

“Defendant successfully challenges the reliability of the breath testing machine in Pennsylvania”

In a recent opinion from the Court of Common Pleas in Harrisburg, Pennsylvania, the defendant Jason Schildt’s lower court conviction for DUI/drunk driving was overturned after an evidentiary hearing revealed that the breath testing machine was not reliable. The written opinion in Commonwealth of Pennsylvania v Jason Richard Schildt, opinion number 2191 CR 2010, was issued by Judge Lawrence Clark, Jr. on December 31, 2012. Judge Clark held that the majority of breath testing devices presently being utilized in Pennsylvania, and in particular the Intoxilyzer 5000, as those machines are presently calibrated and utilized in Pennsylvania, are not capable of providing a legally acceptable blood alcohol content reading. This is so because these devices’ operational calibration and subsequent display of a BAC reading for an individual cannot be reliably and scientifically verified due to the limited operational field calibration range of .05 percent to .15 percent. Therefore, the utilization of any breath test machine reading either above or below that range (.05 percent-.15 percent) cannot, as a matter of science and law, satisfy the Commonwealth’s burden of proof beyond a reasonable doubt on an essential element of a charged defense of DUI/drunk driving in that category of the Pennsylvania motor vehicle code.

FACTS:

On January 16, 2010, at approximately 2:11 a.m., the Defendant was involved in a single vehicle accident on Beagle Road in Londonderry Township, Dauphin County, Pennsylvania. Pennsylvania State Police Trooper Jeremy Baluh arrived on the scene and observed the Defendant’s vehicle resting on its side in the creek next to Beagle Road. Upon Trooper Baluh’s initial contact with the Defendant, he noticed that the Defendant was speaking with slurred speech, had a strong odor of alcohol on his breath, and his eyes were red. The Defendant admitted that he had consumed several alcoholic beverages prior to operating his car. Trooper Baluh then placed the defendant under arrest for DUI.

The Defendant was transported for a breath test which was conducted by Officer Ben Lucas of the Middletown Borough Police Department. Officer Lucas performed the breath test on the Defendant after a twenty (20) minute observation period. The test was performed utilizing an Intoxilyzer 5000EN, a device manufactured by CMI, and is a device certified by the DOH and PennDOT as an “approved device” for breath testing to determine blood alcohol content. The device used by Officer Lucas was field verified for calibration on January 9, 2010 and tested for accuracy on January 9, 2010 as well. The test was done within two hours of the time the defendant was operating a motor vehicle. The results of the two breath samples provided by the Defendant were 0.208% and 0.214% BAC.

PROCEDURAL HISTORY:

The Defendant was scheduled to appear for Formal Arraignment on June 3, 2010. However, the defendant signed a Waiver of Appearance at Formal Arraignment (hereinafter Waiver of Appearance) which was filed on May 21, 2010. On August 27, 2010, the Defendant, through counsel, filed a “Motion to Quash Criminal Information to Wit: The Charge of 18 PA.C.S.A. §3802(c) Driving Under the Influence-Highest Rate of Alcohol as the Commonwealth is Using Evidentiary Breath Testing Devices That Cannot Scientifically Prove the Quantification for Values Above 0.15 and as such Cannot Prove an Essential Element of the Crime Charged Due to this Inability to Quantify Values Outside of the Demonstrated Linear Dynamic Range.” (hereinafter “Motion to Quash”)

The Court clearly sense from the initial filing of the Motion to Quash by the Defendant's counsel that the scientific issues, and the direct implication of the evidentiary and constitutional law issues attendant to this case could have a profound effect upon similar cases in this Judicial District, and indeed across the Commonwealth.

After discovery was completed by the parties and expert reports were prepared and filed, an Evidentiary Hearing was scheduled for April 16, 19, 23, and 24th of 2012. On April 16, 2012, the Defendant presented testimony from Dr. Lee N. Polite; on April 19, 2012, the Defendant presented testimony from Dr. Jerry Messman; on April 23, 2012, the Defendant presented testimony from Dr. Jimmie Valentine and the Commonwealth presented partial testimony from its prime witness, Mr. Brian T. Faulkner. The Commonwealth concluded the Evidentiary Hearing with its witness, Mr. Faulker, on April 24, 2012. After testimony concluded, the Court advised that each party would have an opportunity to submit any Proposed Findings of Fact, Conclusions of Law, Memorandums of Law, and subsequent Responses thereto. The Commonwealth filed its Memorandum of Law in Opposition to Defense's Motion to Quash, the Defendant filed his Memorandum of Law and Proposed Findings of Fact and both parties ultimately filed Responses thereto.

