

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

STATE OF DELAWARE)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 0402010505
)	
ROBERT A. BOYER,)	
)	
Defendant.)	

Submitted: October 21, 2005
Decided: September 18, 2006

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DECISION AFTER TRIAL

On January 15, 2005, Robert A. Boyer (hereinafter “Boyer”) was arrested and charged with Operating a Motor Vehicle While Under the Influence of Alcohol, in violation of 21 *Del. C.* § 4177, and making an Improper Lane Change, in violation of 21 *Del. C.* § 4122. A trial was held on March 2, 2005 and the Court reserved decision pending briefing on two issues: First, whether the State properly offered State Chemist, Joy Tengonciang’s (hereinafter “Tengonciang”) Intoxilyzer results; and, second, whether the State properly offered the “Officer’s Copy” of an Intoxilyzer card indicating the time

the arresting officer began observing the Defendant with respect to the twenty-minute observation period required prior to administering the Intoxilyzer test. The dispute centers upon the fact that the defendant was given a copy of the card without the handwritten information which appears on the Officer's copy. This is the Court's decision.

FACTS

On January 15, 2005, at approximately 11:57 p.m., Corporal Butkus, of the Delaware State Police Troop 6, stopped the Defendant as he drove westbound on Route 2 in the Town of Elsmere, Delaware. Corporal Butkus testified that while on routine patrol, he observed a 2001 Mercedes 500, Delaware tag number 202557 traveling westbound on Route 2 from Route 141, in the right lane. The vehicle went onto the right shoulder, traveled for three (3) feet and traveled for over one-hundred feet. The vehicle moved back into the traffic lane with a jerk which over corrected and went a foot into the middle lane of this three-lane roadway. He activated his emergency equipment and the vehicle slammed on its brakes stopping in the right travel lane prior to pulling over to the right shoulder.

Corporal Butkus testified defendant was uncooperative, his eyes were bloodshot and glassy, he had a strong odor of alcohol on his breath, his face was flushed and his speech was slurred and slow. Corporal Butkus administered two field sobriety tests, the "Walk-and-Turn" and the "One Leg Stand". The defendant missed heel-to-toe on steps 2-6 on the first 9 steps; made a fast turn during which he stumbled, missed heel-to-toe on steps 7-9, on the 9 steps back, and raised his arms during steps 1-9 on the return steps. During the "One Leg Stand", Corporal Butkus testified the Defendant swayed and

hopped. The Defendant was then taken into custody and transported to Troop 6 for an Intoxilyzer test.

The State introduced the calibration documents for the Intoxilyzer through the testimony of Corporal Butkus as an otherwise qualified witness under Rule 803 (6) of the Delaware Rules of Evidence. State's Exhibit No. 2 is a calibration sheet dated December 29, 2003 for model 5000EN maintained at Delaware State Police Troop 6. It is signed by David Sockrider, Forensic Analytical Chemist for the Delaware State Police Crime Laboratory, certifying the machine was operating properly prior to the Defendant's arrest. State's Exhibit No. 3 is a second document dated February 5, 2004, signed by J.T. Tengongciang, Forensic Chemist for the Delaware State Police Crime Laboratory, certifying the machine was operating properly on that date. The defendant challenges the basis for admitting the second document.

The testimony is as follows:

MR. FERREERA: Okay, well how do you know anything about Joy Tengongciang, then, if you never had any [DUI] instruction since 2002, because she's only been around since 2004?

CPL. BUTKUS: . . . I'm in and out of the barracks on a regular basis, and one of the times when I was at the barracks, she was there conducting the tests. So, I sat town with her, and I know that a lot of times the defense likes to ask about the signatures, so, I asked her to writer her signature out for me. And, I also usually ask for my PBT, if they could take the time, if they have a couple of minutes, to just test it with a sample to see if the PBT's accurate also.

[...]

MR. FERERARA: How can you tell me that he [Sockrider] makes his entries into the log book at or near the time of the event to be recorded?

CPL. BUTKUS: Because he filled out the sheets.

MR. FERRARA: And you've seen him do that?

CPL. BUTKUS: That's correct.

[...]

MR. FERRARA: You know about the contemporaneousness of the record keeping because he showed that to you when he taught you about the academy?

CPL. BUTKUS: Yea. He showed it at the academy and I saw him working at the barracks, also

MR. FERRARA: Okay. How many times have you seen Joy Tengongciang at the barracks working?

CPL. BUTKUS: Four, five times.

