. California Code of Regulations, title 17, sections 1221.2 and 1221.3.

A. § 1221.2 states:

(a) Instruments for breath alcohol analysis shall meet the following standard:

(1) The instrument and any related accessories shall be capable of conforming to the "Model Specifications for Evidential Breath Testing Devices" of the National Highway Traffic Safety Administration of the U.S. Department of Transportation, which were published in the Federal Register, Vol. 49, No. 242, Pages 48854-48872, December 14, 1984, and are hereby adopted and incorporated.

(b) The ability of instruments and any related accessories to conform to the standard of performance set forth in this section shall be tested by the U.S. Department of Transportation.

B. § 1221.3 states:

(a) Only such types and models of instruments and related accessories as are named in the "Conforming Products List" published in the Federal Register by the National Highway Traffic and Safety Administration of the U.S. Department of Transportation shall be used for breath alcohol analysis in this State.

These two sections state that breath test machines used in California must be listed on the NHTSA "Conforming Products List."

**B. National Highway Traffic and Safety Administration
(NHTSA) Federal Register**

These regulations are lengthy but in essence say the following:

1. Vol. 58, No. 179/ pp. 48705-48710 / Friday, September 17, 1993

states the model specifications for devices to measure breath alcohol including:

Model Specifications for Evidential Breath Testers

1. Purpose and Scope

These specifications establish performance criteria and methods for testing of evidential breath testers (EBT). EBTs *measure the alcohol content of deep lung breath samples* with sufficient accuracy for evidential purposes. These specifications are intended primarily for use in the conformance testing of EBTs. (*Id.* at 48707; Italics added.)³

2. Federal Register / Vol. 72, No. 241 / Monday, December 17, 2007

/ Notices gives the Conforming Products List of Evidential Breath Alcohol Measurement Devices. This and the following section of the Federal Register state which devices are approved for breath alcohol measurement, and whether they are approved for mobile and non-mobile purposes.

3. Federal Register / Vol. 77, No. 115 / Thursday, June 14, 2012 /

Notices: This regulation states the Conforming Products List of Evidential Breath Alcohol Measurement Devices.

The government publication on the Breath Alcohol Sampling Simulator test that is used to qualify breath machines for listing in the Federal Register is referenced in the cited Federal Register (section 3.7 of

³ The machine used in this case was described as an EC/IR (electrochromatograph/infrared) machine. (RT 174, 205, 269, 286, 302.) Dr. Hlastala was asked, "EC/IR...Do they provide a scientifically accurate test? A: Well, they don't." (RT 325.)

Federal Register, vol. 58, No. 179, pages 48705-4870). The article, “Breath Alcohol Sampling Simulator (BASS) for Qualification Testing of Breath Alcohol Measurement Devices,” NBS Special Publication 480-41 (U.S. Department of Commerce National Bureaus of Standards), makes the assumption, contradicted by Dr. Hlastala’s work, that when “blood vessels contact the alveoli, the surface-to-volume ratio is much higher than that in the remainder of the respiratory system. Consequently, the alveoli-blood interface is the primary locus for active gas exchange between blood and breath, with relatively little exchanged elsewhere. Here, then, almost all alcohol exchange takes place.” (*Id.* at p. 3.) This statement is contradicted by Dr. Hlastala’s published research and that of others. (*E.g.*, Dr. Kurt M. Dubowski, *The Technology of Breath-Alcohol Analysis*, U.S. Department of Health and Human Services, 1991, DHHS Publication No (ADM) 92-1728, cited in the brief of the Amicus Brief of the California DWI Lawyers Association, pp. 9-10.)

The BASS article agrees with Dr. Hlastala’s view that “volume, flow rate, flow pressure, and temperature of the expired air during the collection process are the key parameters which affect the measured value of alcohol concentration.” (*Ibid.*) And those variables, Dr. Hlastala⁴ (and others) posit, make breath testing less reliable than the manufacturers posit.

The government’s BASS tests use a “substitute for human breath” to test breath machines. (*Id.* at 5.) The appropriate “breath” it attempts to

⁴ Dr. Hlastala testified that the measurement of the amount of breath alcohol can be impacted by a number of physiological variables such as breathing pattern, breath and body temperature, blood hematocrit, and perhaps medical condition such as lung disease, and gender. (2RT 349-350, 355-356.)

replicate is “an adequate amount of the undiluted portion of expired alveolar air.” (Ibid.) The “measured alcohol concentration depends strongly on the parameters discussed in the last section” [volume, flow rate, flow pressure, and temperature of the expired air]. (Ibid.) “Human physiology varies with individuals and also with time in the same individual, hence any given functional relationship is based on statistical averages.” (Ibid.)

In this regard, the BASS report comports with Dr. Hlastala’s testimony about human physiology except that the report assumes the breath alcohol content in the URT (upper respiratory tract) never exceeds that of alveolar air, and even that equilibrium would occur only on rebreathing. (Presumably, unless the person is dead, he/she is always rebreathing.) The assumption contradicts the premise of measuring deep lung air. Alveolar air supposedly approximates a closed container where the relevant blood-air exchange occurs. It is the alveolar level exchange that is said to permit confidence the machine is not measuring either mouth or URT alcohol. If the latter were being measured, as the trial court noted at 2RT 342, it would give artificially high alcohol readings.

