IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JESSICA L. WEBB-BUCKINGHAM,	)	
Defendant-below, Appellant,	)	
v.	)	I.D. No. 0612020853 PLA
STATE OF DELAWARE,	)	
Plaintiff-below, Appellee.	)	

ON APPEAL FROM A DECISION OF
THE COURT OF COMMON PLEAS
AFFIRMED

Submitted: October 17, 2008
Decided: January 22, 2009

OPINION AND ORDER

Joe A. Hurley, Esquire, Wilmington, Delaware, Attorney for Defendant-Below/Appellant.

Cynthia L. Faraone, Esquire, Wilmington, Delaware, Attorney for Plaintiff-Below/Appellee.

ABLEMAN, JUDGE

I. Introduction

Before the Court is an appeal from the April 14, 2008 conviction and sentencing of defendant Jessica L. Webb-Buckingham ("Appellant") in the Court of Common Pleas. Following a bench trial, Appellant was found guilty of Driving Under the Influence of Alcohol in violation of 21 *Del. C.* § 4177(a) and Driving a Vehicle at an Unreasonable or Imprudent Speed in violation of 21 *Del. C.* § 4168(a). Appellant was sentenced to sixty days at Level V confinement, followed by one year of Level I probation.[1]

On appeal, Appellant contends that the trial court abused its discretion by admitting into evidence the results of an Intoxilyzer 5000 test ("the intoxilyzer test") because the arresting officer did not adequately monitor the Appellant during the required twenty-minute observation period prior to administering the test. As will be set forth more fully hereafter, the Court finds that the twenty-minute observation period was satisfied. Therefore, since a proper foundation existed for introduction of the intoxilyzer results, the decision of the Court of Common Pleas is hereby **AFFIRMED**.

II. Factual and Procedural Background

On December 16, 2006, Sergeant Devearl Royster ("Sergeant Royster") of the Delaware State Police was conducting a DUI saturation

[1] *See* Docket 13, at 5.

patrol in the Price's Corner area. At approximately 2:25 a.m., he observed Appellant's vehicle accelerating to a high rate of speed in a 35 mile-per-hour zone. Sergeant Royster followed Appellant's vehicle and paced it at a speed of 45 miles per hour. Sergeant Royster then activated his lights and signaled Appellant to pull over. Appellant continued to drive for a few blocks before pulling over.[2]

When Sergeant Royster approached Appellant in her vehicle, she stated that she knew why she was being pulled over. When asked if she had been drinking, she claimed that she had consumed one alcoholic drink. Sergeant Royster noted that Appellant appeared glassy-eyed and questioned her further. She then stated that she had consumed four alcoholic drinks.[3]

Sergeant Royster performed four field sobriety tests: the alphabet test; the one-leg stand; the walk-and-turn test; and the finger-to-nose test. Appellant successfully recited the alphabet. However, she repeatedly dropped her foot on the one-leg stand, took extra steps and "zig-zagged" in the walk-and-turn test, and missed her nose while disregarding instructions

[2] Docket 4 (Partial Trial Tr.), at 10-11.

[3] *Id.* at 12-13.

to keep her eyes closed on the finger-to-nose test. Sergeant Royster placed Appellant under arrest and transported her to Troop 6.[4]

Upon their arrival at the Troop, Sergeant Royster took Appellant into the intoxilyzer testing room. The sergeant testified that he was certified and experienced in administering intoxilyzer tests, and that he understood standard operating procedures for the machine, including the requirement that each test be preceded by a twenty-minute observation period. Sergeant Royster recounted that he confirmed Appellant was not wearing dentures and began observing her at 2:53 a.m. to ensure that no contaminates entered her mouth for at least twenty minutes prior to the test. Sergeant Royster testified that Appellant did not eat, drink, vomit, or belch for the duration of this observation period, which lasted until 3:15 a.m. The parties stipulated that the intoxilyzer machine was functioning properly when Appellant was tested.[5]

During at least part of this twenty-two minute observation period, Sergeant Royster filled out paperwork. At trial, Sergeant Royster stated that he sat three to four feet away from Appellant and was able throughout the

[4] *Id.* at 14-20.