MR. FERRARA: Alright. Now, how do you know that what, [if] anything, about what she does with regard, to even testing the machine?

CPL. BUTKUS: I seen her test the machine before. [...]

Cpl. Butkus further testified that the he only sat once with Tengongciang for a period of ten minutes while she conducted a calibration, and that he was not there when she began the calibration or was he there when she completed the certification sheet?

MR. FERRARA: Alright. Now, how do you know what, anything, about what she does with regard to, even testing the machines?

CPL. BUTKUS: I seen her test the machine before. [...]

MR. FERRARA: ...[Y]ou only spent ten minutes with her. It takes longer than ten minutes to do it. How could you possibly know what she does?

CPL. BUTKUS: Because I was watching her as we were sitting there. I mean, I didn't sit there through the whole test, and you know, you're correct there, but I don't even think were required to sit through a whole test. But I sat through a majority of it just talking with her, getting her signature [...]

MR. FERRARA: [...] My question is how can you tell us what it is that she does with regard to the calibrating, because she never taught you at the academy what she does and you spent less time with her than it takes to do it. So, you can't tell me that you know it by watching her, because you couldn't have, you didn't have time to see it all. So how do you know?

CPL. BUTKUS: She did the same thing that Mr. Sockrider would do with the simulated stock solutions, you know. But I don't, you know, exactly what the percentage were or anything like that.

MR. FERRARA: Well, did you see the first part of, first ten minutes? Was it the beginning of the testing, or was it the end of testing?

CPL. BUTKUS: Well, she was already in the Intoxilyzer Room.

MR. FERRARA: So, what did you see . . . a middle ten minutes, or did you see it when she finished, or was she still working on it when you left?

CPL. BUTKUS: She was still working on it.

[...]

MR. FERRARA: Alright. Well, then, how could you possibly tell me anything about the contemporaneousness of her recordkeeping, because she wouldn't have kept the records yet, since she wasn't done?

CPL. BUTKUS: The Intoxilyzer Room for Troop 6 is right by the exit door. So whenever you're walking in or out, you always, you know, have to go out that back door, and there's only one exit in the rear. So, you're walking by the room and you see either her or Mr. Sockrider in there conducting a test, filling out the sheets, etc.

MR. FERRARA: Well, then, how can you tell me when she fills out the sheet if you are telling me you didn't see her?

CPL. BUTKUS: In these two cases, I did not see her when she conducted post-test, if you're asking me specifically of that fact in question.

[...]

MR. FERRARA: --[H]ow could you tell us? You said you watched her do it once you didn't finish watching her do it, and you didn't stick around til the end. We, we would agree that she could possibly certify it until it was over, right?

CPL. BUTKUS: Because you . . . she's not off the in the distance. You have to, either, walk through the Intoxilyzer Room or walk right by it [...] The Intoxilyzer room is right by the hallway.

MR. FERRARA: And you've seen her four times, and by dumb luck you happen to walk through there right when she's putting that information on the card, is that what you want to tell us?

CPL. BUTKUS: Yeah. I seen her filling out the sheet before, yes, But not the particular date in question here [...]

MR. FERRARA: When did she fill out the sheet with regard, in re, relation to what she did it, the test?

CPL. BUTKUS: They perform . . . they were filling out the sheets, usually, before they leave the barracks.

MR. FERRARA: No, that doesn't answer my question. When did she fill out the form in relation to when she performs the test?

CPL. BUTKUS: The assumption would be a couple of minutes after the test.

MR. FERRARA: Alright. But that's all it is, right?

CPL. BUTKUS: Yes, like I said, I never witnessed an entire test take place. (Transcript, 199-200).

Corporal Butkus testified that he observed the Defendant for the required twenty-minute observation period, beginning at 12:20am, prior to administering the test at approximately 12:50am (Transcript at 213).¹ During those twenty minutes, the defendant did not consume any alcohol, any other beverages, or foods, smoke, belch, or vomit (Transcript at 211-12). The Intoxilyzer generated a result card summarizing the results of the test.² On the card marked "Officer's Copy" the following information was handwritten on the bottom portion: "Boyer, Robert A.," for the subject's name; "0020," for the time first observed; "DSP6" indicating Delaware State Police Troop 6 as the location of the Intoxilyzer Test; "CPM Butkus 3206 T6," indicating Corporal Butkus as the operator of the machine, and "No dentures-Nothing in Mouth," under the section for additional information. Although Cpl. Butkus testified that he printed out a duplicate copy of the results on the card marked Subject's Copy, which he gave to the Defendant, no handwritten information appeared on that card besides "10, .08, .12" above the line for the subject's name and below that line, the letters "FOP."

