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FALL 2014

DECEMBER 18, 2014

KEEPING THE PORTABLE BREATH TEST OUT OF EVIDENCE AND WHAT TO DO IF IT COMES IN

STEVEN EPSTEIN, ESQ.

SPONSORED BY:
APPELLATE DIVISION, FIRST DEPARTMENT
AND
THE ASSIGNED COUNSEL PLAN FOR THE FIRST DEPARTMENT

Barket, Marion, Epstein & Kearon, LLP

Attorneys at Law

666 Old Country Road, Suite 700
Garden City, New York 11530
|P| 516.745.1500 • |F| 516.745.1245

5 Columbus Circle, Suite 710
New York, New York 10019
|P| 212.972.1710 •
|Send mail to Garden City|

www.barketmarion.com

KEEPING THE PORTABLE BREATH TEST OUT OF EVIDENCE

&

WHAT TO DO IF IT COMES IN.

WHAT IS A PORTABLE BREATH TEST?

PBT is the abbreviation for portable breath test. It is typically utilized in a DWI investigation at the scene of an arrest. VTL §1194 refers to portable breath tests as "field tests" and the statutory scheme in New York clearly distinguishes a "field test" from a "chemical test." A "chemical test" typically is administered in a controlled environment such as a precinct. These include the Intoxilyzer 5000 and the Datamaster among others. The term chemical test is derived from the early breath test devices such as the Breathalyzer 900a which used chemical solutions in the testing process.

VTL §1194 (1) states:

> 1. Arrest and field testing. (a) Arrest. Notwithstanding the provisions of section 140.10 of the criminal procedure law, a police officer may, without a warrant, arrest a person, in case of a violation of subdivision one of section eleven hundred ninety-two of this article, if such violation is coupled with an accident or collision in which such person is involved, which in fact has been committed, though not in the police officer's presence, when the officer has reasonable cause to believe that the violation was committed by such person.

> (b) Field testing. Every person operating a motor vehicle which has been involved in an accident or which is operated in violation of any of the provisions of this chapter shall, at the request of a police officer, submit to a breath test to be administered by the police officer. If such test indicates that such operator has consumed alcohol, the police officer may request such operator to submit to a chemical test in the manner set forth in subdivision two of this section.

This last sentence of subparagraph (b) expresses a legislative intent to differentiate between these two types of breath tests.

It had long has been recognized that the purpose of a field test is to provide probable cause for defendant's arrest and not to serve as evidence at trial. In People v. Thomas, 70 NY2d 823 (1987)***(Appendix A),*** the Court of Appeals ruled that it was error to admit evidence of a field test at trial, specifically an Alco-Sensor. Many courts have similarly ruled that field tests are inadmissible at trial. See People v Reed, 5 Misc 3d 1032(A) (Sup Ct, Bronx County 2004, Tallmer, J.)***(Appendix B);*** People v Santana, 31 Misc 3d 1232(A) (Crim Ct, NY County 2011, Simpson, J.) ***(Appendix C);*** People v Schook, 16 Misc 3d 1113(A)(Suffolk Dist Ct 2007, Alamia, J.)***(Appendix D);*** People v Harper, 18 Misc 3d 1107(A) (Justice Ct., Dutchess County 2007, Steinberg, J.)***(Appendix E)***.

A review of the law on portable breath test admissibility in other jurisdictions supports that portable breath tests are not generally accepted by the scientific community. Cases across the nation routinely hold that portable breath tests are unreliable as evidence of blood alcohol content. For example, the Missouri Court of Appeals outlined in State v. Robertson, 328 S.W.3d 745 (2010)***(Appendix F)***, the many times its state courts have found portable breath tests unreliable and therefore inadmissible. Reasons included no evidence that it was properly calibrated, maintained or working properly at the time of the test, and that the testifying officer did not know how the

machine worked internally, nor the scientific process by which the machine took a sample. See e.g. State v. Kaufman, 770 N.W.2d 850 (Iowa App. 2009)(upholding that the results of a portable breath test are inadmissible at trial)***(Appendix G)***; Com v. Brigidi, 607 Pa. 329, 6 A.3d 995 (2010)(portable breath tests have not reached to "a stage where they manifest sufficient reliability to satisfy prevailing judicial standards governing the admissibility of scientific evidence.")***(Appendix H)***; Sharber v. State of Indiana, 750 N.E.2d 796 (2001)(Court of Appeals held portable breath tests generally inadmissible if the Department has not approved some aspect of the test)***(Appendix I);*** Boyd v. City of Montgomery, 472 So 2d 694, 697(Ct. of Crim. App., Alabama, 1985)***(Appendix J)***; State v. Thompson, 357 NW2d 591, 593-594 (Sup. Ct. Iowa. 1984)***(Appendix K)***; State v. Smith, 218 Neb 201, 352 NW2d 620, 624 (Sup. Ct. Nebraska, 1984)***(Appendix L)***; State v. Orvis, 143 Vt 388, 465 A2d 1361 (Sup. Ct. Vermont, 1983)***(Appendix M);*** State v. Albright, 98 Wis 2d 663, 298 NW2d 196, 203 (Ct App Wisconsin, 1980)(Portable breath tests do not reliably render accurate quantitative results and should not be admitted into evidence at trial.)***(Appendix N).***

There have been a recent series of decisions in the local Criminal Courts of the City of New York allowing the prosecution to introduce at trial the results of portable breath tests to establish intoxication. See People v. Jones, 33 Misc.3d 181 (N.Y.City. Crim. Court, 2011, Mandelbaum, J.)***(Appendix O)***; People v. Aliaj, 36 Misc.3d 682 (N.Y. City Crim.Ct., 2012, Conviser, J.)***(Appendix P)***, People v. Hargobind, 34 Misc.3d 1237(A)(Kings Co. Crim.Ct., 2012, Gerstein, J.)***(Appendix Q)***. The rationale of these decisions is premised on the fact that some portable breath test devices are included on the Conforming Products List of Evidential Breath Alcohol Measurement Devices as established by the United States Department of Transportation/National Highway Traffic Safety Administration.

On November 5, 1973, the National Highway Traffic Safety Administration (NHTSA) published the Standards for Devices to Measure Breath Alcohol. A Qualified Products List of Evidential Breath Measurement Devices comprised of instruments that met this standard was first issued on November 21, 1974. On December 14, 1984 NHTSA converted this standard to Model Specifications for Evidential Breath Testing Devices and published a Conforming Products List of instruments that were found to conform to the Model Specifications ***(Appendix R).***

The Conforming Products List has been adopted in New York through both VTL 1195 and VTL 1194 ("[t]he department of health shall issue and file rules and regulations approving satisfactory techniques or methods of conducting chemical analyses of a person's blood, urine, breath or saliva and to ascertain the qualifications and competence of individuals to conduct and supervise chemical analyses of a person's blood, urine, breath or saliva"). The department of health has adopted the Conforming Products List of Evidential Breath Measurement Devices through the enactment of 10 NYCRR 59.4 ***(Appendix S)***.

The courts that have admitted the portable breath tests into evidence despite the holding in Thomas and the cases referenced above have reasoned that the Conforming Products List itself establishes the general acceptance of the reliability and accuracy of the portable breath test results. There are however many arguments that should be made that rebut this reasoning and it is important for defense counsel to make a complete record so as to preserve all possible issues on appeal. These arguments include: existing appellate court decisions; the lack of sophistication and reliability of the device; requesting a Frye hearing; existing statutory framework; and in New York City, the failure to comply with the New York City Police Laboratory Breath Test Rules.

EXISTING APPELLATE COURT DECISIONS

The Appellate Division in Thomas, in a landmark decision that was affirmed by the Court of Appeals, held, in relevant part:

> It is well settled that "[t]there must be a sufficient showing of reliability of the test results before scientific evidence may be introduced." "[S]cientific evidence will only be admitted at trial if the procedure and results are generally accepted as reliable in the scientific community." Thus, the Alco-Sensor evidence should have been excluded because as it was presented to the jury it served as proof of intoxication and the People failed to lay a proper foundation showing its reliability for this purpose....Moreover, cases from other jurisdictions hold that the Alco-Sensor test is not reliable evidence of intoxication.***In our view, evidence regarding the Alco-Sensor test had no place in the trial and the objection to its admission should have been sustained. Thomas, 121 A.D.2d 73 (App. Div. 4th Dept. 1986); aff'd 70 N.Y.2d 823 (1987)***(Appendix T)***.

In his decision in Jones, 33 Misc.3d at 181, Judge Mandelbaum distinguished Thomas because the Court of Appeals narrowly ruled that the evidence that was offered at trial was irrelevant, however the language of the Appellate Division decision cited above was far more broad and supports the conclusion that there is no place in a trial for the admission of the results of a portable breath test.

In the recent decision of People v. Kulk, 103 A.D.3d 1038 (3rd Dept. 2013)***(Appendix U)*** the court again concluded that there is no place in a trial for the admission of the results of a portable breath test and affirmed the trial court decision which denied the defendant's request to introduce the results of a portable breath test indicating a BAC of .06 into evidence. The court held that "although the alco-sensor test may be used to establish probable cause for an arrest, it is not admissible to establish intoxication, as its reliability for this purpose is not generally accepted in the scientific community. The application to admit in Kulk was made by the Defendant but that is a distinction without merit.

When citing to the Kulk decision be sure to point out that the Appellate Division is a single statewide court divided into departments for administrative convenience, and therefore, the doctrine of *stare decisis* requires trial courts in any Department to follow precedents set by the Appellate Division of another department until the Court of Appeals or that particular Appellate Division pronounces a contrary rule. Mountainview Coach Lines, Inc. v. Storms, 102 A.D2d 663 (2d Dept. 1984).

In People v. Rosas, Ind. 4773/2012***(Appendix V)***, Justice Goldberg of the New York County Supreme Court ruled that the Kulk decision compels a finding that the result of the portable breath device in that case, an SD-S is inadmissible at trial. Justice Goldberg ruled in this manner despite the fact that the SD-2 is on the Conforming Products List.

There is another 3rd Department decision that counsel should be aware of and that is People v. Hampe, 181 A.D.2d 238 (3rd Dept. 1992). In Jones, 33 Misc.3d at 18, the Court cited to Hampe for the court's holding that the inclusion of a testing device on the Conforming Products List itself establishes the general acceptance of the reliability and accuracy of a device. But the device in Hampe was not a portable breath test, it was the BAC Verifier, a station house device akin to the traditional chemical test devices which are routinely admitted into evidence throughout the State and the nation.

THE LACK OF SOPHISTICATION AND RELIABILITY OF THE DEVICE

The reason the portable breath test has not been accepted in the scientific community is their lack of sophistication and safeguards which are prevalent in chemical tests traditionally administered with equipment such as the Intoxilizer 5000. Intoxilizers, for example, must go through a 13 point checklist before being operated, require the use of 3 "air blanks" checks at

different intervals to make sure that there is nothing in the room that interferes with the reading, contains a radio frequency detector, a slope detector to eliminate the contamination caused by mouth alcohol and most importantly requires the use of a reference standard before every subject test to ensure the equipment is operating properly at the time the evidentiary sample is measured. Portable breath testing devices on the other hand, not only lack the heightened technology and protocol, but are more prone to error because they are always administered in the field. This type of uncontrolled setting makes it nearly impossible for the officer to observe the suspect and control radio interference with the onset of nearby and unpredictable traffic and pedestrians. See Aliaj, at 692. ("Even under the most optimal conditions, tests given in the field are prone to multiple possibilities for interference which may not exist at police stations."); Reed, at 7. (Stating that the "conditions surrounding a field test do not give the same assurance of reliability and accuracy as those in a controlled environment.")

REQUESTING A FRYE HEARING

In relying on the inclusion of devices on the Conforming Products List as the *sine qua non* of admissibility of evidence the trial courts that have allowed the portable breath test into evidence have abandoned their role as gate keeper of evidence. In order to preserve this issue counsel must make factual allegations such as those referenced herein as to why the device is unreliable and request a Frye hearing. However if counsel is successful in obtaining such a hearing you must be prepared to successfully conduct the hearing or risk the establishment of very bad precedent. Requesting this hearing is essential to preserve the issue for appeal.

EXISTING STATUTORY FRAMEWORK

VTL §§ 1194(1)(b) and 1194(2) differentiates between a preliminary field test and a chemical breath test, the latter being admissible at trial when the proper foundation is laid. According to VTL §§1194(1)(b) and 1194(2), initial breath tests and subsequent breath tests serve two different purposes—one is employed to establish that alcohol is present for the purposes of probable cause, while the other determines the level of alcohol consumed. See McKinney's Commentary to the VTL, which states that a field test is reliable for the determination of some presence of alcohol in a person's blood but not the actual percentage or concentration. Carrieri, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 62A, VTL §1194 (2012) at 336-337. The court in Reed, 5 Misc.3d at 1032(a) summed this up when it concluded:

> The position urged by the People does violence to this statutory scheme and is contrary to the weight of judicial authority construing VTL 1194. Clearly, the Legislature intended to differentiate between preliminary tests done at the scene of the crime and those conducted back at the station house. The obvious rationale for this distinction is that the conditions surrounding a field test do not give the same assurance of reliability and accuracy as those in a controlled environment.

There is no language in the VTL that provides that a field test is admissible at trial.

NEW YORK CITY POLICE LABORATORY BREATH TEST RULES

Though not yet raised or discussed in any of the lower court decisions, there exists an issue that is specific to the practice in New York City. Within the discovery packet at each of the trials in New York City the prosecutor will turn over the "New York City Police Laboratory Breath Test Rules." ***(Appendix W)*** These rules require two things that the government cannot establish in order to get the results of a portable breath test into evidence at trial. They are: breath tests must be given only by those members who possess a valid breath analysis permit; and when a breath test is

administered the operator must complete the operational check list and operate the instrument in accordance with that checklist. The Department of Heath does not issue permits for portable breath tests and the operational checklist does not exist for the portable breath test.

HAS A SUFFICIENT FOUNDATION BEEN LAID?

In Jones 33 Misc.3d 181, Judge Mandelbaum rendered a decision post trial. When the decision was written the Court had the benefit of having already ruled on the question of foundation for admission into evidence. The phrasing of the issue before the court is vital because despite a court's ruling on the general acceptance of the reliability and accuracy of the results of any breath test, the prosecution still must lay a proper foundation for the results of any breath test to be admitted at trial. Exactly what is required for that foundation is not clear nor is it consistently applied by the courts.

In Hargobind, 34 Misc3d at 1237(a) the court held the portable breath test was admissible but recognized the difficulty the prosecution would have in establishing foundation and set forth a list of minimum requirements which include that the device had been tested, producing a reference standard, within a reasonable period prior to defendant's test; that the device had been properly calibrated; that the device was properly functioning on the day the test was administered; that the test was administered properly, including that the device was purged prior to the test, by a properly qualified administrator; and that defendant was observed for at least 15 minutes prior to the test to ensure that Defendant had not "ingested alcoholic beverages or other fluids, regurgitated, vomited, eaten, or smoked, or have anything in his/her mouth." In Aliaj, 36 Misc.3d at 682 the court held that as a general matter portable breath tests are presumptively inadmissible but adopts what the court describes as a five factor test that can be applied and if the prosecution establishes by clear

and convincing evidence that such results bear the hallmarks of a reliable chemical test, those results should be admitted.

Regardless of whether the test is a stationary chemical test or a portable breath test, neither test can come into evidence unless a proper foundation can be established that the machine is (a) accurate, (b) that it was working properly when the test was performed, and (c) that the test was properly administered. See People v. Mertz, 68 N.Y.2d 136, 148 (1986).

The Court of Appeals recently reiterated the requirement of establishing that the test was in proper working order at the time it was administered. In People v. Boscic, 15 N.Y.3d at 494 ***(Appendix X)***, the Court held that the People were required to demonstrate the "instrument was in 'proper working order' at the time the test was administered. If the People fail[ed] to demonstrate that, then the chemical test results [would be] inadmissible at trial." Boscic, 15 N.Y.3d at 498 (2010).

The use of a reference standard as mandated by 10 NYCRR 59.5***(Appendix Y)*** ensures a machine is in proper working order at the time a defendant gives a breath sample for evidentiary purposes. To comply with the requirements set forth by the Department of Health the People must produce evidence of "the result of an analysis of a reference standard with an alcoholic content greater than 0.08 percent" as set forth in 10 NYCRR § 59.5(d), and the analysis "shall immediately precede or follow the analysis of the breath of the subject and shall be recorded." The portable breath testing device has no systematic method of measuring and recording a reference unless the police change the manner in which the device is used.

In an article published in the peer-reviewed international publication, The Journal of Analytical Toxiology, "Quality Assurance in Breath-Alcohol Analysis," ***(Appendix Z)*** Dr. Kurt M. Dubowski, Ph.D., states that virtually every automated breath-alcohol testing device is factory

calibrated as opposed to calibrated at the time the subject is tested. He states, "[c]ontrol tests accompanying every human subject test are an essential form of scientific safeguard. In essence, a control test constitutes a total system check because it tests the contribution of the alcohol analyzer, its calibration, the analysis process, the analyst's function, the environment, and the reporting process." And the National Safety Council Committee on Alcohol and Other Drugs, in its Recommendations of the Subcommittee on Alcohol Technology, Pharmacology, and Toxicology: Acceptable Practices for Evidential Breath Alcohol Testing recommends that "at least one control analysis should be performed as a part of each subject test sequence as an assessment of within-run accuracy and/or verification of calibration" if the reading in question is going to be assigned evidentiary weight at trial. ***(Appendix AA)***

Proper maintenance is another issue that must be explored in the context of not only weight of evidence but foundation. The very same provision of the Department of Health Rules and Regulations that adopts the Conforming Products List also provides that "[m]aintenance shall be conducted as specified by the training agency, and shall include, but shall not be limited to, calibration at a frequency as recommended by the device manufacturer or, minimally, annually."

Although the Court of Appeals in Boscic, 15 N.Y.3d at 494 eliminated the requirement that breath testing devices be calibrated at a minimum every six (6) months, it specifically did not address the requirements set forth in the 10 NYCRR Part 59.

Counsel should be sure to obtain at a minimum the most recent record of calibration of all breath testing devices as well as the manual for the device. The SD-2 for example requires monthly calibration, something the New York Police Department does not currently do. ***(Appendix BB)***

The Yin Yang Theory: There must be some good that comes from this.

•Stay positive and be creative, this is an exciting time to try a portable breath test case.

•There is no playbook.

•There are ways the portable breath test can help you. Be creative.

Here are some ways the portable breath test can help…

- Plea bargaining…you say your policy is .12 or below?
- 2 Readings allows you to prove the measurements are inconsistent.
- To defeat an 1192(2a) charge.
- To defeat retrograde extrapolation by showing absorption phase.
- So why didn't you use it in this case? Especially if it is prompt.

Do your homework!

- You must find out from client if there was a portable breath test.
- Do a Request for Bill of Particulars in every case.
- Portable breath test is usually not in the complaint.
- Do a Demand for Discovery in every case.
- Know your sanctions. CPL 240.70.

CROSS EXAMINATION: USE THEIR OWN PRACTICES, POLICIES AND PROCEDURES AGAINST THEM.

PRACTICES

- No one has explained the new portable breath test approach to the police officers.
- How many times have you testified about a portable breath test in court?
- Why did you not mention it in the Complaint?
- Why not video this test?
- If so easy to use, why not do it at IDTU as well.

POLICIES

- NYPD policy is bring DWI arrestees to IDTU for intoxilyzer, not portable breath test.
- NO NYPD policy of evidentiary portable breath test testing.
- No policy to record results anywhere??? But you record clothes messy?

PROCEEDURES

- IDTU checklist for Intoxilyzer, not portable breath test.
- Procedure on every breath test at IDTU is reference sample first.
- 20 minute observation period is difficult in field.

CROSS EXAMINATION: USE THE MANUAL AGAINST THEM.

- What is the manual?
    - Portable breath test manual itself.
    - NY Department of Health Rules and Regulations.
    - Research and studies.
- The manual itself.
    - Ambient temperatures (how was it stored?).
    - 20 minute observation period.
    - No radio transmitters.

- Monthly calibrations recommended by manufacturer.
- Calibration adjustments not more then 2/3 x per year.
    - Get discovery!
- Routine field service checks:
    - Battery check and replacement
    - Sampling system check
    - Breath sampling light check
    - Test fuel cell switch
    - Fuel cell replacement (when was it last done?)
    - Storage

•The Department of Health Regulations

- VTL 1195 - admissibility
- VTL 1194 – defers to DOH
- Section 59.5 Breath analysis; techniques and methods.
    - Reference standard

• Dubowski – Quality Assurance in Breath –Alcohol Analysis

- Quality assurance program – checklist.
- Blank test – must use negative control
- Replicate testing

• National Safety Council Report

- Replicate testing.
- One control analysis as part of every test.
- Blank test – must use negative control.

APPENDIX "A"

70 N.Y.2d 823
(Cite as: 70 N.Y.2d 823, 517 N.E.2d 1323)

People v Thomas
70 N.Y.2d 823, 523 N.Y.S.2d 437
N.Y. 1987.

70 N.Y.2d 823, 517 N.E.2d 1323, 523 N.Y.S.2d 437, 1987 WL 146

The People of the State of New York, Appellant,
v.
Jafers Thomas, Respondent.
Court of Appeals of New York

Argued October 5, 1987;
decided November 12, 1987

CITE TITLE AS: People v Thomas

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered December 12, 1986, which (1) reversed, on the law, a judgment of the Monroe County Court (John J. Connell, J.), rendered upon a verdict convicting defendant of manslaughter in the second degree, vehicular manslaughter, criminally negligent homicide, driving while intoxicated, failure to obey a traffic control device, leaving the scene of an accident, failure to keep right and speeding, and (2) granted a new tri- al.

People v Thomas, 121 AD2d 73, affirmed.

HEADNOTES

Motor Vehicles
Chemical Tests
Alco-Sensor Test

(1) In a criminal prosecution for manslaughter and various other offenses arising out of a motor vehicle accident, the Appellate Division correctly concluded that the trial court erred in admitting evidence, over defendant's objection, that he was arrested "based on the results" of an Alco-Sensor test. The stated purpose of this proof was to permit the prosecution to establish that the arresting officer had "reasonable grounds" to give defendant a breathalyzer test *(see,* Vehicle and Traffic Law § 1194 [1] [1]). The evidence should have been excluded as irrelevant since reasonable cause is not an element of the crime charged *(see,* Vehicle and Traffic Law § 1192 [2]) and defendant, at no time, raised an issue with regard to the existence of probable cause to give the breathalyzer test.

Crimes
Evidence
Proof of Subsequent Design Modifications to Automobile as Defense in Prosecution Arising out of Motor Vehicle Accident

(2) In a criminal prosecution for manslaughter and various other offenses arising out of a motor vehicle accident, the trial court erred in excluding as irrelevant defendant's proof of subsequent design modifications to his automobile offered in support of his defense that the accident was caused, not by his drinking, but by defects in his motor vehicle. Although evidence of postaccident design changes is irrelevant in strict liability or negligence cases when offered to prove negligent design, here, the conduct of the manufacturer or seller in designing the vehicle was not at issue. Rather, consistent with his explanation at the scene of the accident, defendant sought only to prove the existence of a "defect" in his automobile, as part of his defense. Moreover, the policy reasons for not allowing evidence of postaccident repairs or improvements in the civil cases do not apply.

APPEARANCES OF COUNSEL

Howard R. Relin, District Attorney (Elizabeth Clifford of counsel), for appellant.
Edward J. Nowak, Public Defender (Brian Shiffrin of counsel), for respondent. ***825**

70 N.Y.2d 823
(Cite as: 70 N.Y.2d 823, 517 N.E.2d 1323)

OPINION OF THE COURT

The order of the Appellate Division should be affirmed.

Defendant was involved in an automobile accident which resulted in the death of an occupant of one of the other vehicles. He was convicted of manslaughter in the second degree, vehicular manslaughter, criminally negligent homicide, driving while under the influence of alcohol, and other charges in connection with the accidents. The Appellate Division reversed defendant's conviction on the law and ordered a new trial.

(1) We agree with the Appellate Division that the trial court erred in admitting evidence, over defendant's objection, that he was arrested "based on the results" of an Alco-Sensor test. The stated purpose of this proof was to permit the prosecution to establish that the arresting officer had "reasonable grounds" to give defendant a breathalyzer test *(see,* Vehicle and Traffic Law § 1194 [1] [1]). The evidence should have been excluded as irrelevant since reasonable cause is not an element of the crime charged *(see,* Vehicle and Traffic Law § 1192 [2]) and defendant, at no time, raised an issue with regard to the existence of reasonable cause to give the breathalyzer test.

(2) The trial court excluded as irrelevant defendant's proof of subsequent design modifications to his automobile offered in support of his defense that the accident was caused, not by his drinking, but by defects in his motor vehicle. We agree with the Appellate Division that such evidence should have been permitted. We reject the People's argument that such evidence was inadmissible under the rule stated in *Cover v Cohen* (61 NY2d 261) and *Caprara v Chrysler Corp.* (52 NY2d 114). Evidence of postaccident design changes is irrelevant in strict liability or negligence cases when offered to prove negligent design *(see, Cover v Cohen, supra,* at 270; *Rainbow v Elia Bldg. Co.,* 79 AD2d 287, 292 [Simons, J.], *affd on opn below*56 NY2d 550; *cf., Caprara v Chrysler Corp., supra,* at 122-126). Here, however, the conduct of the manufacturer or seller in designing the vehicle was not at issue. Rather, consistent with his explanation at the scene of the accident, defendant sought only to prove the existence of a "defect" in his automobile, as part of his defense. Moreover, the policy reasons for not allowing evidence of postaccident repairs or improvements in the civil cases *(see, Caprara v Chrysler Corp., supra,* at 122; *see also, Cover v Cohen, supra)* do not apply.

The People's other contention is without merit. *826

Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Titone, Hancock, Jr., and Bellacosa concur.

Order affirmed in a memorandum.

N.Y. 1987.
People v Thomas
70 N.Y.2d 823, 517 N.E.2d 1323578523 N.Y.S.2d 4376021987 WL 146999, 517 N.E.2d 1323578523 N.Y.S.2d 4376021987 WL 146999, 517 N.E.2d 1323578523 N.Y.S.2d 4376021987 WL 146999

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APPENDIX "B"

5 Misc.3d 1032(A), 799 N.Y.S.2d 163, 2004 WL 2954905 (N.Y.Sup.), 2004 N.Y. Slip Op. 51662(U)
(Table, Text in WESTLAW), Unreported Disposition
(Cite as: 5 Misc.3d 1032(A), 2004 WL 2954905 (N.Y.Sup.))

(The decision of the Court is referenced in a table in the New York Supplement.)

Supreme Court, Bronx County, New York.
The PEOPLE of the State of New York
v.
David REED, Defendant.

No. 2003BX039117.
Dec. 15, 2004.

MEGAN TALLMER, J.

*1 Defendant is charged with driving while intoxicated. At defendant's arraignment on July 14, 2003, the People gave the following notice pursuant to CPL § 710.30(1)(a):

> The defendant stated on 7–14–03 at 10:08 a.m. at the 45th Precinct, a video statement, the defendant requested an attorney. There was a second statement on 7–14–03, it looks like 12:28 a.m. at the time and place of occurrence to Sergeant Daskalakis, "He walked out on the street then hesitated, went back to the sidewalk and then stepped out on the street again in front of the car. I was at a bar and a comedy club." Pre–Miranda to P.O. Fanini on 7–14–03, at approximately 12:28 a.m. at the corner of Co-op City boulevard and Bartow Avenue in sum and substance "I was driving. I am the one who hit him."

On August 27, 2003, the People filed a superceding information which alleged that at about 12:20 AM at the scene of the accident, defendant stated to Officer Maher "I was driving the car on Bartow Avenue. As I entered the intersection of Coop City Blvd., a guy ran out in front of me and stopped. He made a movement back to the curb and then continued into the street. I had no time to stop and ran him over. I had a few drinks."

On October 23, 2003, defendant made a demand for discovery and an omnibus motion to suppress physical evidence as the fruit of an unlawful arrest. He also moved to suppress the results of a field test on the ground that it was not administered within the two hour period proscribed by VTL 1194(2)(a)(2). In their response to defendant's omnibus motion, dated December 1, 2003, the People asserted that defendant told one of the police officers at the scene that he had a few drinks. The People resisted a hearing on defendant's motion to suppress on the basis that the two hour rule only applies to chemical tests given post-arrest and does not govern pre-arrest field alcohol tests (page 5 of People's Response).

On December 4, 2003, Judge Marvin granted defendant's motion to suppress the field test results to the extent of ordering a *Mapp/Dunaway* hearing. Judge Marvin referred the admissibility of the field test to the trial court. The People moved to reargue Judge Marvin's decision. In his affirmation in support of reargument, the Assistant District Attorney stated:

> The legislature specifically distinguished between "breath tests" and "chemical tests" in section 1194 of the VTL and only set forth a probable (reasonable) cause threshold (as well as a "two hour" rule) for chemical tests. If the legislature intended to require probable cause for the police to administer a field breath test, then it would not have created a separate section in the statute for breath tests....A *Mapp* hearing is only appropriate when the defense is requesting suppression of tangible physical evidence that was recovered from the defendant and that the People seek to introduce at trial. In this case, there is none.

The prosecutor added in a footnote that "a field breath test is a device that is used in part to determine probable cause to make an arrest and administer a chemical test, and it is therefore illogical to require probable cause to administer the breath test."

*2 Judge Marvin granted the motion to reargue but adhered to his original decision granting a *Mapp/Dunaway* hearing as to the field test results. Citing several cases, Judge Marvin observed that the admissibility of field sobriety tests "is hardly a settled issue."

At the hearing on defendant's motion held on August 9, 2004, the People changed their position and asserted that the field test results were admissible at trial as evidence in chief of intoxication. The parties were directed to submit memoranda of law on this issue.

In the course of the hearing, the People indicated that they wished to introduce the following statements made by defendant in addition to those noticed at arraignment:

1. On July 14, 2003 at 12:20 AM at the scene to Police Officer Maher: I was driving the car on Bartow Avenue. As I entered the intersection of Coop City Boulevard, a guy ran out in front of me and stopped. He made a movement back to the curb and continued into the street. I had no time to stop and ran him over. I had a few drinks. (People's Memorandum of Law, September 24, 2004, pp 42, 47).

2. On July 14, 2003 at 2:25 AM at the scene to Detective Bowden: We were on Bartow Avenue with the green light. The guy was running across the street after the intersection. I was in the middle lane. He slowed down and I swerved to avoid him, but he started again and ran right in front of the car. I was going about 20–30. He was running from my left to right (South). I was drinking. I had two Jack Daniels. (People's Memorandum of Law, September 24, 2004, p. 47).

Upon learning of these unnoticed statements, defendant moved to preclude their use at trial, arguing that the People failed to provide adequate notice pursuant to CPL 710.30(1)(a). The Court held the *Huntley* hearing in abeyance pending resolution of defendant's preclusion motion. The Court proceeded to hold a refusal hearing, at which Police Officer Fantini testified for the People. I find Officer Fantini credible and make the following findings of fact as to the refusal hearing.

On July 14, 2003 at 12:20 AM, Officer Fantini and his partner received a radio run of a car accident at Coop City Boulevard and Bartow Avenue. When they responded to that location, they observed a pedestrian on the ground and two parked cars, one of which was a silver Mitsubishi with extensive damage. Officer Fantini walked over to the Mitsubishi and spoke with defendant, who was standing a few inches away from the car. When Officer Fantini asked whether defendant had been driving, defendant replied "yes." Defendant had no trouble standing, his speech was not slurred and there was no other indication that he had consumed alcohol.

Officer Fanini followed an ambulance carrying the pedestrian to Jacobi Hospital. After he was told that the pedestrian had died, Officer Fantini returned to the scene of the accident at about 2:40 AM. He was informed that defendant registered a .166 blood alcohol content on a field test [FN1] and had been placed under arrest. Officer Fantini claimed that at that time, he detected a moderate smell of alcohol on defendant's breath and observed that he had red, bloodshot eyes.

FN1. The People assert and defendant does not dispute that the field test was performed with an Intoxilyser S–D2.

*3 A videotape introduced at the hearing indicates that at approximately 3:38 a.m. on July 14, 2003 at the 45th Precinct, defendant was asked by Officer Ryan of the Highway 1 Unit to submit to a breathalyzer test. Initially, defendant agreed to take the test. After Officer Ryan explained the testing procedure, however, defendant asked Officer Ryan, "should I do this without checking with a lawyer first?" Officer Ryan told defendant it was his choice but that a lawyer would not be allowed in

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the testing room. Officer Ryan then read defendant instructions advising him of the consequences of refusing to take the test and again asked defendant if he would take the breath test. When the defendant did not respond, Officer Ryan said he needed a yes or no answer. Defendant stated that he wanted to speak with his lawyer first and videotaping was suspended. Defendant was allowed to make telephone calls to his sister but she was unable to find an attorney. Without any further inquiry of defendant, the police determined that he had refused to take a breathalyzer test.

The Court makes finds the following conclusions of law as to (1) the admissibility of the field test; (2) defendant's motion to preclude statements; (3) defendant's motion to suppress evidence of his refusal to submit to a chemical test.

1. *Admissibility of the Field Test*

In their response to defendant's omnibus motion and again in their motion to reargue, the People emphatically asserted that it was unnecessary to hold a suppression hearing as to the field test because a field test is not a chemical test within the meaning of VTL 1194(2). It was not until the suppression hearing held nine months later that the People reversed their position and argued that the field test does qualify as a chemical test admissible in evidence to prove intoxication.

Pursuant to CPL 60.10, the rules of evidence applicable to civil cases are applicable to criminal proceedings unless otherwise provided by statute or judicially established rules of evidence. In civil cases, the law long has recognized an exception to the hearsay rule for admissions made by a party. Prince, Richardson on Evidence § 8–201, p. 510 (Farrell 11th ed); *Matter of MNORV,* 46 N.Y.2d 985 (1979). That same rule applies in criminal cases. *See, e.g., People v. Brown,* 98 N.Y.2d 226 (2002); *People v. Rivera,* 58 A.D.2d 147 (1st Dept.1977), *aff'd on op below* 45 N.Y.2d 989 (1978).

One species of admissions are informal judicial admissions made by the parties in their written submissions to the court. *See* Richardson, *supra* at § 8–219, p. 529. An informal judicial admission is not conclusive but is evidence of the fact or facts admitted. Richardson, *supra,* at 530; *People v. Brown, supra* at 232; *People v. Rivera, supra.* The declarant may offer an explanation for an admission. Richardson, *supra,* at § 8–211, p. 520; *Jack C. Hirsch, Inc. v. Town of North Hempstead,* 177 A.D.2d 683 (2nd Dept.1991).

*4 Numerous cases have held that statements made by attorneys in moving papers constitute admissions. *People v. Brown,* 98 N.Y.2d 226, 232–233 (2002), concerned statements made by counsel in a pretrial motion. Noting that the attorney's statements were made to secure a favorable pretrial ruling, the Court held that these statements could be used to impeach defendant's inconsistent trial testimony. *See also Gomez v. City of New York,* 215 A.D.2d 353 (2d Dept.1995) (statements contained in bill of particulars); *People v.. Rivera, supra* (statement made by attorney in affirmation in support of pretrial motion). *Accord Kurten v. R.D. Werner Co. Inc.,* 139 A.D.2d 699 (2d Dept.1988).

In *Matter of Liquidation of Union Indemnity Insurance Co.,* 89 N.Y.2d 94 (1996), the Court of Appeals found that plaintiff made informal judicial admissions in its response to pretrial motions. The case involved the liquidation of Union Insurance Company, a subsidiary of Hall & Co.. When the Liquidator brought an action against Hall for fraud, it submitted affidavits of counsel. Those affidavits asserted that Hall failed to disclose Union's insolvency and planned to use Union for Hall's purposes. After that suit was settled, the respondent reinsurers sought rescission of their agreements with Union. The Liquidator opposed their claim, contending that Union was operated as an independent insurance company and that Union's transactions with Hall met acceptable industry standards.

The Court of Appeals agreed with the Appellate Division and trial court that the facts alleged in the Liquidator's written submissions for the first

case were admissible as informal judicial admissions. The Court observed:

> It would be unseemly, to say the least, to permit the Liquidator to renege on its court-submitted evidence and, in effect, to use quasi-official assertions as both a sword and a shield by simultaneously documenting Union's fraud and failure to disclose its insolvency and yet later trying to deny the relevance and applicability of the same admissions and data in an action involving the reinsurers.
>
> 89 N.Y.2d at 103–104.

Following the reasoning of these cases, the statements made by the People in opposition to defendant's omnibus motion and in support of its motion to reargue are informal judicial admissions. As such, they may be considered in determining whether the field test administered to defendant was a chemical test admissible in evidence. While their admission is not conclusive, the People have made no attempt to explain why the position they now espouse diametrically is opposed to their original contention.[FN2] *See Matter of Liquidation of Union Ins. Co., supra* at 104 (although given full and fair opportunity, party fails to rebut nonconclusive informal judicial admissions).

> FN2. The issue as to the change in the People's position was raised at the hearing on August 9, 2004. On September 24, 2004, the People filed a voluminous Memorandum of Law addressed to the field test issue. A Supplemental Memorandum of Law was filed on October 14, 2004. On November 18, 2004, the People filed a Response to Defendant's Memorandum of Law. None of these submissions makes any reference to or attempts to explain the People's about-face.

The Court acknowledges that the admissions made in the People's original papers could be characterized as conclusions of law rather than assertions of facts. Nonetheless, the same unseemliness that concerned the Court of Appeals in *Union, supra,* is present here. It is not fair for the People on the one hand to argue and reargue against a *Mapp* hearing on the grounds that the field test is not physical evidence admissible at trial and on the other to seek to admit the field test as evidence in chief of intoxication. *Cf. People v. Jerrick,* NYLJ, Nov 25, 1996, at 34, col 5 (Sup Ct, Kings County) (People estopped from claiming in suppression hearing that charges are unrelated where People earlier affirmed that charges were related for purposes of consolidation). The Court accordingly will take the People's admission into account in determining whether the field test qualifies as a chemical test within the meaning of VTL 1192(2).

*5 Article 31 of the Vehicle and Traffic Law provides an elaborate statutory scheme for proving and punishing offenses involving alcohol and drugs

Section 1194 of the Vehicle and Traffic Law is entitled "Arrest and testing." VTL 1194(1)(a) provides that the police may arrest a person for the violation of driving while impaired if there has been an accident and the police have reasonable cause to believe that the person violated VTL 1192(1). The police have this authority even if they have not witnessed the violation, an exception to the general rule that a violation must be committed in an officer's presence [see CPL 140.10(1)(a)].

Subdivision two(b) of VTL 1194 provides:

> (b) Report of refusal. (1) If: (A) such person having been placed under arrest; or (B) after a breath test indicates the presence of alcohol in the person's system; or (C) with regard to a person under the age of twenty-one, there are reasonable grounds to believe that such person has been operating a motor vehicle after having consumed alcohol in violation of section eleven hundred ninety-two-a of this article; and having thereafter been requested to submit to such chemical test and having been informed that the person's license or permit to drive and any non-resident op-

> erating privilege shall be immediately suspended and subsequently revoked ... whether or not the person is found guilty of the charge for which such person is arrested or detained, refuses to submit to such chemical test or any portion thereof, unless a court order has been granted pursuant to subdivision three of this section, the test shall not be given and a written report of such refusal shall be immediately made by the police officer before whom such refusal was made.

It long has been recognized that the purpose of a field test is to provide probable cause for defendant's arrest, rather than to serve as evidence at trial. In *People v. Thomas,* 70 N.Y.2d 823 (1987), the Court of Appeals ruled that it was error to admit evidence of an alcosensor test. The Court reasoned that the sole purpose of this evidence was to establish that the police had cause to administer a breathalyser test, an issue not relevant to whether defendant committed the crime of driving while intoxicated. *See also People v. McDonald,* 227 A.D.2d 672 (3nd Dept.1996), *affd* 89 N.Y.2d 908 (1996) (results of alcohol prescreening device not admissible to prove intoxication); *People v. Wright,* 1 Misc.3d 133(A) (App Term, 9th and 10th Jud Dists 2003) (error to admit results of alcosensor test, although deemed harmless). Numerous trial courts as well as courts of other States have agreed that the results of a test administered at the scene of an accident are not admissible at trial.[FN3]

> FN3. *See People v. Ronald Schwartz,* —— A.D.2d ——, 783 N.Y.S.2d 806 (1st Dept.2004) (challenge to admission of field test academic where court specifically disclaimed reliance upon the results); *People v. Gray,* NYLJ, Jan.18, 2002, at 19, col 3 (Sup Ct, Kings County) (People concede alcosensor unreliable); *People v. Cannella,* NYLJ, Apr. 12, 1994, at 25, col. 3 (County Ct., Nassau County) (preliminary breath test unreliable and inadmissible); *Boyd v. City of Montgomery,* 472 So2d 694 (1985) (results of roadside alcosensor unreliable); *Iowa v. Thompson,* 357 NW2d 591 (1984) (not harmless error to admit preliminary breath screening test); *Nebraska v. Smith,* 218 Neb 201 (1984) (error to admit results of preliminary breath test).

The commentary to VTL 1194(1)(b) similarly concludes that the field tests results should not be admitted at trial, stating:

> [The] breath test, sometimes called a screening test, involves a portable machine which is used by the police on the road to determine whether there is alcohol present in the motorist being tested. The screening or breath test machine is used as a pass/fail test and is basically reliable for the determination of some presence of alcohol in a person's blood but not the actual percentage or concentration....While the cases differ, it would appear that the majority and the better view is that the breath or alcosensor test results should not be admissible in evidence Carrieri, Practice Commentaries, McKinney's Cons Laws of NY, Book 62A, VTL 1194, at 91–92 (1996 ed).

