

**IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE

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)

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v.

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Cr. A. No: 0807040189

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CECIL G. PALOMINO,
Defendant

)

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Submitted: August 6, 2009

Decided: September 3, 2009

Upon Defendant's Objection to Admission of Evidence
Under the Business Records Exception

OVERRULED

MEMORANDUM OPINION AND ORDER

Barzilai K. Axelrod, Esquire, Department of Justice, Wilmington, Delaware,
Attorney for the State

Thomas A. Foley, Esquire, Wilmington, Delaware, Attorney for the
Defendant

ROCANELLI, J.

Defendant Cecil G. Palomino was charged by information with Driving Under the Influence of Alcohol in violation of 21 Del. C. §4177(a).¹ Defendant objected to the admission into evidence of two certification sheets purporting to show the intoxilyzer machine was operating accurately before and after testing Defendant's breath. The Court concludes Trooper Joshua Walther is an "other qualified witness" who attested to the necessary foundational requirements of Rule 803(6) of the Delaware Rules of Evidence. Therefore, the business records exception to the hearsay rule is satisfied and Defendant's objection is overruled.

THE FACTS

On July 26, 2008, at 11:26 p.m., Trooper Walther of Delaware State Police Troop One responded to a report about a vehicle stopped on the exit ramp from Interstate 95 northbound to Marsh Road. Trooper Walther observed a 2002 Mazda MPV minivan ("Defendant's Vehicle") stopped on the far right side of the ramp, partially blocking traffic, with thick smoke coming from Defendant's Vehicle. Trooper Walther arrived from the

¹ Defendant was charged with four (4) separate counts. The State entered a nolle prosequi on the charges of failure to have proof of insurance pursuant to 21 Del. C. §2118(p) (Count Two) and driving an unsafe motor vehicle in violation of 21 Del. C. §2115(6) (Count Three). Defendant stipulated he was driving with an expired license in violation of 21 Del. C. §2701(d) (Count Four). Only the DUI charge is at issue (Count One).

opposite direction onto the ramp and pulled his marked patrol car in front of Defendant's vehicle. Upon approaching Defendant's Vehicle, Trooper Walther noticed a large amount of oil on the pavement under Defendant's Vehicle, and Trooper Walther observed the hood was warm to the touch.

Defendant was in the driver's seat, attempting to start Defendant's Vehicle. In response to Trooper Walther's inquiry, Defendant stated he had been driving on I-95 and smoke started coming from his vehicle so he pulled off I-95 onto the ramp. While standing approximately one to two feet away from Defendant, Trooper Walther noticed Defendant had bloodshot, glassy eyes, was slurring his words, and had a strong odor of alcohol on his breath. Trooper Walther asked Defendant to perform a series of field sobriety tests, to which Defendant consented.

The first field sobriety test performed by Defendant was the Horizontal Gaze Nystagmus ("HGN") test. It was established Trooper Walther was trained to administer HGN tests.² The HGN test was administered to Defendant in compliance with National Highway Traffic Safety Administration standards. Defendant failed six of the six possible clues.

² HGN training was part of Trooper Walther's training at the National Highway Traffic Safety Administration DWI Detection and Standardized Field Sobriety Testing Course. Trooper Walther's certificate for the course was introduced into evidence as State's Exhibit B.

Trooper Walter read the instructions for the walk-and-turn test but Defendant did not understand the instructions and therefore did not complete the walk-and-turn test. Trooper Walther administered a portable breath test (“PBT”), which Defendant failed.

Trooper Walther placed Defendant under arrest for Driving Under the Influence of Alcohol in violation of 21 Del. C. §4177(a).³ Trooper Walther transported Defendant to Troop One. After observing Defendant for twenty minutes and obtaining Defendant’s consent, Trooper Walther administered an intoxilyzer test according to standard operating procedure.

STATE’S EVIDENCE AND DEFENDANT’S OBJECTION

According to the State, the intoxilyzer machine at Troop One was calibrated by State Chemist Julie Willey before and after the test performed on Defendant, specifically calibration records dated July 18, 2008 and September 8, 2008 established the intoxilyzer machine was in good working

³ Defendant moved to suppress the arrest on the basis that Trooper Walther did not have probable cause to take Defendant into custody. Based on the uncontroverted testimony Defendant was trying to start a smoking vehicle; he had bloodshot, glassy eyes; there was a strong odor of alcohol; and he failed the HGN test and PBT, the Court ruled Trooper Walther had probable cause to take Defendant into custody. *Bease v. State*, 884 A.2d 495, 500 (Del. 2005) (holding probable cause can be established by the Trooper’s observations and the rational inferences drawn therefrom).

order within acceptable range of error.⁴ The State did not present State Chemist Willey to testify at trial, and instead relied on Trooper Walther to testify as an “other qualified witness” who could attest to the necessary foundational requirements of Rule 803(6). According to the State, the business records exception to the hearsay rule applies.

Defendant objected on the grounds Trooper Walther is not an “other qualified witness” because he has never met State Chemist Willey and has never seen her perform a calibration check on an intoxilyzer machine. According to Defendant, the business records exception to the hearsay rule does not apply.