Corporal Butkus explained when an Intoxilyzer card is generated, several carbon copies are produced along with it. However, the entire card and all the copies must be

¹ Using Intoxilyzer Analyzer Model 5000EN, Serial Number 68-001969

² State's Exhibit No. 4

reprinted immediately after the original. The feature was newly added as a result of past instances where Defendants would eat the result card and all of its copies. Corporal Butkus testified that he placed the first card, the “Officer’s Copy”, in a file for safekeeping and then printed another card, “Subject’s Copy”, to give to the defendant. None of the handwritten information from the Officer’s Copy, most critically the time the twenty-minute observation period began, was on the defendant’s copy.

During discovery the Officer’s Copy was produced to defense counsel prior to trial. At trial, Defense counsel objected to the admission of the officer’s copy’s because it is not identical to the “subject’s copy,” which was given to the defendant the night of his arrest. However, the State responds that the “Officer’s Copy” was given to defense counsel during discovery, providing adequate notice to the defendant.

Corporal Butkus then testified and explained why the handwriting on the Officer’s copy and on the Subject’s copy differed:

MR. STRONG: Okay. Not considering what you write on those cards, is the reprinted card identical to the other card.

CPL. BUTKUS: It’s an exact replica. It has the Intoxilyzer number, it has all the data. It had the Defendant’s name, his license number, ticket number. All the times are the same, all the calibrations are the same, and most importantly, the subject’s sample is the same. (Transcript at 227)

[...] Then on cross-examination

MR. FERRERA: You, you said that you’re trying to give the defendant a reprinted copy, but you really don’t because you don’t give him any of that data at the bottom. Why don’t you fill in the information to make it match with yours, instead of giving him a complete blank?

CPL. BUTKUS: That’s the handwritten information with the Defendant’s name, my information. But all that information’s up above, everything but, I guess, time observed.

MR. FERRERA: How, how would, well, that's you know that's a critical piece of information, time observed, and that's not anywhere on here, is it?

CPL. BUTKUS: No, it's not. Not on the copy. (Transcript at 229)

OPINION

I. *Was Tengonciang's Intoxilyzer Certification sheet properly admitted into evidence?*

The Intoxilyzer 5000 has been deemed a scientifically reliable means of testing an individual's blood alcohol content as long as the State Chemist certifies the machine was operating accurately thirty (30) days before and thirty (30) days after test was administered to defendant. *DiSabatino v. State*, 808 A.2d 1216, 1223 (Del. Super. 2002)(citations omitted). An Intoxilyzer result used at trial to prove a violation of 21 *Del. C.* §4177 requires the State to lay an adequate evidentiary foundation for the test result's admission. *Clawson v. State*, 867 A.2d 187 (Del. Supr. 2005). The test result may be admitted under the business records hearsay exception, pursuant to Section 803(6) of the Delaware Rule of Evidence ("DRE"). However, the evidence admitted must be: (1) prepared in the regular course of business; (2) made at or near the time of the event; (3) trustworthy; and (4) testified to by custodian of the record or other qualified person. *Talley v. State*, 841 A.2d 308 (Del. Supr. 2003).

An otherwise qualified witness may testify regarding the records, if such witness: (1) have the knowledge that the declarant had knowledge to make accurate statements; (2) that the declarant's recording of the statements were contemporaneous with his or her actions; (3) that the declarant made the record in the regular course of business activity;

and (4) that such records were regularly kept. *Trawick v. Sate*, 845 A.2d 505 (Del. Supr. 2004).

To be a qualified witness, [a]n Officer must also be able to provide foundational testimony. *State v. Arnold*, 2003 WL 23112735 (Del. Com. Pl)(citing *Bruce v. State*, 781 A.2d 544 (Del. Supr. 2001)). In *State v. Arnold*, this Court ruled that an officer could not lay a proper foundation for the admission of Intoxilyzer certification sheets, under DRE 803(6) when he did not know how the test was performed, did not know anything about the contemporaneous recording of the sheets, never saw the chemist sign the sheet, and never witnessed an actual certification procedure, but was only told that the chemist performed a certain test. *Id.*

In the instant case there are two certification sheets prepared and signed by two different state forensic chemists, Sockrider and Tengonciang, dated December 29, 2003 and February 5, 2004 respectively. The State offered neither chemist to lay the evidentiary foundation for the admission of the Intoxilyzer calibration sheets, but relied upon Corporal Butkus as an other qualified witness. The Corporal provided sufficient testimony to admit Sockrider's certification, but the Defense challenged Tengonciang's certification on the grounds that the Corporal did not have the knowledge to make accurate statements and his knowledge of the contemporaneousness that she completed the sheets.