ISSUE BEFORE THE COURT:

Are the regulations as promulgated by the Pennsylvania Department of Health adequate and scientifically reliable as to testing on a breath test device when the results are above .15 percent?

DISCUSSION:

As preliminarily mentioned, the Defendant's assertion in his Motion to Quash is that the Commonwealth cannot establish to a legally and scientific acceptable certainty that the alleged quantitation of the BAC above .15% (which is derived from the breath sample obtained from the Defendant) is legally accurate when displayed as a test result reading on an approved breath testing device; and thus, it is contended, that the Commonwealth is unable to prove an essential element of its case beyond a reasonable doubt as it pertains to a charge of DUI brought pursuant to 75 Pa. C.S. §3802(c). This Court is constrained to agree with the Defendant's contention.

The law in Pennsylvania for driving under the influence of alcohol or a controlled substance is as follows:

(a) General Impairment

(1) An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the individual is rendered incapable of safely driving, operating or being in actual physical control of the movement of the vehicle.

(2) An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of

alcohol such that the alcohol concentration in the individual's blood or breath is at least 0.08% but less than 0.10% within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle.

(b) High rate of alcohol - An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the alcohol concentration in the individual's blood or breath is at least 0.10% but less than 0.16% within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle.

(c) Highest rate of alcohol - An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the alcohol concentration in the individual's blood or breath is 0.16% or higher within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle.

75 Pa.C.S.A. §3802.

Additionally, regulation **§77.24(d)** provides as follows:

(d) *Simulator solution certification.* The manufacturer of simulator solution shall certify to the test user that its simulator solution is of the proper concentration to produce the intended results when used for accuracy inspection tests or for calibrating breath test devices. This certification shall be based on gas chromatographic analysis by a laboratory independent of the manufacturer. (emphasis added).

Assuming the foregoing regulations have been followed and an individual is charged with driving under the influence of alcohol, the admissibility of that individual's chemical testing results are governed by 75 Pa.C.S.A. §1547(c).

As a result of the evidence produced at the Hearing, it is now extremely questionable as to whether or not any DUI prosecution which utilizes a reading from an Intoxilyzer 5000EN breath testing device could presently withstand scrutiny based upon the startling testimony of the Commonwealth's own witness, Mr. Faulkner, at the Hearing. What has now come into play as a result of Mr. Faulkner's testimony is a serious question as to procedures and simulator solutions utilized by the manufacturer, CMI, to initially "teach" the Intoxilyzer 5000EN breath testing device to accurately and reliably respond to an ethanol sample during the original calibration of the device, post physical production, but while undergoing such initial calibration at the CMI facilities. As previously mentioned, the Commonwealth's sole expert witness was Mr. Faulkner, who testified that once the physical manufacturing process for the Intoxilyzer 5000EN is complete, the device then goes through the manufacturer's (CMI's) in-house initial calibration lab

where it has its calibration and consequent displayed reading adjusted for the first time. The lab introduces allegedly known concentrations of ethanol solutions to determine the device's response to ethanol. N.T. 4/23/12 at 170.

However, a quite thorny issue developed during Mr. Faulkner's testimony concerning that initial calibration by CMI which appears to collide with Pennsylvania's regulations requiring that "the manufacturer of simulator solution shall certify to the test user that its simulator solution is of the proper concentration to produce the intended results when used for accuracy inspection tests or for calibrating breath test devices. This certification shall be based on gas chromatographic analysis by a laboratory independent of the manufacturer." 67 Pa. Code. §77.24(d) (emphasis added).