*6 As the People originally maintained, VTL 1194 distinguishes between field tests and chemical tests. Thus, VTL 1194(2)(a)(2) provides that any driver is deemed to have consented to a chemical test of his breath within two hours after a breath test authorized by VTL 1194(1)(b) indicates he has consumed alcohol. VTL 1194(2)(f) allows the People to introduce evidence of a driver's refusal to submit to a chemical test if he refuses to take a chemical test after being given clear and unequivocal warnings of the effect of such refusal. VTL 1195(1), entitled "Chemical test evidence," allows the introduction of evidence of blood alcohol content "as shown by a test administered pursuant to [VTL 1194]."

The statute further requires the Department of Health to issue rules and regulations approving satisfactory methods of conducting chemical analyses of a person's breath [VTL 1194(4)(c)]. The rules and regulations of the Department of Health gov-

erning the administration of chemical tests are set out in Part 59 of Title 10 of the New York Codes Rules and Regulations. 10 NYCRR 59.1 defines a "chemical test" as including breath tests conducted on instruments found on the Conforming Products List of Evidential Breath Measurement Devices, as established by the United States Department of Transportation. 10 NYCRR 59.4(b) provides that the Department of Health has adopted the United States Department of Transportation's list of approved breath testing instruments and that unless otherwise noted, those devices are approved both for mobile and nonmobile use. The Intoxilyser S–D2 is included on that list.

The Department of Health regulations themselves recognize the distinction between preliminary screening tests and chemical tests. 10 NYCRR 59.5 provides that a breath sample shall be collected within two hours of the time of arrest "or within two hours of a positive breath alcohol screening test." This subsection also requires that the driver be under continuous observation for 15 minutes prior to a chemical test, that a system purge immediately must precede both the test and analysis of the reference sample and that analysis of a reference standard be made and recorded immediately prior to or following the breath test.[FN4]

> FN4. The People concede that the field test failed to comply with 10 NYCRR 59.5(d), but argue that such failure does not preclude admissibility (People's Response, November 18, 2004, at 3). In *People v. Aldrich–O'Shea,* NYLJ, Dec 14, 2004, at 32, col 4 (App Term, 9th and 10th Jud Dists 2004) however, the Appellate Term held that the results of blood tests improperly were admitted where the People failed to show compliance with the regulations of the Department of Health.

The statutory scheme set out in VTL 1194 and 1195 clearly contemplates the following sequence of events:

1. The police arrive at the scene of an accident;

2. Based on the fact that the driver has been involved in an accident, the driver is asked to submit to a field test of his breath [VTL 1194(1)(b)];

3. Within two hours after a field test indicates the consumption of alcohol, the driver is asked to submit to a chemical test and is given warnings as to the consequences of refusing to take a chemical test [VTL 1194(2)(a)(2), 1194(2)(f)];

4. If defendant does not refuse to take a test, a chemical test is conducted in accordance with the provisions of VTL 1194(2);

5. Evidence of a test administered pursuant to VTL 1194 is admissible in evidence at a trial for violation of VTL 1192 [VTL 1195(1)].

*7 The position urged by the People does violence to this statutory scheme and is contrary to the weight of judicial authority construing VTL 1194. Clearly, the Legislature intended to differentiate between preliminary tests done at the scene of the crime and those conducted back at the station house. The obvious rationale for this distinction is that the conditions surrounding a field test do not give the same assurance of reliability and accuracy as those in a controlled environment.

The People's reliance upon *People v. Monahan,* 25 N.Y.2d 378 (1969) and *People v. Hampe,* 181 A.D.2d 238 (3d Dept.1992) is misplaced. In *Monahan,* a sample of defendant's blood was taken by a physician and analyzed by a laboratory assistant. The sole issue on appeal was whether the People could lay the foundation for the admission of the test results without introducing documentary proof of the rules and regulations of the police department adopted pursuant to VTL 1194(1). The Third Department concluded that the People need not introduce such rules and regulations, provided the customary foundation for admitting scientific evidence exists. *Monahan* thus did not concern the admissibility of field tests.

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Hampe similarly did not involve a test conducted in the field. In *Hampe,* defendant was arrested after the police conducted coordination tests in the field. The disputed breath test was administered at the police substation. [FN5] The only question addressed in *Hampe* was whether the inclusion of a breath testing instrument in the list of devices approved by the Department of Health dispenses with the need for expert testimony as to the accuracy and reliability of the device. The Third Department's holding that expert testimony is not necessary to establish the foundation for admitting a breath test conducted with an approved instrument in no way concerns the admissibility of a test conducted in the field with such an instrument.

> FN5. These facts were obtained from the briefs to the Third Department in *People v. Hampe.*

None of the other cases cited by the People holds that a breath test conducted at the scene of an accident is admissible at trial as evidence of defendant's intoxication. In *People v. DeMarasse,* 85 N.Y.2d 842 (1995), defendant was removed to Central Testing at police headquarters for a breath test after he failed field sobriety tests. Similarly, in *People v. Seide,* 5 Misc.3d 395 (Just Ct, Tioga County 2004), defendant's breath was tested at the State Police substation. *People v. O'Brien,* 2001 WL 1722772 (Erie County Ct) distinguishes cases involving alcosensor prescreening devices used in the field from the BAC Datamaster at issue in that case. There is no indication in *People v. Holmes,* 171 Misc.2d 962 (Just Ct, Monroe County 1997) that the disputed test was conducted on the scene.

After considering the statute, the case law, and the submissions of the parties, including the People's unexplained admission that field tests are not admissible, the Court concludes that field test results cannot be introduced as evidence in chief of defendant's intoxication.

2 *Defendant's Refusal to Submit to a Breathalyzer Test*

***8** A person who has been arrested for driving while intoxicated has the right to speak with an attorney before deciding whether to take the chemical test. *See People v. Gursey,* 22 N.Y.2d 224, 229 (1968). *Gursey* cautioned, however, that the right to counsel does not give defendant an absolute right to refuse to take a test until a lawyer appears and may not be used to delay a timely test.

It is well settled that an individual may not condition his consent to a blood alcohol test on first consulting with an attorney. *See People v. Monahan,* 295 A.D.2d 626 (2d Dept.2002). *See also Matter of Boyce v. Commissioner of N.Y.S. Dept. Of Motor Vehicles,* 215 A.D.2d 476, 477 (2d Dept.1995); *Matter of Cook v. Adduci,* 205 A.D.2d 903 (3d Dept.1994). In this case, the defendant was afforded the opportunity to contact an attorney. He also was given clear and unequivocal warnings of the consequences of refusing to take the breathalyzer test, as required by VTL 1194(2)(f). Under these circumstances, defendant's response to the police that he wanted to speak with an attorney before taking the test correctly was deemed to be a refusal to submit to the test and such refusal is admissible in evidence.

3. *Defendant's Motion to Preclude Statements*

CPL 710.30(1)(a) requires the People to serve notice of their intention to introduce evidence of statements made by defendant to law enforcement. The People must serve this notice within 15 days of arraignment [CPL 710.30(2)]. The purpose of the statute is to give defendant adequate time to investigate the circumstances under which a statement was made and to allow defendant adequate time to prepare for a hearing as to the statement's voluntariness. CPL 710.30(1)(a) also permits an orderly hearing and determination of the voluntariness of statements prior to trial. *People v. Briggs,* 38 N.Y.2d 319, 322–323 (1975).

Defendant asserts that statements not noticed at arraignment must be precluded because the People failed to comply with CPL 710.30(1)(a). The People counter that the notice given at arraignment

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was sufficient to apprise defendant of the existence of the unnoticed statements. The People also oppose preclusion on the ground that the unnoticed statements were included in the superceding accusatory instrument and in the People's response to defendant's omnibus motion.

The absence of timely notice pursuant to CPL 710.30(1)(a) cannot be cured by documents turned over in discovery or recited in an accusatory instrument. *See People v. Lopez,* 84 N.Y.2d 425, 428 (1994); *People v. Phillips,* 183 A.D.2d 856 (2d Dept.1992); *People v. Calise,* 167 Misc.2d 277, 280 (Crim Ct Bronx County 1996) (Sussman, J.). Nor does the absence of prejudice to defendant relieve the People of their obligation to provide timely notice. *People v. Lopez, supra.*

Notwithstanding the lack of timely notice, the courts have held that CPL 710.30(1)(a) is not violated if the unnoticed statements substantially are consistent with statements that properly were noticed. *See People v. Cooper,* 78 N.Y.2d 476, 484 (1991); *People v. Bennett,* 56 N.Y.2d 837, 839 (1982). The cases in which this principle has been applied generally involve additional statements made to the same police officer in the course of a single conversation. *See, e.g., People v. Cooper,* 78 N.Y.2d 476, 484 (1991); *People v. Garcia,* 290 A.D.2d 299 (1st Dept 2002); *People v. Morris,* 248 A.D.2d 169 (1st Dept 1998); *People v. Martinez,* 203 A.D.2d 212 (1st Dept 1994).

*9 An alternative exception to the requirements of CPL 710.30(1)(a) has been recognized where the People serve notice of a statement in one form but fail to notice a substantially similar statement in another form. *See, e.g., People v. Bennett,* 56 N.Y.2d 837 (1982) (oral statement substantially same as written confession); *People v. Valdivia,* 236 A.D.2d 225 (1st Dept 1997) (statements in written form substantially consistent with noticed statements); *People v. Kelly,* 200 A.D.2d 440 (1st Dept 1994) (videotaped statement substantially identical to noticed statements). *But see People v. Phillips,* 183 A.D.2d 856, 858 (2d Dept 1992) (notice of videotape did not satisfy CPL 710.30(1)(a) as to oral statement).

The unnoticed statement to Officer Maher at the scene of the accident falls within this first line of cases. The statement is more incriminating because defendant admits that he was drinking. It is consistent, however, with the defendant's noticed statement to Sgt. Daskalakis that he was at a bar and appears to have been made at the same time and place as the noticed statements.

The unnoticed statement to Detective Bowden is more problematic. It was made two hours later and to a different police officer than the noticed statements and thus does not fall squarely within either of the recognized exceptions to the requirements of CPL 710.30(1)(a). In *People v. Poole,* 10 AD3d 581 (1st Dept 2004), however, the Appellate Division found that the statute was satisfied where defendant's statements to a detective were similar to noticed statements made to other officers earlier in time. A review of the briefs submitted in *Poole* reveals that the People indicated in their Voluntary Disclosure Form that they intended to introduce evidence of the following three statements (Brief for Respondent at 28–29):

> 1. May 17, 2002 at about 10:30 a.m., to Police Officer Andrew Lewis, in response to a question by the officer about whether defendant had anything sharp in his pocket, defendant stated, in substance, "Like a razor blade, no I got rid of that. I'm gonna deny I cut her. I just feel bad about the old man. I didn't mean to cut him."
>
> 2. May 17, 2002, at about 11:00 a.m., to Police Officer Andrew Lewis, defendant stated, in substance, "I had a gun with me, but I got rid of it. I threw it near the dumpsters at 103 and Park. I had another gun when I was in the apartment where you arrested me, But I threw it out the window before you came in."
>
> 3. May 17, 2002 at about 10:30 to Police Officer Lee, defendant stated, in substance "I wanted to

> kill Shameika Wilson. I think she was trying to set me up. I bought a gun out of state and threw it out the window. I had a gun with me when I sliced her face and I threw it in the dumpster."

The unnoticed statement at issue in *Poole* was made to Detective Leahy at 11:45 AM at the precinct. Defendant told Detective Leahy that he "hooked up" with Sameika Nelson a few days before May 17, when the couple ate at a restaurant together. On May 17, defendant went to Nelson's building and waited outside of her apartment until she emerged. After Nelson entered an elevator, defendant ran downstairs to a lower floor and pressed the elevator button. When the elevator arrived, defendant dragged Nelson off the elevator and slashed her. Nelson's father and children appeared, after which the razor was kicked out of defendant's hand, and defendant "blacked out" (Brief for Respondent at 32–33).

*10 The facts in *Poole* are close to those here. While defendant's statement to Detective Bowden was made about two hours later in time and contains more inculpatory details, it is consistent with and similar to the statements noticed at arraignment. Accordingly, the Court finds that the People did provide sufficient notice of all of defendant's statements and defendant's motion to preclude is denied. Having denied preclusion, the Court directs a *Huntley/Dunaway* hearing as to defendant's statements.

This constitutes the decision and order of the Court.

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END OF DOCUMENT

APPENDIX "C"

31 Misc.3d 1232(A)
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The People of the State of New York
v.
Juan Santana, Defendant.
2010NY044345

Criminal Court of the City of New York, New York County

Decided on May 16, 2011

CITE TITLE AS: People v Santana

ABSTRACT

Motor Vehicles
Chemical Tests
Admissibility of Field Test Result as Evidence-in-Chief of Intoxication

People v Santana (Juan), 2011 NY Slip Op 50962(U). Motor Vehicles—Chemical Tests—Admissibility of Field Test Result as Evidence-in-Chief of Intoxication. (Crim Ct, NY County, May 16, 2011, Simpson, J.)

APPEARANCES OF COUNSEL

FOR THE PEOPLE
ROBERT M. MORGENTHAU, ESQ.
DISTRICT ATTORNEY
ONE HOGAN PLACE
NEW YORK, NEW YORK 10013
BY: A.D.A. RICHARD FREUD, ESQ.
FOR THE DEFENDANT
RICHARD ABRAHAM, ESQ.
OF COUNSEL TO THE
THE LEGAL AID SOCIETY OF NY
49 THOMAS STREET
NEW YORK, NEW YORK 10013-3821
(212) 298-5043

OPINION OF THE COURT

ShawnDya L. Simpson, J.

The defendant is charged with one count each of Operating a Motor Vehicle While Intoxicated (VTL §1192.3) and Operating a Motor Vehicle While Impaired (VTL §1192.1). The defense has made a motion to preclude the People from introducing the result of the SD-2 Intoxilyzer portable breath alcohol test administered to the defendant. A response was filed by the People. For the foregoing reasons, the defense's motion to preclude introduction of evidence relating to the portable breath alcohol test is granted.

Relying on the statutory scheme and the Court of Appeals' ruling in *2*People v. Thomas*, 70 NY2d 823,523 N.Y.S.2d 437 [1987], the court in *People v. Reed*[FN1], 5 Misc 3d 1032A,799 N.Y.S.2d 163 [Bx. Co., Sup. Ct. 2004], held that "field test results cannot be introduced as evidence in chief of defendant's intoxication" (*see People v. Reed*, 5 Misc 3d 1032A,*citingPeople v. MacDonald*, 227 AD2d 672,641 N.Y.S.2d 749 [App. Div., 3rd Dept. 1996], *affd.* 89 NY2d 908,653 N.Y.S.2d 267 [1996]; *People v. Wright*, 1 Misc 3d 133A,781 N.Y.S.2d 627 [App. Tm., 9th and 10th Jud. Dists. 2003]). Pursuant to VTL §1194, a field test serves to determine probable cause for an arrest and it is the chemical breath test that may be admitted at trial (*seePeople v. Reed*, 5 Misc 3d 1032A,*People v. Schook*, 16 Misc 3d 1113(A), N.Y.S.2d 898 [Dist. Ct., Suffolk Co. 2007], *citingPeople v. Thomas*, 70

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NY2d 823;*People v. Wright*, 1 Misc 3d 133(A)). The ruling in *People v. Hampe*, 181 AD2d 238,585 N.Y.S.2d 861 [App. Div., 3rd Dept. 1992], which has been relied upon is inapplicable to the instant facts given that the test in that case involved a chemical test given at the precinct, a field test was not at issue in that proceeding.

The statute differentiates between a preliminary field test and a chemical breath test, which is admissible at trial with the laying of a proper foundation (*seePeople v. Reed*, 5 Misc 3d 1032A,*citing* VTL §1194; *see also*, *People v. Boscic*[FN2], 15 NY3d 494,912 N.Y.S.2d 556). According to VTL §1194 (2) (a) and (b), the initial breath test and the subsequent chemical test serve difference purposes, the first determines if alcohol was consumed and the second determines the level of alcohol consumed. The statute does not provide that a field test is admissible as evidence in chief of defendant's intoxication and no such language will be read into the statute by this court. That the Intoxilyzer S-D2 is listed as a devise approved to test blood alcohol content does not establish that the devise is admissible at trial to prove the defendant was legally intoxicated.

The portable SD-2 Intoxilyzer alcohol breath test is used as a screening tool in the field to determine if the defendant has consumed alcohol (*seePeople v. Reed*, 5 Misc 3d 1032A,*People v. Schook*, 16 Misc 3d 1113(A),*People v. O'Reilly*, 16 Misc 3d 775,842 N.Y.S.2d 292 [Dist. Ct., Suffolk Co. 2007]). A roadside Alco-Sensor screening test "is sufficiently reliable for use in determining the presence of alcohol on a pass/fail basis", if "properly administered [an] Alco-Sensor test can help establish probable cause for the arrest of a DWI suspect" (*People v. Harper*, 18 Misc 3d 1107A,856 N.Y.S.2d 25, at 4, [Justice Ct., Dutchess Co. 2007] *citingPeople v. Thomas*, 121 AD2d 73,509 N.Y.S.2d 668,*aff'd*70 NY2d 823,523 N.Y.S.2d 437 [1987]; *Smith v. Commissioner of Motor Vehicles*, 103 AD2d 865, 866, 478 N.Y.S.2d 103 [App. Div., 3rd Dept. 1984]; *People v. Schook*, 16 Misc 3d 1113(A), Gerstenzang & Sills, §7:14, "Handling a DWI Case in New York -- 2007-2008 Edition [Thomson-West, 2007]).

A portable alcohol screening devise may be used for a field test to determine probable cause for an arrest and its use in determining blood alcohol content is proper for that purpose given its approval, but "is not admissible at trial in a DWI prosecution because the test results are not sufficiently reliable to prove intoxication (i.e. the blood alcohol content reading)" (*People v. Harper*, 18 Misc 3d 1107A, at 4,*citingPeople v. Thomas*, 121 AD2d 73,*see also*, *310 N.Y.C.R.R. 59.4 (b) (4) (xxiii), *People v. Reed*, 5 Misc 3d 1032A,*People v. Schook*, 16 Misc 3d 1113(A),*People v. Herrera*, 23 Misc 3d 1104A, 885 N.Y.S.2d 712 [Dist. Ct., Suffolk Co. 2009]). As noted [FN3] in *Reed*, 5 Misc 3d 1032A, the Department of Health rules and regulations themselves recognize the difference between preliminary screening test and chemical test (*see*10 N.Y.C.R.R. 59.4 (b) (4) (xxiii)).

The reliability of a field test is compromised precisely because it's done in the field, generally under less stable condition than that of the precinct. In states where field test are admitted a visual recording of the officer carrying out the test is provided to establish the reliability of that evidence. Similarly, in New York a video recording of the test is performed at the precinct to establish the reliability of its administration. In other states, where a portable breath test is done in the field it may be admitted in the People's case in chief because it is video recorded. Where a portable test is admissible there should be mechanisms in place to support its reliability. In DWI cases legislators have sought to ensure that the defendant is convicted on reliable evidence.

The portable SD-2 Intoxilyzer test and the Intoxilyzer 5000EN are used differently, the later is used at trial to establish the level of alcohol in the defendant's body while the first is used in the field to determine if alcohol was consumed. Further, to admit the results of the Intoxilyzer 5000EN, which is conducted at the precinct, the People must show

that the devise was properly calibrated, generally within about a six month period (see *People v. Boscic*, 15 NY3d 494). As the defense notes, machines are fallible and to admit the result of such equipment there must be evidence that the devise was regularly serviced and maintained to ensure its effective operability.

Additionally, if portable breath test done in the field were admissible in the People's case in chief due process would require advising the driver that the result of such test could be used to convict. Vehicle and Traffic Law § 1194 (1) (b) provides that a driver cannot refuse a breath test and that a chemical test may be given if the initial breath test indicates that the driver has consumed alcohol. Further, if portable breath test were admissible at trial to prove the suspect was legally intoxicated there would be no cause to provide for a second test, if the first were sufficient. To admit evidence of a portable breath test in a case in chief would be to circumvent the law. For the People to be able to rely on a portable alcohol breath test conducted at the scene in the field to prove their case in chief there must be a different statutory scheme than that in existence. Consequently, the People may not admit the result of the portable breathilyzer test conducted in this case.

Accordingly, the defendant's motion to preclude evidence of the results of a portable breathilyzer test is granted.

This constitutes the decision, opinion and order of the Court.

Dated:New York, New YorkMay 16, 2011

_____The Honorable ShawnDya L. SimpsonJudge of the Criminal Court

FOOTNOTES

FN1. The portable breath alcohol test that was at issue in *People v. Reed*, 5 Misc 3d 1032A, was the Intoxilyzer S-D2, the same test/devise at issue in the present case.

FN2. In *People v. Boscic*, 15 NY3d 494, the alcohol breath test was done after the defendant had been arrested at the precinct and does not serve to support the People's contention in this case.

FN3. The court in *Reed*, at 7, quotes that " 10 NYCRR 59.5 provides that a breath sample shall be collected within two hours of the time of arrest or *within two hours of a positive breath alcohol screening test*.' This subsection also requires that the driver be under continuous observation for 15 minutes prior to a chemical test, that a system purge immediately must precede both the test and analysis of the reference sample and that analysis of a reference standard be made and recorded immediately prior to or following the breath test" (emphasis added).

N.Y.City Crim.Ct. 2011.
People v Santana
31 Misc.3d 1232(A), 930 N.Y.S.2d 176930 N.Y.S.2d 176 (Table)(Table, Text in WESTLAW), Unreported Disposition6022011 WL 21195039992011 N.Y. Slip Op. 50962(U)4603, 930 N.Y.S.2d 176930 N.Y.S.2d 176 (Table)(Table, Text in WESTLAW), Unreported Disposition6022011 WL 21195039992011 N.Y. Slip Op. 50962(U)4603, 930 N.Y.S.2d 176930 N.Y.S.2d 176 (Table)(Table, Text in WESTLAW), Unreported Disposition6022011 WL 21195039992011 N.Y. Slip Op. 50962(U)4603

END OF DOCUMENT

APPENDIX "D"

16 Misc.3d 1113(A)
(Table, Text in WESTLAW), Unreported Disposition
(Cite as: 16 Misc.3d 1113(A), 847 N.Y.S.2d 898)

People v Schook
16 Misc.3d 1113(A), 847 N.Y.S.2d 898
N.Y.Dist.Ct. 2007.

16 Misc.3d 1113(A), 847 N.Y.S.2d 898, 2007 WL 2108043, 2007 N.Y. Slip Op. 51411(U)

The People of the State of New York,
v.
Steven Schook, Defendant.
2006SU17659

District Court of Suffolk County, First District

Decided on July 16, 2007

CITE TITLE AS: People v Schook

ABSTRACT

Crimes
Right to Remain Silent

People v Schook (Steven), 2007 NY Slip Op 51411(U). Crimes—Right to Remain Silent. Criminal Procedure Law—§ 140.10 (1) (Arrest without warrant; by police officer; when and where authorized). (Suffolk Dist Ct, July 16, 2007, Alamia, J.)

APPEARANCES OF COUNSEL

THOMAS J. SPOTA, ESQ.
Suffolk County District Attorney
400 Carleton Avenue
Central Islip, NY 11722
By:Alison Cardino, Esq.
Assistant District Attorney
ROBERT B. KRONENBERG, ESQ.
Attorney for the Defendant
1355 Motor Parkway
Hauppauge, NY 11749

OPINION OF THE COURT

Salvatore A. Alamia, J.
The defendant is charged with Driving While Intoxicated Per Se in violation of VTL 1192(2), Driving While Intoxicated in violation of VTL 1192(3) and Leaving the Scene of an Incident Without Reporting in violation of VTL 600(1). A *Huntley*, *Dunaway* and *Mapp* hearing was held on March 28, 2007 and continued on March 30, 2007, to determine the admissibility at trial of evidence obtained against the defendant. The parties were given the opportunity to submit written closing statements, which have since been received in chambers.

Findings of Fact

The sole witness at the hearing was Police Officer Douglas Nassisi, a police officer with the Suffolk County Police Department, who testified on behalf of the People. Based upon the credible evidence adduced at the hearing, the Court makes the following findings of fact and conclusions of law.

Officer Nassisi, Shield No. 4824, Command 410, has been a police officer with the Suffolk County Police Department for 13 years, and has made approximately 500 DWI arrests. He is presently assigned to the patrol division, overnight squad. On April 2, 2006, Officer Nassisi was on patrol in a marked patrol car, working a 9:00 p.m. to 7:00 a.m. tour of duty. At approximately 3:16 a.m. on that date, the officer was on Jericho Turnpike in Smithtown, Town of Smithtown, Suffolk County, when he received a radio call that a car had struck a building at Edgewood and Route 25 in Smithtown. One to two minutes later, while responding to the call, the officer received a second radio *2 call that a vehicle had struck a parked car in front of the Myst Bar on Main Street in Smithtown and had left

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the scene.

The officer arrived at the scene of the first radio call and observed that a black car had struck a building located at a gas station on Edgewood and Route 25, also known as Main Street. Two marked patrol cars had also responded to the call. After speaking briefly with the police officers already at the scene, Officer Nassisi proceeded to the location reported in the second radio call. When the officer arrived at the Myst Bar, located about one mile away, he observed that a parked Nissan Sentra had been hit and had sustained body damage. Officer Nassisi canvassed the area in front of the bar for witnesses and located two witnesses to the accident who stated that a black car, identified by one of the witnesses as an Infiniti, had struck the parked vehicle and left the scene at approximately 3:15 a.m.

Officer Nassisi returned to the location reported in the first radio call, observing that the car that had struck the gas station building was a black 2001 Infiniti. The officer approached three people who were standing directly behind the Infiniti and asked who had been driving the vehicle. The defendant came forward and said he was the driver. The officer asked the defendant for his driver's license and the vehicle registration, which were produced. The officer then asked the defendant to come to his patrol car to fill out a report of what had happened at both accident scenes. The officer took the defendant to the trunk area at the back of the officer's patrol car, where the defendant gave a written statement on the motor vehicle accident supplemental report (People's exhibit 2 in evidence). The statement, which is comprised of a single sentence, reads "I was traveling (*illegible*) a car hit (*illegible*) side swiped."

While speaking with the defendant, Officer Nassisi noticed the odor of alcohol on the defendant's breath and asked him if he'd been drinking. The defendant answered that he'd had a couple of drinks and that he was drunk. The defendant agreed to take field sobriety tests. The officer administered the horizontal gaze nystagmus (HGN) test to the defendant, which he failed. The defendant refused to perform the walk and turn and the one-legged stand tests, stating that he was too drunk and did not want to take them. The defendant submitted to an SD-2 alco-sensor field breath test, which he failed with a .24% reading.

At approximately 4:16 a.m., Officer Nassisi placed the defendant under arrest for Driving While Intoxicated and *3 transported him to the Fourth Precinct in Hauppauge, New York. Following their arrival, Officer Nassisi read the "chemical test request" portion of the Alcohol/Drug Influence Report (AIR) to the defendant at approximately 4:28 a.m. (People's exhibit 2 in evidence). The defendant initialed the portion of the form containing the printed warnings of the consequences of refusing, wrote the word "consent" in the space provided, and signed his name beneath it. A technician arrived at the precinct and administered an Intoxilyzer 5000 breath test to the defendant at 5:14 a.m., which registered an insufficient sample. A second test was administered at 5:31 a.m., which resulted in a blood alcohol content reading of .20%.

The officer next read the *Miranda* warnings portion of the form to the defendant and the questions printed in that portion of the form, recording the defendant's responses in the spaces provided (People's Exhibit 3 in evidence). The defendant answered "yes" when asked if he understood each of the rights explained by the officer, and "no" when asked if he wished to contact a lawyer. In response to the question "Having these rights in mind, do you wish to talk to me now, without a lawyer?," the defendant answered "no," which the officer recorded on the AIR form. Soon thereafter, the defendant stated that he was willing to talk to the officer without a lawyer, but the officer did not record the defendant's change of mind or the time on the AIR form. Officer Nassisi then asked the defendant the questions printed on the bottom portion of the AIR form, again recording the defendant's answers on the form. The defendant's responses to the ques-

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tions on the form indicate that the defendant had been on his way home from the Myst Bar, where he'd been drinking alcoholic beverages and had three to four Bud beers (People's Exhibit 3 in evidence).

Conclusions of Law

Officer Nassisi, in the course of his investigation of the hit and run accident at the Myst Bar, had an articulable, objective basis to approach the defendant and the two other persons at the scene of the gas station accident and request information, as the vehicle involved in that accident matched the description of the vehicle reportedly involved in the hit and run accident which had taken place only minutes earlier and a mile away. *See*, *People v. Hollman*, 79 NY2d 181, 184 (1992); *People v. De Bour*, 40 NY2d 210, 223 (1976); *see also*, *People v. Asher*, 2007 NY Slip Op 27248 (App. Term, 9th & 10th Jud. Dists. 2007). The defendant's admissions that he had operated the vehicle and that he was drunk, together with the officer's observations of the odor of alcohol on the defendant's breath and his failure of the *4 HGN and SD-2 field tests, were sufficient to provide the officer with reasonable grounds to believe the defendant had been driving in violation of VTL 1192, and provided probable cause for the arrest for Driving While Intoxicated. *See*, *People v. Kowalski*, 291 AD2d 669 (3rd Dept. 2002); *People v. Asher, supra* ;*People v. Cullison*, 8 Misc 3d 128A, 2005 NY Slip Op 50967U (App. Term, 9th & 10th Jud. Dists. 2005); CPL 140.10(1). The Court therefore finds that the evidence obtained as a result of the defendant's arrest is not subject to suppression for lack of probable cause.

A police officer conducting an investigation at the scene of a traffic accident is not required to administer *Miranda* warnings where the investigation has not yet reached the custodial stage. *See*, *People v. Dougal*, 266 AD2d 574 (3rd Dept. 1999), lv. den.94 NY2d 879 (2000); *People v. Aia*, 105 AD2d 592 (3rd Dept. 1984); *People v. Atwood*, 2 AD3d 1331 (4th Dept. 2003), lv. den.3 NY3d 636 (2004). Temporary detentions for the investigation of traffic-related matters are generally non-custodial in nature and do not require the administration of *Miranda* warnings. *See*, *People v. Mackenzie*, 9 Misc 3d 129A, 2005 NY Slip Op 51535U (App. Term, 9th & 10th Jud. Dists. 2005), lv. den.5 NY3d 807 (2005); *People v. Myers*, 1 AD3d 382, 383 (2d Dept. 2003), lv. den.1 NY3d 631 (2004); *see also People v. Bennett*, 70 NY2d 891 (1987). The applicable standard for determining whether an interrogation is or is not custodial is whether a reasonable person, innocent of any crime, would have believed he was free to leave had he been in the defendant's position. *See*, *People v. Yukl*, 25 NY2d 585, 589 (1969), cert. den.400 U.S. 851;*People v. Fenti*, 175 AD2d 598 (4th Dept. 1999). The issue of custody is not determined by the subjective beliefs of the individual defendant or of the police officer, except to the extent that his or her belief is communicated to the defendant. *See*, *People v. Joy*, 114 AD2d 517 (2d Dept. 1985); *People v. Fenti, supra* .

Officer Nassisi's questioning of the defendant at the scene of the gas station accident occurred in a non-custodial setting and was investigatory in nature. The evidence at the hearing did not suggest that the defendant's statements at the accident scene were obtained by means of coercion or unfairness. The officer thus was not required to administer *Miranda* warnings before conducting the initial investigation. *See*, *People v. Mackenzie, supra* ;*People v. Parulski*, 277 AD2d 907 (4th Dept. 2000). The defendant's admission of operation, his written statement on the motor vehicle accident supplemental report, and his statements that he'd had a couple of drinks and that he was drunk, were not obtained in violation of his *Miranda* rights and are not subject to suppression at trial.*5

Results of field sobriety tests are not deemed testimonial or communicative, and evidence of a defendant's performance of such tests is admissible, in the absence of *Miranda* warnings, as probative of the issue of intoxication. *See*, *People v. Berg*, 92 NY2d 701 (1999); *People v. DiNonno*, 171 Misc 2d 335 (App. Term, 9th & 10th Jud. Dists. 1997);

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(Table, Text in WESTLAW), Unreported Disposition
(Cite as: 16 Misc.3d 1113(A), 847 N.Y.S.2d 898)

People v. DeRojas, 196 Misc 2d 171 (App. Term, 9th & 10th Jud. Dists. 2003), lv. den.100 NY2d 593 (2003). Evidence of a defendant's refusal to perform such tests is also admissible, as long as the refusal was not the product of custodial interrogation. *See*, *People v. Berg, supra* .The Court accordingly finds that evidence of the defendant's performance of the HGN test and his refusal to perform the walk and turn and one-legged stand tests is admissible at trial. *See*, *People v. Berg, supra* , 92 NY2d at 705. The defendant's statement that he was too drunk to perform the tests is also admissible, as it was not obtained as a result of custodial interrogation. *See*, *People v. Berg, supra* .

Alcohol screening tests are considered sufficiently reliable to indicate the presence of alcohol in a person's breath for the purpose of establishing probable cause for an arrest, but are not sufficiently reliable to determine the actual blood alcohol concentration. *See*, *People v. Thomas*, 121 AD2d 73, 76, 78-79 (4th Dept. 1986), affd. 70 NY2d 823 (1987). Unlike field coordination tests, alcohol screening tests are not probative of the issue of intoxication and the results are not admissible at trial (*see*, *People v. Thomas, supra* , 70 NY2d at 825;*People v. Wright*, 1 Misc 3d 133A,781 NYS2d 627 [App. Term, 9th & 10th Jud. Dists. 2003]), unless probative of some other issue (*see*, *People v. Thomas, supra* , 70 NY2d at 825;*People v. MacDonald*, 227 AD2d 672 [3rd Dept. 1996], affd. 89 NY2d 908 [1996];VTL 1194[2]). The defendant's SD-2 field breath test results therefore shall not be admitted into evidence at trial unless the relevance is otherwise demonstrated.

When the *Miranda* warnings were read to the defendant, he unequivocally indicated that he did not wish to talk to the officer without a lawyer (*see*, People's Exhibit 3), thereby invoking both his right to remain silent and his right to counsel. A suspect's right to remain silent, once invoked, must be "scrupulously honored," and "he may not within a short period thereafter and without a fresh set of warnings be importuned to speak about the same suspected crime." *People v. Ferro*, 63 NY2d 316, 322 (1984), cert. den.472 U.S. 1007 (1985), quoting *Miranda v. Arizona*, 384 U.S. 436 (1966). Although the officer had recorded the defendant's responses on the AIR form up to that point, he significantly failed to record the defendant's subsequent waiver of his *Miranda* rights or the time of the *6 waiver. The evidence at the hearing did not establish that there had been a sufficiently pronounced break between the defendant's invocation of his *Miranda* rights and his purported waiver of those rights, nor that the defendant had again been advised of his *Miranda* rights before the officer proceeded with the questions at the bottom of the AIR form, which elicited incriminating responses from the defendant. *See*, *People v. Ferro, supra* ;*see also*, *People v. Ferrara*,158 Misc 2d 671 (Criminal Ct., Richmond Co. 1993).The evidence at the hearing thus was not sufficient to establish that the defendant knowingly and voluntarily waived his right to remain silent and his right to counsel, and his responses to the questions in the bottom portion of the AIR form shall be suppressed at trial.

This constitutes the decision and order of the Court.

The parties are directed to appear on the New Court Date indicated below.

People v Schook
16 Misc.3d 1113(A), 847 N.Y.S.2d 898847 N.Y.S.2d 898 (Table)(Table, Text in WESTLAW), Unreported Disposition6022007 WL 21080439992007 N.Y. Slip Op. 51411(U)4603, 847 N.Y.S.2d 898847 N.Y.S.2d 898 (Table)(Table, Text in WESTLAW), Unreported Disposition6022007 WL 21080439992007 N.Y. Slip Op. 51411(U)4603, 847 N.Y.S.2d 898847 N.Y.S.2d 898 (Table)(Table, Text in WESTLAW), Unreported Disposition6022007 WL 21080439992007 N.Y. Slip Op. 51411(U)4603

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APPENDIX "E"

18 Misc.3d 1107(A)
(Table, Text in WESTLAW), Unreported Disposition
(Cite as: 18 Misc.3d 1107(A), 856 N.Y.S.2d 25)

People v Harper
18 Misc.3d 1107(A), 856 N.Y.S.2d 25

18 Misc.3d 1107(A), 856 N.Y.S.2d 25, 2007 WL 4571180, 2007 N.Y. Slip Op. 52463(U)

The People of the State of New York, Plaintiff,
v.
Matthew D. Harper, Defendant.
07-06-0113

Just Ct of Town of Hyde Park, Dutchess County

Decided on December 31, 2007

CITE TITLE AS: People v Harper

ABSTRACT

Motor Vehicles
Operating Vehicle while Under Influence of Alcohol or Drugs
Probable Cause to Arrest

People v Harper (Matthew), 2007 NY Slip Op 52463(U). Motor Vehicles—Operating Vehicle while Under Influence of Alcohol or Drugs—Probable Cause to Arrest. Criminal Procedure Law—§ 70.10 (2) (Standards of proof; "reasonable cause to believe that person committed offense" defined). (Just Ct of Town of Hyde Park, Dutchess County, Dec. 31, 2007, Steinberg, J.)

APPEARANCES OF COUNSEL

D. James O'Neil, Esq.
O'Neil Burke, LLP, Esqs.
Attorneys for Defendant
301 Manchester Road, Suite 203
Poughkeepsie, New York 12603
William V. Grady, Esq.
Allison LaBate, Esq., Of Counsel
Dutchess County District Attorney
236 Main Street
Poughkeepsie, New York 12601

OPINION OF THE COURT

David L. Steinberg, J.
The defendant, Matthew Harper, is charged with two counts of Driving While Intoxicated in violation of VTL 1192 (2), (3), and Failure to Keep Right in violation of VTL 1120(a). A pre-trial hearing was ordered to determine defendant's motion to suppress. On September 5, 2007, a *Dunaway/Huntley/Mapp* hearing was held to determine the admissibility at trial of evidence obtained against the defendant, including chemical test results and statements.

The two witnesses at the hearing were Sgt. Robert J. Benson and Officer Jason Ruscillo of the Hyde Park Police Department, who testified credibly on behalf of the People. Based upon the evidence adduced at the hearing, the Court makes the following findings of fact and conclusions of law.

Findings of Fact

In the early morning hours of June 7, 2007 at about 1:30 a.m., Sgt. Benson and Officer Ruscillo were on patrol in separate, marked Hyde Park patrol cars working the "A line" tour of duty from 11:00 p.m. to 7:00 a.m. They were dispatched to a domestic incident in progress at the Building 9 of the Hyde Park Ledges apartment complex on Route 9 in the Town of Hyde Park, New York. Upon arrival, they came upon the defendant who was outside the apartment building. He appeared to be very upset and was crying. Sgt. Benson did not recall the defendant showing any signs of intoxication, such as odor of alcohol, stumbling or staggering, glassy or

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bloodshot eyes. Officer Ruscillo observed the defendant acting in a confused manner. He further detected the odor of alcohol from the defendant and that he had glassy eyes. The officer believed that defendant appeared to be intoxicated.

Further investigation at the scene revealed that the defendant's girlfriend wanted to leave, but he did not want her to go. Defendant told the police that his girlfriend had been drinking alcohol and should not be allowed to drive. The girlfriend's departure was delayed because she was unable to find her cell phone which the defendant stated he had thrown into the bushes. Sgt. Benson assisted for 10-15 minutes in the search for the cell phone. After a fruitless search, the defendant was found to be in possession of the cell phone which was returned to the female. Prior to allowing her to get in her car and drive away, the police gave her an Alco-Sensor test with negative results. No charges were filed against anyone.

After Sgt. Benson left The Ledges, he went to another nearby apartment complex at *2 Royal Crest Apartments located across Route 9 on Scenic Drive. He then observed a gray vehicle with very black windows traveling southbound on Route 9. The windows were so dark that he could not see into the vehicle. While following the vehicle, he observed it cross the yellow line in the middle of the road on three occasions. Each time, the car moved to the left with both tires on the driver's side on the double yellow line in the middle of the road. This occurred in the vicinity of St, James Church, the Hyde Park Town Hall and Dunkin' Donuts. Upon calling in the license plate (Colorado 252 KAJ), it came back as belonging to the defendant, Matthew D. Harper. He pulled over the vehicle, a 2006 Nissan, at about 2:00 a.m. and recognized the driver as the same individual he had encountered at The Ledges. The defendant said he was going to Darby O' Gills, a local bar. The defendant's license and registration was valid. No open containers of alcoholic beverages were observed. Since Sgt. Benson smelled alcohol on defendant's breath, and he had watery, glassy eyes, Sgt. Benson turned the defendant over to Officer Ruscillo for further DWI investigation. He did not administer any *Miranda* rights at the scene.

Sgt. Benson cited the defendant for Failure to Keep Right in violation of VTL 1120(a). He did not write a ticket for excessive window tint, as the HPPD tint meter at the police station had dead batteries, and he did not want to write the ticket in the absence of corroboration that a tint meter would have provided.

Officer Ruscillo has been a police officer with the Hyde Park Police Department

for two years. He has experience and training in DWI detection and has made 30-35 arrests for Driving While Intoxicated. At about 2:00 a.m. on June 7th, he heard over his radio that Sgt. Benson was involved in a traffic stop with the same individual that had been in the domestic incident at The Ledges a short time before. When Officer Ruscillo arrived at the scene, Sgt. Benson turned over the defendant to him for DWI investigation. He spoke with the defendant who advised him he had not been drinking, and was going to Darby O' Gills. Officer Ruscillo observed the defendant to have glassy eyes, slurred speech and the odor of alcohol on his breath. He had him exit the vehicle to perform several field sobriety tests. He did not advise the defendant of his *Miranda* rights at the scene.