ANALYSIS

The Intoxilyzer 5000 with which Defendant’s breath was tested has been deemed a scientifically acceptable means of measuring blood alcohol content.⁵ It is well-established the prerequisite to introducing the result of an intoxilyzer test into evidence is to present certifications by the State Chemist that the intoxilyzer machine was operating accurately before and after

⁴ It was stipulated by the parties, if the Court rules the calibration sheets be admitted into evidence pursuant to the business records exception to the hearsay rule, then the printouts from the intoxilyzer machine, commonly known as “flimsies,” will also be admitted into evidence.

⁵ *Best v. State*, 328 A.2d 141, 143 (Del. 1974); *State v. Munden*, 891 A.2d 193, 200 (Del. Super. 2005); *Clawson v. State*, 867 A.2d 187, 192 (Del. 2005).

testing the breath of the defendant on trial.⁶ The State need not produce the State Chemist at trial to testify about the calibration tests and can instead rely on the business records exception to the hearsay rule, set forth in Rule 803(6) by presenting “the custodian or other qualified witness.”⁷

A qualified witness must understand the record-keeping system.⁸ Defendant concedes Trooper Walther is generally familiar with the proper method used by State Chemists to calibrate an intoxilyzer machine; he has been trained regarding the calibration methods; and has observed calibration of intoxilyzer machines by State Chemists other than State Chemist Willey. Trooper Walther is a qualified witness.

“A qualified witness, in addition to his or her familiarity with the record-keeping system, must attest to the following foundational requirements of Rule 803(6): (1) [that] the declarant in the records had knowledge to make accurate statements; (2) that the declarant recorded statements contemporaneously with the actions which were the subject of the reports; (3) that the declarant made the record in the regular course of

⁶ *Anderson v. State*, 675 A.2d 943 (Del. 1996).

⁷ *Trawick v. State*, 845 A. 2d 505, 508-09 (Del. 2004). The Court rejects as incorrect Defendant’s argument that this well-established rule is disrupted by *Melendez-Diaz v. Massachusetts*, 557 U.S. ____, 129 S.Ct. 2527, 2009 WL 1789468 (June 25, 2009), because that decision addresses testimonial evidence which is not reflected in the calibration sheets at issue here.

⁸ *Trawick*, 845 A. 2d at 508-09.

business activity; and (4) that such records were regularly kept by the business.”⁹ As set forth below, the necessary foundational requirements have been established for the calibration sheets to be admitted into evidence under the business records exception to the hearsay rule.

First, the declarant is the State Chemist. “In the absence of evidence to the contrary, there is a presumption that the State Chemist acted carefully and in a prudent manner.”¹⁰ Trooper Walther testified he recognized the handwriting on the certification sheets as that of State Chemist Willey and he recognized her signature because he reviewed an e-mail containing her signature. Defendant has not challenged the accuracy of the statements made by the State Chemist in the calibration logs; therefore the State is entitled to the presumption that State Chemist Willey acted carefully and in a prudent manner. The first prong of the foundational test is satisfied.

Second, there is evidence the State Chemist Willey recorded the statements in the log book contemporaneously with the calibration tests. According to Trooper Walther, the entries made by State Chemist Willey in the log book were made at or near the time the tests were performed. The second prong of the foundational test is satisfied.

⁹ *Id.*

¹⁰ *McConnell v. State*, 639 A. 2d 74 (Del.), 1994 WL 43751 at *1.

Third, evidence must be presented that the State Chemist made the record in the regular course of business activity. Defendant stipulated the calibration sheets are prepared by the State Chemist in the ordinary course of business. Trooper Walther testified the purpose of the logbook is to maintain the calibration records of the Troop's intoxilyzer machine; and these records are kept to show that the intoxilyzer machine is working properly. The third prong of the foundational test is satisfied.

Finally, the records must be regularly kept by the business. Defendant stipulated the calibration sheets are kept in the ordinary course of business in the logbook in Trooper Walther's Lieutenant's office at Troop One. The fourth and final prong of the foundational test is satisfied.

Under the circumstances presented here – where Trooper Walther is qualified as a witness based on his familiarity with the record-keeping system and where the four foundational elements of the business records exception to the hearsay rule have been established – it is not necessary to address the fact that Trooper Walther had never observed State Chemist Willey perform a calibration of an intoxilyzer machine.

CONCLUSION

For these reasons, the Court rules Trooper Walther is an “other qualified witness” and the necessary foundational requirements of Rule 803(6) of the Delaware Rules of Evidence have been satisfied. Defendant’s objection to the admission into evidence of two certification sheets and the related flimsies which demonstrate the intoxilyzer machine was operating accurately before and after testing Defendant’s breath is **OVERRRULED**. The certification sheets and related flimsies are therefore admitted into evidence pursuant to the business records exception to the hearsay rule.

IT IS SO ORDERED.

Andrea L. Rocanelli

The Honorable Andrea L. Rocanelli