[5] *Id.* at 22.

observation period to monitor her for eating, drinking, or regurgitation,[6] none of which occurred. Specifically, Sergeant Royster offered the following testimony during voir dire:

> Q: I am now citing, for your approval, the American Heritage Dictionary of the English Language, which defines . . . three definitions of "observe": "To be or become aware of especially through careful and directed attention; secondly, to watch attentively . . . ; third, to make a systematic or scientific observation." . . . Do you take the position that . . . you observed [Appellant] continuously, without interruption, for twenty minutes?
> A: If you're asking . . . did I look at her the whole twenty minutes, no, I was also doing paperwork. But . . . my attention was to her, and if she did put anything in her mouth, if she did regurgitate anything, I would have knew about it. I made, like I said, many arrests prior to her. So, I know and understand the importance of the twenty-minute observation period.
> . . .
> Q: How would you know, if you're not looking at her, whether or not she burped without making a noise?
> A: You'd hear it, and again, it's not that we're that – we weren't that far apart. And in the left corner of my eyes, if she makes a movement as to burp, I would have seen that. I would have heard that. . . .[7]

[6] Appellant and the State agree that, for the purposes of the intoxilyzer observation period, "regurgitation" must be understood broadly to encompass both vomiting and belching. Either vomiting or belching can invalidate intoxilyzer results by introducing contaminating alcohol into the mucous lining of the mouth.

[7] Docket 4, at 30-31.

When further questioned regarding his ability to visually observe Appellant as he completed the paperwork, Sergeant Royster stated that he kept her in the peripheral vision of his left eye.[8]

After the twenty-two minute observation period, Sergeant Royster administered the intoxilyzer test. The results showed that Appellant had a Blood Alcohol Content (BAC) of 0.192.[9]

At trial, Appellant objected to the introduction of the intoxilyzer results on the basis that Sergeant Royster did not comply with the observation period requirement, since he could not have adequately monitored her while filling out paperwork. The trial judge found that the State had laid a sufficient foundation through Sergeant Royster's testimony and admitted the intoxilyzer results.[10]

No witnesses other than Sergeant Royster testified. The Court of Common Pleas found Appellant guilty of Driving Under the Influence of Alcohol and Driving a Vehicle at an Unreasonable or Imprudent Speed. On appeal, Appellant contends that the trial judge abused his discretion in

[8] *Id.* at 31-32.

[9] *Id.* at 41.

[10] *Id.*

admitting the results of Appellant's intoxilyzer test. Appellant seeks to have this Court reverse her convictions and remand her case for a new trial.

III. Standard and Scope of Review

In reviewing appeals from the Court of Common Pleas, this Court sits as an intermediate appellate court, and its function mirrors that of the Supreme Court.[11] Decisions regarding the admissibility of otherwise legal evidence are reviewed for abuse of discretion.[12] An abuse of discretion occurs when the trial court has "exceeded the bounds of reason in view of the circumstances" or "so ignored recognized rules of law or practice so as to produce injustice."[13]

To the extent that the trial court's evidentiary ruling is based upon its own factual findings, the Court "must determine whether there is sufficient evidence in the record to support those [findings] and determine whether those findings are the result of a logical and orderly deductive process."[14] Where the trial court makes a factual finding that turns on the credibility of a

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[11] *See, e.g.*, *Baker v. Connell*, 488 A.2d 1303, 1309 (Del. 1985); *State v. Richards*, 1998 WL 732960, at *2 (Del. Super. May 28, 1998).

[12] *Zimmerman v. State*, 693 A.2d 311, 313 (Del. 1997); *see also Clawson v. State*, 867 A.2d 187, 192 (Del. 2005).

[13] *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994) (quoting *Firestone Tire & Rubber Co. v. Adams*, 541 A.3d 567, 570 (Del. 1988)).

[14] *Walker v. State*, 919 A.2d 562, 2007 WL 481957, at *4 (Feb. 15, 2007) (TABLE).

witness, its finding "may not be rejected on appeal unless it is clearly erroneous and the doing of justice requires its rejection."[15]

IV. Discussion

Under 21 *Del. C.* § 4177(a), there are several bases upon which a defendant may be found guilty of Driving Under the Influence of Alcohol. In relevant part, § 4177(a) states:

> (a) No person shall drive a vehicle:
> (1) When the person is under the influence of alcohol; . . .
> [or]
> (5) When the person's alcohol concentration is, within 4 hours after the time of driving .08 or more.

The sole issue in this appeal is whether the trial judge properly admitted the intoxilyzer results showing that Appellant's BAC was 0.192 within four hours of her driving a vehicle.[16]

The Delaware Supreme Court has held that admission of intoxilyzer results must be predicated on an "adequate evidentiary foundation" that includes evidence "that there was an uninterrupted twenty minute

[15] *State v. Cagle*, 332 A.2d 140, 143 (Del. 1974).