He first gave the defendant the Horizontal Gaze Nystagmus test. The defendant failed the test in that his eyes lacked smooth pursuit at maximum deviation. The defendant failed the walk and turn test by stepping off the line numerous times and losing his balance. He also failed the one leg stand by raising his arms for balance and miscounting twice. The defendant tested positive for alcohol on the Alco-Sensor test. Officer Ruscillo did not have the defendant perform the Romberg balancing test, the alphabet test, or the finger to nose test.

Based upon the defendant's actions, his slurred

speech, the odor of alcohol on his breath, his glassy, bloodshot eyes, his failure to perform any of the three field sobriety tests given, and the positive test on the Alco-Sensor test, defendant was arrested for Driving While Intoxicated.

At the police station, the defendant was given the *Miranda* warnings at 2:26 a.m. and declined to answer many questions. He stated again he had been driving from his home at The Ledges to Darby O' Gills.

Conclusions of Law

A traffic stop constitutes a limited seizure of the person of each occupant of the vehicle which, to be constitutional, must be justified at its inception. *People v. Banks*, 85 NY2d 558, 562 (1995), *cert. den.* 516 U.S. 868 (1995). Sgt. Benson's observation of the defendant's failure to keep to the right of the roadway by driving onto the double yellow line in the middle of Route 9 *3 on three separate occasions within a short distance and time frame provided the officer with a lawful basis for stopping the vehicle. *People v. Robinson*, 97 NY2d 341 (2001); *People v. Wright*, 42 AD3d 942 (2nd Dept., 2007); VTL 1120(a).

Probable cause or reasonable cause to arrest is a common sense standard which has emerged from the case law and has been statutorily defined by CPL 70.10(2). The terms "reasonable" and "probable" are used interchangeably.

"Reasonable cause to believe that a person has committed

an offense" exists when evidence or information which

appears reliable discloses facts or circumstances which are

collectively of such weight and persuasiveness as to convince

a person of ordinary intelligence, judgment and experience

that it is reasonably likely that such offense was committed

and that such person committed it. Except as otherwise

provided in this chapter, such apparently reliable evidence

may include or consist of hearsay.

CPL 70.10(2)

The legal standard for determining probable cause is set forth in *People v. Carrasquillo,* 54 NY2d 248 (1981) which states as follows:

In passing on whether there was probable cause for an arrest,

we consistently have made it plain that the basis for such belief

must not only be reasonable, but it must appear to be at least

more probable than not that a crime has taken place and that the

one arrested is its perpetrator, for conduct equally compatible

with guilt or innocence will not suffice.

54 NY2d at 252 (1981)

A finding of probable cause does not require the same quantum of proof necessary to sustain a conviction, or to establish a *prima facie* case. Rather it need merely appear more probable than not that a crime has taken place and that the one arrested is the perpetrator. *People v. Hill*, 146 AD2d 823, 824 (3rd Dept., 1989); *see People v. Attebery*, 223 AD2d 714,715 (2nd Dept., 1996). Moreover, in determining whether a police officer has probable cause for an arrest, the emphasis should not be nar-

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rowly focused on ....any....single factor, but on an evaluation of the totality of circumstances, which takes into account "the realities of everyday life unfolding before a trained officer who has to confront, on a daily basis, similar incidents." *People v. Wright*, 8 AD3d 304, 306-307 (2nd Dept., 2004), *People v. Bothwell,* 261 A.D. 232, 234 (1st Dept., 1999), *quoting People v.; Graham*, 211 AD2d 55, 58-59 (1st Dept., 1995). In making the determination to arrest, the officer is not obligated to eliminate all possible innocent explanations for incriminating facts [*see, People v. Mercado*, 68 NY2d 874, 877 (1986); *People v. Daye*, 194 AD2d 339,340 (1st Dept., 1993)]. Moreover, "[a] party may act with probable cause even though mistaken...if the party acted reasonably under the circumstances in good faith." *People v. Colon*, 60 NY2d 78, 82 (1983); *Villalobos v. County of Nassau*, 15 Misc 3d 135(A), 839 N.Y.S.2d 437 (App. Term, 9th and 10th Jud. Dists., 2007)

In *People v. Farrell*, 89 AD2d 987 (2nd Dept., 1982), the Appellate Division, Second *4 Department articulated the reasonable cause standard as it applies to drinking and driving offenses. The inquiry is:

[W]hether, viewing the facts and circumstances as they

appeared at the time of arrest, a reasonable person in the

position of the officer could have concluded that the

motorist had operated the vehicle while under the

influence of intoxicating liquor.

89 AD2d at 988 (2nd Dept., 1982)

In *People v. Bratcher*, 165 AD2d 906 (3rd Dept., 1990), *lv. den.* 77 NY2d 958 (1991) the Appellate Division, Third Department concluded that there was a valid arrest for driving while intoxicated where the police officer observed defendant's car weaving in its own lane and crossing over into the opposite lane of travel. Thereafter, the officer had "ample opportunity" to observe that the defendant had red, watery eyes, slurred speech, a strong odor of alcohol on his breath, a staggering walk, and a sway while standing.

In *People v. McCarthy*, 135 AD2d 1113 (4th Dept., 1987), probable cause was established where the defendant's eyes were bloodshot, his speech slurred, and there was a strong odor of alcohol coming from the car. Also, the defendant was given a roadside Alco-Sensor test with positive results. *Accord, People v. Blajeski*, 125 AD2d 582 (2nd Dept., 1986).

With respect to a roadside Alco-Sensor screening test, it has been held sufficiently reliable for use in determining the presence of alcohol on a pass/fail basis, and to be a factor in a determination as to whether a police officer has probable cause to arrest an individual for driving while intoxicated. *People v. Thomas*, 121 AD2d 73 (4th Dept., 1986), *aff'd*70 NY2d 823 (1987); *Smith v. Commissioner of Motor Vehicles*, 103 AD2d 865,866 (3rd Dept., 1984); *People v. Schnook*, 16 Misc 3d 1113(A), 2007 WL 2108043 (Suffolk Dist. Ct., 2007) These cases stand for the proposition that a properly functioning, properly administered Alco-Sensor test can help establish probable cause for the arrest of a DWI suspect, but it cannot, in and of itself, establish probable cause for such arrest. Gerstenzang Sills, 7:14, "Handling a DWI Case in New York -- 2007-2008 Edition (Thomson-West, 2007). Such an Also-Sensor screening test is not admissible at trial in a DWI prosecution because the test results are not sufficiently reliable to prove intoxication (i.e. the blood alcohol content reading).*People v. Thomas, supra.*

The Court concludes that Sgt. Benson initial stop of the defendant for a moving traffic infraction of failing to keep right by crossing onto the double yellow line three times in a short period of time and distance was proper. The reliability of the information conveyed by Sgt. Benson to a fellow officer, Office

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Ruscillo, may be assumed by the arresting officer in the field. *People v. Lypka*, 36 NY2d 210 (1975); *People v. Ball*, 141 AD2d 743, 744 (2nd Dept.,1988).

Officer Ruscillo had probable cause to arrest the defendant for Driving While Intoxicated based upon the indicia of alcohol consumption such as the odor of alcohol on the breath, and watery, glassy eyes, defendant's failure to pass the Horizontal Gaze Nystagmus test, the walk and turn test, and the one leg stand test, along with a positive Alco-Senor screening test for the presence of alcohol.

Officer Ruscillo had also closely observed the defendant at The Ledges outside his apartment for a period of approximately 20 minutes, less than one hour prior to the traffic stop. He had made an initial conclusion at that time that the defendant was intoxicated, based on the *5 odor of alcohol from the defendant, glassy eyes, and his confused manner. These close and direct observations by an experienced and trained police officer, both at The Ledges and at the roadside traffic stop, were sufficient to provide the officer with reasonable grounds to believe that defendant had been driving in violation of VTL 1192, and provided probable cause for the defendant's arrest for Driving While Intoxicated. The evidence obtained as a result of the lawful arrest should not be suppressed.

A defendant who has been temporarily detained pursuant to a routine traffic stop, including suspected driving while intoxicated offenses, is not considered to be in custody for *Miranda* purposes. *People v. Parris*, 26 AD3d 393 (2nd Dept.), *lv. den.* 6 NY3d 851 (2006); *People v. Myers*, 1 AD3d 383 (2nd Dept., 2003), *lv. den.* 1 NY3d 631 (2004); *People v. MacKenzie*, 9 Misc 3d 129(A), (App. Term, 9th and 10th Jud. Dists., 2005). A reasonable initial interrogation during such stop is therefore held to be merely investigatory and does not require *Miranda* warnings. *See,People v. Mackenzie, supra.;People v. Mathis*, 136 AD2d 746 (2nd Dept) , *lv. den.*, 71 NY2d 899 (1988). Moreover, *Miranda* warnings are not required before the administration of performance tests. *People v. Hager*, 69 NY2d 141 (1987); *People v. Myers*, *supra* at 383.

Sgt. Benson and Officer Ruscillo's temporary roadside detention of the defendant, after defendant was lawfully stopped for a traffic infraction, was permissible and non-custodial in nature, and the officers were not required to administer *Miranda* warnings before conducting their roadside investigation.

At the police station, following defendant's arrest, *Miranda* warnings were given, and the defendant executed a written *Miranda* Warning waiver form at 2:26 a.m. (People's Exhibit "2"). He subsequently declined to answer any questions other than that he had been driving from home to Darby O' Gills.

The Court accordingly determines that both the roadside statement and police station statement were voluntary and admissible at trial. Neither was an admission nor incriminating statement in any event. To the contrary, the defendant denied drinking to Officer Ruscillo during the roadside deten- tion

Based upon the above findings of fact and conclusions of law, the defendant's motion to suppress physical evidence and statements is denied in all respects.

David L. Steinberg

Town Justice

Dated: Hyde Park, New York

December 31, 2007

To: D. James O'Neil, Esq.

O'Neil Burke, LLP, Esqs.

Attorneys for Defendant

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301 Manchester Road, Suite 203

Poughkeepsie, New York 12603*6

William V. Grady, Esq.

Allison LaBate, Esq., Of Counsel

Dutchess County District Attorney

236 Main Street

Poughkeepsie, New York 12601

People v Harper
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APPENDIX "F"

C

Missouri Court of Appeals,
Western District.
STATE of Missouri, Appellant,
v.
Lindsey D. ROBERTSON, Respondent.

No. WD 72529.
Dec. 14, 2010.

Background: Defendant in prosecution for driving while intoxicated (DWI) moved to suppress results from a pre-arrest breath test. Following a hearing, the Circuit Court, Boone County, Missouri, Clifford Eugene Hamilton, Jr., J., granted motion. State filed interlocutory appeal.

Holdings: The Court of Appeals, James Edward Welsh, J., held that:
(1) proof of calibration of portable breath-testing machine was not required for the admissibility of results of portable breath test to show probable cause for arrest;
(2) the Court of Appeals would defer to circuit court's determination that results of portable breath test were not credible; and
(3) trooper lacked probable cause, absent results from portable breath test, to arrest defendant for DWI.

Affirmed.

West Headnotes

|1| Criminal Law 110 ⚿1158.12

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.8 Evidence
110k1158.12 k. Evidence wrongfully obtained. Most Cited Cases
Review by the Court of Appeals of the circuit court's sustaining a motion to suppress is limited to determining whether or not substantial evidence supported the ruling.

|2| Criminal Law 110 ⚿1144.12

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.12 k. Reception of evidence. Most Cited Cases
In reviewing an order sustaining a motion to suppress, the Court of Appeals considers all the evidence and reasonable inferences in the light most favorable to the circuit court's ruling and defers to the circuit court's factual findings and credibility determinations.

|3| Criminal Law 110 ⚿1134.49(4)

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)4 Scope of Inquiry
110k1134.49 Evidence
110k1134.49(4) k. Illegally obtained evidence. Most Cited Cases
The Court of Appeals will reverse a circuit court's ruling on a motion to suppress only if the decision is clearly erroneous and leaves the Court of Appeals with a definite and firm impression that a mistake has been made.

|4| Criminal Law 110 ⚿1139

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)13 Review De Novo
110k1139 k. In general. Most Cited Cases

Criminal Law 110 ⚿1158.12

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.8 Evidence
110k1158.12 k. Evidence wrongfully obtained. Most Cited Cases

On appeal of a suppression ruling, although the Court of Appeals reviews the circuit court's conclusions as to the historical facts under a clearly erroneous standard, the issue of whether the Fourth Amendment has been violated is an issue of law that the Court of Appeals reviews de novo. U.S.C.A. Const.Amend. 4.

|5| Automobiles 48A ⚷349(6)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak349 Arrest, Stop, or Inquiry; Bail or Deposit
48Ak349(2) Grounds
48Ak349(6) k. Intoxication. Most Cited Cases

Automobiles 48A ⚷424

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Foundation or Predicate
48Ak424 k. Reliability of particular testing devices. Most Cited Cases

Proof of calibration of portable breath-testing machine was not required for the admissibility of results of portable breath test to show probable cause for arrest of defendant for driving while intoxicated (DWI). U.S.C.A. Const.Amend. 4; V.A.M.S. § 577.021.

|6| Automobiles 48A ⚷411

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak411 k. In general. Most Cited Cases

The use of the portable breath-testing machine prior to the arrest of a person suspected of driving while intoxicated (DWI) is strictly limited by statute. V.A.M.S. § 577.021.

|7| Automobiles 48A ⚷411

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak411 k. In general. Most Cited Cases

Automobiles 48A ⚷422.1

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Foundation or Predicate
48Ak422.1 k. In general. Most Cited Cases

The statutory requirements for the validity of chemical tests in the context of public safety offenses do not apply to the administration of a pre-arrest breath test using a portable breath-testing machine to a person suspected of driving while intoxicated (DWI). V.A.M.S. §§ 577.021, 577.026.

|8| Automobiles 48A ⚷349(6)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak349 Arrest, Stop, or Inquiry; Bail or Deposit
48Ak349(2) Grounds
48Ak349(6) k. Intoxication. Most Cited Cases

Automobiles 48A ⚷424

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Foundation or Predicate
48Ak424 k. Reliability of particular testing devices. Most Cited Cases

Automobiles 48A ⚷426

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak426 k. Procedure; evidence and fact questions. Most Cited Cases

The Court of Appeals would defer to circuit court's determination, at suppression hearing in prosecution for driving while intoxicated (DWI), that results of pre-arrest test by portable breath-testing machine were not credible, where trooper who stopped defendant testified that he did not know when machine had been calibrated prior to date of arrest, and that he did not understand the scientific process by which the machine took a sample of breath and then determined the blood-alcohol content. V.A.M.S. § 577.021.

[9] Criminal Law 110 ⚖388.1

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k388 Experiments and Tests; Scientific and Survey Evidence
110k388.1 k. In general. Most Cited Cases

Even if the foundational requirements for admission of scientific evidence are met, it is still a discretionary decision for the circuit court to admit or deny the admission of the proffered evidence.

[10] Automobiles 48A ⚖349(6)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak349 Arrest, Stop, or Inquiry; Bail or Deposit
48Ak349(2) Grounds
48Ak349(6) k. Intoxication. Most Cited Cases

Trooper lacked probable cause, absent results that circuit court found not credible from a portable breath-testing machine, to arrest defendant for driving while intoxicated (DWI); trooper testified that he probably would not have arrested defendant without the results from portable breath test even though defendant smelled of intoxicants and had watery, bloodshot, and glassy eyes, defendant performed several sobriety tests without any difficulty, and although she was stopped for speeding, speeding was not a sign of intoxication. U.S.C.A. Const.Amend. 4.

*746 Brent M. Nelson, Columbia, MO, for Appellant.

Jerome S. Antel, III, Columbia, MO, for Respondent.

Before KAREN KING MITCHELL, P.J., JAMES EDWARD WELSH, and MARK D. PFEIFFER, JJ.

JAMES EDWARD WELSH, Judge.

The State of Missouri appeals the circuit court's order granting Lindsey D. Robertson's motion to suppress evidence concerning the results of a pre-arrest portable *747 breathalyzer test. The circuit court found that the evidence did not establish that the portable breathalyzer machine had been calibrated prior to Robertson's arrest and, therefore, no probable cause existed for her arrest. Pursuant to section 547.200.1(3), RSMo 2000, the State filed this interlocutory appeal. The State contends that the results of a portable breathalyzer test administered prior to arrest are admissible as evidence of probable cause and that the totality of the circumstances in this case establish probable cause to arrest Robertson for driving while intoxicated. We disagree and affirm the circuit court's order granting Robertson's motion to suppress.

The State charged Robertson with the class B misdemeanor of driving while intoxicated and the class B misdemeanor of operating a motor vehicle in a careless and imprudent manner. Robertson filed a motion to suppress, and the circuit court held a hearing. The evidence at the hearing established that, in the early morning hours of May 2, 2009, Missouri State Highway Patrolman Patrick Sublette was in his patrol car and was parked in a driveway accessing Route E in Boone County. At approxim-

ately 1:30 a.m., Sublette noticed a maroon, Toyota Tacoma pickup truck traveling northbound on Route E in an area with a posted speed limit of 40 miles per hour. When Sublette's radar gun indicated that the truck was traveling at a speed of 53 miles per hour, Sublette pursued the truck to initiate a traffic stop. Although Sublette temporarily lost sight of the truck, a short time later, he saw the truck enter Route E from Rose Drive, and Sublette initiated a traffic stop at approximately 1:36 a.m.

After stopping the truck, Sublette walked up to the side of truck. The driver of the vehicle provided Sublette with a driving license identifying herself as Lindsey Robertson. Sublette saw four people within the vehicle and noticed a strong odor of intoxicants coming from the vehicle's interior. Upon Sublette's request, Robertson exited her vehicle to join Sublette in his patrol car. Sublette continued to notice a strong odor of intoxicants upon Robertson's person. Sublette asked Robertson about her whereabouts and whether she had consumed alcohol prior to driving. Robertson explained that she was coming from The Field House in Columbia and that she had consumed about a beer-and-a-half. Robertson initially denied turning off of Route E after passing Sublette's patrol car, but, later, she admitted that she had in fact had turned off Route E because a passenger notified her that he was going to vomit. Sublette then left his patrol car to identify the intoxicated passengers in the truck. When he left his patrol car, Sublette allowed Robertson to remain in the patrol car to telephone her father on her cellular telephone about whether to perform field sobriety tests. Upon returning to his car, Sublette asked Robertson if she would submit to field sobriety tests including a preliminary breathalyzer test, and Robertson agreed.

When the State asked Sublette at the suppression hearing what he observed when he administered the portable breathalyzer test, Robertson's attorney objected based upon a lack of foundation for the test. The circuit court initially sustained the objection. The State then questioned Sublette further about the portable breathalyzer test machine:

Q. Trooper Sublette, are you familiar with the PBT [(portable breathalyzer test)] that you carry?

A. Yes.

Q. And is it one that's assigned specifically to you?

A. Yes.

*748 Q. Have you operated it throughout your capacity as a highway patrolman?

A. Yes, I have.

Q. Are you aware of how often it's calibrated and who might calibrate it?

A. Yes.

Q. Okay. Who calibrates it?

A. Down at the radio shop at Troop F Headquarters—

[ROBERTSON'S ATTORNEY]: Well, Judge, I'm going to object. This is hearsay, obviously, if somebody else is going to be—

THE COURT: Objection will be sustained.

[ASSISTANT PROSECUTING ATTORNEY]: The question is whether he's aware that it's calibrated, your Honor.

THE COURT: And I think he was testifying to hearsay. Lay your foundation if it's not.

BY [ASSISTANT PROSECUTING ATTORNEY]:

Q. It is calibrated at Troop F Headquarters?

A. When I have my PBT calibrated, I take it to the radio shop and I—one of the radio operators does it while I stand there and watch them. They

have a wet bath solution. I watch them hook up the PBT to the wet bath, blow into it, and observe the reading. It's a—

[ROBERTSON'S ATTORNEY]: I'll—

A. —.10 solution, and it's always—

[ROBERTSON'S ATTORNEY]: Judge, I'm going to object again to the lack of foundation for this. It's beyond the—

THE COURT: Objection will be overruled.

BY [ASSISTANT PROSECUTING ATTORNEY]:

Q. How often do you take that down there to have it calibrated?

A. We don't have a set policy on how often it has to be taken down. Looking at my maintenance records on it, it appears that I take it down about every two months or so.

Q. All right. Now, you've had opportunities to utilize this portable or preliminary breath test in your experience. Is that right?

A. Yes.

Q. And do you compare the results that you would read on the preliminary test with the Data Master or any other type of breathalyzer at the locations you would use those, whether it be the sheriff's department or other departments?

A. I don't keep a specific logging comparing one-to-one. However, it is my experience that the reading on the preliminary breath test is generally consistent—

[ROBERTSON'S ATTORNEY]: Well, Judge, I'm going to object. This is, again, lack of foundation for the reading on the portable breath test, plus definitely lack of foundation on the evidentiary breath test. He's just generally talking about—He's talking about other tests and we don't know what he's talking about.

THE COURT: Objection will be overruled.

BY [ASSISTANT PROSECUTING ATTORNEY]:

Q. Okay. You found them to be consistent with each other?

A. They are—I have never found an inconsistency in them. They are generally consistent. If I were to ever find an inconsistency, then I would ask that the unit be replaced or recalibrated or checked out. In the three years I've had it, I've never had a problem with it.

*749 Q. And on May 2nd of 2009, did you have any reason to believe that your preliminary breath test in your vehicle was improperly maintained or inaccurate?

A. No.

Q. When Ms. Robertson provided a breath sample for the PBT, what did you observe?

Robertson's attorney then objected again for lack of foundation, and the circuit court overruled the objection. Robertson's attorney asked to *voir dire* the witness and engaged in this inquiry with Sublette:

Q. Trooper, you do not know and do not understand the scientific process by which this instrument takes a sample of breath and determines the blood-alcohol content; correct? That's outside your expertise. Is that right?

A. That's fair, yes.

Q. So you don't know that this instrument uses science that's generally accepted by the scientific community. Is that correct? You don't know how it works?

A. I know that I operate the—the PBT that I have has an automatic mode and a manual mode. I operate it in the automatic mode. And according

to the manual, it says that if they provide an adequate breath sample, the instrument observes the curve and length of the breath and takes a read- ing.

Q. But the science behind it, you don't under—you don't know what the science even is?

A. I don't have a science degree with regard to the PBT.

Q. All right. So you don't know that that thing is based upon science that's generally accepted in the community or among scientists, do you?

A. I don't know the foundation behind that.

Robertson's attorney then renewed his objection regarding the portable breathalyzer test for lack of foundation, and the circuit court overruled the objection. On cross-examination, Sublette said that he did not know when the portable breathalyzer machine was calibrated prior to May 2, 2009, which was the date of the arrest in this case. Sublette said that "[i]t wasn't until July of 2009 that [he] started taking it to the radio shop to have it calibrated."

In regard to the portable breathalyzer test, Sublette testified that, at 2:03 a.m., he gave Robertson the breathalyzer test using the Lifeloc Portable Breath Test machine. Prior to administering the portable breathalyzer test, Sublette asked Robertson if she had anything in her mouth. While the portable breathalyzer machine was in automatic mode, Sublette collected a breath sample which showed a reading that was in excess of 0.08 percent.

Sublette then asked Robertson to perform other field sobriety tests, such as counting and reciting portions of the alphabet, as well as balance and walking tests. Robertson was able to do the counting and alphabet tests. On the one-leg stand test and the walk-and-turn test, Sublette noticed no standard clues of impairment.

During his contact with Robertson, Sublette said that he noticed that Robertson's eyes were watery, bloodshot, and glassy. Sublette also categorized Robertson's attitude as argumentative. When he asked Robertson where she would rate herself on a scale if one equals "being completely sober" and ten equals "being falling-down drunk," Robertson indicated that she was a "two."

Just prior to her arrest at 2:23 a.m., Robertson provided a second breath sample into the portable breathalyzer machine. Sublette observed a result well in excess of ***750** 0.08 percent. Prior to this breath sample, Sublette had continuously observed Robertson for fifteen minutes. Sublette then placed Robertson under arrest for the offense of driving while intoxicated. At the suppression hearing, the video recording of the stop, which included the interactions between Sublette and Robertson and the field sobriety tests, was received into evidence.

After the suppression hearing, the circuit court issued an order granting Robertson's motion to suppress. The circuit court found that, because no record existed establishing that the portable breathalyzer machine had been calibrated prior to Robertson's arrest, no probable cause existed for the arrest. The State appeals that ruling *via* an interlocutory appeal pursuant to section 547.200.1(3), RSMo 2000, which allows the State through the prosecuting attorney to appeal "from any order or judgment the substantive effect of which results in .... [s]uppressing evidence."

In its sole point on appeal, the State contends that the circuit court erred in granting Robertson's motion to suppress because the results of the portable breathalyzer test, which was administered prior to Robertson's arrest, were admissible as evidence of probable cause [FN1] and the totality of the circumstances in this case establish probable cause to arrest Robertson for driving while intoxicated. We disagree.

FN1. For clarity, the results of the portable breath test were admitted by the circuit court at the suppression hearing.

[1][2][3][4] Our review of the circuit court's sustaining a motion to suppress is limited to determining whether or not substantial evidence supported the ruling. *State v. Peery,* 303 S.W.3d 150, 153 (Mo.App.2010). We consider all the evidence and reasonable inferences in the light most favorable to the circuit court's ruling and defer to the circuit court's factual findings and credibility determinations. *Id.*; *State v. Sund,* 215 S.W.3d 719, 723 (Mo. banc 2007). We will reverse a circuit court's ruling on a motion to suppress only if the decision is clearly erroneous and leaves us with a definite and firm impression that a mistake has been made. *State v. Dixon,* 218 S.W.3d 14, 18 (Mo.App.2007). However, although we review the circuit court's conclusions as to the historical facts under a clearly erroneous standard, the issue of whether or not the Fourth Amendment has been violated is an issue of law that we review *de novo. Peery,* 303 S.W.3d at 153.

[5] The State contends that the circuit court erred in concluding that the results of the portable breathalyzer test had to be suppressed because no record existed establishing that the portable breathalyzer machine had been calibrated prior to Robertson's arrest. The State asserts that the results of the portable breathalyzer test could be considered for determining probable cause, regardless of evidence of calibration.

[6] Section 577.021.1, RSMo Cum.Supp.2009, expressly permits an officer to administer a portable breathalyzer test prior to the arrest of a person suspected of driving while intoxicated. That section says:

> Any state, county or municipal law enforcement officer who has the power of arrest for violations of section 577.010 or 577.012 and who is certified pursuant to chapter 590, RSMo, may, prior to arrest, administer a chemical test to any person suspected of operating a motor vehicle in violation of section 577.010 or 577.012.

***751** § 577.021.1. That section further provides that "[a] test administered pursuant to this section shall be admissible as evidence of probable cause to arrest and as exculpatory evidence, but shall not be admissible as evidence of blood alcohol content." § 577.021.3. The use of the portable breathalyzer test, therefore, is "strictly limited by statute." *State v. Duncan,* 27 S.W.3d 486, 488 (Mo.App.2000). It is used to indicate "the presence of alcohol based on a breath sample" and "is designed for use by police officers to assist them in determining whether they have probable cause to arrest a suspect." *Id.*

[7] As such, the portable breathalyzer test "is not subject to the same Department of Health Regulations that govern breath analysis tests admissible to prove that a defendant was intoxicated. *See* Mo.Code Regs. title 19, §§ 25–30.011 – 25–30.060." *Id.* Indeed, section 577.021.3 specifically says, "The provisions of sections 577.019 and 577.020 shall not apply to a test administered prior to arrest pursuant to this section." Subsection 3 and 4 of section 577.020, RSMo Cum.Supp.2009, instructs that chemical tests of a person's breath, blood, saliva, or urine to determine a person's blood alcohol content must be performed according to methods and standards approved by the Department of Health. Pursuant to section 577.021, these methods and standards are not applicable to a portable breathalyzer test administered prior to a person's arrest. Moreover, the requirements for the validity of chemical tests contained in section 577.026, RSMo 2000, do not apply to the administration of a portable breathalyzer test. *State v. Stottlemyre,* 35 S.W.3d 854, 860 (Mo.App.2001). We, therefore, agree with the State that proof of calibration of the portable breathalyzer machine was not required for admissibility of the results of the portable breath test under section 577.021.

[8] Admissibility of the results of the portable breath test, however, is not the issue because the circuit court clearly admitted the results into evidence for the purpose of the hearing on the motion to suppress. The State's real complaint is that the circuit court did not accept and rely on the results of

the portable breath test. Viewing the evidence in the light most favorable to the circuit court's findings and ignoring any evidence to the contrary, as we must do in this case, it appears that the circuit court found the results of the portable breath test inconsistent with all the other evidence in the case. The circuit court received into evidence a video recording of the stop that included the interactions between Robertson and the trooper and included the field sobriety testing. Even the trooper conceded that, but for the results of the portable breath test, he probably would not have had probable cause to arrest Robertson for driving while intoxicated. Thus, to establish probable cause, the State was willing to rely solely on the results of the portable breath test. The circuit court, however, was not so willing given that it had reservations about the calibration history of the portable breath machine.

[9] Indeed, the Missouri Supreme Court has recognized in a driving license revocation case that the lack of calibration of a portable breathalyzer machine may impact the circuit court's finding as to whether the results obtained from the portable breathalyzer test were credible.[FN2] *York v. Dir. of Revenue,* 186 S.W.3d 267, 272 (Mo. banc 2006), *overruled on other *752 grounds by White v. Dir. of Revenue,* 321 S.W.3d 298 (Mo. banc 2010). In *York,* the circuit court had found that the officer lacked the proper training to administer the portable breathalyzer test and that "no evidence existed to establish that the device used was properly calibrated, maintained or even working at the time it was used." *Id.* The Supreme Court deferred to the circuit court's credibility determinations and found that the circuit court acted within its discretion when it ruled that the portable breathalyzer test evidence was not credible. *Id.*

> FN2. This is a criminal case, and, therefore, the test for admission of scientific evidence is the test established in *Frye v. United States,* 293 F. 1013 (D.C.Cir.1923). In a civil matter, such as *York,* our courts follow the test set forth in section 490.065, RSMo 2000. However, even if the foundational requirements for admission of scientific evidence are met, it is still a discretionary decision for the circuit court to admit or deny the admission of the proffered evidence. *Scott v. Blue Springs Ford Sales, Inc.,* 215 S.W.3d 145, 173 (Mo.App.2006). While relevant to the issues in a motion to suppress, the use of the portable breath test to establish probable cause for the arrest may not be relevant to the issues before a jury in a criminal trial. This is especially true when the indicium of reliability of the probable breath test is called into question, as was done in this case.

Further, in *Paty v. Director of Revenue,* 168 S.W.3d 625, 632 (Mo.App.2005), this court's Eastern District found in a driving license revocation case that a circuit court could disregard the results of a portable breathalyzer test as unreliable. The *Paty* court deferred to the circuit court's factual findings that the portable breathalyzer machine had probably never been calibrated and that the officer did not know how the machine worked internally, had not received any training in the use of the machine, and did not properly administer the test. *Id.* at 631–32.

The trooper in this case testified that he did not know when the portable breathalyzer machine was calibrated prior to May 2, 2009, which was the date of arrest in this case. The trooper said that "[i]t wasn't until July of 2009 that [he] started taking it to the radio shop to have it calibrated." Moreover, the trooper testified that he did not know how the portable breathalyzer machine worked, in that he did not understand the scientific process by which the machine took a sample of breath and then determined the blood-alcohol content. In finding that no record existed establishing that the portable breathalyzer machine had been calibrated prior to Robertson's arrest, we infer that the circuit court questioned the reliability of the portable breathalyzer test and concluded that the portable breathalyzer

test was not credible. We, therefore, defer to the circuit court's determination on the credibility of the portable breathalyzer test evidence. *Sund,* 215 S.W.3d at 723.

[10] Without the portable breathalyzer test results, the trooper in this case did not have probable cause to arrest Robertson. Indeed, the trooper testified that, although Robertson smelled of intoxicants and had watery, bloodshot, and glassy eyes, he probably would not have arrested Robertson without the results from the portable breathalyzer test. Robertson performed several sobriety tests without any difficulty. She counted and recited the portions of the alphabet that the trooper asked her to do, and she completed the one-leg stand test and the walk-and-turn test without any standard clues of impairment. Although Robertson was stopped for speeding, speeding is not a sign of intoxication. After reviewing and taking into account the credibility of all the evidence, the circuit court exercised its discretion and sustained the motion to suppress. We find that the circuit court did not clearly err in granting Robertson's motion to suppress the evidence concerning the portable breathalyzer test. We affirm.

All concur.

Mo.App. W.D.,2010.
State v. Robertson
328 S.W.3d 745

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APPENDIX "G"

Westlaw.

770 N.W.2d 850, 2009 WL 928702 (Iowa App.)
(Table, Text in WESTLAW), Unpublished Disposition
(Cite as: 770 N.W.2d 850, 2009 WL 928702 (Iowa App.))

(The Court's decision is referenced in a "Decisions Without Published Opinions" table in the North Western Reporter.)

Court of Appeals of Iowa.
STATE of Iowa, Plaintiff–Appellee,
v.
Adam Lee KAUFMAN, Defendant–Appellant.

No. 08–0880.
April 8, 2009.

West KeySummary**Automobiles 48A** ⚿411

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak411 k. In general. Most Cited Cases
The district court did not err in not granting the defendant's motion in limine and permitting evidence of a preliminary breath test. The trial court ruled that the state could refer to the fact that a PBT was administered and that the defendant fled the scene immediately afterwards, but could not refer to the result of the PBT. The state showed a videotape of the defendant's encounter with the police. The defendant asserted that the tape should have been redacted in order to remove the part where he was shown taking the PBT. The tape was muted when the results where read. Iowa Code § 321J.5 (2).

Appeal from the Iowa District Court for Bremer County, Peter B. Newell, District Associate Judge.
A defendant appeals from his conviction of operating while intoxicated, first offense. AFFIRMED.
Dale Putnam, Decorah, for appellant.

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney General, Kasey E. Wadding, County Attorney, and Jill Dashner, Assistant County Attorney, for appellee.

Considered by VOGEL, P.J., and VAITHESWARAN and EISENHAUER, JJ.

VOGEL, P.J.

*1 Adam Kaufman appeals from judgment and sentence following his conviction of operating while intoxicated, first offense. He asserts that the district court erred in not granting his motion in limine and permitting evidence of a preliminary breath test. We affirm.

I. Background Facts and Proceedings

At approximately 2:00 a.m. on May 19, 2007, Police Chief Steve Aiello of Readlyn, having just come off duty, heard tires squealing about a block away from his home. Upon investigation, Chief Aiello found Kaufman's vehicle with the two front tires on the roadway, the two back tires over the curb, and Kaufman attempting to drive the vehicle back onto the roadway. Chief Aiello approached the vehicle and spoke to Kaufman. He noticed a strong odor of alcohol on Kaufman's breath and that Kaufman's speech was slurred and difficult to understand. Chief Aiello observed one full and two empty beer cans in the console area. When asked, Kaufman repeatedly gave the false name of "Ralph," but admitted that he had been drinking "everything in the bar." He soon pointed across the street, mentioning that he had smashed into another vehicle that was parked in a private driveway. Eventually Kaufman produced his driver's license, but stated the Chief would not be able to charge him with OWI as his step-father was a city of Readlyn council member. He also told Chief Aiello that he should have taken off running, as the Chief would not have been able to catch him.

Deputy Brian Bockhaus of the Bremer County Sheriff's Office arrived at the scene and also noticed an odor of alcohol on Kaufman and that Kaufman?s speech was slurred and his eyes were bloodshot and watery. With a video camera running, the Deputy administered three field sobriety tests as

well as a preliminary breath test (PBT). Immediately following the PBT, Kaufman fled the scene. Kaufman was later arrested and charged with operating while intoxicated and two counts of interference with official acts.[FN1]

> FN1. Kaufman was also charged with failure to maintain control pursuant to Iowa Code section 321.288 (2007), and striking an unattended vehicle pursuant to Iowa Code section 321.264.

On December 14, 2007, Kaufman filed a motion in limine requesting the district court to prohibit any mention at trial of a preliminary breath test. After a hearing, the district court ruled the State could refer to the fact that a PBT was administered and Kaufman fled the scene immediately afterwards, but could not refer to the result of the PBT. Following a jury trial, Kaufman was convicted of operating while intoxicated, first offense, in violation of Iowa Code sections 321 J.2(1)(a) and (b) and 321 J.2(2)(a) (2007). At the sentencing hearing, the district court entered judgment and sentence on the OWI conviction. Additionally the district court entered judgment and sentence on one count of interference with official acts in violation of Iowa Code section 719.1 and dismissed one count of interference with official acts at the State's request. Kaufman appeals.

II. Standard of Review

We review evidentiary rulings for an abuse of discretion. *State v. Parker,* 747 N.W.2d 196, 203 (Iowa 2008). We review a district court's interpretation of the rules of criminal procedure for correction of errors at law. *State v. Sanders,* 623 N.W.2d 858, 859 (Iowa 2001).

III. Analysis

*2 A video tape, with audio, captured the deputy while he conducted three field sobriety tests and administered the PBT, as well as Kaufman's flight from officers. Kaufman filed a motion in limine on December 14, 2007, and the district court took up the motion on the morning of the scheduled trial, February 7, 2008. Kaufman appeals the district court's denial of his motion in limine requesting the court to prohibit the State from "offering testimony, statements about, or interjecting the term 'preliminary breath test' or the results thereof."

First, Kaufman asserts that his motion should have been "deemed granted" as the State did not file a written resistance and counsel was unprepared to reply to the State's oral argument. The district court did not specifically rule on Kaufman's assertion but rather stated, "I think you better argue the merits." The hearing continued with both sides afforded the opportunity to speak to the motion.

Iowa Rule of Criminal Procedure 2.11(4) provides that "[m]otions in limine shall be filed when grounds therefor reasonably appear but no later than nine days before the trial date." There is no provision requiring a time or manner in which the State must reply to the motion. Iowa Rule of Criminal Procedure 2.35(2) provides: "If no procedure is specifically prescribed by these rules or by statute, the court may proceed in any lawful manner not inconsistent therewith." While a written resistance prior to the date of the hearing may provide the moving party an opportunity to better formulate a reply argument, it is not required by the rules. Therefore, we find no error in the district court proceeding to hear the merits as well as the resistance to the motion.

The State asserts Kaufman has not preserved error on the district court?s denial of his motion in limine as he failed to also lodge an objection during the trial. *See State v. Alberts,* 722 N.W.2d 402, 406 (Iowa 2006) ("Ordinarily, error claimed in a court's ruling on a motion in limine is waived unless a timely objection is made when the evidence is offered at trial."). We disagree. In determining whether a motion in limine preserves error, we must examine what the district court's ruling actually does. *Id.; State v. O'Connell,* 275 N.W.2d 197, 275 (Iowa 1979). "A ruling only granting or denying protection from prejudicial references to challenged evidence cannot preserve the inadmissibility

issue for appellate review." *O'Connell,* 275 N.W.2d at 275. However, "if the ruling reaches the ultimate issue and declares the evidence admissible or inadmissible, it is ordinarily a final ruling and need not be questioned again during trial." *Id.*

In the present case, it was very clear during the hearing on the motion in limine as to what the court would allow and what must be excluded in reference to the PBT. Both counsel described what the jury would see and hear on the video tape and what would be muted so the jury would not hear certain comments by the deputy. The district court's ruling reached the "ultimate issue," declaring the video tape admissible with certain audio muted. *Id.* Therefore, Kaufman was not required to make any further objections during trial, as the issue had been decided in advance of trial.

*3 Next, Kaufman asserts the video should have been redacted, so the jury would not see Kaufman taking the breath test. He claimed this should have been done in order to avoid prejudice to Kaufman, as immediately after taking the test, Kaufman fled the scene. Kaufman feared the jury would infer that he had failed the breath test, anticipated being arrested, and therefore took off running. The State, seeking to have the video made part of the record, offered to have the volume muted, so that the jury could see what transpired, but there would be no audio of any conversation between Kaufman and the deputy as it pertained to the PBT. Kaufman and the State agree that because the administration of the PBT, the brief dialog, and Kaufman's flight happened so quickly that it was impossible to sever or redact the events, but it was possible simply to mute the volume. The district court concluded:

> I would agree that I think the general rule is that the PBT is sort of the third rail of an OWI trial; you just don't put those in; you just don't talk about them. And I think, generally, that's appropriate because the State has all the other evidence of intoxication.
>
> But in this case, his running I think is a critical issue for the jury to hear about. And, you know, the reason behind his fleeing the scene, I think, is critical.
>
> So, I'm going to go ahead and indicate that the State is not allowed to talk about the results of the PBT, but the evidence about the offering of the PBT and the Defendant's running, I think, is admissible.

The court then instructed the State to mute that part of the tape when the PBT test was being administered, the subsequent comments by the deputy and the actions of Kaufman.

Iowa Code section 321J.5 restricts the use of a PBT.

> The results of this preliminary screening test may be used for the purpose of deciding whether an arrest should be made or whether to request a chemical test authorized in this chapter, but shall not be used in any court action except to prove that a chemical test was properly requested of a person pursuant to this chapter.

