

## COA Opinion: The printout from a breathalyzer test is neither testimonial nor hearsay, but an officer's recording of those test results is a recorded recollection for evidentiary purposes

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In *Michigan v Dinardo*, No. 294194, the Court of Appeals held that the machine-generated printout from a breathalyzer test was neither testimonial in a constitutional sense or hearsay under Michigan law. Furthermore, the Court of Appeals held that a report recording the test results that was prepared by the officer administering the breathalyzer test qualified as a recorded recollection under Michigan Rule of Evidence 803(5) where the officer no longer had independent recollection of the results and was available to testify.

The defendant was arrested on suspicion of drunk driving and given a breathalyzer test. The test machine printed out a paper ticket stating that the defendant's alcohol level was 0.20 percent. The officer then wrote the test results on a DI-177 breath-test report. The defendant received a copy of the breathalyzer printout, but neither the copy nor the original could be found by the time of the trial. At that time, the officer no longer had an independent recollection of the breathalyzer results. The prosecution moved to admit the officer's DI-177 report.

The defendant moved to suppress the results of the breathalyzer test on the grounds that the lack of the printout rendered the other evidence regarding the test results inadmissible as hearsay and violating the Confrontation Clause of the United States and Michigan Constitutions. The circuit court held that the DI-177 report constituted inadmissible hearsay, and that the officer neither could not use the DI-177 report to refresh his memory, nor could he read it into evidence, because it would merely reveal the numbers he had written down.

On appeal, the Court of Appeals reversed the circuit court's order and remanded for further proceedings consistent with the court's opinion. The Court held that the breathalyzer printout was neither testimonial in nature nor hearsay under Michigan law.

First, the Confrontation Clause of the United States Constitution guarantees defendants the right to confront witnesses against them. Under *Crawford v Washington*, 541 US 36; 124 S Ct 1354 (2009), testimonial statements from witnesses absent from trial are admissible only if the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant. The Court of Appeals held that the breathalyzer report was not testimonial under *Crawford*. The Court reasoned that although laboratory reports prepared by non-testifying analysts are considered testimonial, the machine printout is distinguishable because the printout was entirely generated by the machine without any human analysis. Therefore, there was no "witness" to be confronted.

Second, the Court held the printout was not hearsay because a machine cannot be a declarant for the purpose of hearsay. Under Michigan Rule of Evidence 801(c), hearsay is defined as “a statement, other than the one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. A declarant is defined under Rule 801(b) as “a person who makes a statement.” The Court reasoned that a machine is not a person, and therefore is not a declarant capable of making a hearsay statement.

Additionally, the Court of Appeals held that DI-177 report constituted a recorded recollection under Rule 803(5). The Court applied Rule 803(5) to the facts and found the report met the requirements of the rule because the officer saw the original breathalyzer printout before he made the report, he no longer has independent recollection of the results, and he personally drafted the DI-177 report. It therefore held that the circuit court had erred when it precluded the officer from reading the report into evidence.