[16] Because the State amended the information in this case to remove reference to "§ 4177(A)(1)" and replace it with a charge under § 4177(a), it is unclear from the record below whether Appellant was convicted under § 4177(a)(1) or § 4177(a)(5). Docket 4, at 4. This fact, however, does not affect the Court's analysis. Although the State need not introduce evidence of BAC testing in order to obtain a conviction under § 4177(a)(1), the erroneous introduction of test results will jeopardize a defendant's right to a fair trial and thus merit reversal. *Clawson*, 867 A.2d at 192.

observation of the defendant prior to testing."[17] The twenty-minute period must precede insertion of the testing card into the intoxilyzer machine, as this action initiates the test.[18] The twenty-minute pre-test observation period is drawn from the manufacturer's protocol and ensures that the mouth cavity is cleared of residual alcohol or other contaminates that may enter the mouth via smoking, eating, or drinking, or through regurgitation of material already in the body.[19] Case law therefore makes clear that strict quantitative compliance with the twenty-minute time period is required.[20]

As the parties note, this case revolves around the qualitative, rather than quantitative, demands of the observation requirement. Appellant essentially urges that a "true" observation period requires that an officer maintain a fixed gaze on the intoxilyzer test subject for the duration of the twenty-minute period. If the officer "is otherwise occupied for even brief periods of time," Appellant argues that "untold mischief can occur" and the

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[17] *Id.* at 191-92.

[18] *Id.* at 192.

[19] *Id.*

[20] *Id.*; *see also Holland v. Voshell*, C.A. No. 86A-AP2, at 1 (Del. Super. Sept. 3, 1986) (Chandler, J.) (TRANSCRIPT) (establishing "bright line" rule that State must show twenty-minute observation period as predicate to admissibility of intoxilyzer results); *State v. Gumm*, 1996 WL 1471325, at *2 (Del. Com. Pl. Dec. 10, 1996) ("Without a bright line rule . . . [c]ourts would be left to guess how much time would suffice to establish the likelihood that a false positive would not result from a time under 20 minutes.").

foundation for admission of the intoxilyzer results is undermined.[21] In support of her argument, Appellant notes language in *State v. Clawson* reasoning that the twenty-minute observation period must be completed prior to insertion of the intoxilyzer card into the testing device to begin the test because "once the testing procedure begins the officer is focused on the machine rather than on the defendant who is before him."[22] Appellant also emphasizes that Delaware courts have consistently required that the twenty-minute observation period be "continuous"[23] and "uninterrupted."[24]

Although the issue has not been directly addressed in Delaware, numerous other jurisdictions have held that an officer need not "stare fixedly" at a suspect or satisfy an "eyeball-to-eyeball" rule throughout the observation period preceding an intoxilyzer or similar alcohol concentration breath test.[25] In *State v. Smith*, for example, the Connecticut Appellate

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[21] Docket 9 (Appellant's Opening Br.), at 9.

[22] *Clawson*, 867 A.2d at 192 (quoting *State v. Subrick*, Cr.A. No. 93-12-0496, slip op. at 3 (Del. Com. Pl. Feb. 8, 1994)).

[23] *Gumm*, 1996 WL 1571325, at *2.

[24] *Clawson*, 867 A.2d at 192.

[25] *State v. Remsburg*, 882 P.2d 993, 996 (Idaho Ct. App. 1994); *Tipton v. Commonwealth*, 770 S.W.2d 239 (Ky. Ct. App. 1989), *abrogated on other grounds by Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2004); *see also People v. McDonough*, 518 N.Y.S.2d 524, 526 (App. Div. 1987) ("Although the arresting officer testified that he was doing some paperwork at the time, he . . . was able to observe whether [the defendant] did anything with his hands, belched, or regurgitated. A constant vigil is not required."); *State v. Steele*, 370 N.E.2d 740 (Ohio 1977) (holding that twenty-minute observation period was fulfilled despite

Court reasoned that a state regulation requiring a suspect to be under "continuous observation" for at least fifteen minutes prior to chemical breath analysis tests "must be interpreted with reference to the purpose of the regulation" in ensuring that contaminates do not enter the suspect's mouth.[26] Therefore, the *Smith* court concluded that "continuous observation" need not entail "that an officer fix his unswerving gaze" on the defendant for the observation period, provided that the evidence reflected that the defendant was in the officer's presence for the observation period and did not smoke, ingest, or regurgitate anything in that time.[27] The *Smith* court noted that an excessively literal construction of the "continuous observation" requirement would both render compliance impossible and raise the possibility that a defendant could defeat the observation period "simply by turning his head away from the observing officer."[28]

The Court finds the reasoning expressed in *Smith* and other cases rejecting a "fixed gaze" requirement persuasive. As the trial judge observed

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officer placing suspect out of his line-of-sight for a few seconds); Debra T. Landis, *Necessity and Sufficiency of Proof that Tests of Blood Alcohol Concentration Were Conducted in Conformance With Prescribed Methods*, 96 A.L.R.3d 745, § 9 (2008) (collecting cases).