Iowa Code § 321J.5(2). While the jury may have inferred from Kaufman's flight that he failed the PBT, they may have also linked his flight to his earlier comment to Chief Aiello that he should have taken off running when he first saw the Chief. Furthermore, the district court instructed the jury: "The results of a preliminary breath test, also known as a PBT, are not admissible in evidence as the results are not reliable as a matter of law."

The State argues, and we agree, there was no violation of the ruling on the motion in limine nor was the ruling itself in error. Merely showing that Kaufman was given a PBT does not violate the statute. *Gavlock v. Coleman,* 493 N.W.2d 94, 96–97 (Iowa Ct.App.1992). As our supreme court has stated:

> In enacting this section the legislature's underlying purpose was to provide peace officers with the tool of a quick, convenient test to assist of-

> ficers in determining whether an arrest should be made. The problem with this quick, convenient test is unreliability. To guard against this problem, the legislature chose to make the "results" inadmissible in evidence.

*4 *State v. Denshaw,* 404 N.W.2d 156, 158 (Iowa 1987).

There was no "result" of the PBT mentioned or offered by the State. The only evidence was playing the muted video tape, showing the administration of the PBT. Kaufman's own conduct is captured on the tape, including his fleeing the scene after he had been administered three field sobriety tests and the PBT. As the district court reasoned, "his running is a critical issue for the jury to hear about. And, you know, the reason behind his fleeing the scene, I think, is critical." *See State v. Barr,* 259 N.W.2d 841, 842 (Iowa 1977) ("We continue in the view a jury might believe a person fleeing to avoid and retard the prosecution might be more apt to be guilty than one who does not."). We conclude the district did not err in admitting the objected to portions of the videotape.

Finally, Kaufman claims the district court erred in entering judgment and sentencing him on a misdemeanor charge of interference with official acts pursuant to Iowa Code section 719.1. The State asserts that we do not have jurisdiction to decide the issue. Under Iowa Code section 814.6(1), Kaufman does not have a right of appeal of a simple misdemeanor and he has not sought discretionary review. *See* Iowa Code § 814.6(2) (providing for discretionary review from simple misdemeanor convictions). His proper course of appeal is utilizing Iowa Rule of Criminal Procedure 2.73. We have no jurisdiction, nor even a record of the simple misdemeanor case, to entertain his appeal.

AFFIRMED.

Iowa App.,2009.
State v. Kaufman
770 N.W.2d 850, 2009 WL 928702 (Iowa App.)

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APPENDIX "H"

Westlaw.

6 A.3d 995
607 Pa. 329, 6 A.3d 995
(Cite as: 607 Pa. 329, 6 A.3d 995)

Supreme Court of Pennsylvania.
COMMONWEALTH of Pennsylvania, Appellant
v.
Marc P. BRIGIDI, Appellee.

Submitted June 15, 2010.
Decided Oct. 19, 2010.

Background: Defendant was convicted in bench trial in the Court of Common Pleas, Montgomery County, Criminal Division, No. CP-46-SA-1118-2007,Stanley R. Ott, J., of summary offense of consuming alcoholic beverages while under age of 21 years. Defendant appealed. The Superior Court, No. 910 EDA 2008, 2009 PA Super 123, 977 A.2d 1177,McEwen, P.J.E., reversed and remanded for a new trial. Appeal was granted.

Holdings: The Supreme Court, No. 107 MAP 2009, Saylor, J., held that:
(1) Department of Health Notice, approving a particular device for prearrest breath testing of a person suspected of driving under the influence of alcohol (DUI), did not provide basis for admissibility of results obtained from that device in a prosecution for underage drinking;
(2) in underage drinking context, prearrest breath testing does not create a rebuttable presumption as to presence or absence of alcohol in a suspect's blood; disapproving *Commonwealth v. Allen,* 454 Pa.Super. 73, 684 A.2d 633; and
(3) section of Vehicle Code pertaining to chemical testing generally does not apply to proceedings exclusively under the Criminal Code.

Order of Superior Court affirmed.

Eakin, J., filed a concurring opinion.

West Headnotes

|1| Intoxicating Liquors 223 ⚿227

223 Intoxicating Liquors
223VIII Criminal Prosecutions
223k225 Admissibility of Evidence
223k227 k. Character, condition, or occupation of accused. Most Cited Cases

Department of Health notice, approving a particular device for prearrest breath testing of a person suspected of driving under the influence of alcohol (DUI), did not provide basis for admissibility of results obtained from that device in a prosecution for underage drinking; sole purpose of the device approval was to assist officers in determining probable cause to arrest for DUI. U.S.C.A. Const.Amend. 4; 18 Pa.C.S.A. § 6308; 75 Pa.C.S.A. § 1547(k).

|2| Criminal Law 110 ⚿1134.28

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)4 Scope of Inquiry
110k1134.28 k. Statutory issues in general. Most Cited Cases

Review of whether Vehicle Code's evidentiary prerequisites for chemical testing extended into a prosecution for underage drinking under Crimes Code was plenary, as issue was one of statutory interpretation. 18 Pa.C.S.A. § 6308; 75 Pa.C.S.A. § 1547.

|3| Intoxicating Liquors 223 ⚿224

223 Intoxicating Liquors
223VIII Criminal Prosecutions
223k224 k. Presumptions and burden of proof. Most Cited Cases

In underage drinking context, prearrest breath testing does not create a rebuttable presumption as to presence or absence of alcohol in a suspect's blood; disapproving *Commonwealth v. Allen,* 454 Pa.Super. 73, 684 A.2d 633. 18 Pa.C.S.A. § 6308.

|4| Automobiles 48A ⚿411

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak411 k. In general. Most Cited Cases
Section of Vehicle Code pertaining to chemical testing to determine blood alcohol content or presence of controlled substance generally does not apply to proceedings exclusively under the Criminal Code. 75 Pa.C.S.A. § 1547.

**995 Robert Martin Falin, Esq., Risa Vetri Ferman , Esq., Norristown, Montgomery County District Attorney's Office, for Commonwealth of Pennsylvania.

**996 Max Paul Little, Esq., Towanda, PA District Attorneys Association, for Appellant Amicus Curiae, Pennsylvania District Attorneys Association.

Marc P. Brigidi, pro se.

CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, ORIE MELVIN, JJ.

OPINION

Justice SAYLOR.

*331 The question presented is whether restrictions on the admissibility of pre-arrest alcohol screening reposited in the Vehicle Code pertain in prosecutions under the Crimes Code.

In May 2007, Appellee received a citation for the summary offense of consuming alcoholic beverages while under the age of twenty-one. *See* 18 Pa.C.S. § 6308. He was found guilty in a magisterial district court and lodged an appeal in the common pleas court.

At the ensuing *de novo* bench trial, the Commonwealth presented the testimony of the arresting officer, who explained that he was tasked to investigate an underage drinking party, at which he found Appellee among those present. The officer indicated that he administered alcohol testing using an electronic pre-arrest breath testing device known as an Alco–Sensor.[FN1] In response to Appellee's objection to admission of the test result, the Commonwealth asserted that such machine was an approved device pursuant to a Department of Health notice. *See* N.T., Feb. 21, 2008, at 9–10 (citing Notice, Prearrest Breath Testing Devices, 35 Pa.B. 2694 *332 (Dep't of Health April 30, 2005)).[FN2] upon continuing objections, the prosecUTOR ADDUCED SOME ADDITIONAL foundation, as follows:

> FN1. Devices used to conduct such testing are variously referred to as pre-arrest breath testing devices (or "PBTs"); preliminary and portable breath testers; and alcohol screening devices.
>
> FN2. As further developed below, this notice was issued pursuant to authority contained in Section 1547 of the Vehicle Code, 75 Pa.C.S. § 1547.

Q. Officer ..., have you had any training with regard to using the Alco–Sensor?

* * *

[A.] There has been training. I didn't attend a school. When you receive the PBTs new, we used them. We work out how to use it, so on and so forth. There are directions in the box and we used it.

Q. And during your eight years of employment with Upper Dublin, have you had occasion to use the Alco–Sensor at other times?

A. Yes.... It's a commonly used tool in our profession.

Q. And as an Officer with Upper Dublin, are you required to attend any type of updates or certification on your police work in general each year.

A. Yes.

N.T., Feb. 21, 2008, at 15–16.

The arresting officer then testified that the pre-

arrest breath testing device indicated that Appellee's blood alcohol content was .144 percent. *See id.* at 17.[FN3] On cross-examination, the officer indicated that: to his knowledge, the unit was not calibrated and did not need to be calibrated; he did not possess any certification for **997 the unit's use; and he did not take various precautions, such as observing a pre-testing waiting period. *See id.* at 22, 31–32; *see also id.* at 37 (redirect).

> FN3. The officer did not recall seeing Appellee in possession of an alcoholic beverage or manifesting any visible signs of intoxication.

The common pleas court entered a verdict of guilty, and Appellee filed a further appeal. In its opinion under Rule of Appellate Procedure 1925(a), the common pleas court explained:

> ***333** At the trial, the Court took judicial notice that an "Alco–Sensor" ... is an approved pre-arrest breath taking device, as set forth in Volume 35 of the *Pennsylvania Bulletin*, No. 18, dated April 30, 2005. Such an improved [sic] PBT is not calibrated and tested for accuracy. Accordingly, even though it is a proper tool to assist an officer in determining probable cause for an arrest, it does not provide sufficient evidence for the conviction of a misdemeanor such as driving under the influence of alcohol[.] *Commonwealth v. Myrtetus*, 397 [Pa.Super.] 299, 580 [A.2d] 42 (1990)[.] However, the results of an approved PBT are admissible to support a summary charge of underage drinking and they create a rebuttable presumption that the defendant has engaged in the prohibited activity[.] *Commonwealth v. Allen*, 454 [Pa.Super.] 73, 684 [A.2d] 633 (1996), *see also*, 27 *Standard Pennsylvania Practice 2d*, § 135–209. Accordingly, once this Court took judicial notice of the PBT as an approved device, the officer's credible testimony as to the results obtained was admissible without the need to establish calibration, certification or any other factors cited by the defendant[.]

Commonwealth v. Brigidi, No. 46 SA 1118–07, *slip op.* at 3–4 (C.P.Montgomery, May 5, 2008).

Upon its review, a divided Superior Court reversed and remanded for a new trial. *See Commonwealth v. Brigidi*, 977 A.2d 1177 (Pa.Super.2009). The majority explained that the use of electronic devices to measure breath alcohol content is authorized by Section 1547 of the Vehicle Code, highlighting the requirements of "approved" and "calibrated" equipment as prerequisites to admissibility. *Id.* at 1179–80, 1182 (citing 75 Pa.C.S. § 1547). The majority accepted that the device was an approved one, pursuant to the Department of Health notice invoked by the Commonwealth. Nevertheless, because the arresting officer indicated that the breath testing unit was not calibrated, the court found that the test result should have been excluded from evidence. *See id.* at 1182. In response to the Commonwealth's argument that *Allen* stands for the proposition that the requirements of calibration and certification *334 are not applicable in cases of underage drinking, the majority stated:

> [T]he Commonwealth's citation to *Allen* is inapposite, since in *Allen* this Court did not specifically address the issue of calibration, but limited its inquiry to the issue of whether the results of a preliminary breath test (PBT) derived from a test authorized under the Vehicle Code was admissible to support a charge of underage drinking brought under the Crimes Code.

Brigidi, 977 A.2d at 1182.[FN4]

> FN4. Judge Klein dissented, asserting that Appellee's Superior Court brief failed to meet the requirements of the Rules of Appellate Procedure. As such, his position was that the appeal should have been quashed. *See Brigidi*, 977 A.2d at 1182 (Klein, J., dissenting).

[1][2] We allowed appeal, on the Commonwealth's petition, to consider whether the Vehicle Code's evidentiary prerequisites pertaining to pre-

arrest breath testing extend into the Crimes Code setting. As this issue is one of statutory interpretation, our review is plenary.

**998 The Commonwealth argues that the Superior Court majority ignored the plain language of Section 1547(c), which on its terms is limited to "any summary proceeding ... in which the defendant is charged with a violation of section 3802 [driving under the influence] or any other violation of this title [*i.e.*, the Vehicle Code] arising out of the same action." 75 Pa.C.S. § 1547(c). According to the Commonwealth, Section 1547(c)(1)'s evidentiary restrictions plainly apply only to cases arising under the Motor Vehicle Code. In the absence of a statutory restriction on the use of pre-arrest breath testing in such cases, the Commonwealth asserts that the common pleas court's admission of test results must be respected.

The Commonwealth also contends that the Superior Court majority inappropriately disregarded *Allen's* refusal to extend Section 1547(c)(1)' s requirements into the underage drinking context. *See Allen,* 454 Pa.Super. at 77, 684 A.2d at 634–35. The Commonwealth describes the majority's more limited perspective on *Allen* as "artificial" and "somewhat indecipherable." Brief for the Commonwealth at 13.

*335 The Commonwealth's *amicus*, the Pennsylvania District Attorneys Association, complains that the requirement of "evidential-quality breath-testing" in underage drinking prosecutions is unworkable. Brief for *Amicus* Pa. Dist. Attorneys Ass'n at 5. In this regard, the Association catalogues challenges facing police officers in investigating underage drinking.[FN5] According to the Association, its members are not philosophically opposed to the regulation of pre-arrest breath testing use in underage drinking prosecutions. However, they believe such a regulatory scheme may best be created legislatively, with the practicality and purpose of underage drinking prosecutions taken into account. The Association recognizes that "there is a legitimate interest in assuring the reliability of PBT results used to secure [underage drinking] convictions." *Id.* at 5. Nevertheless, it finds a fundamental difference between driving while intoxicated prosecutions under the Vehicle Code, where the Commonwealth may be required to establish a specific blood alcohol content, and underage drinking proceedings under the Crimes Code, in which the prosecution merely needs to establish the fact of consumption. The Association posits that this distinction justifies lesser regulation in the latter context. [FN6]

FN5. For example, the Association indicates:

> The investigation of UAD can be far less predictable than the investigation of DUI. Often, officers will respond to a report of a party in a remote location. They may arrive at the site of the party on foot, with little or no assistance. The detention of suspects within this context can be far more challenging than the detention of a driver during a vehicle stop. Officers may not be physically able to detain suspects at all, given the unruly nature of an underage drinking "bust." Even if two or three officers were able to detain a party of twenty-five suspects, it is highly unlikely that either officer would be able to observe any one suspect to the degree mandated by 67 Pa.Code § 77.24(a). Therefore, under the Superior Court's ruling, any PBT results they obtained could be ruled inadmiss- ible.
>
> Brief for *Amicus* Pa. Dist. Attorneys Ass'n at 9.

FN6. Appellee filed a *pro se* brief, *inter alia*, incorporating the arguments from his counseled brief filed in the Superior Court.

Upon consideration of the arguments, and as a threshold matter, there appears to be a fundamental

misunderstanding of the statutory and administrative regulation of pre-arrest *336 breath testing devices. Initially, such equipment is not regulated by Section 1547(c) of the Vehicle Code at all, since the statute carefully distinguishes between evidential quality testing and pre-**999 arrest testing, and Section 1547(c) pertains to the former. *See* 75 Pa.C.S. § 1547(c). Pre-arrest breath testing is separately governed by Section 1547(k), under which the use of approved equipment expressly is limited to field screening, as an aid to determine probable cause. *See id.* § 1547(k) ("The sole purpose of this preliminary breath test is to assist the officer in determining whether or not the person should be placed under arrest.").

Second, the Department of Health approval for the use of pre-arrest alcohol screening devices, upon which the Commonwealth has relied, is expressly pursuant to—and limited to— Section 1547 of the Vehicle Code (and other similar pre-arrest testing scenarios).[FN7] Thus, under the Commonwealth's own line of argumentation— *i.e.*, that authorities centered on the Vehicle Code should not extend to the Crimes Code setting—this administrative approval is not controlling in the present proceeding under the Crimes Code.

> FN7. Per the terms of the Department of Health's notice, the approvals also pertain in the context of pre-arrest testing under the Fish and Boat Code, *see* 30 Pa.C.S. § 5125(c)(1), and the Game and Wildlife Code, *see* 34 Pa.C.S. § 2502(c), neither of which is relevant here.

More important, the Health Department approval upon which the Commonwealth relies simply does not concern the subject matter of Section 1547(c), namely, evidential quality alcohol testing. Rather, the notice is pursuant to Section 1547(k)—"prearrest breath test[ing]"—and mirrors that statutory provision. Consequently, the notice indicates that the sole purpose of the device approval is to assist officers in determining probable cause. *See* Notice, 35 Pa.B. 2694. Thus, there simply is no underlying administrative approval relating to admissibility of pre-arrest breath testing results in *any* form of prosecution. *Accord Commonwealth v. Marshall*, 824 A.2d 323, 328 (Pa.Super.2003) ("To the extent that the Department of Health approves the PBT device, ... it is for this field screening purpose only[.]").[FN8]

> FN8. Notably, the Department has issued separate notices, pursuant to Section 1547(c) of the Vehicle Code, identifying equipment that *is* approved for evidential quality breath testing. *See, e.g.*, Notice, Equipment to Determine Blood Alcohol Content, 37 Pa.B. 5435 (Dept' of Health Oct. 6, 2007) ("Equipment approved under this notice may be used by law enforcement officials to obtain test results which will be admissible in evidence [for identified purposes including Vehicle Code violations]".).

*337 For this reason, the common pleas court erred by taking judicial notice, for the purpose of determining admissibility, of the pertinent Health Department notice. Moreover, the common pleas court's indication that the Alco–Sensor does not require calibration and accuracy testing is also questionable, since the court did not denote the source of authority upon which it was relying. Presumably, the common pleas court relied on the arresting officer's testimony that, to his knowledge, calibration was not required. The officer, however, was not qualified as an expert, and the limited nature of his training and understanding was apparent from his testimony.[FN9]

> FN9. Parenthetically, the manufacturer's website for the Alco–Sensor unit specifies that "[c]hecks and calibrations should be performed with either a National Highway Traffic Safety Administration's (NHTSA) approved wet bath simulator or a dry gas standard." Intoximeters Incorporated Products, http:// www. intox. com/ products/ as_ datasheet. asp? pnid= 14 (last

visited Aug. 5, 2010).

[3] Next, we address the rebuttable presumption the common pleas court derived from the Superior Court's decision in *Allen.* In this regard, the *Allen* panel relied on *Myrtetus* as establishing that **1000 pre-arrest breath testing is reliable to discern the presence or absence of alcohol in a suspect's blood. *See Allen,* 454 Pa.Super. at 77, 684 A.2d at 634. However, *Myrtetus's* comments on reliability were limited to "the results of chemical tests of breath or blood *taken after arrest.* " *Myrtetus,* 397 Pa.Super. at 309, 580 A.2d at 47 (emphasis added). With regard to *pre-arrest* breath testing, the court stated: "No such presumption [of validity and reliability] can be made from the preliminary breath test, nor do we find the legislature intended to create such a presumption." *Id.* The presumption *Allen* advanced, therefore, is based on a patent misreading of the sole source of authority upon which it relied. Accordingly, this presumption is not sustainable on the *338 grounds stated and must be disapproved unless and until a persuasive rationale is advanced and accepted.

In the present case, the Superior Court majority also assumed a threshold, evidence-related approval by the Department, which, in fact, is lacking. Nevertheless—and although we agree with the Commonwealth that the evidential requirements of Section 1547(c) are not directly relevant—it is worth repeating that the Commonwealth's own position that the Alco-Sensor is an approved device derives from Section 1547. For purposes of responding to the question presented here on the terms on which it is framed, we find that the Commonwealth cannot invoke Section 1547 as support for admissibility (even indirectly) while simultaneously disavowing any obligation of adherence to the requirements of that section.

Thus, while the Superior Court's decision is predicated on an incorrect assumption, its reasoning is otherwise appropriate to the disposition of this specific case, and we will so limit it. Moreover, the result was correct based on the independent ground that the underlying Health Department approval was lacking beyond the sanctioning of field use of the pre-arrest breath testing unit to assist in determining probable cause.

In response to the arguments of the Commonwealth's *amicus*, the legislative limitations on the admissibility of preliminary alcohol testing reflect obvious reliability concerns, and we do not see from the face of the statute that such concerns are limited to determination of a specific blood alcohol percentage. Indeed, the broader concerns are also reflected in a number of judicial opinions from other jurisdictions. For example, an Ohio court recently indicated as follows:

> PBT results are considered inherently unreliable because they "may register an inaccurate percentage of alcohol present in the breath, and may also be inaccurate as to the presence or absence of any alcohol at all." PBT devices are designed to measure the amount of certain chemicals in the subject's breath. The chemicals measured are found in consumable alcohol, but are also present in industrial chemicals and certain nonintoxicating over-the-counter medications.*339 They may also appear when the subject suffers from illnesses such as diabetes, acid reflux disease, or certain cancers. Even gasoline containing ethyl alcohol on a driver's clothes or hands may alter the result. Such factors can cause PBTs to register inaccurate readings, such as false positives. This lack of evidential reliability provides a basis for excluding PBT results from admissibility at trial.
>
> *State v. Shuler,* 168 Ohio App.3d 183, 858 N.E.2d 1254, 1257 (2006) (citations omitted).

We do appreciate the difficulties of proof facing the Commonwealth in underage drinking scenarios, as amply developed by **1001 *amicus. See supra* note 5. *Amicus*, however, has not demonstrated persuasively that the prevailing understanding that pre-arrest breath testing devices are appropriate for field screening purposes only is outdated.

If the technology for these devices has advanced (or advances) to a stage where they manifest sufficient reliability to satisfy prevailing judicial standards governing the admissibility of scientific evidence, the Commonwealth may demonstrate this in courts of law via established means. *See, e.g., Commonwealth v. Blasioli,* 552 Pa. 149, 713 A.2d 1117 (1998) (reflecting first-time judicial acceptance in Pennsylvania of the product rule used in explaining the significance of DNA evidence). The Commonwealth may also pursue additional legislative and/or administrative approvals, and these may be respected in the courts to the degree they comport with constitutional norms. What the Commonwealth may not do, however, is to suggest that an expressly limited scheme of statutory and administrative approval extends beyond its own carefully delineated boundaries.

Amicus's brief accurately reflects another underlying concern in these cases, which we also share: "Conviction of UAD carries criminal and collateral sanctions. Obviously, there is a legitimate interest in assuring the reliability of PBT results used to secure such convictions." Brief for *Amicus* Pa. Dist. Attorneys Ass'n at 5. Nevertheless, neither *amicus* nor the Commonwealth has provided any indicia of reliability whatsoever from which admissibility could be assessed according to prevailing judicial standards. In the absence of such support, *340 we simply are unable to subordinate the interests of the accused to considerations of ease and efficiency for law enforcement. As applied to the present case, consistent with the legislative and administrative reluctance to authorize the admission of pre-arrest breath testing results in judicial proceedings, we find insufficient evidence, on this record, to support such admission over Appellee's timely objection.

[4] In summary, we agree with the Commonwealth that Section 1547 of the Vehicle Code generally does not apply to proceedings exclusively under the Crimes Code. Nevertheless, we hold that the Commonwealth also may not rely on statutory and administrative approvals of pre-arrest breath testing devices pursuant to Section 1547 of the Vehicle Code to justify the admission of test results into evidence in prosecutions under the Crimes Code.

In concurrence, Mr. Justice Eakin indicates that he would affirm based on the Superior Court's rationale. In considering this position, it is important to bear in mind that the *Brigidi* panel was bound by *Allen. See Commonwealth v. Crowley,* 413 Pa.Super. 554, 556, 605 A.2d 1256, 1257 (1992) (explaining that "precedent (*stare decisis*) requires us to adhere to a ruling of this Court until it is reversed either by our Supreme Court or an en banc panel of Superior Court"). Indeed, the *Brigidi* panel accepted *Allen's* central premise that pre-arrest breath testing is presumptively reliable to discern the presence or absence of alcohol in a suspect's blood (albeit the panel implemented a calibration requirement). *See Brigidi,* 977 A.2d at 1182. However, particularly since the sole authority relied upon by *Allen* said precisely the opposite concerning the reliability aspect, we find that a more probing review presently is implicated.

The order of the Superior Court is affirmed.

Chief Justice CASTILLE, Justices BAER, TODD, McCAFFERY, Justice ORIE MELVIN join the opinion.
Justice EAKIN files a concurring opinion.

1002 *341 ***CONCURRING OPINION*

Justice EAKIN.

I would affirm based on the well-reasoned opinion of Superior Court President Judge Emeritus McEwen.

Pa.,2010.
Com. v. Brigidi
607 Pa. 329, 6 A.3d 995

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APPENDIX "I"

Westlaw.

750 N.E.2d 796
(Cite as: 750 N.E.2d 796)

C

Court of Appeals of Indiana.
Michael SHARBER, Appellant-Defendant,
v.
STATE of Indiana, Appellee-Plaintiff.

No. 29A04-0012-CR-538.
May 29, 2001.

Defendant was convicted in the Superior Court, Hamilton County, Richard Campbell, J., of felony operating while intoxicated (OWI). Defendant appealed. The Court of Appeals, Baker, J., held that defendant failed to establish that portable breath test administered following his arrest satisfied statutory or foundational requirements, and thus, results of such test were not admissible.

Affirmed.

West Headnotes

|1| Criminal Law 110 ⚿661

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k661 k. Necessity and Scope of Proof. Most Cited Cases

Criminal Law 110 ⚿1153.1

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1153 Reception and Admissibility of Evidence
110k1153.1 k. In General. Most Cited Cases
(Formerly 110k1153(1))
The admissibility of evidence is within the sound discretion of the trial court, and the Court of Appeals will reverse only for an abuse of that discretion.

|2| Criminal Law 110 ⚿1147

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1147 k. In General. Most Cited Cases
An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or if the court has misinterpreted the law.

|3| Automobiles 48A ⚿422.1

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Foundation or Predicate
48Ak422.1 k. In General. Most Cited Cases
Blood alcohol content tests are admissible in operating while intoxicated (OWI) cases so long as standards and regulations for such testing are met in accordance with statute governing the selection and certification of breath test operators, equipment, and chemicals used when administering the tests. West's A.I.C. 9-30-6-5.

|4| Automobiles 48A ⚿422.1

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Foundation or Predicate
48Ak422.1 k. In General. Most Cited Cases
The foundational requirements for the admission of breath alcohol test results in operating while intoxicated (OWI) cases include a showing that the test was administered by an operator certified by the State Department of Toxicology, the equipment used in the test was inspected and approved by the Department, and the operator used techniques approved by the Department.

|5| Automobiles 48A ⚿422.1

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Foundation or Predicate
48Ak422.1 k. In General. Most Cited Cases
Breath alcohol test results are generally inadmissible for the benefit of either party in an operating while intoxicated (OWI) case if the State Department of Toxicology has not approved some aspect of the test.

|6| Automobiles 48A ⚿422.1

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Foundation or Predicate
48Ak422.1 k. In General. Most Cited Cases

Automobiles 48A ⚿424

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Foundation or Predicate
48Ak424 k. Reliability of Particular Testing Devices. Most Cited Cases
Defendant failed to establish that portable breath test administered following his arrest for operating while intoxicated (OWI) satisfied statutory or foundational requirements, and thus, results of such test were not admissible in prosecution for felony OWI, even though such results were exculpatory, where defendant presented no evidence that any standards or procedures even existed for the test, and officer testified at trial that the portable test was a hand-held instrument that did not meet any of the statutory certification requirements and was used only to confirm or deny the presence of alcohol in an individual. West's A.I.C. 9-30-6-5.

*797 Annette Fancher Bishop, Indianapolis, Indiana, Attorney for Appellant.

Steve Carter, Attorney General of Indiana, Richard C. Webster, Deputy Attorney General, Indianapolis, Indiana, Attorneys for Appellee.

OPINION

BAKER, Judge

Appellant-defendant Michael Sharber appeals his conviction for Operating While Intoxicated,[FN1] a class D felony. Specifically, Sharber contends that the trial court erred in preventing him from cross-examining a police officer as to the results of a portable breath test that had been administered following his arrest.

FN1. IND. CODE § 9-30-5-3.

FACTS

The facts most favorable to the verdict reveal that at approximately 12:30 a.m., on April 3, 1999, Carmel police officer Jason Greer noticed that Sharber was driving his vehicle with only one headlight. As a result, Officer Greer began to follow him on U.S. 31 and noticed that Sharber was swerving in his lane of traffic. Officer Greer stopped the vehicle and when he approached, he noticed that Sharber smelled strongly of alcohol and had red, glassy eyes. Sharber admitted to Officer Greer that he had consumed some vodka earlier that evening.

After Sharber failed three field sobriety tests, Officer Greer administered a portable breath test. The result of that test revealed that Sharber had a blood alcohol content of .099 percent. Thereafter, Sharber was transported to the Carmel Police Department where he was tested on the BAC Data-Master machine. Those results revealed that Sharber's blood alcohol level was .11 percent.

Before the trial commenced, the State filed a motion in limine which sought to prevent Sharber from admitting the results of the portable breath test into evidence. Over Sharber's objection, this evidence was excluded and Sharber was found guilty of Operating a Vehicle with a .10 percent BAC or

more. Thereafter, he was also convicted of Operating a Vehicle While Intoxicated as a class D felony because of a prior conviction. Sharber now appeals.

DISCUSSION AND DECISION

[1][2] We initially observe that the admissibility of evidence is within the sound discretion of the trial court. We will reverse only for an abuse of that discretion. *Tardy v. State,* 728 N.E.2d 904, 906 (Ind.Ct.App.2000). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or if the court has misinterpreted the law. *798*Hanna v. State,* 726 N.E.2d 384, 387 (Ind.Ct.App.2000).

[3][4][5] We note that blood alcohol content tests are admissible so long as standards and regulations for such testing are met in accordance with IND. CODE § 9-30-6-5. Specifically, this statute governs the selection and certification of breath test operators, equipment and the chemicals used when administering the tests. The foundational requirements for the admission of breath alcohol test results include a showing that the test was administered by an operator certified by the State Department of Toxicology (Department), the equipment used in the test was inspected and approved by the Department, and the operator used techniques approved by the Department. *Hornback v. State,* 693 N.E.2d 81, 84 (Ind.Ct.App.1998). Our supreme court has recognized that a defendant does not enjoy an unlimited constitutional right to offer exculpatory evidence. *Roach v. State,* 695 N.E.2d 934, 939 (Ind.1998). Even though Sharber advocated for the admission of such evidence in this case, breath test results are generally inadmissible for the benefit of either party if the Department has not approved some aspect of the test. *See Mullins v. State,* 646 N.E.2d 40, 49-51 (Ind.1995).

[6] Here, Sharber has presented no evidence demonstrating that the portable breath test satisfied the requirements of I.C. § 9-30-6-5. Moreover, he did not establish any of the foundational requirements for the admission of those results. It was never established that any standards or procedures even existed for the test, and Officer Greer testified at trial that the portable test was a hand-held instrument that did not meet any of the certification requirements. He further acknowledged that this instrument was used only to confirm or deny the presence of alcohol in an individual.

While Sharber asserts that he was denied the right to due process because he could not present the results of the portable breath test to the jury, we note that evidence was presented on both direct and cross-examination that the portable breath test was given, along with the field sobriety tests. It is apparent that the trial court granted the motion in limine for the purpose of excluding unreliable evidence from the trier of fact. As a result, the trial court did not err in denying Sharber's request to admit the results of the portable breath test.

Judgment affirmed.

BAILEY, J., and MATHIAS, J., concur.

Ind.App.,2001.
Sharber v. State
750 N.E.2d 796

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APPENDIX "J"

472 So.2d 694
(Cite as: 472 So.2d 694)

C

Court of Criminal Appeals of Alabama.
William M. BOYD
v.
CITY OF MONTGOMERY.

3 Div. 34.
May 14, 1985.

Defendant was convicted of driving under the influence, in the Circuit Court, Montgomery County, Joseph D. Phelps, J., and he appealed. The Court of Criminal Appeals, Bowen, P.J., held that: (1) proof that defendant had more than 0.10% alcohol in his blood was sufficient to support conviction; (2) erroneous admission of arresting officer's testimony that defendant failed roadside Alco-Sensor test was harmless in light of other evidence that defendant had been drinking, including his own admission; (3) erroneous admission of officer's testimony that defendant admitted drinking in response to officer's question was waived where such testimony was elicited by defendant himself; (4) officer was not required to give *Miranda* rights before giving such test; (5) results of chemical blood test given after arrest were admissible; and (6) $1,000 fine and 60 days' imprisonment in city jail was not excessive.

Affirmed.

West Headnotes

|1| Automobiles 48A ⚿355(6)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak355 Weight and Sufficiency of Evidence
48Ak355(6) k. Driving while intoxicated. Most Cited Cases

Mere proof that police officer smelled alcohol on breath of driver will not sustain conviction for driving under the influence.

|2| Automobiles 48A ⚿355(6)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak355 Weight and Sufficiency of Evidence
48Ak355(6) k. Driving while intoxicated. Most Cited Cases

In prosecution for driving while under the influence, proof that there was more than 0.10% alcohol in defendant's blood, which raised presumption of guilt, was sufficient to support conviction in light of jury's discretion in finding whether such presumption was rebutted by evidence. Code 1975, § 32-5A-194(b)(3).

|3| Automobiles 48A ⚿411

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak411 k. In general. Most Cited Cases
(Formerly 110k388)

Results of Alco-Sensor test were not admissible in trial for driving under the influence. Code 1975, § 32-5A-194.

|4| Criminal Law 110 ⚿1169.2(2)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.2 Curing Error by Facts Established Otherwise
110k1169.2(2) k. Particular evidence or prosecutions. Most Cited Cases

Criminal Law 110 ⚿1169.3

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error

110k1169 Admission of Evidence
110k1169.3 k. Curing error by facts admitted by defendant. Most Cited Cases
In prosecution for driving under the influence, erroneous admission of police officer's testimony that defendant failed Alco-Sensor test was harmless, in light of other evidence, including defendant's own admission, that he had been drinking.

|5| Criminal Law 110 ⚿1169.3

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.3 k. Curing error by facts admitted by defendant. Most Cited Cases
In prosecution for driving under the influence, any error in police officer's testimony that defendant replied affirmatively to question of whether he had been drinking was waived by fact that such testimony was elicited by defendant himself on cross-examination.

|6| Criminal Law 110 ⚿411.26

110 Criminal Law
110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)11 Custody
110k411.21 What Constitutes Custody
110k411.26 k. Traffic stops. Most Cited Cases
(Formerly 110k412.2(2))

Criminal Law 110 ⚿411.37

110 Criminal Law
110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)13 Interrogation in General
110k411.36 What Constitutes Interrogation
110k411.37 k. In general. Most Cited Cases
(Formerly 110k412.2(2))
Roadside questioning of a motorist detained pursuant to routine traffic stop does not constitute a "custodial interrogation" requiring *Miranda* warning.

|7| Automobiles 48A ⚿421

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak421 k. Advice or warnings; presence of counsel. Most Cited Cases
(Formerly 110k388)
Police officer who administered roadside Alco-Sensor test to determine whether he had probable cause to arrest driver was not required to inform driver of his *Miranda* rights before giving test.

|8| Automobiles 48A ⚿349(17)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak349 Arrest, Stop, or Inquiry; Bail or Deposit
48Ak349(14) Conduct of Arrest, Stop, or Inquiry
48Ak349(17) k. Detention, and length and character thereof. Most Cited Cases
(Formerly 48Ak349)
Where police officer making traffic stop suspects commission of a crime, he may detain person briefly to investigate suspicion and ask moderate number of questions to determine driver's identity and obtain information.

|9| Criminal Law 110 ⚿393(1)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k393 Compelling Self-Incrimination
110k393(1) k. In general. Most Cited Cases
Driver's breath, and odor of alcohol thereon, is

not protected by the Fifth Amendment privilege against self-incrimination. U.S.C.A. Const.Amend. 5.

|10| Automobiles 48A ⚿411

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak411 k. In general. Most Cited Cases
(Formerly 110k388)

In prosecution for driving under the influence, chemical analysis of driver's blood, breath or urine may be admitted only if driver was lawfully arrested before being directed to submit to test, arresting officer had reasonable grounds to believe that driver was under the influence, test was designated by proper law enforcement agency, and test was performed according to methods of proof by State Board of Health and by an individual possessing a valid permit therefor. Code 1975, §§ 32–5–192(a), 32–5A–194(a)(1).

|11| Automobiles 48A ⚿424

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Foundation or Predicate
48Ak424 k. Reliability of particular testing devices. Most Cited Cases
(Formerly 110k388)

Testimony by officer who performed blood-alcohol test on drunk driving suspect that he performed test according to applicable rules and regulations and that machine was tested once a month was sufficient predicate for admission of test results, even though officer had no personal knowledge of exact dates on which machine was tested before and after test performed on suspect.

|12| Automobiles 48A ⚿357(6)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak357 Instructions
48Ak357(6) k. Driving while intoxicated. Most Cited Cases
(Formerly 48Ak357)

Where complaint charged defendant with driving while there was 0.10% or more alcohol in his blood, trial judge was not required to instruct jury on other grounds for finding defendant guilty of driving while under the influence. Code 1975, § 32–5A–191(a)(1–5).

|13| Criminal Law 110 ⚿1036.8

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1036 Evidence
110k1036.8 k. Sufficiency of evidence. Most Cited Cases

Sufficiency of evidence to support conviction for driving under the influence was not preserved for review absent appropriate objection.

|14| Automobiles 48A ⚿359.4

48A Automobiles
48AVII Offenses
48AVII(C) Sentence and Punishment
48Ak359.3 Driving While Intoxicated
48Ak359.4 k. In general. Most Cited Cases
(Formerly 48Ak359)

Sentence of 60 days' imprisonment in city jail, $1,000 fine and $50 court costs for conviction of driving under the influence was within statutory range of punishment, under § 32–5A–191(c), and was not excessive. Code 1975, § 32–5A–191(c).

*695 John T. Kirk, Montgomery, for appellant.

J. Bernard Brannan, Jr., Montgomery, for appellee.

*696 BOWEN, Presiding Judge.

William M. Boyd was convicted in the municipal court of the City of Montgomery of driving

under the influence of alcohol and with improper lane usage. He appealed his conviction to the circuit court where a jury found him guilty as charged. He was sentenced to sixty days' imprisonment in the city jail and fined $1,000. Seven issues are raised on appeal.

I

The defendant argues that the evidence was insufficient to sustain the jury's verdict.

The City's only witness, Montgomery Police Corporal J.R. Taylor, testified that, at approximately 7:30 on the evening of the 19th of February, 1984, he observed the defendant on Wares Ferry Road traveling west approaching Twain Curve. The defendant was "weaving in the road * * * He had run across the yellow line and back across the other side of the road and run off the pavement himself and liked to have run off into the ravine or ditch." The officer stopped the defendant who got out of his car and "was kind of wobbling as he walked back to the car." The officer "smelled a strong odor of alcohol on his breath and about his person." The defendant failed "an alcohol sensor test" given at the scene and was placed under arrest for improper lane usage. The defendant was taken to police headquarters and given a GCI test by Corporal Taylor. The defendant registered .13%. Taylor testified that in his opinion the defendant was intoxicated: "It was my opinion that he had had too much to drink in operating a motor vehicle." This opinion was not based on the GCI test but was "just from observing him on the street."

The defendant testified that he had had two and one-quarter beers that afternoon but denied being intoxicated. He admitted that he may have "swerved out" to avoid "potholes" and "low spots" in the road but denied crossing the center line. The defendant's testimony was corroborated by that of Bonnie Jean Abemathy, the defendant's thirteen-year-old cousin, and Manfred Austin, a friend, who were passengers in the car driven by the defendant.

[1] We agree with the defendant that mere proof that the officer smelled alcohol will not sustain a conviction for driving under the influence.

> "It is true, as the defendant argues, that mere proof that he smelled of alcohol will not sustain a conviction for driving under the influence.
>
> " 'Proof of the drinking of intoxicating liquor, or that the defendant's breath smelled of liquor, is not in itself sufficient to show that the defendant was intoxicated or under the influence of intoxicating liquor. However, where the charge is driving while under the influence of intoxicating liquor, it is not necessary that the prosecution show that the defendant was in a drunken stupor. And where there is evidence in the record from which the jury may infer that the defendant drove a motor vehicle upon a public way while intoxicated or under the influence of intoxicating liquor, a conviction will not be disturbed on appeal, even though there is also evidence in the record to the contrary.' 7A Am.Jur.2d, supra, at § 375.
>
> " *Rainey v. State,* 31 Ala.App. 66, 67, 12 So.2d 106 (1943) ('The statement that he was "drinking" does not necessarily establish that he was intoxicated.'). Intoxication is not 'established by the mere fact that accused drank intoxicating liquor or had an odor of liquor on his breath, in the absence of some proof showing that it produced in him some manifestation of intoxication.' 61A C.J.S. *Motor Vehicles* § 633(7) (1970)." *Hanners v. State,* 461 So.2d 43, 45–46 (Ala.Cr.App.1984) (Bowen, P.J., concurring).

"[W]hen it is shown that the driver of an automobile has been drinking it becomes a question for the jury to say, from all the facts and circumstances, whether or not the driver was under the influence of liquor." *697 *Evans v. State,* 36 Ala.App. 145, 146, 53 So.2d 764 (1951). See also *Hanners,* supra; *Pace v. City of Montgomery,* 455 So.2d 180 (Ala.Cr.App.1984).

[2] Because there was more than 0.10 percent

by weight of alcohol in the defendant's blood, it is presumed that he was under the influence of alcohol. Alabama Code 1975, § 32–5A–194(b)(3). The reasonableness of the defendant's explanation for the manner in which he was driving was a question for the jury. See *Ashurst v. State,* 462 So.2d 999, 1005 (Ala.Cr.App.1984).