However, In the course of his testimony and voir dire, the Corporal established that he completed Intoxilyzer training, conducted by State Chemist Sockrider, and was familiar with the calibration processes used and contemporaneousness of how the certification sheets are maintained at Troop 6. Furthermore, the Corporal stated he sat

with Tengonciang during a portion of one of her calibrations and saw her perform calibrations with stock solutions, just as he saw Sockrider. Corporal Butkus also obtained a signature sample from Tengonciang, for identification, and testified to have witnessed her perform other certifications and fill out certification forms at Troop 6.

Therefore, the Corporal's testimony establishes that he has the knowledge to make accurate statements about the calibration sheets, their preparation in the normal course of business, and has sufficiently testified that he saw Tengonciang perform calibrations and fill out certification sheets. Accordingly, he meets the criteria as an "otherwise qualified witness" under DRE 803(6) and the Intoxilyzer certification sheet prepared by Tengonciang is admitted.

II. *Was the State required to provide the Defendant with the exact copy of the Intoxilyzer result card to be admitted into evidence?*

The Court is confronted with an obligation to "balance its duty to admit all relevant and material evidence with its duty to enforce a standard of fairness and the Rules of [the] Court." *Cofrancesco v. Shop-Rite Supermarkets, Inc.*, 2001 WL 541482 (Del. Super. 2001) (citing *Colonial Towers, Inc. v. Long*, 348 A.2d 325, 326 (concluding that the trial court committed reversible error when it admitted evidence at trial which had not been disclosed in a response to properly propounded discover).

There must be sufficient evidence in the record to meet the foundation requirement that a defendant was observed for an uninterrupted twenty-minute period prior to the taking of the breath sample, which commences upon the officer inserting the Intoxilyzer card in the machine. *Clawson v. State*, 867 A.2d 187 (Del. Supr. 2005). In *Clawson* the Court held the twenty-minute observation period is foundational, which may be raised either by a pretrial motion or at trial. *Id.*, 867 A.2d at 191 (citations omitted).

The Court went on to hold, the Intoxilyzer breath test inadmissible at trial because the officer failed to actually observe defendant for the required uninterrupted 20-minute period before obtaining the breath sample.

The defense also argues that there is a third missing “copy” of the Intoxilyzer card. However, Corporal Butkus testified there were only two copies of the defendant’s Intoxilyzer result card which were printed on January 15, 2005, the officer’s copy and the suspect’s copy. Even if there were three cards, I fail to find merit on this position. Corporal Butkus testified that the officer’s Copy of the Intoxilyzer card was placed in a file, after being filled out, until produced during discovery.

The State argues the Intoxilyzer results are proper and the defendant’s motion to suppress lacks a legal basis. The State reasons that the Intoxilyzer test and the procedure are reliable. Moreover, the fact that defendant did not receive the Officer’s copy at the time of his arrest, should be denied because it was produced during discovery and there is no prejudice.

The Corporal’s testimony and the two Intoxilyzer result cards establish that the cards were created contemporaneously. The printed information on both cards are identical, both contain the exact printout information, including the Intoxilyzer serial number, the date on which the test was conducted and result printed, the identity of the subject tested, and the precise times the results printed. This is contrary to defendant’s argument that the cards were not printed contemporaneously, the times stamps are identical and this information automatically printed by the machine cannot be replicated

Though the Officers Copy contains additional handwriting that the subject’s copy did not, the defense was given adequate notice and the Officer’s Copy was produced

during discovery. I fail to see any prejudice to the defendant by this procedure. An officer is permitted to make notes which will later assist him at trial.

Conclusion

Therefore, the calibration sheet offered by State prepared by forensic chemist Tengonciang is permitted into evidence. The Intoxilyzer card is admitted into evidence. The defendant's breath analysis is .12 alcohol content. Therefore, based on the evidence in the record, I am convinced beyond a reasonable doubt that the defendant is Guilty of Operating a Motor Vehicle While Under the Influence of Alcoholic in violation of 21 *Del. C.* § 4177, and Making Improper Lane Change in violation of 21 *Del. C.* § 4122, and guilty findings are hereby entered.

The Clerk will schedule the matter for sentencing.

SO ORDERED this 18th day of September, 2006

Alex J. Smalls
Chief Judge