[26] *State v. Smith*, 547 A.2d 69, 73 (Con. App. Ct. 1988).

[27] *Id.*

[28] *Id.*

in this case, the human need to blink makes it impossible for an officer to conduct literally "uninterrupted" visual observation for a twenty-minute period.[29] Even if this physiological barrier could be overcome, as the *Smith* court observed, an inflexible rule requiring constant, direct visual contact places the defendant in a position to disrupt the observation period. Furthermore, the Court is satisfied that the purpose of the observation period can be fulfilled without the need for "eyeball-to-eyeball" scrutiny for the entire twenty minutes. To the extent that the observing officer's testimony as to whether the defendant was adequately observed raises questions of credibility, resolution of such issues rests with the trial judge, who, as trier-of-fact, must determine witnesses' credibility and "[resolve] conflicts in factual disputes relating to the admissibility of evidence."[30]

As Appellant notes, prior Delaware cases discussing the admissibility of intoxilyzer results have stated that the observation period must be "uninterrupted" and "continuous."[31] This language, however, arose in cases addressing the duration of the observation period, not the type or quality of monitoring required. Thus, in *Clawson v. State*, the Delaware Supreme

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[29] Docket 4, at 34-35.

[30] *Folks v. State*, 648 A.2d 424, 1994 WL 330011, at *2 (Del. June 28, 1994) (TABLE) (citing *Chao v. State*, 604 A.2d 1351, 1363 (Del. 1992)).

[31] *See Clawson*, 867 A.2d at 192; *Gumm*, 1996 WL 1571325, at *2.

Court held that the State failed to establish that officers "actually observed [the defendant] for an uninterrupted twenty minute period" when only nineteen minutes elapsed between the start of the observation period and the initiation of the intoxilyzer test.[32] Similarly, in *State v. Gumm*, the Court of Common Pleas observed that a "continuous" twenty-minute time period is a "bright-line rule" intended to prevent courts from having to "guess *how much time* would suffice to establish the likelihood that a false positive would not result from a time under [twenty] minutes."[33]

By contrast, no such bright-line rule has been established requiring that there be "continuous" or unwavering visual or aural monitoring of the test subject for the entire twenty minutes. For the reasons articulated above, the *quality* of observation during the twenty-minute period is not susceptible to such a bright-line rule. Where the twenty-minute time period is clearly met, the question of whether the type and manner of observation provide an adequate evidentiary foundation will depend upon the facts of each case viewed in light of the purpose of the observation period.

Obviously, the observation requirement cannot be satisfied where there is a lapse in an officer's visual or aural monitoring significant enough

[32] 867 A.2d at 192.

[33] 1996 WL 1571325, at *2 (emphasis added).

that the officer could miss the occurrence of eating, drinking, smoking, or regurgitation. The evidence in this case, however, does not reveal such a lapse. Sergeant Royster testified that he was sitting approximately a yard away from Appellant throughout the observation period, kept his attention on her, and would have been able to see or hear any burping or other actions that might contaminate the intoxilyzer results. Nothing in the record suggests that Appellant actually did consume or regurgitate any contaminating substances during the observation period.

The trial court credited Sergeant Royster's statements that he monitored Appellant in such a way that he would have observed any potentially contaminating actions or bodily functions, and that none occurred. The trial court's decision to accept Sergeant Royster's testimony was not clearly erroneous, and it was within reason for the trial court to conclude, based on the sergeant's testimony, that the purpose of the observation requirement had been fulfilled. Therefore, the Court finds that the trial court did not abuse its discretion in admitting the intoxilyzer results.

V. Conclusion

For the foregoing reasons, the Court of Common Pleas acted within its discretion in admitting the results of Appellant's intoxilyzer test. Because

the evidence was properly admitted, Appellant's convictions under 21 *Del. C.* § 4177(a) and 21 *Del. C.* § 4168(a) are hereby **AFFIRMED.**

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary

cc: Joe A. Hurley, Esq.
Cynthia L. Faraone, Esq.