II

[3] In connection with Issue I, the defendant argues that the results of the "alco-sensor test" were inadmissible because there is "no authority in Alabama that has adopted the alco-sensor as a valid test to impose upon a citizen." Appellant's Brief, p. 18.

The Alco-Sensor is a testing device which "utilizes an electromechanical transducer, fuel cell, to measure the subject's breath alcohol content." R. Erwin, 2 *Defense of Drunk Driving Cases* § 24.12 (1982).

The results of the Alco-Sensor test should not have been admitted to show that the defendant was intoxicated. See *State v. Albright,* 98 Wis.2d 663, 298 N.W.2d 196, 203 (1980) (improper comment by prosecutor); *Elam v. State,* 125 Ga.App. 427, 187 S.E.2d 920, 921–22 (1972) (alcolyser test results improperly admitted without any foundation and constituted incompetent hearsay without probative value).

> "Although these preliminary checking devices for the purpose of determining the presence of alcohol are very helpful to police officers in the performance of their duties, they have no place in the courtroom. Most police officers and prosecutors know that evidence as to the results obtained from such devices is not admissible because the devices are not specific for alcohol nor are they designed to give an accurate quantitative analysis." 2 *Drunk Driving* § 24.20.

The Alco-Sensor test does not determine the "amount of alcohol or controlled substance in a person's blood" and for that reason is not admissible under Alabama's chemical test for intoxication statute. Alabama Code 1975, § 32–5A–194. Even in those states which authorize a preliminary screening test, the test results are not admissible in evidence. *State v. LeBeau,* 144 Vt. 315, 476 A.2d 128, 130 (1984); *State v. Orvis,* 143 Vt. 388, 465 A.2d 1361, 1362 (1983); *State v. Hull,* 143 Vt. 353, 465 A.2d 1371, 1372 (1983); *State v. Smith,* 218 Neb. 201, 352 N.W.2d 620, 624 (1984). "The inadmissibility of preliminary test results at trial does not deprive them of all utility, but merely reflects a determination that more sensitive measurements are easily available and therefore should be used. * * * We view the alco-sensor as a quick and minimally intrusive investigative tool which performs a valuable function as a screening device.... We therefore hold that results of a preliminary breath alcohol screening test which indicate impairment, although inadmissible as evidence, may alone provide the reasonable grounds to believe a person is under the influence of intoxicating liquor...." *Orvis,* 465 A.2d at 1362–63. "[T]he Alco-Sensor is used as an ingredient for probable cause to arrest and require a postarrest test of blood, breath, or urine as authorized [by statute]. As a matter involving probable cause, any aspect of the breath test was a matter of law for judicial determination, not evidence for the jury.... The result of the preliminary breath test was irrelevant to prove any aspect of the charge against [the motorist]. Under the circumstances it was error to place before the jury any evidence regarding the result from the Alco-Sensor." *Smith,* 352 N.W.2d at 624. Although preliminary breath tests are not admissible, "evidence of manual tests given to the defendant at the time of his arrest, such as walking along a straight white line, has been held admissible." 7A Am.Jur.2d *Automobiles And Highway Traffic* § 375 (1980).

Where the admission into evidence of the results of a Alco-Sensor test constitutes *698 error, that error has been considered harmless where the results were cumulative and there was overwhelming evidence against the motorist, *Smith,* 352 N.W.2d at 624, and where the test results were

offered not for the purpose of establishing the charge against the motorist but rather to establish justification for placing the motorist under arrest and there was ample evidence to justify the arrest.

[4] Here, Officer Taylor merely testified that he gave the defendant "an alcohol sensor test, which he failed" and that this, when coupled with his observations of the defendant's driving and walking, were the reasons why he arrested the defendant. When this evidence is considered with the fact that there was other evidence that the defendant had been drinking, including the defendant's own admission, the error in the admission of the testimony that the defendant failed the Alco-Sensor test was rendered harmless.

III

The defendant contends that the giving of the Alco-Sensor field test and the officer's asking "have you been drinking" were "geared to invoke the most incriminating statements" and should not have been given or asked in the absence of the *Miranda* warnings.

[5] It was defense counsel who, on cross examination of Officer Taylor, injected the defendant's response that he had been drinking. The prosecutor, on direct examination, did not question the officer about what, if any, conversation he had with the defendant.

There was no objection to the officer's testimony at trial and consequently nothing is preserved for review. "An accused cannot by his own voluntary conduct invite error and then seek to profit thereby. It would be a sad commentary upon the vitality of the judicial process if an accused could render it impotent by his own choice." *Aldridge v. State,* 278 Ala. 470, 474, 179 So.2d 51 (1965).

[6] Not only was any potential error waived by the defendant's own admission, but here there was no error. Roadside questioning of a motorist detained pursuant to a routine traffic stop does not constitute "custodial interrogation" for purposes of *Miranda. Berkemer v. McCarty,* 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).

[7][8][9] The Alco-Sensor test was used by Officer Taylor in determining whether he had probable cause to arrest the defendant. The officer was not required to inform the defendant of his *Miranda* rights before giving the field test. In the usual traffic stop, the policeman who lacks probable cause but whose observations lead him reasonably to suspect that a particular person has committed, is committing, or is about to commit a crime, may detain the person briefly in order to investigate his suspicions and "may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." *Berkemer,* 104 S.Ct. at 3150–3151. A motorist's breath is not protected by the Fifth Amendment privilege against self-incrimination. *People v. Pecora,* 123 Misc.2d 259, 473 N.Y.S.2d 320 (N.Y.Town Ct.1984). See also *Schmerber v. California,* 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966); *State v. Badon,* 401 So.2d 1178 (La.1981). "In the context of an arrest for driving while intoxicated, a police inquiry of whether the suspect will take a blood-alcohol test is not an interrogation within the meaning of *Miranda.* " *South Dakota v. Neville,* 459 U.S. 553, 564, n. 15, 103 S.Ct. 916, 923, n. 15, 74 L.Ed.2d 748 (1983).

IV

The defendant contends that the result of the GC1 test was inadmissible because the City, in laying a predicate for its admission, failed to prove "the calibration of the machine by the Department of Public Safety." Appellant's Brief, p. 21.

[10] In a prosecution for an offense arising while the motorist was driving under the influence of intoxicating liquor, in *699 order for a chemical analysis of a person's blood, breath, or urine to be valid and admissible in evidence, a predicate must be laid showing (1) that the motorist was lawfully arrested before being directed to submit to a test, (2) that the law enforcement officer had reasonable

grounds to believe that the motorist was driving under the influence, (3) that the test administered was designated by the proper law enforcement agency, Alabama Code 1975, § 32–5–192(a), (4) that the test was performed "according to methods approved by the state board of health", and (5) "by an individual possessing a valid permit issued by the state board of health for this purpose." Alabama Code 1975, § 32–5A–194(a)(1). "A party offering results from tests shown to be given in conformity with the statute is relieved of the burden of laying the extensive predicate generally necessary for admission of scientific test results." *McGough v. Slaughter,* 395 So.2d 972, 975 (Ala.1981); *Moore v. State,* 442 So.2d 164, 166 (Ala.Cr.App.1983).

[11] The defendant argues that the proper predicate was not laid in this case because "Corporal Taylor ... did not have the records of calibration/maintenance provided by an every thirty-day inspection, nor was he able to testify as to the dates of inspection/certification of the machine's functioning properly within the required time *before or after* the test on Mr. Boyd." Appellant's Brief, p. 22, emphasis in original.

Officer Taylor testified that he performed the GCI test "in accordance with the rules and regulations of the Department of Health." A copy of the "Rules of State Board of Health Administration Chapter 420–1–1 Chemical Test For Intoxication" was admitted into evidence as part of the City's case in chief. Rule 420–1–1–.01(3)(a) states, "There shall be a periodic inspection of each breath testing instrument. The inspection shall be conducted at reasonable time intervals set by the State Health Officer through the Technical Director."

On direct examination, Taylor testified that he had "personal knowledge of this GCI machine being periodically inspected by the Department of Public Health." On cross examination, he stated that the machine was "checked once every calendar month" but admitted that he did not have personal knowledge of the exact dates the machine was tested before and after the defendant was tested.

Officer Taylor's testimony supplied the proper predicate for the admission of the GCI test results. See generally *Webb v. State,* 378 So.2d 756 (Ala.Cr.App.), cert. denied, 378 So.2d 758 (Ala.1979).

V

[12] The trial judge properly refused to instruct the jury on § 32–5A–191(a)(1) through (5):

" § 32–5A–191. Driving while under influence of alcohol, controlled substances, etc.

"(a) A person shall not drive or be in actual physical control of any vehicle while:

"(1) There is 0.10 percent or more by weight of alcohol in his blood;

"(2) Under the influence of alcohol;

"(3) Under the influence of a controlled substance to a degree which renders him incapable of safely driving;

"(4) Under the combined influence of alcohol and a controlled substance to a degree which renders him incapable of safely driving; or

"(5) Under the influence of any substance which impairs the mental or physical faculties of such person to a degree which renders him incapable of safely driving."

Since it was specifically alleged in the complaint that the defendant did "drive or did have actual control of a motor vehicle while there was 0.10% percent or more by weight of alcohol in his blood, to wit: GCI reading .13%" it was incumbent on the City to prove this particular allegation.

*700 Moreover, this issue has not been preserved for review as there is no written requested charge contained in the record. *Ex parte Allen,* 414 So.2d 993 (Ala.1982). Additionally, the record shows that defense counsel "requested the court to give the charge 32.191(5)." Although it is argued

on appeal that "a clerical error is clear," Appellant's Brief, p. 23, this Court is bound by the record. There was no motion to correct the record as provided in A.R.A.P. 10(f).

VI

In Issue 1, this Court found that the evidence of the defendant's guilt of the offense charged was sufficient to support the conviction. Whether the statutory presumption of intoxication arising from the GCI reading was rebutted by the evidence was a question for the jury. "Evidence as to the results of medical or chemical tests for intoxication is not conclusive or binding upon the jury; the weight to be given such evidence is a matter for the determination of the jury, and the guilt or innocence of the defendant is still a question to be determined on the basis of all the evidence in the case." 7A Am.Jur.2d *Automobiles* at § 380.

[13] Additionally, this issue was not preserved for review since the record contains no objection challenging the sufficiency of the evidence.

VII

[14] The defendant was sentenced to sixty days' imprisonment in the city jail and fined $1,000 and $50 court costs. See Alabama Code 1975, § 12–19–150 et seq. Objection to this sentence is raised for the first time on appeal. Upon a first conviction, the defendant could have been imprisoned for not more than one year, or by fine of not less than $250 nor more than $1,000, or by both such fine and imprisonment. Alabama Code 1975, § 32–5A–191(c) (1983). The defendant was sentenced within the statutory range of punishment and we do not deem it excessive.

The judgment of the circuit court is affirmed.

AFFIRMED.

All Judges concur.

Ala.Cr.App.,1985.
Boyd v. City of Montgomery
472 So.2d 694

END OF DOCUMENT

APPENDIX "K"

357 N.W.2d 591
(Cite as: 357 N.W.2d 591)

C

Supreme Court of Iowa.
STATE of Iowa, Appellee,
v.
Larry Dean THOMPSON, Appellant.

No. 84–190.
Nov. 14, 1984.

Defendant was convicted by a jury in the District Court for Mahaska County, Robert Bates, J., of operating a motor vehicle while under the influence of intoxicants (second offense) and driving while his license was revoked. Defendant appealed. The Supreme Court, Carter, J., held that: (1) introduction of results of preliminary breath screening test given to defendant by police officer was reversible error; (2) conviction for driving while license was revoked did not require retrial of elements of revocation procedure; and (3) jury instructions on offense of driving while license was revoked were sufficient.

Affirmed in part; reversed in part.

West Headnotes

|1| Automobiles 48A ⚖422.1

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Foundation or Predicate
48Ak422.1 k. In general. Most Cited Cases
(Formerly 48Ak422, 110k388)
In trial of defendant for driving while intoxicated, results of preliminary breath screening test given to defendant by police officer were not admissible to show foundational facts for admission of results of intoxilyzer test, where intoxilyzer results had already been admitted prior to time screening test results were offered. I.C.A. § 321B.3.

|2| Criminal Law 110 ⚖736

110 Criminal Law
110XX Trial
110XX(F) Province of Court and Jury in General
110k733 Questions of Law or of Fact
110k736 k. Preliminary or introductory questions of fact. Most Cited Cases
(Formerly 110k736(1))
Questions of admissibility of breath test results in trial for driving while intoxicated are for the court and not for the jury.

|3| Criminal Law 110 ⚖1162

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1162 k. Prejudice to rights of party as ground of review. Most Cited Cases
When trial court error is not of constitutional magnitude, the test of prejudice is whether it sufficiently appears that the rights of the complaining party have been injuriously affected.

|4| Criminal Law 110 ⚖1169.1(7)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.1 In General
110k1169.1(7) k. Immaterial or incompetent evidence in general. Most Cited Cases
New trial was required for defendant convicted of driving while intoxicated where results of preliminary breath test, which were erroneously admitted at trial, tended to corroborate intoxilyzer readings which defendant had challenged. I.C.A. § 321.281.

|5| Administrative Law and Procedure 15A ⚖500

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(D) Hearings and Adjudications
15Ak500 k. Collateral attack. Most Cited Cases
Ordinarily, a final decision of an agency is not subject to collateral attack in a subsequent proceeding.

|6| Automobiles 48A ⚷326

48A Automobiles
48AVII Offenses
48AVII(A) In General
48Ak326 k. License and registration. Most Cited Cases
(Formerly 48Ak353)

Automobiles 48A ⚷353(2)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak353 Presumptions and Burden of Proof
48Ak353(2) k. License and registration. Most Cited Cases
(Formerly 48Ak353)
State was not required to retry elements of drivers license revocation procedure in prosecution for driving while license was revoked. I.C.A. §§ 321B.16, 321B.38.

|7| Automobiles 48A ⚷357(2)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak357 Instructions
48Ak357(2) k. License and registration. Most Cited Cases
(Formerly 48Ak357)
In trial for driving while license was revoked, instruction to jury that State was required to prove beyond reasonable doubt that defendant's license had been revoked and that defendant had operated a motor vehicle while his license was thus revoked was sufficient to convey to jury elements of the offense. I.C.A. § 321B.38.

*592 Charles L. Harrington, Appellate Defender, and Patrick R. Grady, Asst. Appellate Defender, Des Moines, for appellant.

Thomas J. Miller, Atty. Gen., Rebecca L. Claypool, Asst. Atty. Gen., and Charles A. Stream, County Atty., for appellee.

Considered by REYNOLDSON, C.J., and McCORMICK, LARSON, SCHULTZ, and CARTER, JJ.

CARTER, Justice.

Defendant Larry Dean Thompson appeals his convictions for operating a motor vehicle while under the influence of intoxicants (second offense) and driving while license revoked in violation of Iowa Code sections 321.281 and 321B.38 (1983). He urges on appeal that: (1) evidence concerning a preliminary chemical test was improperly admitted in violation of Iowa Code section 321B.3; (2) evidence that defendants' license had been "revoked as provided in this chapter" was insufficient to support a verdict of guilty in the absence of proof that the revocation was accomplished in strict compliance with the statutory procedures set forth in section 321B.16; and (3) the jury should have been instructed that revocation in accordance with the requirements of section 321B.16 was an element which the State must prove beyond a reasonable doubt in order to sustain a conviction for driving while license revoked.

The defendant was observed driving a motorcycle on July 27, 1983 by a police officer. A subsequent radio check elicited information that defendant's driver's license was currently revoked. As a result, radio contact was made with another officer who stopped the defendant and detected an odor of alcohol on his breath. A preliminary breath

screening test was administered on a sample of defendant's breath which recorded a result of more than ten hundredths of one percent by weight of alcohol in the blood. Upon obtaining this result on the preliminary screening test, an intoxilyzer test was performed pursuant to the implied consent procedures of section 321B.4. The results of that intoxilyzer test indicated .16 of one percent by weight of alcohol in the blood.

At trial, evidence was presented through cross-examination of the State's witnesses that the accuracy of an intoxilyzer test might be questionable if performed in proximity to radio frequency interference. It *593 was further developed that the test in question was not insulated from such interference in the manner recommended by the Department of Public Safety. Peace officers testified that the defendant was courteous and performed fairly well on all the field sobriety tests except the heel-toe walk. Appellant testified that his poor performance on the latter test resulted from a severe ankle sprain.

The last item of evidence introduced by the State prior to the resting of its case was a document which included the results of the preliminary screening test conducted prior to the intoxilyzer test. This document contained the defendant's name and thereafter indicated that "the above-named person ... submitted to a preliminary breath screening test which indicated ten hundredths (.10) or more of one percent by weight of alcohol in the blood." This evidence was received over defendant's objection that it was inadmissible by reason of the provisions of Iowa Code section 321B.3.

A certified copy of defendant's driving record was admitted which showed that his license was revoked on July 27, 1983. No evidence was presented to show the particulars of the revocation procedure or the manner in which the revocation had been accomplished. Defendant moved for a directed verdict on the ground that the State had failed to show that the revocation was "in accordance with the requirements of section 321B.16." This motion was overruled by the trial court. Thereafter, defendant objected to the trial court's marshalling instruction to the jury on the ground that it did not require the State to show that the method of revocation was in strict compliance with the requirements of section 321B.16.

1. *Admissibility of Preliminary Breath Screening Test Results.*

[1] Defendant urges that the trial court erred by admitting into evidence over his objection documentary evidence that he had submitted to a preliminary breath screening test "which indicated ten hundredths (.10) or more of one percent by weight of alcohol in the blood." He urges that the use of such evidence is prohibited by section 321B.3 which provides in part:

> The results of this preliminary screening test may be used for the purpose of deciding whether an arrest should be made and whether to request a chemical test authorized in this chapter, but shall not be used in any court action *except to prove that a chemical test was properly requested of a person pursuant to this chapter.*

(Emphasis added). In response to this contention, the State urges that this evidence falls within the exception provided in the last sentence of the above-quoted statute. Such evidence, the State contends, was offered to show the foundational facts necessary for the admission of the results of the intoxilyzer test.

The strength of the State's argument is diminished by the fact that there was no issue in the case concerning the foundational facts necessary for the admission of the intoxilyzer test. The defendant had not challenged the admissibility of the intoxilyzer results by a motion to suppress. This evidence was already admitted prior to the time the preliminary screening test was received.

[2] In addition, we conclude that the limited exception to the prohibition against use of preliminary screening test results has reference to the found-

ational showing which must be made to the court in order to justify admissibility of a chemical test. Questions of admissibility of these test results are for the court and not for the jury. *Lessenhop v. Norton,* 261 Iowa 44, 53, 153 N.W.2d 107, 112–13 (1967). We do not believe the statutory exception authorizes providing the results of preliminary screening tests to the trier of fact as evidence in the case.

[3] The State urges that if the results of the preliminary screening test are deemed to be inadmissible, the result in the present case is harmless error. When trial court error is not of constitutional magnitude, the test of prejudice is whether it sufficiently appears that the rights of the ***594** complaining party have been injuriously affected. *State v. Massey,* 275 N.W.2d 436, 439 (Iowa 1979). We believe it sufficiently appears that defendant's rights in the present case suffered the requisite harm necessary for a reversal.

[4] Defendant challenged the accuracy of the intoxilyzer test results based on potential radio frequency interference. In support of this contention he provided a memorandum from the state crime laboratory stating that sources of radio waves should be insulated from the intoxilyzer and, in addition, presented evidence through cross-examination of State witnesses that this had not been done on the intoxilyzer test which was administered to him. Use of the preliminary screening results by the State tends to corroborate the intoxilyzer reading which the defendant has challenged. We conclude that this evidence may not be deemed harmless. As a result of the error in its admission, a new trial is required on the information charging a violation of section 321.281.

II. *Elements of Driving While License Revoked Offense.*

Defendant's second and third issues both involve the same basic question: What are the elements of the offense defined in section 321B.38? He alleges that strict compliance with all of the procedural steps of section 321B.16 must be shown and constitute essential elements of the offense.

Defendant contends that his motion for directed verdict should have been sustained because proof of such elements is lacking in the present case. In particular, he contends that the State should have, but did not, present evidence that at the time of the revocation the arresting officer seized his driver's license and sent it to the Department of Transportation with an affidavit stating the basis for the revocation.

The State contends that if defendant wished to challenge the legality of the revocation of his license, as he apparently now seeks to do, this required an exhaustion of the administrative remedies provided in section 321B.26 and 321B.27. Failure to pursue these administrative remedies, the State contends, renders the revocation conclusive for purposes of establishing the present charge that defendant was operating a motor vehicle while his license was revoked.

[5][6] Ordinarily, a final decision of an agency is not subject to collateral attack in a subsequent proceeding. *Walker v. Iowa Department of Job Service,* 351 N.W.2d 802, 805 (Iowa 1984); *Toomer v. Iowa Department of Job Service,* 340 N.W.2d 594, 598 (Iowa 1983). Given the administrative review process which was available to defendant with respect to the revocation of his operator's license and the right of judicial review which was available upon exhaustion of those administrative remedies, we conclude that the legislature did not intend that the State must retry the elements of the revocation procedure in a criminal prosecution based in whole or in part upon the act of revocation.

[7] The same reasons which lead us to conclude that the elements upon which the revocation was based need not be established a second time in a prosecution under section 321B.38 also sustain the trial court's refusal to include such elements in the marshalling instruction given to the jury. In the marshalling instruction, the State was required to

prove beyond a reasonable doubt that (1) defendant's license had been revoked, and (2) defendant had operated a motor vehicle while his license was thus revoked. We conclude that this instruction was sufficient to convey to the jury the elements of the offense.

We have considered all issues presented and find no basis for reversing the judgment of conviction on the charge of driving while license revoked. The judgment of conviction under section 321.281 is reversed, and that charge must be retried.

AFFIRMED IN PART; REVERSED IN PART.

Iowa,1984.
State v. Thompson
357 N.W.2d 591

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APPENDIX "L"

Westlaw.

352 N.W.2d 620
218 Neb. 201, 352 N.W.2d 620
(Cite as: 218 Neb. 201, 352 N.W.2d 620)

C

Supreme Court of Nebraska.
STATE of Nebraska, Appellee,
v.
Kenneth L. SMITH, Appellant.

No. 83-594.
Aug. 3, 1984.

Defendant was convicted in the District Court, Dawson County, John P. Murphy, J., of operating motor vehicle while under influence of alcoholic liquor or while he had .10 of 1 percent or more by weight of alcohol in his body fluid. Defendant appealed. The Supreme Court, Shanahan, J., held that though it was error for the trial court to admit evidence of results of preliminary breath test, such evidence going to probable cause issue for judicial determination, not for the jury, that evidence was merely cumulative and did not cause miscarriage of justice so as to require reversal, in light of other overwhelming evidence, including results of blood alcohol test, conducted nearly one and a half hours after defendant had last consumed alcohol, showing his blood alcohol level to still be in excess of statutory limit.

Affirmed.

West Headnotes

Criminal Law 110 ⚿1169.2(4)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.2 Curing Error by Facts Established Otherwise
110k1169.2(4) k. Immaterial and Incompetent Evidence in General. Most Cited Cases
(Formerly 110k388, 110k1169.2(2))
Though it was error for the trial court to admit evidence of results of preliminary breath test in prosecution for driving while under influence of alcohol, such evidence going to probable cause issue for judicial determination, not for the jury, that evidence was merely cumulative and did not cause miscarriage of justice so as to require reversal, in light of other overwhelming evidence, including results of blood alcohol test, conducted nearly one and a half hours after defendant had last consumed alcohol, showing his blood alcohol level to still be in excess of statutory limit. Neb.Rev.St. §§ 29-2308, 39-669.07, 39-669.08(3), 4.

***621 Syllabus by the Court*

*201 Criminal Law: Appeal and Error. No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred.

P. Stephen Potter of Bacon & Potter, Gothenburg, for appellant.

Paul L. Douglas, Atty. Gen., and Michaela M. White, Lincoln, for appellee.

KRIVOSHA, C.J., BOSLAUGH, HASTINGS, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired.

SHANAHAN, Justice.

A county court jury found Kenneth L. Smith guilty of the charge that Smith operated a motor vehicle while he was under the influence of alcoholic liquor or while he had .10 of 1 percent or more by weight of alcohol in his body fluid. See Neb.Rev.Stat. § 39-669.07 (Cum.Supp.1982). After determining that such offense was Smith's second conviction of driving while under the influence of alcoholic liquor, the county court for Dawson

County, Nebraska, sentenced Smith to pay a fine of $500, confinement in the county jail for 48 hours, and 2 years' probation. On appeal the district court affirmed the judgment of the county court, and Smith appeals to this court. We affirm.

During the late hours of November 12, 1982, Smith spent about 1 1/2 hours in Bob's Reload Lounge in Cozad, Nebraska, where, according to Smith, he drank four cans of beer. Smith drank his last beer around 1:15 a.m. on November 13, although one of Smith's friends testified Smith left the lounge at 1 a.m. Alone, Smith drove his pickup east on U.S. Highway 30 toward the Darr road. The Darr road is approximately 4 miles from ***202** Bob's Reload Lounge.

Trooper Gregory L. Vandenberg of the Nebraska State Patrol was on routine patrol westbound on Highway 30 as Smith's pickup approached from the west. By the mobile radar unit in the patrol car, Trooper Vandenberg determined that Smith's pickup was traveling at 69 miles per hour. After Smith's oncoming pickup passed the trooper's unit, Vandenberg turned his vehicle and pursued Smith. Smith made a right turn from Highway 30 and proceeded south on the Darr road for approximately one-fourth of a mile, where the trooper stopped Smith at 1:45 a.m. to issue a speeding citation. Before he was stopped, Smith had not driven erratically and had violated no traffic law except the speeding infraction.

At the driver's side of the stopped pickup, Trooper Vandenberg asked for Smith's driver's license and vehicle registration. At that time Vandenberg smelled the odor of alcoholic beverage coming from within the pickup. Trooper Vandenberg asked Smith to come to the patrol car, observed Smith's conduct, and noted that Smith was walking unsteadily. In the patrol unit Vandenberg again smelled the odor of alcoholic beverage on Smith's breath, and Smith admitted that he had been drinking at the Reload Lounge.

During the stop at the Darr road, Trooper Vandenberg used an "Alco-Sensor," an instrument used by law enforcement officers in connection with field sobriety tests. The Alco-Sensor was used for the preliminary breath test of Smith pursuant to Neb.Rev.Stat. § 39-669.08(3) (Cum.Supp.1982), which in pertinent part provides that a law enforcement officer can require an individual****622** "to submit to a preliminary test of his or her breath for alcohol content if the officer has reasonable grounds to believe that such person has alcohol in his or her body, or has committed a moving traffic violation, or has been involved in a traffic accident." That preliminary test was administered to Smith at 2:07 a.m. The Alco-Sensor was a "pass-warn-fail" model which indicates any presence of alcohol on the breath of the person tested. As described by Vandenberg, the Alco-Sensor is a means for an officer to confirm a "suspicion" that "the subject has consumed alcoholic beverage or is under the influence," or "to determine ***203** whether or not the subject does have alcohol on his breath." According to Vandenberg, the Alco-Sensor cannot measure the blood alcohol content of an individual, but is used as a test "to build probable cause" to arrest an individual and require an additional test of blood, breath, or urine in accordance with § 39-669.08(4). Over Smith's objection, Vandenberg testified the Alco-Sensor, when applied to Smith's breath, registered "fail." Vandenberg arrested Smith and transported him to the city police department in Lexington, Nebraska.

Smith and Vandenberg arrived at the Lexington Police Department at 2:18 a.m., where Smith stated he had his last drink of alcohol at Bob's Reload Lounge at 1 a.m. Trooper Vandenberg then administered a breath test on Smith with an "Intoxilyzer 4011AS" at 2:35 a.m. (Smith stipulated foundation for the test equipment and correctness of all procedures used for the Intoxilyzer breath test.) The digital "readout" of Smith's test on the Intoxilyzer was .12 percent. Smith acknowledged such measurement by the Intoxilyzer.

At the police station Trooper Vandenberg also

administered four separate sobriety tests, including the balance test, in which Smith "wobbled back and forth"; the heel-to-toe test; and two types of the finger-to-nose test, during which Smith touched the bridge of his nose with his index finger during one test and touched his upper lip during another test. Vandenberg also observed Smith staggering and having difficulty getting through the door to use the restroom at the police station.

Trooper Vandenberg, based on his observations but over Smith's objection, testified that Smith was "under the influence of alcohol to such an extent that it impaired his physical and mental faculties to an appreciable extent" while operating the pickup. Later, without objection, Vandenberg again expressed his opinion that Smith was "under the influence." On cross-examination Vandenberg reaffirmed his opinion given on direct examination, namely, that Smith was "under the influence of alcohol."

On cross-examination Trooper Vandenberg acknowledged that generally an individual reaches a "peak" or the maximum level of absorption for alcohol anywhere from 45 minutes to an hour after the last ingestion of alcohol and that an individual's ***204** level of alcohol thereafter decreases at the rate of .015 percent per hour. Also, Vandenberg acknowledged the Intoxilyzer 4011AS had a margin of error of .01 percent, so that the reading of .12 percent regarding Smith could actually have been .11 percent or .13 percent instead of the .12 percent "readout" on Smith's breath test.

The jury found Smith guilty as charged.

Smith contends there is no sufficient evidence to sustain his conviction and that it was prejudicial error to admit the testimony of Trooper Vandenberg regarding the Alco-Sensor, the preliminary breath test.

In his question about the sufficiency of evidence to support the verdict, Smith has perhaps passed over the fact that § 39-669.07 defines an offense based on multiple situations involving alcohol, namely, operating or controlling a motor vehicle while (1) under the influence of alcoholic liquor or (2) having .10 of 1 percent or more by weight of alcohol in body fluid. See *State v. Weidner*, 192 Neb. 161, 219 N.W.2d 742 (1974). There was proper evidence before the jury regarding Smith's driving his pickup while he was under the influence of alcoholic liquor-conduct and a situation prohibited by § 39-669.07. Trooper Vandenberg****623** testified about Smith's odor from alcoholic beverage and additional observations about Smith's difficulties in locomotion at the scene of the arrest as well as at the police station. On both direct examination and cross-examination, Trooper Vandenberg expressed his opinions that Smith was intoxicated and "under the influence." Such opinions were among the evidence from which a jury could reasonably infer that Smith was guilty of driving a motor vehicle while under the influence of alcoholic liquor.

No aspect of the Intoxilyzer 4011AS is questioned by Smith. In fact, during argument to this court, Smith's counsel emphasized the importance of the Intoxilyzer measurement relative to Smith's defense, which may be summarized in the following hypothesis: The Intoxilyzer's margin of error results in an accepted measurement of Smith's blood alcohol level of .11 percent at 2:35 a.m. during the 45-minute period of an ascending blood alcohol level; an ascending level of Smith's blood alcohol content prevented determination of the precise ***205** blood alcohol level at the time Smith was stopped at 1:45 a.m., or indicated that Smith's blood alcohol level was less than .10 percent; hence, Smith cannot be convicted of driving with a blood alcohol content at a level more than .10 percent.

In probing the intricacies of machines and man's metabolism, Smith has overlooked a less complicated and more common item-the clock. Testimony concerning the time of Smith's last drink of alcohol ranges from 1 a.m. to 1:15 a.m. Crucial to Smith's hypothesis is a postingestion span of 45

minutes to 1 hour as the period during which the blood alcohol level rises toward a maximum level of absorption. However, the Intoxilyzer test was not administered during such initial 45-minute or 1-hour period following Smith's last consumption of alcohol. The Intoxilyzer test was administered at 2:35 a.m., at least 1 hour and 20 minutes after Smith's last consumption of alcohol. In view of the testimony and the suggested hypothesis, Smith's blood alcohol level was descending at the time the Intoxilyzer test was administered, not ascending. Concerning proof that Smith drove his pickup while his blood alcohol content was more than .10 percent, Trooper Vandenberg testified that, after the maximum level of absorption has been reached, the individual's blood alcohol level decreases at the rate of .015 percent per hour. Among various courses open to the jury in determining Smith's blood alcohol content at 1:45 a.m. were two paths. First, from the evidence the jury could have formulated a commonsense hypothesis of its own: whatever is descending is moving from a higher level. At 2:35 a.m. the uncontradicted Intoxilyzer measurement of Smith's blood alcohol content was at least .11 percent and descending from a greater or maximum level of absorption reached by the time the trooper stopped Smith at 1:45 a.m. Therefore, Smith's blood alcohol content was greater than .11 percent when he was stopped at 1:45 a.m. Second, based on the evidence, the jury could have satisfactorily computed Smith's blood alcohol content at 1:45 a.m. On the basis of an individual's blood alcohol level decreasing at the rate of .015 percent per hour, Smith's blood alcohol level decreased .01125 percent between 1:45 a.m. (when Smith was stopped) until 2:35 a.m. (when the Intoxilyzer test was administered). [Rate of decrease (.015 *206 percent) multiplied by the elapsed time (three-fourths of an hour or 75 percent of the hourly rate of decrease) equals .01125 percent.] According to the evidence adduced by Smith in his questions about the Intoxilyzer, and allowing for the margin of error in the Intoxilyzer test, the lowest level of Smith's blood alcohol content was .11 percent. By adding .01125 percent (the amount of the decrease from 1:45 a.m. to 2:35 a.m.) to the level of .11 percent, determined by the Intoxilyzer test at 2:35 a.m., a jury could find that at the time Smith was stopped on the Darr road, the level of Smith's blood alcohol content was at least .121 percent. A jury could have so interpolated the figures pertaining to the measurement by the Intoxilyzer at 2:35 a.m. and the hourly rate of decrease in Smith's blood alcohol content to determine **624 Smith's blood alcohol level at 1:45 a.m. By either path, and by inference from the facts presented, the jury reached a permissible verdict.

Rule 401 of the Nebraska Evidence Rules provides: "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Neb.Rev.Stat. § 27-401 (Reissue 1979). Trooper Vandenberg described the function of the Alco-Sensor as a means for an officer to confirm a "suspicion" that a driver had been drinking alcohol. Vandenberg also acknowledged that the Alco-Sensor was not an instrument for measuring the blood alcohol content of a driver. Moreover, as testified by the trooper, the Alco-Sensor is used as an ingredient for probable cause to arrest and require a postarrest test of blood, breath, or urine as authorized under § 39-669.08(4). As a matter involving probable cause, any aspect of the breath test was a matter of law for judicial determination, not evidence for the jury. (In disposing of the question raised about the preliminary breath test in this case, we need not define the exact legal nature and role of the preliminary breath test.) The result of the preliminary breath test was irrelevant to prove any aspect of the charge against Smith. Under the circumstances it was error to place before the jury any evidence regarding the result from the Alco-Sensor. However, Neb.Rev.Stat. § 29-2308 (Cum.Supp.1982) *207 provides in part:

> No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or

> for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred.

Although it was error for the trial court to admit the result of the Alco-Sensor, testimony about the Alco-Sensor was cumulative. Other evidence against Smith, and properly before the jury, was overwhelming and of such stature that admission of evidence about the Alco-Sensor did not cause any miscarriage of justice in Smith's trial. Cf. *State v. Red Feather,* 205 Neb. 734, 289 N.W.2d 768 (1980) (cumulative evidence not requiring reversal). See, also, *State v. Heiser,* 183 Neb. 665, 163 N.W.2d 582 (1968).

The judgment of the district court affirming the judgment upon Smith's conviction in the county court is correct and is affirmed.

AFFIRMED.

Neb.,1984.
State v. Smith
218 Neb. 201, 352 N.W.2d 620

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APPENDIX "M"

465 A.2d 1361
143 Vt. 388, 465 A.2d 1361
(Cite as: 143 Vt. 388, 465 A.2d 1361)

C

Supreme Court of Vermont.
STATE of Vermont
v.
William G. ORVIS.

No. 82-498.
Sept. 6, 1983.

Defendant was convicted in the District Court, Windham Circuit, Joseph J. Wolchik, J., of driving while having .10 percent or more by weight of alcohol in his blood, and he appealed. The Supreme Court, Gibson, J., held that: (1) results of preliminary breath alcohol screening test which indicate impairment, although inadmissible as evidence, may alone provide reasonable grounds to believe a person is under influence of intoxicating liquor, as required by statute allowing taking of breath sample whenever an officer has reasonable grounds to believe that person was operating, attempting to operate or was in actual physical control of any vehicle while under influence of intoxicating liquor, and (2) defendant's admission that he operated vehicle at time of parking lot accident, fact that he was found seated behind steering wheel with motor running, and gas chromatograph analysis revealing blood alcohol content of .16 percent were together sufficient to withstand motion for judgment of acquittal.

Affirmed.

West Headnotes

[1] Automobiles 48A ⚿419

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak417 Grounds for Test
48Ak419 k. Grounds or Cause; Necessity for Arrest. Most Cited Cases
(Formerly 110k388)
Results of preliminary breath alcohol screening test which indicate impairment, although inadmissible as evidence, may alone provide reasonable grounds to believe a person is under influence of intoxicating liquor as required by statute allowing taking of breath sample whenever an officer has reasonable grounds to believe that person was operating, attempting to operate or was in actual physical control of any vehicle while under influence of intoxicating liquor. 23 V.S.A. § 1202(a).

[2] Automobiles 48A ⚿356(6)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak356 Questions for Jury
48Ak356(6) k. Driving While Intoxicated. Most Cited Cases
(Formerly 48Ak356)
Defendant's admission that he operated vehicle at time of parking lot accident, fact that he was found seated behind steering wheel with motor running, and gas chromatograph analysis revealing blood alcohol content of .16 percent were together sufficient to withstand motion for judgment of acquittal in prosecution for driving while having .10 percent or more by weight of alcohol in his blood. 23 V.S.A. § 1201(a)(1).

****1361** ***389** William E. Kraham, Windham County Deputy State's Atty., Brattleboro, for plaintiff-appellee.

O'Connor & Morse, Brattleboro, for defendant-appellant.

Before ***388** BILLINGS, C.J., and HILL, UNDERWOOD, PECK and GIBSON, JJ.

GIBSON, Justice.

Defendant appeals from a conviction, after trial by jury, for driving while there was .10 percent or more by weight of alcohol in his blood, in violation of 23 V.S.A. § 1201(a)(1). He claims that the trial

court erred in allowing the admission of the results of an alcohol breath test and refusing to give a requested jury instruction. He further claims that the court erred in denying his motion for a directed verdict of acquittal. We disagree with defendant's arguments and affirm.

The circumstances surrounding defendant's arrest and subsequent conviction are not disputed. Essentially, defendant was involved in an automobile accident with another vehicle in a grocery store parking lot at 3:00 a.m. on May 29, 1982. He admitted to the investigating officer that he had consumed approximately six beers since the early afternoon; his breath had a faint odor of alcohol, and he was emotional and clearly very upset about the damage to his car. However, defendant was cooperative with the investigating officers and appeared to be in control of his faculties. No field dexterity tests were administered to defendant, but he was given an alco-sensor **1362 test. On the basis of that preliminary test, defendant was detained for further processing. A breath sample was then administered, and the gas chromatograph analysis revealed blood alcohol content of .16 percent.

The focus of defendant's argument is that the officer did not have "reasonable grounds to believe" that he was intoxicated, as required by 23 V.S.A. § 1202(a), because he acted normally and appeared in control of his faculties. Thus, defendant claims that the officer was without authority to administer the more sophisticated gas chromatograph test which led to defendant's *390 conviction. See *id.* In other words, defendant contends that the results of tests with the preliminary breath alcohol screening device, pursuant to § 1202(b), absent external manifestations of intoxication, may not alone provide an officer with reasonable grounds to employ more sophisticated and reliable testing. However, for reasons which appear below, we decline to so hold.

First, viewing the evidence in the light most favorable to the State as the prevailing party below, we note that the mild odor of alcohol, defendant's excited state and his admission of alcohol consumption, in conjunction with the fact of the 3:00 a.m. automobile accident and admitted operation, would appear to provide reasonable grounds for further inquiry by a law enforcement officer.

Second and more important, however, defendant's reasoning ignores the express statutory language and the clear intent of the legislature. 23 V.S.A. § 1202(a) creates a quid pro quo between the licensed driver and the state: in exchange for the privilege of driving in Vermont, the operator "is deemed to have given his consent" to provide samples of his breath to determine the alcohol content of his blood. This implied consent does not, however, leave the motorist stripped of procedural safeguards. Section 1202(c), for example, provides several protections not here in issue. Nevertheless, § 1202(a) allows the taking of a breath sample whenever an officer "has reasonable grounds to believe that the person was operating, attempting to operate or was in actual physical control of any vehicle while under the influence of intoxicating liquor." Moreover, § 1202(b) expressly provides that the "preliminary breath alcohol screening device [may be used] to determine whether further and more accurate testing is appropriate."

Defendant points to our holding in *State v. Rollins,* 141 Vt. 105, 110, 444 A.2d 884, 887 (1982), that evidence of insobriety at the time of arrest has probative value, and argues in his brief that the "reverse" is also true: "if there is evidence to find reasonable grounds for sobriety, the test should not be given and, if given, the results are not admissible." We fail to see how such a contention is the "reverse" of the *Rollins* rule, and we decline to wrench such a holding, by implication or otherwise, from *Rollins.* Further, to so hold would invade the legislature's domain by creating an entirely new and unprecedented*391 protection in an area where the operator's rights are creatures of statute. Cf. *State v. Brean,* 136 Vt. 147, 151-52, 385 A.2d 1085, 1088 (1978) (holding that the right to refuse to take test is purely statutory). We therefore refuse the invita-

tion to read defendant's amendatory interpretation into the statutory scheme.

