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SUPREME COURT
FILED

May 1, 2013

MAY - 3 2013

Supreme Court of California
Frank A. McGuire, Office of the Clerk
350 McAllister Street
San Francisco CA 94102

Frank A. McGuire Clerk
CFE
Deputy

RECEIVED

RE: **People v. Terry Lee Vangelder, S195423**
4th DCA D059012

MAY -3 2013

CLERK SUPREME COURT

Dear Mr. McGuire,

This is a response to the supplemental letter brief filed by the City of San Diego on April 26, 2013. The parties do not dispute the content of the referenced statutes and regulations. Both sides agree that the intent of the regulations is to have the "combined effect of ensuring the accurate testing of deep lung air" and to "test deep lung air." (City Supplement Brief, p. 3.) Both sides also agree that these provisions do "not significantly assist in the determination of the issue presented in this case." (Ibid.)

Vangelder disagrees with the City's contentions as to the following:

1. No regulation can ensure deep lung air testing by breath machines. Dr. Michael Hlastala's work over a quarter of a century and research shows they do not. The jury should have heard his evidence on this point.

2. The City alleges that Vangelder is arguing that the "breath sample captured by the machine does not accurately reflect the true blood alcohol level when the 2100 to 1 partition ratio is used to calculate the blood alcohol level, because the breath sample is affected by alcohol in non-alveolar regions of the lung." (Ibid.) This is not Vangelder's position and not what Dr. Hlastala would have testified. He would have testified that breath machines give differing and unreliable measurements based body or breath temperatures, lung volume, hematocrit, and breathing patterns into the machine. (See 2RT 349-350, 355.) This has nothing to do with partition ratio or blood alcohol comparisons. (2RT 357.) The focus is on breath alcohol measurements *before* the application of the programmed conversion.

As the Court of Appeal wrote: "[I]f the air sample taken by the EC/IR breath test device is defective or inaccurate, how can the blood-alcohol level be correctly calculated,

even with the use of a standardized partition ratio? (Opn. 19.) Further, there are “variances ... separately said to affect the ability of the device to read alcohol levels in a gaseous form, in the breath, *before* any conversion to blood-alcohol concentration is performed.” (Opn., p. 24; italics added.) These variables can give rise to unreliable breath alcohol readings not representative of true breath alcohol content.

3. The City characterizes Vangelder’s argument as disputing “the basic science of breath testing.” The City contends Vangelder disputes that the breath sample reflects the “true blood alcohol level when the 2100 to 1 partition ratio is used to calculate the blood alcohol level....” (City Supplement Brief, p. 3.) Once again, Vangelder’s dispute is not with blood/alcohol concepts or the partition ratio (however defined). Dr. Hlastala would have testified that irrespective of the ratio, the machines are subject to producing unreliable breath/alcohol measurements and are not measuring alveolar air. (2RT 325, 349-351; 2RT 328.)

4. The City contends there is a “broad legal definition” of the partition ratio and a narrow scientific one. (City Supplement Brief, p. 3.) Respondent Vangelder is familiar only with the 2100/1 ratio. The City seeks to fashion a new, vague and “broader” definition of the concept, which just happens to be “broad” enough to exclude Dr. Hlastala’s testimony as purported partition ratio testimony. (See *id.* p. 4.) The City’s definition of the broader legal concept seems to be that “breath testing necessarily involves calculating the level of alcohol in blood based upon breath sampling from a living human.” (*Ibid.*)¹

Not so. The Legislature enacted a breath sample *only* crime, that is the amount of alcohol in breath *is the relevant calculation* to determine a violation of the statute. As this Court made clear in People v. Bransford (1994) 8 Cal.4th 885, while partition ratio challenges previously were relevant under the former legislative scheme, after the amendment in 1990 (*id.* at 890), Vehicle Code section 23152(b) defined a new crime, *unrelated to blood-alcohol level*, and not dependent on conversion using the partition ratio: “23152(b) defined the offense without regard to such ratios.” (8 Cal.4th at 893.) Now, all that matters is whether an accused’s breath-alcohol level was .08 or greater as measured by grams of alcohol per 210 liters of breath. The offense can be shown now “solely by proof of a prohibited breath-alcohol level.” (*Id.* at 891; People v. McNeal (2009) 46 Cal.4th 1183, 1196 [“the presence of a prohibited level of alcohol in...210 liters of breath, [means] a conversion from breath to blood-alcohol concentration is no longer required to establish guilt”].) This is because “[t]he crime itself is defined in terms of a

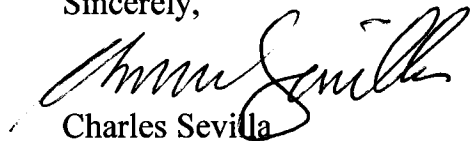
¹ The City concedes that a pure alveolar air sample is never obtained: the machine “will never capture a one hundred percent pure alveolar sample.” (City Supplement Brf., p. 3.)

prohibited...breath result.” (Id. at 1199.)

The City’s position is that the “legislature has declared that it is illegal to drive with a blood alcohol level, as measured by a breath test at a ratio of 2100 to 1, of .08% or above.” (City Supplemental Brf., p. 4.) That may be so as a general proposition, but that is not what the statute at issue, Vehicle Code section 23152(b), specifically criminalizes: it makes it illegal to drive with a prohibited level of alcohol per grams of breath without reference to either blood or the partition ratio.

In sum, the City’s effort to change the nature of the charge to import partition ratio concepts and blood comparisons is meritless. Vangelder should have been permitted to put on evidence from his reputable and experienced expert in the field to dispute the prosecution’s evidence of a .08 breath alcohol reading. His conviction should be reversed and remanded.

Sincerely,

A handwritten signature in black ink, appearing to read "Charles Sevilla". The signature is fluid and cursive, with a large initial "C" and "S".

Charles Sevilla
Attorney for Terry Vangelder

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE, STATE OF CALIFORNIA,)	S195423
)	
Plaintiff/Appellant,)	Court of Appeal No.
)	D059012
v.)	
)	Superior Court App. Div.
TERRY VANGELDER,)	No. CA221258
)	
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 Reply to the City of San Diego'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 May 1, 2013. I certify under penalty of perjury that the foregoing is true and correct. Executed on this 1st day of May 2013 in San Diego, California.