Astoundingly, Mr. Faulkner testified that CMI does not follow the preceding Pennsylvania regulation. At the Evidentiary Hearing, the Commonwealth inquired of its own witness, Mr. Faulkner, as follows:

Mr. Faulkner: "We make our own solutions in-house. Solutions are checked and verified with a gas chromatograph. The gas chromatograph is verified with NIST traceable reference materials." N.T. 4/23/12 at 172-173.

Mr. Faulkner's own testimony stunningly supports the Defendant's claim that the Intoxilyzer 5000EN could not have produced a legally acceptable reading of his (the Defendant's) blood alcohol content derived from the breath alcohol content as tested by the Intoxilyzer 5000EN because the device was never properly calibrated according to Pennsylvania regulatory standards in the first place. Under those Pennsylvania standards, the simulator solution used in the calibration of the breath testing device by the manufacturer of the device must be certified based on gas chromatographic analysis by a laboratory **independent of the manufacturer**. Unfortunately, CMI calibrates the Intoxilyzer 5000EN with a simulator solution made in-house, with no reference to any certification based on gas chromatographic analysis completed by an independent laboratory.

Moreover, 67 Pa. Code §77.26(b)(1) imposes the requirement that calibration testing of a breath test device shall consist of conducting three separate series of five simulator tests to give readings of 0.05%, 0.10%, and a reading above 0.10% which is a multiple of 0.05%. (Pennsylvania uses 0.15% for its calibration verification) . Defense expert, Dr . Polite, addressed the significance of this limited linear range when he declared, "If you're calibrating from 0.05 to 0.15 and did these three points, you have the correlation coefficient, you've proven to me that your instrument works - - definitely works between 0.05% and 0.15%. There's no data to say that it works at 0.16%. There's no data to say it works at 0.04%." N.T. 4/16/12 at 127. Dr. Polite further enunciated that, "Anything outside of the range of 0.05% to 0.15% is not a valid number. We just don't have any data to say anything above 0.15% has any validity because they haven't proven that." N.T. 4/16/12 at 139. That statement captures the essence of the evidentiary deficiency with the calibration of the Intoxilyzer 5000EN and its consequent displayed reading. The Defendant's blood alcohol content was recorded as 0.208% based on the breath test administered on the Intoxilyzer 5000EN. Yet, if the Intoxilyzer 5000EN only undergoes calibration verifications at 0.05, 0.10, and 0.15 data points, how can any reading outside of that linear range be accepted on its face as *per se* valid? All of the expert witnesses, including Mr. Faulkner, acknowledged that at some point, the linear accuracy of a breath testing device will "fall off" and be inaccurate, and that the only way to know where that "falloff" point occurs is to scientifically test for it with valid data points spread across the entire dynamic range of the intended (or possible) measurement spectrum.

Despite CMI's initial calibration and testing of the Intoxilyzer 5000EN up to a 0.30% ethanol concentration (using an in-house prepared solution that is unverified by a laboratory independent of the manufacturer (CMI), in violation of 67 Pa. Code §76.24(d)), the Intoxilyzer 5000EN is not on-site operationally tested and verified above a .15% ethanol concentration once it leaves the manufacturer. Inasmuch as the monthly calibration verifications in Pennsylvania range from 0.05% to 0.15%, it is this Court's estimation that the Intoxilyzer 5000EN could not produce a legally acceptable blood alcohol content reading above 0.15% for the Defendant which can, *per se* and as a matter of acceptable evidentiary law, satisfy the Commonwealth's burden of proving each and every element of a charged offense beyond a reasonable doubt, without engaging in some form of speculation, conjecture or guess. It is bedrock law in this Commonwealth that the finder of fact may not engage in any such specious activity of speculation, conjecture or guess when determining whether or not the Commonwealth has met its burden of proof beyond a reasonable doubt as to each and every element of a charged offense.

CONCLUSION:

The Court finds for the defendant. As discussed extensively above, both presumptions relied upon by the Commonwealth do not extend to a breath testing reading of above .15 percent or below .05 percent. Both presumptions, without valid testing of that premise on any such approved device, are fatally affirm as a matter of science and law.

WHEREFORE, the defendant's motion to quash is hereby granted and the same relief shall apply to all similarly situated cases as have been joined for this hearing.