Although not without some force, the assertion that the legislature itself has determined the preliminary device to be so inaccurate as to be per se inadmissible, *id,* is of no avail. The inadmissibility of preliminary test results at trial does not deprive them of all utility, but merely reflects a determination that more sensitive measurements are easily available and therefore should be used.

[1] We view the alco-sensor as a quick and minimally intrusive investigative tool which performs a valuable function as a screening device. Cf. *McGarry v. Costello,* 128 Vt. 234, 240, 260 A.2d 402, 405 (1969) (legislature encourages the use of chemical analysis in DUI investigations). Moreover, while it is beyond dispute that external manifestations of intoxication are relevant ****1363** and may be introduced at trial, *State v. Rollins, supra,* 141 Vt. at 108-10, 444 A.2d at 886-87, this Court has never held that they are essential to a successful prosecution under 23 V.S.A. § 1201(a)(1). To so hold would be to reward the experienced drinker who consumes excessive amounts of intoxicants without obvious physical impairment. We note that defendant here informed the officer that he had done a lot of drinking and could "pack it away" without visible effects. We therefore hold that results of a preliminary breath alcohol screening test which indicate impairment, although inadmissible as evidence, may alone provide the reasonable grounds to believe a person is under the influence of intoxicating liquor required by 23 V.S.A. § 1202(a).

Defendant's two other claimed errors fall with our rejection of his first challenge. After the jury was charged, defendant requested an additional instruction asking the jury to decide whether the officer had reasonable grounds to request a breath test. We have held above that reasonable grounds for further investigation existed as a matter of law. In any event, questions of the admissibility of evidence, here the breath test ***392** results which are defendant's ultimate target, are determined by the court. See V.R.E. 104. The belatedly proposed instruction was properly refused.

[2] Finally, defendant submits that the court erred in denying his motion for a directed verdict of acquittal. Viewing the evidence in the light most favorable to the State, in order to determine its sufficiency to convince a reasonable trier of fact of defendant's guilt beyond a reasonable doubt, *State v. Derouchie,* 140 Vt. 437, 445, 440 A.2d 146, 150 (1981), we affirm the trial court. Defendant's admission that he operated the vehicle at the time of the parking lot accident, the fact that he was found seated behind the steering wheel with the motor running, see *State v. Godfrey,* 137 Vt. 159, 400 A.2d 1026 (1979), and the .16 reading on the gas chromatograph test, are together sufficient to withstand a motion for judgment of acquittal. In that defendant provides no support for his assertion to the contrary, we reject it.

Judgment affirmed.

Vt.,1983.
State v. Orvis
143 Vt. 388, 465 A.2d 1361

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APPENDIX "N"

Westlaw.
298 N.W.2d 196
98 Wis.2d 663, 298 N.W.2d 196, 26 A.L.R.4th 1100
(Cite as: 98 Wis.2d 663, 298 N.W.2d 196)

Court of Appeals of Wisconsin.
STATE of Wisconsin, Plaintiff-Respondent,
v.
Howard Quigg ALBRIGHT, Defendant-Appellant.

No. 80-340.
Submitted on Briefs July 16, 1980.
Opinion Released Sept. 8, 1980.
Opinion Filed Sept. 8, 1980.

Defendant appealed from judgment of the Circuit Court, Milwaukee County, Patricia S. Curley, J., entering jury verdict of guilty of operating motor vehicle while under influence of an intoxicant and appealed from order denying his motions for directed verdict and new trial. The Court of Appeals, Decker, C. J., held that: (1) breathalyzer test refusal evidence was admissible; (2) trial court did not err in not instructing jury that the State had burden of proving offense beyond reasonable doubt and that jury's verdict must be unanimous; (3) defendant was not entitled to new trial on basis of newly discovered evidence; (4) evidence was sufficient to sustain verdict; (5) prosecutor's reference in opening statement to jury that defendant had been given preliminary breath test was improper; (6) arresting officer's reference to weapons he took from defendant at time of arrest was improper; and (7) prosecutor's reference in closing argument that defendant should not be believed because he had stake in outcome of trial and arresting officer testifying had none was improper.

Order affirmed in part and reversed in part; judgment vacated and cause remanded for new trial.

West Headnotes

|1| Automobiles 48A ⚿414

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak414 k. Right to Take Sample or Conduct Test; Initiating Procedure. Most Cited Cases
(Formerly 48Ak144.1(1))
Wisconsin drivers have no constitutional right to refuse to take breathalyzer test. U.S.C.A.Const. Amend. 5; W.S.A.Const. Art. 1, § 8; W.S.A. 343.305(1).

|2| Criminal Law 110 ⚿393(3)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k393 Compelling Self-Incrimination
110k393(3) k. Exposing Accused or Person of Accused to View of Witness or Jury, and Compelling Submission to Physical Examination. Most Cited Cases
Evidence obtained by breathalyzer test, though incriminating, is not testimony or evidence relating to a communicative act within purview of constitutional protections against self-incrimination. U.S.C.A.Const. Amend. 5; W.S.A.Const. Art. 1, § 8 .

|3| Automobiles 48A ⚿413

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak413 k. Refusal of Test, Admissibility. Most Cited Cases
(Formerly 48Ak354)
Evidence of breathalyzer test refusal is relevant and constitutionally admissible in prosecution for operating motor vehicle while under influence of an intoxicant. W.S.A. 343.305, 346.63(1).

|4| Automobiles 48A ⚿332

48A Automobiles
48AVII Offenses
48AVII(A) In General
48Ak332 k. Driving While Intoxicated. Most Cited Cases
First violation of statute prohibiting operation of motor vehicle while under influence of an intox-

icant is not a criminal act, although there is possibility of imprisonment if forfeiture judgment is not paid. W.S.A. 345.47(1)(a), 346.63(1), 346.65(2)(a).

|5| Automobiles 48A ⚿357(6)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak357 Instructions
48Ak357(6) k. Driving While Intoxicated. Most Cited Cases
(Formerly 48Ak357)

In prosecution for operating motor vehicle while under influence of an intoxicant, trial court did not err in not instructing jury that the State had burden of proving offense beyond reasonable doubt and that jury's verdict must be unanimous. W.S.A. 346.63(1).

|6| Criminal Law 110 ⚿911

110 Criminal Law
110XXI Motions for New Trial
110k911 k. Discretion of Court as to New Trial. Most Cited Cases

Criminal Law 110 ⚿1156(1)

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1156 New Trial
110k1156(1) k. In General. Most Cited Cases

The refusal or granting of a new trial rests in discretion of trial court and will not be disturbed unless there is a showing of a clear abuse of discretion.

|7| Criminal Law 110 ⚿938(3)

110 Criminal Law
110XXI Motions for New Trial
110k937 Newly Discovered Evidence
110k938 In General
110k938(3) k. Facts Within Knowledge of Defendant. Most Cited Cases

Defendant was not entitled to new trial of prosecution for operating motor vehicle while under influence of an intoxicant on basis of newly discovered evidence where defendant knew before trial of evidence which he claimed to be newly discovered and only his lawyer did not know of such evidence. W.S.A. 805.15(3).

|8| Criminal Law 110 ⚿753.2(5)

110 Criminal Law
110XX Trial
110XX(F) Province of Court and Jury in General
110k753 Direction of Verdict
110k753.2 Of Acquittal
110k753.2(3) Insufficiency of Evidence
110k753.2(5) k. Sufficiency to Warrant Conviction or to Present Jury Question. Most Cited Cases

Test for determining whether directed verdict should be granted is whether there is any credible evidence which under reasonable view would support a verdict contrary to that which is sought.

|9| Criminal Law 110 ⚿753.2(8)

110 Criminal Law
110XX Trial
110XX(F) Province of Court and Jury in General
110k753 Direction of Verdict
110k753.2 Of Acquittal
110k753.2(8) k. Hearing and Determination. Most Cited Cases

In determining whether a directed verdict should be granted, evidence is viewed most favorably to contention of nonmoving party.

|10| Automobiles 48A ⚿355(6)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution

48Ak355 Weight and Sufficiency of Evidence

48Ak355(6) k. Driving While Intoxicated. Most Cited Cases

Evidence regarding defendant's performance just before and at time of arrest sustained jury's verdict that defendant was operating his vehicle while under influence of an intoxicant. W.S.A. 346.63(1).

|11| Criminal Law 110 ⚿2069

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2067 Scope and Effect of Opening Statement
110k2069 k. For Prosecution. Most Cited Cases
(Formerly 110k703)

In prosecution for operating a motor vehicle while under influence of an intoxicant, prosecutor's reference in opening statement to jury that defendant had been given a preliminary breath test was improper. W.S.A. 343.305(2)(a), 346.63(1).

|12| Criminal Law 110 ⚿338(7)

110 Criminal Law
110XVII Evidence
110XVII(D) Facts in Issue and Relevance
110k338 Relevancy in General
110k338(7) k. Evidence Calculated to Create Prejudice Against or Sympathy for Accused. Most Cited Cases

Arresting officer-witness' reference, during prosecution for operating motor vehicle while under influence of an intoxicant, to weapons confiscated from defendant at time of arrest was improper as testimony created unfair prejudice which substantially outweighed any probative value in that jury might have unjustifiably concluded on basis of confiscation that defendant was engaged in violent and unlawful activity and therefore would convict on basis of such uncharged "crimes." W.S.A. 346.63(1).

|13| Criminal Law 110 ⚿2089

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2088 Matters Not Sustained by Evidence
110k2089 k. In General. Most Cited Cases
(Formerly 110k719(1))

Argument on matters not in evidence is improper.

|14| Criminal Law 110 ⚿2089

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2088 Matters Not Sustained by Evidence
110k2089 k. In General. Most Cited Cases
(Formerly 110k719(1))

In prosecution for operating motor vehicle while under influence of an intoxicant, prosecutor's comments in closing argument that defendant should not be believed because he had stake in outcome of trial and arresting officer who testified had none was erroneous as no evidence was introduced on subject. W.S.A. 346.63(1).

|15| Criminal Law 110 ⚿2192

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2191 Action of Court in Response to Comments or Conduct
110k2192 k. In General. Most Cited Cases
(Formerly 110k730(1))

Criminal Law 110 ⚿1169.5(1)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.5 Curing Error by Withdrawal, Striking Out, or Instructions to Jury
110k1169.5(1) k. In General. Most Cited Cases

Evidentiary errors and improper remarks of counsel may be cured if given overall evidence of guilt and curative effect of instructions, no prejudice is shown.

|16| Criminal Law 110 ⚖867.2

110 Criminal Law
110XX Trial
110XX(J) Issues Relating to Jury Trial
110k867 Discharge of Jury Without Verdict; Mistrial
110k867.2 k. Discretion of Court. Most Cited Cases
(Formerly 110k867)

A motion for mistrial is directed to discretion of trial court.

|17| Criminal Law 110 ⚖1162

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1162 k. Prejudice to Rights of Party as Ground of Review. Most Cited Cases

Error is harmless unless error is so prejudicial that a different result might have been reached had error not been made.

|18| Criminal Law 110 ⚖905

110 Criminal Law
110XXI Motions for New Trial
110k905 k. Nature and Scope of Remedy of New Trial in General. Most Cited Cases

A new trial should be granted where different result would probably have been reached absent errors at trial.

|19| Criminal Law 110 ⚖1189

110 Criminal Law
110XXIV Review
110XXIV(U) Determination and Disposition of Cause
110k1185 Reversal
110k1189 k. Ordering New Trial. Most Cited Cases

Cumulative effect of errors, occurring when prosecutor made improper references that defendant failed preliminary breath test, arresting officer testified about weapons taken from defendant at time of arrest for operating motor vehicle while under influence of intoxicant, and prosecutor referred to defendant's allegedly biased testimony, necessitated granting of new trial. W.S.A. 346.63(1).

****198 *665** Waring R. Fincke and Shellow & Shellow, Milwaukee, for defendant-appellant.

Bronson C. La Follette, Atty. Gen., with whom on the brief was Albert Harriman, Asst. Atty. Gen., for plaintiff-respondent.

Before DECKER, C. J., MOSER, P. J., and CANNON, J.

DECKER, Chief Judge.

Howard Albright appeals from a judgment entering a jury verdict of guilty of operating a motor vehicle while under the influence of an intoxicant, contrary to sec. 346.63(1), Stats., and an order denying his motions for directed verdict and a new trial. Albright alleges seven trial court errors including the reception of prosecution evidence of Albright's refusal to take a breathalyzer test. While finding this admission of evidence and three other alleged errors to be proper, we reverse on the basis of the prejudicial effect of remarks by the prosecutor in opening and closing arguments and testimony by the arresting officer about weapons confiscated from Albright.

Initially the Chief Judge denied defendant's

motion for a three-judge panel. After reviewing the briefs, the Chief Judge, on his own motion, granted a collegial panel.

*666 Albright was stopped by State Trooper Randall at approximately 1 a. m. on April 4, 1979. Randall had been passed by Albright who was driving his vehicle at 87 m.p.h.[FN1] Randall observed the vehicle change from the left lane to the right lane where the two right wheels struck the shoulder of the road. The trooper stopped the vehicle on an off-ramp and in a conversation with Albright, noticed a moderate odor of some type of alcoholic beverage. The officer also noticed that Albright's eyes were watery and red.

FN1. Albright admitted that he was driving his vehicle at 80 to 85 miles per hour.

The officer testified that he asked Albright to perform some field tests. Albright recited the alphabet to the letter "K," at which point his voice trailed off and the officer could no longer understand him. Albright did not perform the balance test, despite the officer's instructions. Albright was able to walk in a heel-to-toe manner, but fell against the patrol car while turning around. Albright successfully touched the tip of his nose with both his right and left hand.[FN2] The officer also administered a preliminary breath test.

FN2. Albright testified that he successfully completed the alphabet, balance and heel-to-toe tests.

Upon completion of these tests, Albright was arrested and taken to the Milwaukee County Sheriff's Department where he refused to take a breathalyzer test. Before leaving the scene, the officer removed a length of chain from Albright's car. The **199 officer stated he had removed a knife. His statement was interrupted by an objection from Albright's trial counsel, and thus, the place from which the knife was removed was not described by the officer.[FN3]

FN3. Albright's counsel later stated in argument to the trial court that the knife was removed from Albright's pocket.

Albright makes four claims of error which we find to be unsubstantiated. First, Albright contends that the *667 trial court erred in refusing to grant his motion for a mistrial when the prosecutor told the jury in his opening statement that Albright had been offered but had refused to take a breathalyzer test, and in permitting the prosecutor to admit into evidence Albright's refusal to take the breathalyzer test.

The arresting officer testified that he informed Albright of the implied consent law, that Albright indicated he understood, that the officer asked him to take the breathalyzer, but that Albright did not take the test. Albright objected to introduction of this evidence on the grounds of relevance.

The Wisconsin Supreme Court has held that testimony of a police officer that the defendant refused to take any chemical tests for intoxication was admissible evidence. "The (defendant) was asked to take a chemical test. It was his right to either submit to the test or refuse to do so. He chose to refuse to do so. His response to such a request is admissible evidence." [FN4] Our supreme court reasoned that as the results of the chemical tests are admissible pursuant to sec. 885.235, Stats., evidence of refusal to take the tests is also admissible. [FN5]

FN4. City of Waukesha v. Godfrey, 41 Wis.2d 401, 409, 164 N.W.2d 314, 318 (1969), quoted in State v. Draize, 88 Wis.2d 445, 451, 276 N.W.2d 784, 788 (1979).

FN5. City of Waukesha, supra note 4, 41 Wis.2d at 408, 164 N.W.2d at 318 (citing Barron v. Covey, 271 Wis. 10, 72 N.W.2d 387 (1955)).

No Wisconsin case law, however, specifically

addresses the issue of the relevancy of evidence of a refusal to submit to chemical tests for intoxication. Also, City of Waukesha was decided prior to the effective date of sec. 343.305, Stats., which imposes suspension of license on refusal to submit to chemical tests for intoxication. Therefore, we address the issue as one of first impression in this state.

Jurisdictions which have considered the relevancy of refusal evidence have reached differing results. We find ***668** those opinions which hold the evidence relevant and admissible to be persuasive. Several states which hold such evidence inadmissible have statutes clearly distinguishable from Wisconsin statutes.

In People v. Sudduth, 65 Cal.2d 543, 55 Cal.Rptr. 393, 421 P.2d 401 (1966), the arresting officer testified that Sudduth refused to take a breathalyzer test and the prosecutor commented on this evidence in argument. The jury was instructed:

> Whether or not (refusal to take a breathalyzer test) shows a consciousness of guilt and the significance to be attached to such a circumstance are matters for your determination.[FN6]

> FN6. Sudduth, 55 Cal.Rptr. at 396 n.5, 421 P.2d at 404 n.5.

Chief Justice Traynor, writing for a unanimous court, held that admission of test refusal evidence and the jury instructions were proper.

The supreme court of Ohio agrees:

> Thus, it is reasonable to infer that a refusal to take such a test indicates the defendant's fear of the results of the test and is consciousness of guilt, especially where he is asked his reasons for such refusal and he gives no reason which would indicate that his refusal had no relation to such consciousness of guilt.[FN7]

> FN7. City of Westerville v. Cunningham, 15 Ohio St.2d 121, 122, 239 N.E.2d 40, 41 (1968). In this case, Albright claimed only that he refused because of his belief in the inaccuracy of the test.

****200** Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." [FN8]

> FN8. Sec. 904.01, Stats.

A reasonable inference from refusal to take a mandatory breathalyzer test is consciousness of guilt. The person is confronted with a choice of the penalty for refusing a test, or taking a test which constitutes evidence of ***669** his sobriety or intoxication. Perhaps the most plausible reason for refusing the test is consciousness of guilt, especially in view of the option to take an alternative test.

[1][2] Before considering cases holding that refusal evidence is irrelevant, we note that use of test refusal evidence for the purpose of showing consciousness of guilt is constitutionally permissible. The only rationale for a rule prohibiting comment on a refusal would be that there is a right to refuse the test.[FN9] Wisconsin drivers have no constitutional right to refuse to take the breathalyzer. [FN10] There is no self-incrimination within the protections of the fifth amendment of the United States Constitution, or article I, sec. 8 of the Wisconsin Constitution. These provisions protect against compulsion to testify against oneself. The evidence obtained by a breathalyzer test, though incriminating, is not testimony or evidence relating to a communicative act. [FN11] Our supreme court has twice held that "admission of evidence of the defendant's refusal to furnish a sample of urine for a chemical test did not violate the defendant's constitutional privilege against self-incrimination (Wis.Const., art. I, sec. 8)." [FN12] In the context of refusal to take a chemical test to determine the amount of alcohol in a person's blood, there is no

difference between the alternative chemical tests. The same rule applies to all.

FN9. City of Waukesha, supra note 4, 41 Wis.2d at 409, 164 N.W.2d at 318 (citing Sudduth, supra note 6, 55 Cal.Rptr. at 395, 421 P.2d at 403).

FN10. State v. Bunders, 68 Wis.2d 129, 132, 227 N.W.2d 727, 729 (1975) (quoting Schmerber v. California, 384 U.S. 757, 765, 86 S.Ct. 1826, 1832, 16 L.Ed.2d 908 (1966)).

FN11. State v. Neitzel, 95 Wis.2d 191, 198, 289 N.W.2d 828, 832 (1980); Bunders, supra note 10, 68 Wis.2d at 132, 227 N.W.2d at 729.

FN12. City of Waukesha, supra note 4, 41 Wis.2d at 408, 164 N.W.2d at 317 (citing Barron, supra note 5).

Although some jurisdictions have held that refusal evidence is irrelevant, almost all have statutory schemes *670 distinguishable from Wisconsin. Four of those states have adopted statutes expressly excluding evidence of refusal to take the breathalyzer test in proceedings for driving while intoxicated. [FN13] Nine other jurisdictions holding refusal evidence inadmissible have statutes or case law which recognize a right to refuse to take chemical tests. [FN14] In those states, sanctions for opting to refuse the tests would erode the constitutional or statutory right to refuse.[FN15] Jurisdictions which do not recognize a right to refuse breathalyzers or other chemical tests have held **201 refusal evidence to be relevant and admissible.[FN16]

FN13. Commonwealth v. Scott, 359 Mass. 407, 269 N.E.2d 454 (1971); Davis v. State, 8 Md.App. 327, 259 A.2d 567 (1969); State v. Gillis, 160 Me. 126, 199 A.2d 192 (1964); People v. Boyd, 17 Ill.App.3d 879, 309 N.E.2d 29 (1974).

FN14. City of St. Joseph v. Johnson, 539 S.W.2d 784 (Mo.App. 1976); State v. Oswald, 241 N.W.2d 566 (S.D. 1976); People v. Hayes, 64 Mich.App. 203, 235 N.W.2d 182 (1975); State v. Andrews, 297 Minn. 260, 212 N.W.2d 863 (1973), cert. denied, 419 U.S. 881, 95 S.Ct. 146, 42 L.Ed.2d 121 (1974); Crawley v. State, 219 Tenn. 707, 413 S.W.2d 370 (1967); Stuart v. District of Columbia, 157 A.2d 294 (D.C. Mun.App. 1960); State v. Seversen, 75 N.W.2d 316 (N.D. 1956); State v. Anonymous, 6 Conn.Cir. 470, 276 A.2d 452 (1971); State v. Parker, 16 Wash.App. 632, 558 P.2d 1361 (1976).

FN15. Chief Justice Traynor hypothesized in Sudduth that the disparate results as to relevancy of refusal evidence in other jurisdictions "may be ascribed to the presence of an underlying constitutional or statutory right to refuse to produce the physical evidence sought. States that recognize a right to refuse to take such tests exclude evidence of a refusal. States that recognize no right to refuse allow testimony and comment on refusal." Sudduth, supra note 6, 55 Cal.Rptr. at 395-96, 421 P.2d at 403-04. (Footnotes omitted.)

FN16. State v. Duke, 378 So.2d 96 (Fla.App. 1979); People v. Thomas, 46 N.Y.2d 100, 412 N.Y.S.2d 845, 385 N.E.2d 584 (1978); State v. Tabisz, 129 N.J.Super. 80, 322 A.2d 453 (1974); Commonwealth v. Robinson, 229 Pa.Super. 131, 324 A.2d 441 (1974); State v. Miller, 257 S.C. 213, 185 S.E.2d 359 (1971); Vernon v. State, 512 P.2d 814 (Okl.Cr. 1973); Gardner v. Commonwealth, 195 Va. 945, 81 S.E.2d 614 (1954); Campbell v. Superior Court, 106 Ariz. 542, 479 P.2d 685 (1971). Westerville, supra note 7; Sudduth, supra note 6. See also State v. Bock, 80 Idaho 296, 328 P.2d 1065 (1958).

Three jurisdictions have statutes expressly admitting refusal evidence in proceedings for driving while intoxicated: Delaware, State v. Lynch, 274 A.2d 443 (Del.Super. 1971); Iowa, State v. Tiernan, 206 N.W.2d 898 (Iowa 1973); and North Carolina, State v. Flannery, 31 N.C.App. 617, 230 S.E.2d 603 (1976).

*671 Wisconsin clearly does not recognize a right to refuse the test. "Any person who drives or operates a motor vehicle upon the public highways of this state ... shall be deemed to have given consent to tests of his or her breath, blood or urine ...." [FN17] "Any such test shall be administered upon the request of a law enforcement officer." [FN18] A driver's only option upon arrest is to "recant the consent previously given." [FN19] Our conclusion of admissibility of evidence of chemical test refusal is consistent with the rationale of the nationwide pattern.

FN17. Sec. 343.305(1), Stats. (Emphasis added.)

FN18. Id. (Emphasis added.)

FN19. Neitzel, supra note 11, 68 Wis.2d at 201, 289 N.W.2d at 833.

Albright also contends that the refusal evidence should be held inadmissible under the principle of expressio unius est exclusio alterius. The legislature requires the officer to inform a driver of the sanction of license revocation for six to twelve months for refusal to take chemical tests for intoxication. [FN20] The driver is not informed that evidence of refusal is admissible in a proceeding for driving while intoxicated. Therefore, Albright contends, that sanction was not intended by the legislature.

FN20. Sec. 343.305(3)(a), Stats.

[3] We disagree. The legislature established an implied consent to take a breathalyzer with very limited exceptions based on physical disability or lack of probable cause by the officer to believe the driver was operating under the influence of an intoxicant.[FN21] "(T)he clear policy of the (implied consent) statute is to facilitate the *672 identification of drunken drivers and their removal from the highways (and) the statute must be construed to further the legislative purpose." [FN22] Evidence of refusal is relevant and constitutionally admissible. We do not interpret the silence of a legislature which manifested a strong desire to remove drunk drivers from Wisconsin roads to mean that this relevant evidence is inadmissible in a proceeding for driving while intoxicated.

FN21. See sec. 343.305(8)(b), Stats.

FN22. Neitzel, supra note 11, 95 Wis.2d at 193, 289 N.W.2d at 830.

[4][5] Second, Albright contends that the trial court erred in not instructing the jury that the state had the burden of proving the offense beyond a reasonable doubt and that the jury's verdict must be unanimous. Albright reasons that a first violation of sec. 346.63(1) is a criminal act and the defendant must be afforded the constitutional protections afforded in a criminal proceeding.

The quantum of proof and the five-sixths verdict are set out in secs. 345.45 and 346.46, Stats. Section 345.45 provides: "(T)he standard proof for conviction of any person charged with violation of any traffic regulation shall be evidence that is clear, satisfactory and convincing." "Traffic regulation" is defined by sec. 345.20(1)(a) as "a provision of chs. 341 to 349 for which the penalty for violation is a forfeiture, or an ordinance enacted in accordance with s. 349.06." Section 345.46 provides: "a verdict is valid if agreed to by five-sixths of the jury." Section 939.12 provides: "(a) crime is conduct which is prohibited by state law and punishable by fine or imprisonment**202 or both. Conduct punishable only by a forfeiture is not a crime." Section 346.65(2)(a) provides: "(a)ny person violating s. 346.63(1): 1. Shall forfeit not less than $100 nor more than $500 ...."

Albright contends that a "first" violation of sec. 346.63(1), Stats., defines a criminal act because there is a possibility of imprisonment even for a first violation and *673 therefore the conduct is not punishable "only by a forfeiture." Imprisonment not to exceed 90 days may be imposed by the court under sec. 345.47(1)(a) if a forfeiture judgment is not paid.

In State ex rel. Prentice v. County Court, 70 Wis.2d 230, 234 N.W.2d 283 (1975), Prentice contended that violation of the Milwaukee Code of Ordinances for speeding was a criminal act because violation created the possibility of suspension or revocation of her driver's license or imprisonment if she did not pay the fine which could be levied. Our supreme court rejected the contention because imprisonment is not "part of the direct punishment for violation of a municipal ordinance, but an incidental means of enforcing and making effective payment of the fine." [FN23] Our supreme court earlier noted that imposition of imprisonment for the purpose of aiding in the collection of a fine "is analogous to most civil contempt judgments where a jail sentence is imposed as an alternative to performance of the judgment." [FN24] For those reasons, a "first" violation of sec. 346.63(1), Stats., is not a criminal act.

FN23. Prentice, 70 Wis.2d at 242, 234 N.W.2d at 289. See also Bayside v. Bruner, 33 Wis.2d 533, 536, 148 N.W.2d 5, 7-8 (1967); Milwaukee v. Horvath, 31 Wis.2d 490, 493, 143 N.W.2d 446, 447, cert. denied, 385 U.S. 970, 87 S.Ct. 505, 17 L.Ed.2d 434 (1966); Neenah v. Alsteen, 30 Wis.2d 596, 601, 142 N.W.2d 232, 236 (1966).

FN24. Horvath, supra note 23, 31 Wis.2d at 494, 143 N.W.2d at 448.

Third, Albright contends that the trial court erred in denying his motion for a new trial on the basis of newly-discovered evidence. At trial, Albright's counsel was not aware that:

(1) from approximately March of 1977 to March of 1978, Albright had been treated with Stelazine, an antipsychotic drug;

(2) in July of 1978, Albright killed his family's dogs; and

*674 (3) as a result of this killing, Albright committed himself to the Milwaukee Psychiatric Hospital for treatment.

[6][7] The refusal or granting of a new trial rests in the discretion of the trial court and will not be disturbed unless showing a clear abuse of discretion. [FN25] A new trial on the basis of newly-discovered evidence may be granted pursuant to sec. 805.15(3), Stats., upon four necessary findings by the trial court. The first is that "(t)he evidence has come to the moving party's notice after trial ...." [FN26]

FN25. Estate of Teasdale, 264 Wis. 1, 7, 58 N.W.2d 404, 406 (1953).

FN26. Sec. 805.15(3)(a), Stats.

This first element has not been met by Albright. Albright certainly knew before trial of the evidence which he now claims to be newly-discovered. Only his lawyer did not know. "It may be true that counsel for the defendant was unaware of the ordinance but the test is not what counsel knows or is aware of but what his client is or should be aware of." [FN27]

FN27. Bear v. Kenosha County, 22 Wis.2d 92, 99, 125 N.W.2d 375, 380 (1963).

Fourth, Albright contends that the evidence was insufficient to sustain the jury's verdict and the trial court erred in refusing to direct a verdict for Albright. The basis of this contention is that the testimonial evidence of intoxication in this case could be construed to indicate that Albright was emotionally upset.

[8][9][10] Nontheless, the test for determining

whether a directed verdict should be granted is "whether there is any credible evidence which under a reasonable view would support a verdict contrary to that **203 which is sought." [FN28] The evidence is viewed most favorably to the contention of the nonmoving party. [FN29] There was no specific evidence *675 that Albright was an emotionally upset person. Taken in connection with the odor of alcohol, the evidence regarding Albright's performance just before and at the time of arrest sustains the jury's verdict that Albright was operating his vehicle while under the influence of an intoxicant.

FN28. Thompson v. Howe, 77 Wis.2d 441, 448, 253 N.W.2d 59, 62 (1977).

FN29. Id.

Albright next claims three errors and contends that each requires reversal. We agree to the extent that the aggregate effect of the errors unfairly prejudiced Albright's case and therefore a new trial is required.

Albright alleges error in the trial court's denial of:

(1) Albright's motion for a mistrial when the prosecutor told the jury in his opening statement that Albright had been given a preliminary breath test;

(2) Albright's motion for a mistrial when the arresting officer testified about weapons he took from Albright at the time of the arrest; and

(3) permission to the defendant to cross-examine the arresting officer with regard to the impact of his drunk driving arrests upon his promotability in the Wisconsin State Patrol, and subsequent refusal to grant Albright's motion for a mistrial when the prosecutor argued in closing that Albright should not be believed because he had a stake in the outcome of the trial and the officer had none.

[11] The reference to a preliminary breath test was improper. Section 343.305(2) (a), Stats., provides in part:

> Neither the results of the preliminary breath test nor the fact that it was administered shall be admissible in any action of the proceeding in which it is material to prove that the person was under the influence of an intoxicant or a controlled substance.

The prosecutor's opening statement literally ignored the legislature's direction.

[12] The reference to confiscated weapons was improper. The testimony created unfair prejudice which substantially outweighed any probative value. Testimony by a state trooper that he confiscated a chain and knife from *676 Albright's car clearly inferred impropriety or illegality on the part of Albright. While a chain or knife does not necessarily constitute a weapon, removal by an officer infers that they were in this case. The resulting prejudice to Albright is that the jury might unjustifiably conclude on the basis of this confiscation that Albright was engaged in violent and unlawful activity and therefore it would convict him on the basis of these uncharged "crimes." We view this evidence as intending the inference we draw from it because we have been provided with no other plausible explanation for offering such obviously irrelevant evidence. We note that this information was not solicited by the prosecutor, but was volunteered by the highway patrolman.

[13][14] The prosecutor, in his closing argument to the jury, stated "I don't think he gets a bonus or any brownie points or any award." [FN30] Argument on matters not in evidence is improper. [FN31] No evidence was **204 introduced regarding receipt of a bonus or "brownie points" for making arrests. The invidious nature of the argument is not apparent from its face. Prior to the commencement of the trial, the prosecutor, Assistant District Attorney Donald Jackson, had moved the trial court, in limine, to prohibit defendant's counsel from cross-examining the state trooper about the al-

leged promotional awards that result to *677 the officer from making arrests. After taking testimony from the officer (in the jury's absence), the trial court precluded such an examination. Having succeeded in preventing defendant's counsel from raising the issue and presenting evidence addressed to it, the prosecutor addressed the jury on the subject that was prohibited at his request in rebuttal argument when the defendant's counsel could not respond.

FN30. The pertinent part of the argument was:

> This is basically a one-on-one case, and credibility is important with respect to some of the factors that Mr. Sandfort had pointed out. The judge is going to tell you that in determining the credibility of witnesses you should take into account their interest, bias, and reasons for falsifying or altering their testimony. And I think it is pretty clear that Mr. Albright does have an interest in this case. Maybe you would assume that the officer does too; but he has told us that he has worked this job for eleven years, he has made other arrests, I am sure for operating under the influence of an intoxicant; I don't think he gets a bonus or any brownie points or any award.

FN31. Draize, supra note 4, 88 Wis.2d at 454, 276 N.W.2d at 789.

[15][16][17][18] The court gave instructions in an attempt to cure the erroneous references to the preliminary breath test and confiscation of the knife and chain. Evidentiary errors and the improper remarks of counsel may be cured if "given the overall evidence of guilt and the curative effect of instructions, no prejudice is shown." [FN32] A motion for mistrial is directed to the discretion of the trial court.[FN33] Error is harmless unless the error is so prejudicial that a different result might have been reached had the error not been made.[FN34] A new trial should be granted where a different result would probably have been reached absent errors at trial.[FN35]

FN32. State v. Tew, 54 Wis.2d 361, 364, 195 N.W.2d 615, 617 (1972); Rasmussen v. Electric Ry. and Transport Co., 259 Wis. 130, 134, 47 N.W.2d 730, 732, rehearing denied, mandate modified on other grounds, 259 Wis. 130, 49 N.W.2d 272 (1951).

FN33. Oseman v. State, 32 Wis.2d 523, 528, 145 N.W.2d 766, 770 (1966).

FN34. Jax v. Jax, 73 Wis.2d 572, 582, 243 N.W.2d 831, 837 (1976). See also secs. 903.01 and 805.18, Stats.

FN35. Thompson, supra note 28, 77 Wis.2d at 452, 253 N.W.2d at 64; Krauth v. Quinn, 69 Wis.2d 280, 291, 230 N.W.2d 839, 845 (1975).

[19] While the prejudice created by each error in isolation may not be sufficient to justify a new trial, we find that the cumulative effect of these errors were of substantial prejudice to Albright's case. The jury might well have reached a different verdict absent improper references that Albright failed a preliminary breath test, carried *678 weapons of violence, and gave biased testimony, as compared to testimony by an unbiased officer with no stake in the outcome. These prejudicial inferences take on added impact when considered with the equivocal evidence of Albright's intoxication, which included the moderate odor of alcohol and the mixed results of the balance and coordination tests. We also note that the jury voted 10-2 for conviction.

While we recognize the trial court's discretion in granting or refusing motions for a new trial in the interests of justice, scrutiny of the record indicates that the cumulative effect of the errors at trial compels us to grant Albright a new trial.

We reverse that portion of the order denying

Albright's motion for a new trial. The portion of the order denying Albright's motion for a directed verdict is affirmed. Judgment is vacated.

Order affirmed in part and reversed in part; judgment vacated and cause remanded for a new trial.

Wis.App., 1980.
State v. Albright
98 Wis.2d 663, 298 N.W.2d 196, 26 A.L.R.4th 1100

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APPENDIX "O"

33 Misc.3d 181, 927 N.Y.S.2d 586, 2011 N.Y. Slip Op. 21250
(Cite as: 33 Misc.3d 181, 927 N.Y.S.2d 586)

Criminal Court, City of New York,
New York County.
The PEOPLE of the State of New York
v.
Kareem JONES, Defendant.

July 18, 2011.

Background: In prosecution for driving while intoxicated and ability impaired by consumption of alcohol, the People moved in limine, over defendant's objection, to introduce evidence that at time of his arrest, defendant had .09 of one percent by weight of alcohol in his blood, as established by "portable breath test" (PBT) administered at the scene.

Holding: The Criminal Court, City of New York, Robert M. Mandelbaum, J., held that results of otherwise-reliable chemical test were not rendered inadmissible just because device used to perform the test was capable of being moved.

Motion granted.

West Headnotes

|1| Automobiles 48A ⚿411

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak411 k. In general. Most Cited Cases

Automobiles 48A ⚿424

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Foundation or Predicate
48Ak424 k. Reliability of particular testing devices. Most Cited Cases
Portability or immobility of breath testing device is not factor relevant to admissibility of its results; rather, evidence of defendant's blood alcohol content is admissible whenever obtained pursuant to chemical test that meets foundational requirements for admissibility, namely, that testing device (1) is of type that, when operated correctly, ordinarily produces scientifically reliable results and (2) was both in good working order and properly used on date in question.

|2| Automobiles 48A ⚿411

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak411 k. In general. Most Cited Cases
Reliability of standard breath testing instrument is shown when device is included on Conforming Products List of Evidential Breath Alcohol Measurement Devices as established by United States Department of Transportation/National Highway Traffic Safety Administration (NHTSA). 10 NYCRR 59.4(b).

|3| Automobiles 48A ⚿411

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak411 k. In general. Most Cited Cases
Inclusion of device on Conforming Products List of Evidential Breath Alcohol Measurement Devices in itself establishes general acceptance of reliability and accuracy of its results and therefore dispenses with need to present foundational evidence thereof through expert testimony. 10 NYCRR 59.4(b).

|4| Automobiles 48A ⚿411

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak411 k. In general. Most Cited Cases
Results of otherwise-reliable chemical test for blood alcohol content were not rendered inadmissible just because device used to perform test at scene of arrest was capable of being moved; device was on Conforming Products List of Evidential

Breath Alcohol Measurement Devices, and was approved for both "Mobile" and "Nonmobile" use. 10 NYCRR 59.4(b).

|5| Automobiles 48A ⚿424

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Foundation or Predicate
48Ak424 k. Reliability of particular testing devices. Most Cited Cases
To establish reliability of results of breath testing device, the People must demonstrate that device has been tested within reasonable period in relation to defendant's test and found to be properly calibrated and in working order.

|6| Automobiles 48A ⚿424

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Foundation or Predicate
48Ak424 k. Reliability of particular testing devices. Most Cited Cases
The People established reliability of results of breath testing device, by offering two certified calibration/maintenance reports demonstrating that machine was determined to be functioning within appropriate margin of error within a few weeks before, and again approximately four months after, defendant's arrest. McKinney's CPLR 4518(a, c); 10 NYCRR 59.4(c) .

|7| Automobiles 48A ⚿423

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Foundation or Predicate
48Ak423 k. Competency of technician. Most Cited Cases
To establish reliability of results of breath testing device, the People must establish that properly functioning testing device was properly operated on occasion in question by qualified administrator.

|8| Automobiles 48A ⚿422.1

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Foundation or Predicate
48Ak422.1 k. In general. Most Cited Cases

Automobiles 48A ⚿423

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Foundation or Predicate
48Ak423 k. Competency of technician. Most Cited Cases
The People established that breath testing device was properly operated in connection with defendant's arrest, through testimony of officer who administered the test as to her training and her testimony that she had administered it to defendant in accordance with its specifications.

|9| Automobiles 48A ⚿422.1

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Foundation or Predicate
48Ak422.1 k. In general. Most Cited Cases
Evidence of analysis of chemical test for blood alcohol content may be introduced by individual other than person possessing permit issued by Department of Health. McKinney's Vehicle and Traffic Law § § 1194(4)(c); 10 NYCRR 59.7.

|10| Automobiles 48A ⚿422.1

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Foundation or Predicate
48Ak422.1 k. In general. Most Cited

Cases

Fact that officer who administered blood alcohol test may not have maintained continuous observation of defendant for 15 minutes prior to test did not render its results inadmissible, but went only to weight to be afforded the results. 10 NYCRR 59.5(b).

**587 Steven Banks, Esq., The Legal Aid Society (Rachel Levy of counsel), for the Defendant.

Cyrus R. Vance, Jr., District Attorney, New York County (Jorge Camacho of counsel), for the People.

ROBERT M. MANDELBAUM, J.

*182 The results of an otherwise-reliable chemical test are not rendered inadmissible**588 at an intoxicated-driving trial just because the device used to perform the test is capable of being moved.

Defendant was tried before a jury on charges of driving while intoxicated and ability impaired by the consumption of alcohol (*see* Vehicle and Traffic Law § 1192[3], [1]). Prior to the commencement of trial, the People moved in limine, over defendant's objection, to introduce evidence that at the time of his arrest, defendant had .09 of one percent by weight of alcohol in his blood, as established by a "portable breath test" (PBT) administered at the scene. Upon hearing argument by both parties, the court rendered an oral decision admitting the evidence. This opinion serves to explain the basis for the court's prior ruling.

[1] *183 The portability or immobility of a breath testing device is not a factor relevant to the admissibility of its results. Rather, evidence of a defendant's blood alcohol content is admissible whenever obtained pursuant to a chemical test that meets the foundational requirements for admissibility—namely, that the testing device (1) is of a type that, when operated correctly, ordinarily produces scientifically reliable results and (2) was both in good working order and properly used on the date in question (*see People v. Mertz,* 68 N.Y.2d 136, 148, 506 N.Y.S.2d 290, 497 N.E.2d 657 [1986]). Indeed,

> "[u]pon the trial of any action or proceeding arising out of actions alleged to have been committed by any person arrested for a violation of any subdivision of [Vehicle and Traffic Law § 1192], the court shall admit evidence of the amount of alcohol or drugs in the defendant's blood as shown by a test administered pursuant to the provisions of [Vehicle and Traffic Law § 1194]" (Vehicle and Traffic Law § 1195[1]).