However, as referenced in our Brief on the Merits, pp. 8-11, Dr. Hlastala would have testified that these assumptions are not correct, that the variables in field testing DUI suspects produce unreliable alcohol content readings, and that the machines do not measure, as they are supposed to, “essentially alveolar air.” (See State of Arizona v. Cooperman (2012) 282 P.3d 446, 641 Ariz.Adv.Rep. 14, *review granted on another ground*, March 21, 2013, <http://apps.supremecourt.az.gov/aacc/asc/ASCpartyindex.htm> [The defense expert “testified ‘you can't always tell if somebody's breathing exactly as instructed.’ In sum, [defendant] Cooperman presented competent

expert testimony that these physiological factors, apart from partition-ratio evidence, can impact the ability of the machine to accurately register a defendant's breath alcohol concentration, which is relevant to both charges. The court thus did not abuse its discretion in concluding the evidence had some tendency to make a fact in issue more or less probable”]; *see also* State of Arizona v Sanchez (Ariz. Ct. App. 1998) 192 Ariz. 454, 455, 459 [“After further investigation into that [breath machine] device, however, defense counsel established at a hearing that it was not scientifically reliable in its ability to test a sample of alveolar air from a subject” despite being previously certified per State regulations]; *accord* Mack v. Cruikshank (Ariz.App. 1999) 196 Ariz. 541, 545, 2 P.3d 100.)

CONCLUSION

The right to present a defense requires that a defendant be given "a meaningful opportunity to present a complete defense." (California v. Trombetta (1984) 467 U.S. 479, 485 [104 S.Ct. 2528, 81 L.Ed.2d 413].) While the work of Dr. Hlastala and other researchers is not novel or recent, this Court has observed that experts “very often testify regarding matters that lie at the frontier of human knowledge about a given subject. It is not surprising that in the latter circumstance, an expert's opinion may rely to some extent on evolving theories, assumptions, or methods.” (In re Richards (2012) 55 Cal.4th 948, 962.)

Here, respondent sought to present evidence of the unreliability of the prosecution’s test results. It was error not to permit it. (*See* Sargon Enterprises, Inc. v. University of Southern California (2012) 55 Cal.4th 747, 769 [noting federal courts caution that “due to the jury trial right, courts should not set the admission [of testimony] bar too high”].)

This error goes to respondent’s right to challenge the evidence the

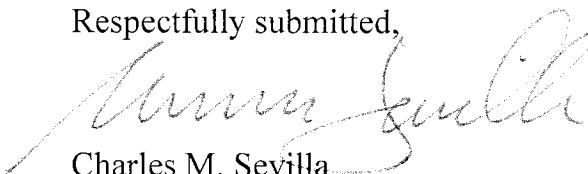
State presents against him. “Allowing [arguably] false testimony to go unchallenged impairs the integrity of the fact-finding objective of a trial (United States v. Havens [(1980)] 446 U.S. [620,] 627 [64 L.Ed.2d 559, 100 S.Ct. 1912]), because such testimony hinders or blocks the disclosure of the truth to the trier of fact (see James v. Illinois [(1990)] 493 U.S. [307,] 321 [107 L.Ed.2d 676, 110 S.Ct. 648]).” (Campbell v. Superior Court (2008)159 Cal.App.4th 635, 652.)

The cited regulations state that breath tests are to measure deep lung air (a point that Dr. Hlastala and others have researched and found that the machines do not measure⁵). The regulations in no way make the proffered testimony any less relevant to the issue of the right to produce relevant evidence and confront the evidence the prosecution presents.

For the above reasons, Mr. Vangelder’s conviction should be reversed and the matter remanded for further proceedings in the trial court.

Respectfully submitted,

4. 24-13

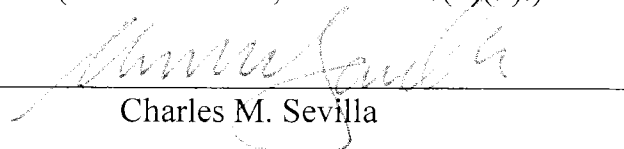


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CERTIFICATION OF WORD COUNT

This brief is proportionally spaced (1.5 line spacing) in 13 point Word Perfect Times Roman and, according to Word Perfect 13 software, contains 2,614 words. (Rules of Court, Rule 8.520(d)(2).)

April 24, 2013



Charles M. Sevilla

⁵ “An error does not become truth by reason of multiplied propagation, nor does the truth become error because nobody will see it.” (Mohandas Gandhi, Young India 1924-1926 (1927), p. 1285, quoted in <http://www.brainyquote.com/quotes/quotes/m/mahatmagan107502.html>.)

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)	
Defendant/Respondent.)	Super. Ct. No. M039138
)	

PROOF OF SERVICE

I, the undersigned, say that I am over 18 years of age, a resident of the County of San Diego, State of California, and not a party to the within action; that my business address is 1010 Second Ave., Suite 1825, San Diego, California, 92101. That I served the within Respondent's Supplemental Brief on Terry Vangelder and by first class mail to the amicus California DUI Attorneys Association % Donald Bartell, 5053 La Mart Dr., #201, Riverside CA 92507, and also delivering by first class mail a copy to:

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and the same were delivered and deposited in the U.S. mail at San Diego, California on April 24, 2013. I certify under penalty of perjury that the foregoing is true and correct. Executed on this 24th day of April 2013 in San Diego, California.