[2] Irrespective of whether it is portable, the reliability of a standard breath testing instrument is shown when the device is included on the Conforming Products List of Evidential Breath Alcohol Measurement Devices (the "List") as established by theUnitedStatesDepartmentofTransportation/National Highway Traffic Safety Administration (NHTSA) (*see* 10 NYCRR 59.4[b]; 75 Fed. Reg. 11,624 [Mar. 11, 2010]; *see also* Vehicle and Traffic Law § 1194[4][c] [Department of Health "shall issue and file rules and regulations approving satisfactory techniques or methods of conducting chemical analyses of a person's blood, urine, breath or saliva"]; 10 NYCRR 59.4[a] [breath analysis instruments found on the List are approved by the Commissioner of Health for use in New York State]; 10 NYCRR 59.5[a] [breath sample "shall be analyzed with breath analysis instruments meeting the criteria set forth in (10 NYCRR 59.4)"]).

[3][4] Inclusion of a testing device on the List in itself establishes the general acceptance of the reliability and accuracy of its results and therefore dispenses with the need to present "foundational evidence thereof through expert testimony" (*People v. Hampe,* 181 A.D.2d 238, 240, 585 N.Y.S.2d 861 [3d Dept. 1992]; *cf. Frye v. United States,* 293 F. 1013 [D.C. Cir.1923]). And the Intoximeter Alco-Sensor FST used here to measure defendant's blood alcohol content is, in fact, on the List and, therefore, approved for use in New York State (*see* 10 NYCRR 59.4[a], [b]; *18475 Fed. Reg. 11,624). FN1 Indeed, the **589 List expressly provides that

the FST is approved for both "Mobile" and "Nonmobile" use (*see* 10 NYCRR 59.4[b]; 75 Fed. Reg. 11,624; *see also* 69 Fed. Reg. 42,237 [July 14, 2004] [adding FST to the List and noting that it has "been evaluated and found to meet the model specifications ... for mobile and non-mobile use"; identifying the FST as "a hand held device intended for use in stationary or roadside operation"]; 58 Fed. Reg. 48,705, model specifications 1, 2.1 [Sept. 17, 1993] [establishing identical performance criteria and conformance testing methods for mobile ("designed to be transported to non-fixed operational sites in the field" [58 Fed. Reg. 48,705, model specification 2.1.1]) and nonmobile ("designed to be operated at a fixed location" [58 Fed. Reg. 48,705, model specification 2.1.2]) evidential breath testers]).

> FN1. The FST conforms to both the Model Specifications for Evidential Breath Alcohol Measurement Devices (58 Fed. Reg. 48,705 [Sept. 17, 1993]) and the Model Specifications for Screening Devices to Measure Alcohol in Bodily Fluids (73 Fed. Reg. 16,956 [Mar. 31, 2008]) (*see* 75 Fed. Reg. 11,624 n *).

Contrary to defendant's contention, *People v. Thomas*, 70 N.Y.2d 823, 523 N.Y.S.2d 437, 517 N.E.2d 1323 [1987] did not hold that "portable breath tests"—versus stationary breath testing devices maintained at precinct houses—are always inadmissible, or that there is something inherently unreliable about instruments that can be moved. Rather, in *Thomas* the Court of Appeals held simply that because in that case evidence as to the results of the PBT—an Alco–Sensor of unspecified model—was offered for the stated purpose of proving that the arresting officer had reasonable grounds to give defendant a breathalyzer test, the evidence should have been excluded as irrelevant, since reasonable cause to give a breathalyzer test is not an element of the crime of driving while intoxicated (*see Thomas*, 70 N.Y.2d at 825, 523 N.Y.S.2d 437, 517 N.E.2d 1323).

And although the Appellate Division in *Thomas* stated that the (unspecified model) Alco–Sensor test was not admissible as evidence of intoxication, that Court based its conclusion on the People's failure at trial to lay a proper foundation showing the test's reliability for that purpose. As the Court explained, "No expert testimony was submitted as to the accuracy of this device and the scientific principles on which it is based. The record is completely barren of scientific evidence which would establish the reliability of the test" (*People v. Thomas*, 121 A.D.2d 73, 76, 509 N.Y.S.2d 668 [4th Dept. 1986]). Here, however, the record is not barren of evidence to establish the reliability of the FST. Rather, its reliability is shown by its inclusion on the List and resulting approval***185** by the Commissioner of Health for use in New York, obviating the need for expert testimony (*see People v. Lent*, 29 Misc.3d 14, 16–17, 908 N.Y.S.2d 804 [App. Term, 2d Dept. 2010] ["The scientific accuracy of breath analysis instruments approved by the New York State Department of Health is no longer open to question" (internal quotation marks and citations omitted)]; *Hampe*, 181 A.D.2d at 240, 585 N.Y.S.2d 861; *see also People v. Boscic*, 15 N.Y.3d 494, 499, 912 N.Y.S.2d 556, 938 N.E.2d 989 [2010] [noting that the Department of Health "has been charged by the Legislature to evaluate and approve specific models of breath-alcohol testing machines" (citation omitted)]).

Nor are PBTs rendered inadmissible by virtue of Vehicle and Traffic Law § 1194. Indeed, section 1194 has nothing to do with the admissibility of trial evidence—as opposed to section 1195, which expressly requires that the court "admit evidence of the amount of alcohol or drugs in the defendant's blood as shown by a test administered pursuant to the provisions of [Vehicle and Traffic Law § 1194]" (****590**Vehicle and Traffic Law § 1195[1]). Section 1194, entitled "Arrest and testing," simply establishes the circumstances under which blood alcohol testing is authorized with respect to persons suspected of driving while intoxicated or impaired, and sets forth the procedures to be followed for

such authorized testing.

That Vehicle and Traffic Law § 1194 refers separately to field testing and to chemical tests (*see* Vehicle and Traffic Law § 1194[1][b] ["Field testing"]; Vehicle and Traffic Law § 1194[2] ["Chemical tests"]) cannot reasonably be read to mean that a test cannot constitute a chemical test simply because it takes place in the field. Rather, Vehicle and Traffic Law § 1194(1)(b) ("Field testing") provides simply that a suspect must submit to a "breath test"—that is, a screening test—and that if such test indicates that the motorist "has consumed alcohol," the motorist may be asked to submit to a chemical test. In other words, the "breath test" contemplated by Vehicle and Traffic Law § 1194(1)(b) is a test that reliably shows only that some alcohol has been consumed—not how much (*see* Carrieri, Practice Commentaries, McKinney's Cons Laws of NY, Book 62A, Vehicle and Traffic Law § 1194, at 91 [1996 ed] ["Th(e) breath test, sometimes called a screening test, involves a portable machine which is used by the police on the road to determine whether there is alcohol present in the motorist being tested. This screening or breath test machine is used as a pass/fail test and is basically reliable for the determination of some presence of alcohol in a person's blood but not the actual percentage or *186 concentration"]). Vehicle and Traffic Law § 1194(2), by contrast, governs chemical tests, which may include "one or more of the following: *breath,* blood, urine, or saliva" (Vehicle and Traffic Law § 1194[2][a] [emphasis added]).

The FST has been determined to be reliable as an "evidential breath tester"—that is, a device which "measure[s] the alcohol content of deep lung breath samples with sufficient accuracy for evidential purposes" (58 Fed. Reg. 48,705, model specification 1). Simply put, the FST, though portable, is not merely a "breath test"; it is a full-fledged chemical test as contemplated by Vehicle and Traffic Law § 1194(2) (*see* 10 NYCRR 59.1[c] [defining "(c)hemical tests/analyses" to "include breath tests conducted on breath analysis instruments approved by the (Commissioner of Health) in accordance with (10 NYCRR 59.4)"]).

To the extent that *People v. Santana,* 31 Misc.3d 1232[A], 2011 N.Y. Slip Op. 50962[U], 2011 WL 2119503 [Crim. Ct., N.Y. County 2011] and *People v. Reed,* 5 Misc.3d 1032[A], 2004 N.Y. Slip Op. 51662[U], 2004 WL 2954905 [Sup. Ct., Bronx County 2004] hold to the contrary, this court respectfully declines to follow them.

[5][6] Of course, foundational evidence to establish the reliability of the results of the particular FST administered to defendant is also a necessary predicate to admissibility of the People's proffered evidence in this case (*see e.g. Boscic,* 15 N.Y.3d at 497, 912 N.Y.S.2d 556, 938 N.E.2d 989). First, just as with any non-portable breath testing device, the People must demonstrate that the machine "had been tested within a reasonable period in relation to defendant's test and found to be properly calibrated and in working order" (*Mertz,* 68 N.Y.2d at 148, 506 N.Y.S.2d 290, 497 N.E.2d 657 [citations omitted]).[FN2] **591 Here, the People offered two certified calibration/maintenance reports (*see* CPLR 4518[a], [c]), demonstrating that the machine was determined to be functioning within an appropriate margin of error on July 26, 2010, and December 20, 2010 [FN3] —within a few weeks before, and again approximately four months after, defendant's arrest *187 on August 18, 2010 (*see Boscic,* 15 N.Y.3d 494, 912 N.Y.S.2d 556, 938 N.E.2d 989 [no strict six-month calibration rule required for admissibility of breath testing evidence]; *see also* 10 NYCRR 59.4[c] [maintenance of a breath analysis instrument shall include "calibration at a frequency as recommended by the device manufacturer or, minimally, annually"]). These reports "adequately assured that the instrument was capable of producing accurate information when defendant was tested" (*Boscic,* 15 N.Y.3d at 500, 912 N.Y.S.2d 556, 938 N.E.2d 989).

FN2. Calibration "means the activity of verifying that a value generated by the in-

strument is in acceptable agreement with the assigned value for a traceable and/or certified reference standard, including any adjustment to the instrument to bring it into acceptable agreement" (10 NYCRR 59.1 [l]; *see also Boscic,* 15 N.Y.3d at 497, 912 N.Y.S.2d 556, 938 N.E.2d 989 ["calibrated" defined as "checked and adjusted by a trained technician"]).

FN3. Although the July analysis reflected a calibrated reading of .083% and the December analysis, a reading of .084%—a difference of .001%— both concluded, "No Adjustment Needed Within Range" (*cf.* 10 NYCRR 59.5 [d] ["The result of an analysis of a reference standard with an alcoholic content greater than or equal to 0.08 percent must agree with the reference standard value within the limits of plus or minus 0.01 percent weight per volume, or such limits as set by the (Commissioner of Health)"]).

[7][8][9] Second, the People must establish that this properly functioning testing device was properly operated on the occasion in question by a qualified administrator of the test. Here, the officer who administered the test to defendant sufficiently testified as to the training she had received regarding the proper operation of the FST and that she had administered it to defendant in accordance with its specifications.[FN4]

FN4. Although proof that a chemical test was administered by an individual possessing a permit issued by the Department of Health (*see* 10 NYCRR 59.7) is "presumptive evidence that the examination was properly given" (Vehicle and Traffic Law § 1194[4][c]), the officer here testified that she had no such permit. Nevertheless, this provision "do[es] not prohibit the introduction as evidence of an analysis made by an individual other than a person possessing a permit issued by the [Department of Health]" (*id.*).

[10] Finally, that the officer who administered the test may not have maintained a continuous observation of defendant for 15 minutes prior to the test does not render the results inadmissible (*cf.* 10 NYCRR 59.5[b] [subject of breath testing "shall be observed for at least 15 minutes prior to the collection of the breath sample, during which period the subject must not have ingested alcoholic beverages or other fluids, regurgitated, vomited, eaten, or smoked, or have placed anything in his/her mouth"]). A failure to continuously observe for the requisite period of time [FN5] "goes only to the weight to be afforded the test result, not its admissibility" (*People v. Schuessler,* 14 Misc.3d 30, 32, 829 N.Y.S.2d 808 [App. Term, 2d Dept. 2006]; *accord Lent,* 29 Misc.3d at 21–22, 908 N.Y.S.2d 804; *People v. Lebrecht,* 13 Misc.3d 45, 51, 823 N.Y.S.2d 824 [App. Term, 2d Dept. 2006] ["the observation requirement is not **592 strictly construed: Neither the statute, the regulations nor the exercise of reason *188 call for a constant vigil" (internal quotation marks and citations omitted)]; *see also People v. Terrance,* 120 A.D.2d 805, 807, 501 N.Y.S.2d 927 [3d Dept. 1986]).

FN5. Although the regulation mandates an observation period of at least 15 minutes (*see* 10 NYCRR 59.5[b]), the New York City Police Department appears to have adopted a procedure requiring that the subject be "under direct observation for at least 20 minutes" (Intoxilyzer Operational Checklist, step 2, N.Y. City Police Dept Arresting Officer's Report—IDTU [PD 213–151]; *see also* NY City Police Dept Highway District IDTU Procedural Guide ¶ 7; *see generally* N.Y. City Police Dept. Patrol Guide 208–40).

Accordingly, the People's motion to introduce evidence of defendant's blood alcohol content obtained at the scene of his arrest must be granted.

N.Y.City Crim.Ct.,2011.

33 Misc.3d 181, 927 N.Y.S.2d 586, 2011 N.Y. Slip Op. 21250
(Cite as: 33 Misc.3d 181, 927 N.Y.S.2d 586)

People v. Jones
33 Misc.3d 181, 927 N.Y.S.2d 586, 2011 N.Y. Slip Op. 21250

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APPENDIX "P"

36 Misc.3d 682, 946 N.Y.S.2d 430, 2012 N.Y. Slip Op. 22137
(Cite as: 36 Misc.3d 682, 946 N.Y.S.2d 430)

C

Supreme Court, New York County, New York.
The PEOPLE of the State of New York
v.
Mustaf ALIAJ, Defendant.

May 21, 2012.

Background: Defendant was charged with driving while intoxicated (DWI) per se, DWI "common law," and driving while ability impaired (DWAI), based in part on results of a portable breath test (PBT) administered at scene of his traffic stop, but after the People's application to admit results of the PBT was denied, defendant was acquitted of the two DWI counts in a bench trial, but convicted of the DWAI count.

Holdings: In explaining its evidentiary decision, the Supreme Court, New York County, Daniel P. Conviser, J., held that:
(1) factors weighed against admitting PBT results, and
(2) evidence was insufficient to prove beyond a reasonable doubt that defendant's blood-alcohol content (BAC) was over the legal limit at time he was driving.

Ordered accordingly.

West Headnotes

|1| Automobiles 48A ⚿411

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak411 k. In general. Most Cited Cases

Automobiles 48A ⚿419

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak417 Grounds for Test
48Ak419 k. Grounds or cause; necessity for arrest. Most Cited Cases

Automobiles 48A ⚿422.1

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Foundation or Predicate
48Ak422.1 k. In general. Most Cited Cases

Automobiles 48A ⚿424

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Foundation or Predicate
48Ak424 k. Reliability of particular testing devices. Most Cited Cases
When giving a portable breath test (PBT) in the field to measure a driver's blood-alcohol content, in order to overcome presumption that chemical tests given in the field are inadmissible, the device used must be on the approved list of alcohol measurement devices, unless the People demonstrate the reliability of another device at trial, and the People must show that the machine was properly calibrated, that the test was properly given, and that the police had reasonable grounds, when test was given, to believe that the driver had committed an alcohol-related violation.

|2| Automobiles 48A ⚿422.1

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Foundation or Predicate
48Ak422.1 k. In general. Most Cited Cases
Fact that officer conducting portable breath test (PBT) at scene of traffic stop failed to abide by rule requiring that the test subject be observed for 20 minutes prior to being tested weighed against admitting test results in prosecution for driving while

intoxicated (DWI).

|3| Automobiles 48A ⚿423

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Foundation or Predicate
48Ak423 k. Competency of technician. Most Cited Cases
Fact that officer conducting portable breath test (PBT) at scene of traffic stop had only taken a one-day course on blood-alcohol tests 14 years previously weighed against admitting test results in prosecution for driving while intoxicated (DWI).

|4| Automobiles 48A ⚿411

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak411 k. In general. Most Cited Cases
Fact that machine used in conducting portable breath test (PBT) at scene of traffic stop lacked various safeguards, found in another machine, intended to ensure accurate results, weighed against admitting test results in prosecution for driving while intoxicated (DWI).

|5| Automobiles 48A ⚿422.1

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Foundation or Predicate
48Ak422.1 k. In general. Most Cited Cases
Procedure followed by officer conducting portable breath test (PBT) at scene of traffic stop weighed in favor of admitting test results in prosecution for driving while intoxicated (DWI).

|6| Automobiles 48A ⚿422.1

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Foundation or Predicate
48Ak422.1 k. In general. Most Cited Cases

Automobiles 48A ⚿424

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Foundation or Predicate
48Ak424 k. Reliability of particular testing devices. Most Cited Cases
Lack of videotapes or other records of portable breath test (PBT) administered to driver, including the self-calibration test done by PBT machine at scene of traffic stop, weighed against admitting test results in prosecution for driving while intoxicated (DWI).

|7| Automobiles 48A ⚿355(6)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak355 Weight and Sufficiency of Evidence
48Ak355(6) k. Driving while intoxicated. Most Cited Cases
Evidence that defendant, when tested at precinct, registered 1/1000th of one percentum of blood-alcohol content (BAC) above legal limit for per se intoxication was insufficient to prove beyond a reasonable doubt that his BAC was over the legal limit at time he was driving, as required in prosecution for driving while intoxicated (DWI), where test was given 1-1/2 hours after defendant drove.

****431** New York County District Attorney Cyrus R. Vance, Jr. (Robert Wainwright, of counsel), for the People.

Peter Koulikordis, for the Defendant.

DANIEL P. CONVISER, J.
***683** Multiple trial courts have wrestled with the question of whether the results of a test which has been approved as valid to measure a defendant's

blood alcohol content but is administered*684 at the scene of a vehicle stop, rather than at a police precinct with all of the traditional protocols of a chemical test, is admissible at trial. At least four trial courts have held that the results of such "portable breath tests" ("PBT's") are never admissible at trial. *See People v. Reed,* 5 Misc.3d 1032[A], 2004 N.Y. Slip Op. 51662 [U], 2004 WL 2954905 (Bronx County Supreme Court, Tallmer, J.); *People v. Santana,* 31 Misc.3d 1232[A], 2011 N.Y. Slip Op. 50962[U], 2011 WL 2119503 (New York City Criminal Court, Simpson, J.); *People v. Schook,* 16 Misc.3d 1113 [A], 2007 N.Y. Slip Op. 51311[U], 2007 WL 1890093 (Suffolk County District Court, Alamia, J.); *People v. Harper,* 18 Misc.3d 1107[A], 2007 N.Y. Slip Op. 52463[U], 2007 WL 4571180 (Dutchess County Justice Court, Steinberg, J.). At least two other courts have held that such tests are admissible, so long **432 as proper foundational requirements are met. *See People v. Jones,* 33 Misc.3d 181, 927 N.Y.S.2d 586 (New York County Criminal Court 2011, Mandelbaum, J.); *People v. Hargobind,* 34 Misc.3d 1237[A], 2012 N.Y. Slip Op. 50450[U], 2012 WL 762897 (New York County Criminal Court, Gerstein, J.).

This Court proposes a third alternative. In the Court's view, the provisions of the Vehicle and Traffic Law (the "VTL") and the inherent difficulty of producing reliable chemical test results at the scene of a car stop indicate that such tests should be presumptively inadmissible to prove a defendant's guilt at trial. However, where the People can meet the threshold requirements for the admissibility of such evidence and, in addition, prove by clear and convincing evidence that such results bear the hallmarks of a reliable chemical test, those results should be admitted. The Court proposes a five factor test to evaluate whether that second requirement has been met. In this case, although the People met the threshold requirements for the admissibility of the PBT, the People fell far short of establishing that the PBT bore the indicia of a reliable chemical test. For that reason, the People's application to admit the results of that test at trial were denied.[FN1]

FN1. The Court initially ruled on this issue from the bench, with an indication that this written Decision would follow. The Defendant in this case was charged with Driving While Intoxicated; Per Se (driving with .08 of one percentum or more of alcohol in his blood, VTL § 1192[2]); Driving While Intoxicated "common law" (VTL § 1192[3]) and Driving While Ability Impaired (VTL § 1192[1]). After a bench trial conducted by this Court, he was acquitted of the two Driving While Intoxicated counts and convicted of the Driving While Impaired count. The instant Statement of Facts focuses on facts relevant to the admissibility of the PBT.

*685 *STATEMENT OF FACTS*

Testimony of Officer Jonathan Re

The Defendant was arrested for driving while intoxicated at 4:17 A.M. on July 11, 2010 in the vicinity of 16th Street and the West Side Highway in New York County by Officer Jonathan Re of the NYPD. Officer Re is a 14 year NYPD veteran. He testified that he was in a marked patrol car when he observed the vehicle the Defendant was driving go through a stop sign at Gansevoort Street and 10th Avenue in New York County at approximately 4:00 A.M. This location is in the "Meat Packing District" of lower Manhattan, an area which contains numerous clubs and bars. The Defendant's vehicle was traveling at approximately 10–15 miles per hour at the time.

The Defendant then made a left turn onto 10th Avenue and a "hard right" onto the West Side Highway, going northbound. Officer Re said that the Defendant's driving with respect to this hard right turn could have resulted in a summons for dangerous driving since he appeared to have almost run into a highway barrier prior to turning right.[FN2] Officer Re and his partner Officer George Mc-

Fall activated their lights and sirens and the Defendant was pulled over a couple of blocks away. He testified that he did not suspect the Defendant was under the influence or alcohol or drugs when he initially pursued him and that the Defendant's vehicle was generally operating normally.

> FN2. The Defendant was charged with three alcohol related offenses but not cited for running a stop sign or dangerous driving. Officer Re's paperwork reflected the DWI and stop sign violations, but had no notations regarding dangerous driving.

Officer Re asked the Defendant for his license and registration and the Defendant complied. Upon being asked whether he had been drinking or was tired the Defendant**433 responded negatively. Officer Re detected the "strong odor" of alcohol. Mr. Aliaj was asked to step out of the vehicle and walk to the back of his car and asked whether he wanted to take a breath test, which the Defendant agreed to. Prior to the breath test, Officer Re again asked the Defendant if he had consumed alcohol and this time the Defendant said he had consumed a "couple of drinks". He also noticed at this point that the Defendant had watery and red eyes.

The breath test device Officer Re used was the "CMI portable SD2" (hereinafter the "SD2") which he said he had used about 65 *686 times before the instant arrest.[FN3] He received training in the use of this device in a one day course during his first year as a police officer in 1998. Officer Re testified that he had never received any subsequent training in the use of the device, had never been trained in the use of the Intoxilyzer machine (discussed *infra*) and was not qualified to give a test using that or any other stationary alcohol measurement machine. He testified that he did not recall whether his 1998 training addressed the need to observe a subject for 15–20 minutes before measuring blood-alcohol content. He also admitted that he was not now aware of any such requirement. He said that he did not recall whether he had received any instruction during his 1998 course on the impact of Radio Frequency Interference ("RFI") on breath test machines and that he was not qualified to give a physical coordination test.

> FN3. The transcript indicates that Officer Re referred to this devise as the "DS2." The People point out, however, that the device is actually called the "SD2." The correct name is used here.

The SD2 has a button which indicates whether it is calibrated. Officer Re testified that if this device reads anywhere from a .000 to a .003, it is properly calibrated. The machine has a yellow and a green light. When the yellow light is illuminated, it means that the subject is blowing into the instrument. The green light will go off when the subject has blown for the appropriate amount of time, which is 8–10 seconds. Once that green light goes off, the operator pushes a button and the result is registered. A subject blows into a straw which is unsealed before it is used. Officer Re testified that all of these procedures were properly followed.

Officer Re testified that he did not recall what the self-calibration record of the machine was on the date Mr. Aliaj took the test and had not made any record of it. He said the .000 and .003 were "all equivalent".[FN4] The procedures he used in administering the SD2 test in this case were the same procedures he had used throughout his career. He said that he did not check prior to going on duty whether the SD2 machine had been calibrated within a reasonable period of time but did recall taking the machine to the Highway District during the year he arrested the Defendant (presumably to be calibrated).

> FN4. May 3, 2012 Trial Transcript, p. 87, ll. 22–23

Approximately 5 minutes elapsed between the car stop at 4:00 A.M. and the SD2 test at 4:05 A.M. Officer Re testified that he did not ask Mr. Aliaj how he was feeling or whether he had *687 thrown up, burped or regurgitated prior to having him walk to the back of his vehicle for the test. He didn't re-

call having ever received any training on those issues. Officer Re observed the Defendant during this five minute period but not for the purpose of detecting anything which might have impacted the test result. He did not observe **434 the Defendant belch or vomit during that time and did not remove any alcoholic beverages from Mr. Aliaj's car.

The Defendant registered a .11 on the test and was then placed under arrest. Mr. Aliaj had two cell phones with him when he was arrested. Officer Re had a two-way police radio on him at the time. The Defendant was later transported to the police precinct, given *Miranda* warnings, answered questions, took three physical coordination tests and submitted to a chemical test using the Intoxilyzer 5000. The Intoxilyzer test occurred at 5:30 A.M. and resulted in a reading of .081. A videotape was made of the Defendant's performance on the physical coordination tests and the Intoxilyzer test. In the Court's view, the Defendant's performance on two of the three physical coordination tests was flawless. He made one mistake indicative of alcohol impairment on the third test. At the precinct, Mr. Aliaj reported that he had consumed two beers between 12:00 and 1:30 A.M. He said that he was in good health and did not require any medical treatment. Officer Re opined that the Defendant was under the influence of alcohol on the morning of his arrest.

Officer Re testified that prior to taking an Intoxilyzer test, a subject must be observed for 20 minutes. He said that normally the arresting officer (in this case, Officer Re) would do arrest paperwork at the precinct and the arresting officer's partner (in this case Officer McFall) would do the 20 minute observation. He said he believed that Officer McFall had observed the Defendant for 20 minutes prior to the Intoxilyzer test but did not watch Officer McFall to see if that had occurred. Officer McFall did not testify at the trial.

Officer Re testified that he kept the SD2 in a bag in the back seat of his patrol car and did not recall the last time he had used it. The machine belongs to the precinct and is used in common by precinct officers. The People introduced two reports regarding the SD2 machine which indicated that it had been properly calibrated on April 22, 2010 and March 7, 2011. Officer Re testified that the device needed to be re-calibrated once a year. He said that the Defendant did not have a number of other possible signs of intoxication during his encounter with him. *688 His clothes were not disheveled, he was not belligerent, he did not stagger or stumble on this feet, he did not slur his words and he was cooperative at all times.

Testimony of Officer Manuel Almanzar

Officer Manuel Almanzar testified concerning the Intoxilyzer 5000 test he gave the Defendant at the 7th Precinct as an officer with the Intoxicated Driver Testing Unit ("IDTU"). In contrast to the 14–year–old one day training course Officer Re received, Officer Almanzar said that he had received a one week training course at the police lab to be certified as a breath analysis operator in 2007, had subsequently passed an examination and was then certified by the New York State Department of Health as a Breath Analysis Operator. This certification lasted for two years, was then renewed and was valid at the time he gave the Intoxilyzer test. He was able to explain the workings of the Intoxilyzer 5000 in detail. He took another course on the technology in 2011 (after the arrest in this case). In order to be re-certified, an operator must perform a certain number of breath tests.

The Intoxilyzer performs a self-calibration test when it is turned on. The People introduced a record of this self-calibration test and the Defendant's test result. The People also introduced records of two calibration tests and two field inspection reports concerning the machine on dates other than the arrest date. Officer Almanzar **435 testified that he directed Officer Re to observe the Defendant for 20 minutes prior to taking the Intoxilyzer test. Officer Almanzar said that a subject is observed to ensure that he does not have alcohol in his mouth and that if a subject eats, drinks, smokes, burps or vomits, the 20 minute period must start

again. Officer Almanzar learned about these issues during his training course. He understood that an officer watching a suspect could not be distracted or leave the observation to attend to another task.

Officer Almanzar said that he goes through a 13 point check list prior to administering the Intoxilyzer test. If the machine does not properly self-calibrate, it cannot function. He said that the Intoxilyzer 5000 could be subject to Radio Frequency Interference ("RFI") if a radio was actually answered while transmitting information. Persons entering the IDTU were instructed to turn off radios and have cell phones on vibrate.

Testimony of Officer Adrian Arav

NYPD Officer Arav testified that he was a state certified technical supervisor who was responsible for health department cards, the testing of machines and the training of officers ***689** at the IDTU. He said he had been with the IDTU for four years. He said that the 28 Intoxilyzer 5000 machines maintained by the NYPD are checked every 5–14 days and are calibrated every six months. Officer Arav testified that when the Intoxilyzer is turned on, it performs a self diagnosis check and then goes through a sequence of events which includes three "air blank" checks to ensure that there is nothing in the room which might skew the test results.

He said that in New York a subject will take an alcohol test only once. A person's temperature can affect a blood alcohol reading. For each rise of 1 degree Celsius, the blood alcohol reading will increase by .007. A person with a temperature of 100.4 degrees Fahrenheit would have this .007 rise in blood alcohol as compared to a person's normal temperature. He said that the Intoxilyzer 5000 can detect a spike in radio frequencies and if that occurs a test is aborted, an alarm sounds and a printout is generated because the test is "RFI inhibited". This occurs if a transmission is made on an officer's radio, but will not occur if a radio transmission is received. Cell phones won't cause such a spike but walkie-talkie radios can.

Testimony of Herbert Leckie

Herbert Leckie testified as an expert witness on behalf of the Defendant in, *inter alia,* breath analysis and the Intoxilyzer 5000. He has a law degree and is a former New Jersey State Trooper who trained other officers in performing alcohol breath tests. He outlined his extensive training and professional experience and currently works as a DWI consultant.

He said that the 20 minute rule was a "comerstone" in breath testing. Various actions like belching or regurgitating would bring alcohol vapors into the mouth and could provide a skewed reading. He said the observation must be continuous and uninterrupted and cannot break for even a second or two, since a person could belch within that time. Adherence to the 20 minute rule was particularly important in a jurisdiction like New York which only has subjects take one breath test. In jurisdictions where two tests are performed, the two tests provide a safeguard to ensure that a temporary belch does not skew a sample. He said that a blood alcohol test without the 20 minute observation period was unreliable. He was not aware of features on the Intoxilyzer 5000 which would provide safeguards regarding the detection of mouth alcohol vs. deep lung alcohol. He said that from his review of all of the discovery materials in the case, ****436** he did not believe that Mr. Aliaj was under the influence of alcohol on the arrest date.

***690** Mr. Leckie explained the differences between a subject's blood-alcohol content at the time of driving as opposed to the time a blood-alcohol test was given, which in this case was 1 1/2 hours later than the car stop. If a person consumes a large amount of alcohol just prior to being stopped, the subject may be more impaired at the time of a later test than at the time the subject was driving. Generally, a drink is absorbed into a person's bloodstream on an empty stomach within 30 minutes. Food in the stomach can extend that period to up to 90 minutes. Alcohol is "burned off" by a person at a rate of roughly 15 percent per hour.

So, depending upon many variables, the result of a blood alcohol test given a period of time after a subject is driving may be unreliable. The Court found the factual testimony of all of the witnesses in this case to be credible although the Court did not agree with certain conclusions various witnesses arrived at.[FN5]

> FN5. The Court did not credit Officer Re's conclusion that the Defendant was driving recklessly when he made a right turn onto the West Side Highway, Mr. Leckie's opinion that the Defendant was not under the influence of alcohol or certain assessments Officer Almanzar provided (not discussed here) of the Defendant's performance on the physical coordination tests and condition.

CONCLUSIONS OF LAW

In *Reed,* Justice Tallmer outlined the ways in which the Vehicle and Traffic Law distinguishes "field tests" designed to help determine whether there is probable cause to arrest a defendant for an Alcohol Related Violation from "chemical tests" designed to provide admissible evidence of a defendant's blood-alcohol content at trial.[FN6] She noted that the VTL contemplated that defendants normally would receive a field test to determine the presence of alcohol and then, after arrest, a chemical test to determine the amount of blood alcohol in a subject's body. Allowing field test evidence to be admissible at trial, she held, would "do violence to this statutory scheme" and was contrary to the weight of judicial authority. The Court also held that the reason for distinguishing between the two tests was that "conditions surrounding a field test do not give the same assurance of reliability and accuracy as those in a controlled environment". 2004 N.Y. Slip Op. 51662[U] at 7. Judge Simpson reached the ***691** same conclusion in *Santana. Reed , Santana* and *Schook* all concerned the same SD2 test at issue here.

> FN6. For purposes of this decision, the Court has used the shorthand "Alcohol Related Violation" to refer to any offense for driving under the influence of alcohol pursuant to VTL § 1192. PBT issues relevant to determinations of whether drivers under the age of 21 have consumed alcohol where no Alcohol Related Violation is charged are not addressed here. *See* VTL §§ 1192–a; 1194(2)(1); 1194–a.

In *Jones,* on the other hand, Judge Mandlebaum held that the results of an otherwise valid chemical test are not rendered inadmissible "just because the device used to perform the test is capable of being moved". 33 Misc.3d at 181, 927 N.Y.S.2d 586. Judge Mandelbaum held that chemical test admissibility depended upon whether the device used to perform the test ordinarily produced scientifically reliable results, was in good working order and had been properly used. A device was reliable when it was included in the Conforming Products List of Evidential Breath Alcohol Measurement Devices (the "List") established by the National Highway Traffic Safety Administration (NHTSA), a list which is incorporated by regulations of the New York State Department of Health mandated by the VTL. *See* ****437** Vehicle and Traffic Law § 1194(6)(c); 10 NYCRR 59.4(b).

The portable device at issue in *Jones,* the Court noted, the Intoximeter Alco–Sensor FST, was on the List. Judge Mandelbaum acknowledged that the VTL distinguished between field tests and chemical tests. He opined, however, that the statute cannot "reasonably be read to mean that a test cannot constitute a chemical test simply because it takes place in the field". 33 Misc.3d at 185, 927 N.Y.S.2d 586. He noted that evidence of the reliability of the test in his case had been provided by calibration reports indicating the machine had been working properly. He further held that the officer who administered the test had been properly trained in the machine and had administered the test correctly. The operator did not have a Department of Health certification which authorized him to perform the test, Judge Mandelbaum noted, but such a certification was not

required by the statute. The Court also noted that the officer "may not have maintained a continuous observation of the defendant for 15 minutes prior to the test" but said that controlling authority clearly held that this went to the weight rather than the admissibility of the test evidence. 33 Misc.3d at 187, 927 N.Y.S.2d 586.

The Court in *Hargobind* reached the same conclusion as the *Jones* Court on the basic issue of whether the results of a PBT (the same model used in *Jones*) could be admitted at trial, but reserved decision on whether the test in that case would be admitted pending the presentation of foundational testimony by the People. The *Hargobind* Court, however, imposed significantly greater admissibility requirements for the test than the *Jones* Court. In addition to the requirements outlined in *Jones,* the *692 *Hargobind* Court held that evidence that the device was purged prior to the test and that the 15 minute observation rule was complied with had to be provided. In addition, the Court noted that it would analyze whether the subject was given the right to refuse the breath test and the interval which had elapsed between calibration tests.

Judge Gerstein indicated that he agreed to some extent with the *Reed* and *Santana* Courts that the VTL contemplated that tests given in the field were generally inadmissible. He also found significant the fact that while blood alcohol tests given at precincts were generally videotaped, no such records were kept of field tests. Given all of these considerations, Judge Gerstein observed, there appeared to be "several obstacles complicating the establishment of a foundation" for the admissibility of the field test evidence in the case. 2012 N.Y. Slip Op. 50450[U] at 4.

Court's Conclusions Regarding the Appropriate Rule

Each of the trial court opinions cited *supra* make important points. It is obvious that the VTL presumes that breath test results obtained by police in the field will not be admissible at trial. The McKinney's commentary to the VTL makes that point:

> This breath test, [the "field test" under the VTL] sometimes called a screening test, involves a portable machine which is used by the police on the road to determine whether there is alcohol present in the motorist being tested. This screening or breath test machine is used as a pass/fail test and is basically reliable for the determination of some presence of alcohol in a person's blood but not the actual percentage or concentration. Carrieri, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 62A, VTL 1194 (2012) at 336–337.

On the other hand, however, the statute governing the admissibility of chemical **438 test results does not make a distinction between initial breath and later chemical tests. That statute (VTL § 1195[1]) says simply that the court "shall admit evidence of the amount of alcohol or drugs in the defendant's blood as shown by a test administered pursuant to the provisions of section eleven hundred ninety-four" of the VTL (which includes both tests administered at car stops and precincts). There is nothing in the VTL*693 which explicitly provides that a valid chemical test administered at the scene of a car stop is inadmissible at a trial. In the Court's view, however, the current distinction between tests given at car stops and police precincts is a valid one. That distinction is not only based on the provisions of the statute. Even under the most optimal conditions, tests given in the field are prone to multiple possibilities for interference which may not exist at police stations.

Lighting conditions may vary. A police officer on the street must always be vigilant about his or her surroundings in a way which may not be necessary at a police station. The environment, whether the air, the possibilities for radio interference, the temperature or a location's physical layout cannot be precisely controlled. A defendant, all things being equal, is more easily monitored at a precinct. Even beyond these inherent difficulties, the protocols used to administer PBT's, when compared to

those used to perform traditional chemical tests, may be sorely lacking.

[1] With those considerations in mind, the Court proposes the following rule. Chemical tests given in the field should be presumptively inadmissible. Overcoming that presumption should involve a two step inquiry. First, as Judge Mandelbaum outlined, the People must make a number of threshold showings. A device used to measure a defendant's blood-alcohol content must be on the approved "List" of alcohol measurement devices, unless the People demonstrate the reliability of a particular device at trial. The People must show that a machine was properly calibrated. The People must demonstrate that the test was properly given. *See People v. Hampe,* 181 A.D.2d 238, 585 N.Y.S.2d 861 (3d Dept. 1992); *People v. Campbell,* 73 N.Y.2d 481, 541 N.Y.S.2d 756, 539 N.E.2d 584 (1989). To these threshold requirements, the Court would add a fourth, which has not yet been discussed in the relevant case law.

A police officer can ask a motorist to submit to a "field test" whenever there is an accident or a violation of any provision of the VTL. VTL § 1194(1)(b). Thus, running a red light, speeding or reckless driving can all serve as valid predicates for a field test, regardless of whether there is any suspicion that a motorist has been drinking. A "chemical test", however, can only be given where a field test indicates the presence of alcohol or there is reasonable grounds to believe a motorist has committed an Alcohol Related Violation.

If a police officer gives an initial breath test to a motorist, therefore, without having reasonable grounds to believe the *694 motorist has committed an Alcohol Related Violation that test is a "field test". Such a test is inadmissible no matter how reliable it might be. A police officer cannot administer a field test (based on a non-alcohol related traffic infraction, for example) and then, having obtained an inculpatory result, have that test admitted into evidence at the trial of a defendant as a "chemical test" the officer did not, at the time, have the right to administer. In the Court's view, the People met all of these threshold requirements for the admission of the SD2 results in this case. The SD2 is on the "List" of approved devices. It had been **439 calibrated within the past year. The test was properly administered. The police had reasonable grounds to believe the Defendant had committed an Alcohol Related Violation when the test was given.

Once these threshold findings have been made, in the Court's view, a test given in the field should not be admissible unless there is clear and convincing evidence that the test has the same general indicia of reliability as a chemical test administered in a controlled environment. To make that determination, the Court proposes a five factor test which covers the parameters which distinguish unreliable field tests from reliable chemical tests. These factors concern the condition of the operator, the qualifications of the test giver, the reliability of the testing device, the manner in which the test was administered and the record of the test procedure.

1. Condition of the Operator: Adherence to the 15 or 20 Minute Observation Rule

[2] Health Department regulations promulgated pursuant to the VTL *require* a 15 minute observation period prior to taking a chemical test during which the subject "must not have ingested alcoholic beverages or other fluids, regurgitated, vomited, eaten or smoked, or have placed anything in his/her mouth". If any of these events occur, an additional 15 minute period must begin 10 NYCRR 59.5(b). The NYPD requires a 20 minute observation period. In the Court's view, adherence to this requirement should be a prerequisite to the admissibility of a chemical test, since a failure to abide by it creates an unreliable result. Controlling authority, however, has repeatedly held that the failure of the police to continuously observe a defendant for a 10, 15 or 20 minute period prior to a breath test goes to only to the weight of such evidence and does not render it automatically inadmissible. *People v. Williams,* 96 A.D.2d 972, 466 N.Y.S.2d 869 (3d Dept. 1983); *People v. Lebrecht,* 13 Misc.3d 45, 51, 823

N.Y.S.2d 824 (2d Dept. App. Term 2006); *People v. Schuessler,* 14 Misc.3d 30, 32, 829 N.Y.S.2d 808 (2d Dept. App. Term 2006).

*695 Here, this factor clearly weighed against admitting the PBT result. Officer Re not only failed to abide by the 20 minute rule-he was not even aware of it. Five minutes elapsed between the car stop and the PBT. But even during that time, Officer Re testified, he was not observing the Defendant for the purpose of seeing whether he did anything which might skew the test result.[FN7]

> FN7. The commentary here is not intended as a criticism of Officer Re. His testimony gave the Court no reason to believe he is anything other than a fine police officer. It is offered to show that while Officer Re was trained and qualified to give Mr. Aliaj a field test, he was not trained or qualified to give him a chemical test.

2. Qualifications of the Test Operator

[3] The VTL provides that where a test operator possess a Department of Health permit to perform a chemical test, that is "presumptive evidence" that an examination was properly given. VTL § 1194(6)(c). The statute also provides that a test by an operator not so qualified is not prohibited. Health Department regulations provide a standard instruction, certification and testing regime for breath analysis instrument operators. They require a minimum 24 hours of instruction, a passing score on a one hour exam and the demonstration of proficiency on the instruments an operator will use. Permits must be re-certified every two years.

These are not onerous requirements. They do, however, provide some assurance that operators are trained and qualified to **440 give chemical tests. In the Court's view, if an operator has a Health Department certification or some equivalent level of training, this factor should weigh in favor of admitting test results. If operators do not possess such training or proficiency, however, that should weigh against admitting test results in a case. Here, this factor clearly weighed against admitting the test evidence. Officer Re testified that he took a one day course on blood alcohol tests 14 years ago. His recollection of what he learned was understandably limited. Indeed, he did not even recall whether he had been trained on an issue so basic as the need to observe a defendant for 15 or 20 minutes prior to administering a chemical test.

3. Testing, Maintenance & Operation of the Testing Device

[4] The differences between the testing and maintenance of the Intoxilzyer 5000 and the SD2 machines in this case were striking.*696 [FN8] Intoxilyzer 5000 machines are checked every 5 to 14 days by a state certified technical supervisor to ensure that they are good working order. Technical supervisors are required to meet even more stringent educational requirements than breath analysis operators. The only thing the Court learned about the SD2 in this regard was that it was kept in a bag in the back of Officer Re's patrol car and was used in common by multiple officers at the precinct. The Intoxilyzer must go through a 13 point checklist before being operated. The SD2, in contrast, is apparently simply turned on, performs its own self-calibration test and is used.

> FN8. The People presented much more detailed evidence at the trial conceming the Intoxilyzer machine than they did regarding the SD2. It is possible that the SD2 had additional reliability features which the Court simply did not leam about.

Persons entering the IDTU are directed to turn off radios and place cell phones on vibrate. Officer Re did not attempt to implement any similar safeguards in the field. Indeed, it is not clear that such procedures could even be observed during a car stop. Officer Arav testified that the Intoxilyzer 5000 uses three "air blanks" at different intervals surrounding a test to ensure that there is nothing in a room which might skew a breath sample. No evidence was presented as to whether the SD2 has a similar feature. The Intoxilyzer 5000 can recognize

a spike in radio frequencies and will abort a test if such a spike is detected. The Court did not learn anything about whether the SD2 has a similar feature. Health Department regulations require that a "system purge" precede both the testing of a subject and a calibration test. 10 NYCRR § 59.5(c). The Court did not learn whether the SD2 complies with this feature. The Intoxilyzer machine is calibrated every six months. The SD2 in this case was calibrated annually.[FN9]

> FN9. It should be noted that the Court of Appeals has held that the standard with respect to the operation of a breath test device is whether the machine is in "proper working order" and has specifically rejected the notion that a breath test machine must be calibrated once every six months. *People v. Boscic,* 15 N.Y.3d 494, 498, 912 N.Y.S.2d 556, 938 N.E.2d 989 (2010).

The Intoxilyzer machine as it is used by the NYPD's IDTU has important safeguards to ensure that blood alcohol tests produce accurate results. The SD2 as it was used in this case, in the Court's view, lacked many of the minimal safeguards which would ensure its reliability. This factor, again, in the Court's view, argued against the test results' admissibility.

**441 *697 *4. The Way the Test Was Given*

[5] Courts should obviously review how an alcohol test was administered. In this case, the evidence appeared to be straightforward in that regard. Officer Re asked the Defendant to blow into a straw, the Defendant blew into the straw and the machine registered a result. This factor, alone among all of the others, in the Court's view, weighed in favor of admitting the test results.

5. Record of Test Results

[6] Blood alcohol tests at police precincts, at least in New York County, appear to be uniformly videotaped. The same holds true for coordination tests. This is an important procedure which helps ensure the reliability of test results and allows fact finders to judge for themselves whether tests are properly performed and subjects are intoxicated. Tests done in the field, on the other hand, at least in New York County, are apparently not videotaped.

In this case, moreover, other records of the test were lacking. The results of the self-calibration test done by the SD2, for example, were not recorded. The records kept by the police should be considered in determining whether tests administered in the field are as reliable as traditional chemical tests. *See Hargobind, supra,* 2012 N.Y. Slip Op. 50450[U] at 5 (lack of test videotape should affect the weight of test evidence). The lack of testing records in this case weighed against the test's admissibility.

These five factors in total, in the Court's view, did not provide clear and convincing evidence that the test administered at the Defendant's road stop had the indicia of a reliable chemical test. Therefore, the Court held that the evidence was inadmissible at trial.

CONCLUSION

[7] PBT's can provide more probative information about a defendant's intoxication than later precinct tests because such portable tests are administered in closer proximity to the time a defendant was driving. This case provides the perfect example. The Defendant here registered a .081 on the Intoxilzyer test. This was 1/1000th of one percentum of blood alcohol above the legal limit for *per se* intoxication. That would be sufficient for conviction of the *per se* intoxication count, of course, if this reading reflected the Defendant's blood alcohol concentration ("BAC") at the time he was driving. But the test was given 1 1/2 hours after the Defendant drove. His BAC may have been higher, *698 lower or the same when he was driving. Given this razor thin margin, the People were unable to prove beyond a reasonable doubt that Mr. Aliaj's BAC was at least .08 an hour and a half before he was tested.

On the other hand, he registered a .11 when he

was stopped. Had this test been admitted and credited, it would have proved that the Defendant was *per se* intoxicated at the time he was driving. That test, however, was clearly unreliable. If district attorneys and police departments are serious about having blood alcohol tests taken at the scenes of car stops admitted into evidence, they will have to do more to conduct those tests reliably. They will have to ensure that defendants are properly observed prior to being tested and that tests are given by trained operators, using well maintained and serviced machines with thorough records.

Unless such procedures are used, courts should resist admitting unreliable evidence which is proffered as an afterthought because a screening test produces an inculpatory result as part of a procedure which was intended only to determine what the **442 next steps in a car stop should be. There is also, obviously, a need for appellate guidance on this important issue. Trial courts have struggled with it for at least 8 years and there is no clear modern rule which governs the standards for determining whether or under what circumstances PBT's given with today's technology and protocols are admissible at trial. Everyone has an interest in ensuring that the rules for the admissibility of such tests at least, are clearly understood and uniformly applied.

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36 Misc.3d 682, 946 N.Y.S.2d 430, 2012 N.Y. Slip Op. 22137

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APPENDIX "Q"

34 Misc.3d 1237(A), 950 N.Y.S.2d 725, 2012 WL 762897 (N.Y.City Crim.Ct.), 2012 N.Y. Slip Op. 50450(U)
(Table, Text in WESTLAW), Unreported Disposition
(Cite as: 34 Misc.3d 1237(A), 2012 WL 762897 (N.Y.City Crim.Ct.))

⊳
(The decision of the Court is referenced in a table in the New York Supplement.)

Criminal Court, City of New York,
Kings County.
The PEOPLE of the State of New York, Plaintiff,
v.
Andrei HARGOBIND, Defendant.

No. 2009KN024543.
Feb. 29, 2012.

Charles J. Hynes, District Attorney (Paul Mysliwiec, Esq., of counsel), for the People.

Gabriel R. Munson, Esq., for the Defendant.

MICHAEL J. GERSTEIN, J.

*1 The People have moved to introduce at trial the results of a portable intoximeter breath test given to Defendant at the time and place of his arrest. Defendant opposes the motion arguing that admission of the results would be improper because the test is unreliable. Defendant has also moved for dismissal of VTL §§ 1128(A), 1163(A), 1180(B), and 1180(D) pursuant to CPL § 30.10. For the reasons set forth below, the People's motion is granted to the limited extent that they are permitted to attempt to lay a foundation for the introduction of the Intoximeter Alco–Sensor results at trial, and Defendant's motion is **DENIED.**

Background and the Parties' Contentions

On March 28, 2009, Defendant was charged with VTL §§ 1192(1), 1192(3), 1180(A), and 1212. Defendant's car was stopped by a Highway Patrol Officer, and during the investigation the Officer observed signs of intoxication. The Officer conducted a field breath test using an Intoximeter Alco–Sensor FST ("Intoximeter") device. After his arrest, Defendant was taken to the 78th Precinct where he was offered and refused a chemical breath test. On July 13, 2011, the People filed a superceding information that added the additional charges of VTL §§ 1128(A), 1163(A), 1180(B), and 1180(D). At the time Defendant objected to the additional charges as untimely pursuant to CPL § 30.10.

The People contend that: (1) the Intoximeter results are relevant evidence of driving while impaired, (2) the results are statutorily admissible, (3) the Intoximeter is on the conforming products list of evidential breath measurement devices, which removes the need for expert testimony, and (4) they will submit evidence to prove that the Intoximeter was working properly at the time of the test. Defendant counters that: (1) the breath tests given prior to an arrest (as opposed to chemical tests given post-arrest) are inadmissable to prove intoxication, and (2) the Intoximeter is scientifically unreliable to determine blood alcohol content. The People's Reply reiterates the reliability of the Intoximeter, and regarding Defendant's CPL § 30.10 claim, notes that replacement of a misdemeanor complaint by an information which adds new charges is proper any time before the entry of a guilty plea or commencement of trial.

the People Are Permitted to Lay a Foundation for the Introduction of the Intoximeter Results at Trial

A fair majority of courts have ruled that field breath tests are not admissible in a DWI prosecution because the test results are not sufficiently reliable to prove intoxication. *See, e.g., People v. Reed,* 5 Misc.3d 1032(A), 799 N.Y.S.2d 163 (Table) (Sup.Ct. Bronx Co.2004); *People v. MacDonald,* 227 A.D.2d 672, 641 N.Y.S.2d 749 (3d Dept.1996); *People v. Thomas,* 121 A.D.2d 73, 509 N.Y.S.2d 668 (4th Dept.1986); *see* Gerstenzang & Sills, Handling the DWI Case in New York, § 7:8 (2011–2012 Ed.)("Evidence concerning the administration of an Alco–Sensor test, as well as evidence of the actual Alco–Sensor test results, is clearly inadmissible at trial.") (citing *People v. Thomas, supra.*). Rather they have found that the field breath tests is more properly used to establish probable

cause by determining the presence of alcohol. *People v. Santana,* 31 Misc.3d 1232(A), 930 N.Y.S.2d 176 (Table) (Crim. Ct. N.Y. Co.2011); *Reed, supra.*

*2 Many courts, as well as Defendant here, rely upon *People v. Thomas,* for the proposition that breath tests are inadmissible to prove intoxication. In *Thomas,* the court found the results inadmissable because, having been offered to prove intoxication, the People had not laid a proper foundation demonstrating the reliability of the test. *Thomas, supra,* at 671. ("The record is completely barren of scientific evidence which would establish the reliability of the test."). Thus the court did not categorically rule out the admission of field breath tests.

Since the *Thomas* decision in 1986, field breath test devices have been deemed scientifically reliable by the New York State Department of Health. Evidence to establish the reliability of breath analysis instruments may be demonstrated by its inclusion on the Conforming Products List of Evidential Breath Alcohol Measurement Devices, and resulting approval by the Commissioner of Health for use in New York, obviating the need for expert testimony. *See People v. Lent,* 29 Misc.3d 14, 16–17, 908 N.Y.S.2d 804 (App .Term, 2d Dept.2010)("The scientific accuracy of breath analysis instruments approved by the New York State Department of Health is no longer open to question."); *People v. Hampe,* 181 A.D.2d 238, 240, 585 N.Y.S.2d 861; *see also People v. Boscic,* 15 N.Y.3d 494, 499, 912 N.Y.S.2d 556, 938 N.E.2d 989 (2010)(noting that the Department of Health "has been charged by the Legislature to evaluate and approve specific models of breath-alcohol testing machines"); 10 NYCRR 59.4(b).

The Intoximeter in our case is now on the Conforming Products List of Evidential Breath Alcohol Measurement Devices; thus expert testimony as to its general reliability is not needed. The Intoximeter Alco–Sensor FST has been on the list approved by New York's Commissioner of Health for use in New York since at least May 2007. *See* 10 NYCRR 59.4(b) (as amended May 2, 2007). The device has been on the federal Conforming Products List of Evidential Breath Alcohol Measurement Devices since July 14, 2004. *See* 69 Fed.Reg. 42237–01, 2004 WL 1561138 (F.R.) (July 14, 2007).

The New York Vehicle and Traffic Law does not specifically prohibit the admission of field breath tests nor does it mandate their admission. Field breath tests are permitted pursuant to VTL § 1194(1)(b), stating that "[i]f such test indicates that such operator has consumed alcohol, the police officer may request such operator to submit to a chemical test." The Commentaries for VTL § 1194(1)(b) note that:

> This breath test, sometimes called a screening test, involves a portable machine which is used by the police on the road to determine whether there is alcohol present in the motorist being tested. This screening or breath test machine is used as a pass/fail test and is basically reliable for the determination of some presence of alcohol in a person's *blood but not the actual percentage or concentration.* (Emphasis added.)

*3 The Practice Commentaries to VTL § 1194 regarding the admissibility of results of screening tests in evidence notes that "[w]hile the cases differ, it would appear that the majority and better view is that the breath or alco-sensor test results should not be admissible in evidence." *See* Carrieri, Practice Commentaries, McKinney's Cons Laws of NY, Vehicle and Traffic Law § 1194 (2011 ed), *citing People v. Thomas,* 121 A.D.2d 73, 509 N.Y.S.2d 668 (4th Dept.1986), *affirmed* 70 N.Y.2d 823, 523 N.Y.S.2d 437, 517 N.E.2d 1323.

The Commentaries continue, observing that "although an alco-sensor test is not admissible as evidence of intoxication, breath screening devices have won acceptance as being sufficiently reliable to establish probable cause for an arrest and may be used by the police to establish a basis to request a chemical test." Carrieri, Practice Commentaries, *supra.*

The People rely on *People v. Jones,* 33 Misc.3d 181, 927 N.Y.S.2d 586 (Crim. Ct., N.Y. Co.2011), which held that an otherwise reliable breath test is not rendered inadmissible because it is capable of being moved. In *Jones,* the court concluded that a portable breath test ("PBT") utilizing the Intoximeter Alco-sensor FST, the same device utilized in our case, is reliable and, having analyzed the breath and chemical alcohol test regulations, that the PBT at issue could also be used as a chemical test. As in *Jones,* this Court holds that the portability of the Intoximeter device does not automatically render its results inadmissible.

This Court, as a trial court, does not lightly disregard appellate precedent, such as *Thomas, supra,* as cited above. However, much of that precedent pre-dates the inclusion of the Intoximeter on the approved list of the Commissioner of Health. Moreover, none of the cases decided subsequently that deny admission of Intoximeter results appear to consider the Commissioner's inclusion of the Intoximeter on the approved list, but they rather rely on earlier cases that predate the device's inclusion as approved by the Commissioner.[FN1] Therefore, in being persuaded by the rationale of *Jones,* this Court does not purport to overrule any of the Appellate precedent cited by the People, but rather to apply the law to changed circumstances—to wit, the Commissioner's subsequent inclusion of the Intoximeter as an approved device.

> FN1. Similarly, while the leading treatise states unequivocally that the results of the Intoximeter test are inadmissible for lack of reliability and proper foundation, every case cited for that proposition antedates the inclusion of the Intoximeter on the Commissioner's list of approved devices. Gerstenzang & Sills, Handling the DWI Case in New York, § 7:8. Of course, as noted above, the device's inclusion on the Commissioner's list does not obviate the necessity of a proper foundation before its results can be admitted into evidence.

In *Jones,* the court ruled orally after argument on a motion in limine, but did not issue its written opinion until conclusion of a jury trial. Thus, prior to issuing its written opinion, the *Jones* court had the benefit of the People's evidentiary foundation, upon which it relied for its opinion. Here, we do not have that benefit. Instead, the People have affirmed they have evidence that will satisfy each of the foundational elements at trial. In these circumstances, the People's affirmation will not suffice to satisfy the foundational requirements; however, the People will have an opportunity to establish an adequate evidentiary foundation at trial for the admission into evidence of the results of the test.

***4** Thus to establish the reliability of the results of the particular Intoximeter administered to Defendant, the People will have to show at least the following: that the device had been tested, producing a reference standard, within a reasonable period prior to Defendant's test; that the device had been properly calibrated; that the device was properly functioning on the day the test was administered; that the test was administered properly, including that the device was purged prior to the test, by a properly qualified administrator; and that Defendant was observed for at least 15 minutes prior to the test to ensure that Defendant had not "ingested alcoholic beverages or other fluids, regurgitated, vomited, eaten, or smoked, or have anything in his/her mouth." *See Boscic, supra; People v. Mertz,* 68 N.Y.2d 136, 148, 506 N.Y.S.2d 290, 497 N.E.2d 657 (1986), *Jones, supra;* 10 NYCRR 59.4 and 59.5.[FN2] And, of course, any foundational evidence proffered by the People will be subject to voir dire and cross-examination by Defendant.[FN3]

> FN2. 10 NYCRR 59.5 states:
>
> > The following breath analysis techniques and methods ... shall be used by operators performing breath analysis for evidentiary purposes:
> >
> > ....

> (b) The subject shall be observed for at least 15 minutes prior to the collection of the breath sample, during which period the subject must not have ingested alcoholic beverages or other fluids, regurgitated, vomited, eaten, or smoked, or have placed anything in his/her mouth;
>
> ....
>
> (c) A system purge shall precede both the testing of each subject and the analysis of the reference standard.
>
> (d) The result of an analysis of a reference standard with an alcoholic content greater than or equal to 0.08 percent must agree with the reference standard value within the limits of plus or minus 0.01 percent weight per volume, or such limits as set by the commissioner. An analysis of the reference standard shall precede or follow the analysis of the breath of the subject in accordance with the test sequence established by the training agency. Readings for the reference standard, a blank and the subject's breath, shall be recorded.

FN3. In this regard, the Court notes that much of the Defendant's opposition goes to whether the People can lay a proper foundation. (*See* Def. Affirmation ¶¶ 14–15.)

Based on the People's motion, there appear to be several obstacles complicating the establishment of a foundation. Difficulties inherent to establishing a foundation for a field test exist that do not exist for tests conducted at the Intoxicated Driver Testing Unit because of the lack of a controlled facility, including, but not limited to: observation of Defendant for 15 minutes,[FN4] evidence of pre- and post-sample purge of the device, and an opportunity to refuse the breath test. Additionally, while there is no strict six-month rule regarding device calibration, *see Boscic, supra,* the post-test calibration in this case occurred more than a year after the Defendant's test was administered, and more than one year elapsed between the pre- and post-breath test calibrations.[FN5] The test given at the time and scene of arrest, while presumably reliable as a breath test, does not necessarily follow the procedures and practices articulated in VTL § 1194(2), and the Court expresses no opinion at this time as to whether the People can lay a sufficient foundation to allow the Intoximeter results into evidence.

FN4. The NYPD Patrol Guide, at 208–40, specifies a 20–minute pre-test period of observation.

FN5. We also note that the two calibrations used different consistencies for the "standard vapor," to wit, 100% +/2% on November 18, 2008, and .085% +/2% on April 9, 2010.

Indeed, as noted in *Reed* and *Santana,* the VTL statutory scheme supports the notion that the field breath test's purpose is "intended to differentiate between preliminary tests done at the scene of the crime and those conducted back at the station house. The obvious rationale for this distinction is that the conditions surrounding a field test do not give the same assurance of reliability and accuracy as those in a controlled environment." *Reed, supra,* *7. Prior to the November 2, 2011 revision, the Department of Health rules had "recognize[ed] the distinction between preliminary screening tests and chemical tests." Prior to revision, 10 NYCRR 59.5(a) provided that a breath sample shall be collected within two hours of the time of arrest "or within two hours of a positive breath alcohol screening test." [FN6]

FN6. The latest version has removed the two-hour time limit within which a breath sample must be collected.

*5 Moreover, as *Santana* articulates, the procedures associated with the application of, and right to refuse, the chemical test in VTL § 1194(2) offer

a specific set of procedures designed to protect the defendant and ensure reliability of test results. The chemical tests that are typically introduced as evidence are conducted at a precinct rather than at the place of arrest, the warnings as to the consequences of refusal, the calibration of the chemical breathalyser machine, and the actual test (or refusal) are videotaped. *Santana, supra,* at *2; VTL § 1194(2). In our case, by contrast, the People have not set forth any indication that the test at issue was videotaped. While lack of video would not necessarily prevent the test results from coming into evidence, it would appear to affect at least the weight afforded any such evidence by the trier of fact, and the lack of a video recording could be considered in the Court's determination as to whether a proper foundation has been laid, for example, if there were to be vague, imprecise or conflicting testimony as to the circumstances under which the test had been given.

Jones also discussed the VTL statutory scheme, specifically VTL §§ 1194 and 1195, concluding that PBTs are not "rendered inadmissible by virtue of VTL § 1194." *Jones, supra,* *3. As noted in *Jones,* VTL § 1195(1) states that "the court shall admit evidence of the amount of alcohol or drugs in the defendant's blood as shown by a test administered pursuant to" VTL § 1194, which lays out the circumstances under which blood alcohol testing is authorized. *See Santana, supra; Jones, supra.* As discussed above, those circumstances and the distinction between field testing (VTL § 1194(1)(b)) and chemical tests administered at a precinct (VTL § 1194(2)), articulate procedures that significantly impact the rights of defendants regarding refusal, and the operation and maintenance of chemical breathalyser tests. [FN7]

> FN7. The Court has no occasion to consider whether evidence of refusal of an Intoximeter test at the scene could be introduced into evidence, and expresses no opinion whatsoever as to that question.

Accordingly, the People's motion is granted only to the extent that they may attempt to lay a proper foundation for admission of the portable Intoximeter field test, with the ultimate decision on admissibility reserved.

The Additional Charges are not Time–Barred

Defendant seeks dismissal of the additional charges added in a superseding information filed on July 13, 2011. Defendant contends that theses charges are untimely as they violate the one-year statute of limitations for petty offenses, including infractions, stated in CPL § 30.10(2)(d).

The incident, here, is alleged to have occurred on March 28, 2009, and Defendant was arraigned and charged with VTL §§ 1192(1), 1192(3), 1180(A), and 1212, two of which are infractions, on the same day. Thus, the action was commenced within the one-year statute of limitations. Furthermore, the People are permitted to superceded a misdemeanor complaint.

New York CPL § 170.65(2) states that:

> An information which replaces a misdemeanor complaint need not charge the same offense or offenses, but at least one count thereof must charge the commission by the defendant of an offense based upon conduct which was the subject of the misdemeanor complaint. In addition, the information may, subject to the rules of joinder, charge any other offense which the factual allegations thereof or of any supporting depositions accompanying it are legally sufficient to support, even though such offense is not based upon conduct which was the subject of the misdemeanor complaint.

*6 Additionally, prior to entry of a guilty plea or commencement of trial the People can add any charge based upon facts alleged in a new information, irrespective of whether the new charge is based upon facts alleged in the original filing. *See* CPL § 100.50. ("If at any time before entry of a plea of guilty to or commencement of a trial of an information ... is filed with the same local criminal

court charging the defendant with an offense charged in the first instrument, the first such instrument is, with respect to such offense, superseded by the second and ... the count of the first instrument charging such offense must be dismissed by the court.").

The Defendant has not pled guilty nor has a trial on these charges commenced, and there are no apparent defects in the Superceding Information filed by the People. Therefore, the People have timely filed all of the charges against Defendant, and the Defendant's motion is dismissed.

Conclusion

The reliability of the intoximeter device having been presumptively established by its inclusion on the Conforming Products List of Evidential Breath Alcohol Measurement Devices, the People will have an opportunity to establish an adequate evidentiary foundation for the admission into evidence of the Intoximeter results. The ultimate decision on admissibility will follow at trial. Defendant's motion to dismiss the Complaint pursuant to CPL § 30.10 is **DENIED.**

This constitutes the decision and order of the Court.

N.Y.City Crim.Ct.,2012.
People v. Hargobind
34 Misc.3d 1237(A), 950 N.Y.S.2d 725, 2012 WL 762897 (N.Y.City Crim.Ct.), 2012 N.Y. Slip Op. 50450(U)

END OF DOCUMENT

APPENDIX "R"

CONFORMING PRODUCTS LIST OF ALCOHOL SCREENING DEVICES—Continued

Distributors/manufacturers	Devices
	• AlcoHAWK PT 500.
	• CA2010.
Repco Marketing, Inc., Raleigh, North Carolina	Alco Tec III.
Seju Engineering Co., Taejeon, Korea	Safe-Slim.
Skyfine Inc., Ltd., Kwai Chung, NT, Hong Kong	• AT577.
	• AT578 (aka: AlcoCheck FC90).
	• AT579.
Sound Off, Inc., Hudsonville, Michigan	Digitox D.O.T.[7]
Varian, Inc., Lake Forest, California	On-Site Alcohol.[10]

[1] The AlcoMate was manufactured by Han International of Seoul, Korea, but marketed and sold in the U.S. by AK Solutions.
[2] Manufactured by Seju Engineering, Korea.
[3] Han International does not market or sell devices directly in the U.S. market. Other devices manufactured by Han International are listed under AK Solutions, Inc. and Q3 Innovations, Inc.
[4] Manufactured by Sentech Korea Corp.
[5] These devices utilize replaceable semiconductor detectors. Instead of re-calibrating the device, a new calibrated detector can be installed. The device comes with 4 detectors including the one that was already installed.
[6] These devices utilize replaceable semiconductor detectors. Instead of re-calibrating the device, a new calibrated detector can be installed. This device comes with 5 detectors including the one that was already installed.
[7] While these devices are still being sold, they are no longer manufactured or supported
[8] The Breath Alcohol ✓ .02 Detection System consists of a single-use disposable breath tube used in conjunction with an electronic analyzer that determines the test result. The electronic analyzer and the disposable breath tubes are lot specific and manufactured to remain calibrated throughout the shelf-life of the device. This screening device cannot be used after the expiration date.
[9] While the ALCO-SCREEN 02™ saliva-alcohol screening device manufactured by Chematics, Inc. passed the requirements of the Model Specifications when tested at 40 °C (104 °F), the manufacturer has indicated that the device cannot exceed storage temperatures of 27 °C (80 °F). Instructions to this effect are stated on all packaging accompanying the device. Accordingly, the device should not be stored at temperatures above 27 °C (80 °F). If the device is stored at or below 27 °C (80 °F) and used at higher temperatures (i.e., within a minute), the device meets the Model Specifications and the results persist for 10–15 minutes. If the device is stored at or below 27 °C (80 °F) and equilibrated at 40 °C (104 °F) for an hour prior to sample application, the device fails to meet the Model Specifications. Storage at temperatures above 27 °C (80 °F), for even brief periods of time, may result in false negative readings.
[10] While this device passed all of the requirements of the Model Specifications, readings should be taken only after the time specified by the manufacturer. For valid readings, the user should follow the manufacturer's instructions. Readings should be taken one (1) minute after a sample is introduced at or above 30 °C (86 °F); readings should be taken after two (2) minutes at 18 °C–29 °C (64.4 °F–84.2 °F); and readings should be taken after five (5) minutes when testing at temperatures at or below 17 °C (62.6 °F). If the reading is taken before five (5) minutes has elapsed under the cold conditions, the user is likely to obtain a reading that underestimates the actual saliva-alcohol level.

Authority: 23 U.S.C. 403; 49 CFR 1.50; 49 CFR part 501.

Issued on: June 11, 2012.

Jeff Michael,

Associate Administrator, Research and Program Development, National Highway Traffic Safety Administration.

[FR Doc. 2012–14582 Filed 6–13–12; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2012–0061]

Highway Safety Programs; Conforming Products List of Evidential Breath Alcohol Measurement Devices

AGENCY: National Highway Traffic Safety Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: This notice updates the Conforming Products List (CPL) published in the **Federal Register** on March 11, 2010 (75 FR 11624) for instruments that conform to the Model Specifications for Evidential Breath Alcohol Measurement Devices dated, September 17, 1993 (58 FR 48705).

DATES: *Effective Date:* June 14, 2012.

FOR FURTHER INFORMATION CONTACT: *For technical issues:* Ms. De Carlo Ciccel, Behavioral Research Division, NTI–131, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590; Telephone; (202) 366–1694. *For legal issues:* Ms. Jin Kim, Office of Chief Counsel, NCC–113, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590; Telephone: (202) 366–1834.

SUPPLEMENTARY INFORMATION: On November 5, 1973, the National Highway Traffic Safety Administration (NHTSA) published the Standards for Devices to Measure Breath Alcohol (38 FR 30459). A Qualified Products List of Evidential Breath Measurement Devices comprised of instruments that met this standard was first issued on November 21, 1974 (39 FR 41399).

On December 14, 1984 (49 FR 48854), NHTSA converted this standard to Model Specifications for Evidential Breath Testing Devices (Model Specifications), and published a Conforming Products List (CPL) of instruments that were found to conform to the Model Specifications as Appendix D to that notice. Those instruments are identified on the CPL with an asterisk.

On September 17, 1993, NHTSA published a notice to amend the Model Specifications (58 FR 48705) and to update the CPL. That notice changed the alcohol concentration levels at which instruments are evaluated, from 0.000, 0.050, 0.101, and 0.151 BAC, to 0.000, 0.020, 0.040, 0.080, and 0.160 BAC, respectively. It also included a test for the presence of acetone and an expanded definition of alcohol to include other low molecular weight alcohols, e.g., methyl or isopropyl. Since that time, the CPL has been annotated to indicate which instruments have been determined to meet the Model Specifications published in 1984, and which have been determined to meet the Model Specifications, as revised and published in 1993. Thereafter, NHTSA has periodically updated the CPL with those breath instruments found to conform to the Model Specifications. The most recent update to the CPL was published March 11, 2010 (75 FR 11624).

The CPL published today adds nine (9) new instruments that have been evaluated and found to conform to the Model Specifications, as amended on September 17, 1993 for mobile and non-mobile use. One instrument is distributed by two different companies, so it has been listed twice, for a total of

ten (10) new entries on this CPL. In alphabetical order by company, they are:

(1) The "SAF'IR Evolution" manufactured by Alcohol Countermeasure Systems Corp. Toronto, Ontario, Canada. This is a hand-held instrument intended for use in stationary or mobile operations. It uses an infrared sensor and powered by internal batteries.

(2) The "Intoxilyzer 600" manufactured by CMI, Inc., Owensboro, Kentucky. This is a hand-held instrument intended for use in stationary or mobile operations. It uses a fuel cell sensor and powered by an internal battery. The Intoxilyzer 600 is also distributed as the Alcolmeter 600 by Lion Laboratories outside the U.S., so it has been listed twice on the CPL, once under each of its distributors/manufacturers.

(3) The "Guth 38" manufactured by Guth Laboratories, Inc., Harrisburg, Pennsylvania. This is a hand-held instrument intended for use in stationary or mobile operations. It uses a fuel cell sensor and is powered by internal batteries.

(4) The "Alco-Sensor V XL" manufactured by Intoximeters, Inc., St. Louis, Missouri. This is a hand-held instrument intended for use in stationary or mobile operations. It uses a fuel cell sensor and is powered by internal batteries.

(5) The "LifeGuard Pro" manufactured by Lifeloc Technologies, Inc., Wheat Ridge, Colorado. This is a hand-held instrument intended for use in stationary or mobile operations. It uses a fuel cell sensor and is powered by internal batteries.

(6) The "DataMaster DMT with fuel cell option series number (SN) 555555" and the "DataMaster DMT with fuel cell option series number (SN) 100630" manufactured by National Patent Analytical Systems, Inc., Mansfield, Ohio. These instruments can be used in stationary and mobile operations. These instruments use both infrared and fuel cell sensors. These instruments can be powered by either 110 volts alternate current or 12 volts direct current.

(7) The "Alcovisor Jupiter" and the "Alcovisor Mercury" manufactured by PAS International, Fredericksburg, Virginia. These are hand-held instruments intended for use in stationary or mobile operations. Both instruments use a fuel cell sensor and are powered by internal batteries.

This update also removes four (4) instruments no longer supported by the manufacturer and makes one minor change.

The following instruments (PBA 3000 B, PBA 3000–P, PBA 3000 C and Alcohol Data Sensor), manufactured by Lifeloc Technologies, Inc., Wheat Ridge, Colorado, are being removed from the CPL because these instruments were determined to be obsolete. These instruments are no longer manufactured, in use or being maintained by the manufacturer.

The minor change includes a change of address for Alcohol Countermeasure Systems Corp., from Mississauga, Ontario, Canada to Toronto, Ontario, Canada.

In accordance with the foregoing, the CPL is updated, as set forth below.

Conforming Products List of Evidential Breath Measurement Devices

Manufacturer/distributor and model	Mobile	Nonmobile
Alcohol Countermeasure Systems Corp., Toronto, Ontario, Canada:		
Alert J3AD*	X	X
Alert J4X.ec	X	X
PBA3000C	X	X
SAF'IR Evolution	X	X
BAC Systems, Inc., Ontario, Canada:		
Breath Analysis Computer*	X	X
CAMEC Ltd., North Shields, Tyne and Ware, England:		
IR Breath Analyzer*	X	X
CMI, Inc., Owensboro, Kentucky:		
Intoxilyzer Model:		
200	X	X
200D	X	X
240 (aka: Lion Alcolmeter 400+ outside the U.S.)	X	X
300	X	X
400	X	X
400PA	X	X
600 (aka: Lion Alcolmeter 600 outside the U.S.)	X	X
1400	X	X
4011*	X	X
4011A*	X	X
4011AS*	X	X
4011AS–A*	X	X
4011AS–AQ*	X	X
4011 AW*	X	X
4011A27–10100*	X	X
4011A27–10100 with filter*	X	X
5000	X	X
5000 (w/Cal. Vapor Re-Circ.)	X	X
5000 (w/⅜" ID Hose option)	X	X
5000CD	X	X
5000CD/FG5	X	X
5000EN	X	X
5000 (CAL DOJ)	X	X
5000VA	X	X
8000	X	X
PAC 1200*	X	X
S–D2	X	X
S–D5 (aka: Lion Alcolmeter SD–5 outside the U.S.)	X	X

CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES—Continued

Manufacturer/distributor and model	Mobile	Nonmobile
Draeger Safety, Inc. (aka: National Draeger) Irving, Texas:		
Alcotest Model:		
6510	X	X
6810	X	X
7010*	X	X
7110*	X	X
7110 MKIII	X	X
7110 MKIII–C	X	X
7410	X	X
7410 Plus	X	X
7510	X	X
9510	X	X
Breathalyzer Model:		
900	X	X
900A*	X	X
900BG*	X	X
7410	X	X
7410–II	X	X
EnviteC by Honeywell GmbH, Fond du Lac, Wisconsin:		
AlcoQuant 6020	X	X
Gall's Inc., Lexington, Kentucky:		
Alcohol Detection System—A.D.S. 500	X	X
Guth Laboratories, Inc., Harrisburg, Pennsylvania:		
Alcotector BAC–100	X	X
Alcotector C2H5OH	X	X
Guth 38	X	X
Intoximeters, Inc., St. Louis, Missouri:		
Photo Electric Intoximeter*		X
GC Intoximeter MK II*	X	X
GC Intoximeter MK IV*	X	X
Auto Intoximeter*	X	X
Intoximeter Model:		
3000	X	X
3000 (rev B1)*	X	X
3000 (rev B2)*	X	X
3000 (rev B2A)*	X	X
3000 (rev B2A) w/FM option*	X	X
3000 (Fuel Cell)*	X	X
3000 D*	X	X
3000 DFC*	X	X
Alcomonitor		X
Alcomonitor CC	X	X
Alco-Sensor III	X	X
Alco-Sensor III (Enhanced with Serial Numbers above 1,200,000)	X	X
Alco-Sensor IV	X	X
Alco-Sensor IV XL	X	X
Alco-Sensor V	X	X
Alco-Sensor V XL	X	X
Alco-Sensor AZ	X	X
Alco-Sensor FST	X	X
Intox EC/IR	X	X
Intox EC/IR II		X
Intox EC/IR II (Enhanced with serial number 10,000 or higher)	X	X
Portable Intox EC/IR	X	X
RBT–AZ	X	X
RBT–III	X	X
RBT III–A	X	X
RBT IV	X	X
RBT IV with CEM (cell enhancement module)	X	X
Komyo Kitagawa, Kogyo, K.K., Japan:		
Alcolyzer DPA–2*	X	X
Breath Alcohol Meter PAM 101B*	X	X
Lifeloc Technologies, Inc., (formerly Lifeloc, Inc.), Wheat Ridge, Colorado:		
LifeGuard Pro	X	X
Phoenix	X	X
Phoenix 6.0	X	X
EV 30	X	X
FC 10	X	X
FC 20	X	X
Lion Laboratories, Ltd., Cardiff, Wales, United Kingdom:		
Alcolmeter Model:		
300	X	X

CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES—Continued

Manufacturer/distributor and model	Mobile	Nonmobile
400	X	X
400+ (aka: Intoxilyzer 240 in the U.S.)	X	X
600 (aka: Intoxilyzer 600 in the U.S.)	X	X
SD–2 *	X	X
SD–5 (aka: S–D5 in the U.S.)	X	X
EBA *	X	X
Intoxilyzer Model:		
200	X	X
200D	X	X
1400	X	X
5000 CD/FG5	X	X
5000 EN	X	X
Luckey Laboratories, San Bernardino, California:		
Alco-Analyzer Model:		
1000 *	.....	X
2000 *	.....	X
Nanopuls AB, Uppsala, Sweden:		
Evidenzer	X	X
National Patent Analytical Systems, Inc., Mansfield, Ohio:		
BAC DataMaster (with or without the Delta-1 accessory)	X	X
BAC Verifier DataMaster (w/ or without the Delta-1 accessory)	X	X
DataMaster cdm (w/ or without the Delta-1 accessory)	X	X
DataMaster DMT	X	X
DataMaster DMT w/ Fuel Cell option SN: 555555	X	X
DataMaster DMT w/ Fuel Cell option SN: 100630	X	X
Omicron Systems, Palo Alto, California:		
Intoxilyzer Model:		
4011 *	X	X
4011AW *	X	X
PAS International, Fredericksburg, Virginia:		
Mark V Alcovisor	X	X
Alcovisor Jupiter	X	X
Alcovisor Mercury	X	X
Plus 4 Engineering, Minturn, Colorado:		
5000 Plus 4 *	X	X
Seres, Paris, France:		
Alco Master	X	X
Alcopro	X	X
Siemans-Allis, Cherry Hill, New Jersey:		
Alcomat *	X	X
Alcomat F *	X	X
Smith and Wesson Electronics, Springfield, Massachusetts:		
Breathalyzer Model:		
900 *	X	X
900A *	X	X
1000 *	X	X
2000 *	X	X
2000 (non-Humidity Sensor) *	X	X
Sound-Off, Inc., Hudsonville, Michigan:		
AlcoData	X	X
Seres Alco Master	X	X
Seres Alcopro	X	X
Stephenson Corp.:		
Breathalyzer 900 *	X	X
Tokai-Denshi Inc., Tokyo, Japan:		
ALC–PRO II (U.S.)	X	X
U.S. Alcohol Testing, Inc./Protection Devices, Inc., Rancho Cucamonga, California:		
Alco-Analyzer 1000	.....	X
Alco-Analyzer 2000	.....	X
Alco-Analyzer 2100	X	X
Verax Systems, Inc., Fairport, New York:		
BAC Verifier *	X	X
BAC Verifier Datamaster	X	X
BAC Verifier Datamaster II *	X	X

*Instruments marked with an asterisk (*) meet the Model Specifications detailed in 49 FR 48854 (December 14, 1984) (i.e., instruments tested at 0.000, 0.050, 0.101, and 0.151 BAC). Instruments not marked with an asterisk meet the Model Specifications detailed in 58 FR 48705 (September 17, 1993), and were tested at BACs = 0.000, 0.020, 0.040, 0.080, and 0.160. All instruments that meet the Model Specifications currently in effect (dated September 17, 1993) also meet the Model Specifications for Screening Devices to Measure Alcohol in Bodily Fluids.

Authority: 23 U.S.C. 403; 49 CFR 1.50; 49 CFR part 501.

Issued on: June 11, 2012.

Jeff Michael,

Associate Administrator, Research and Program Development, National Highway Traffic Safety Administration.

[FR Doc. 2012–14581 Filed 6–13–12; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. AB 303 (Sub-No. 39X)]

Wisconsin Central Ltd.—Abandonment Exemption—in Manitowoc County, WI

Wisconsin Central Ltd. (WCL) has filed a verified notice of exemption under 49 CFR part 1152 subpart F—*Exempt Abandonments* to abandon 6.8 miles of rail line extending from milepost 69.0 in Newton to milepost 62.2 in Cleveland in Manitowoc County, WI. The line traverses United States Postal Service Zip Codes 53015 and 53063, and there are no stations on the line.

WCL has certified that: (1) No local traffic has moved over the line for at least two years; (2) any overhead traffic previously handled on the line could be rerouted over other lines; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7(c) (environmental report), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on July 14, 2012, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[1] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[2] and trail use/rail banking requests under 49 CFR 1152.29 must be filed by June 25, 2012. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by July 5, 2012, with the Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to WCL's representative: Jeremy M. Berman, Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 920, Chicago, IL 60606–2832.

If the verified notice contains false or misleading information, the exemption is void *ab initio*.

WCL has filed a combined environmental and historic report that addresses the effects, if any, of the abandonment on the environment and historic resources. OEA will issue an environmental assessment (EA) by June 19, 2012. Interested persons may obtain a copy of the EA by writing to OEA (Room 1100, Surface Transportation Board, Washington, DC 20423–0001) or by calling OEA at (202) 245–0305. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339. Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), WCL shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by WCL's filing of a notice of consummation by June 14, 2013, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at "*www.stb.dot.gov*."

[1] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Office of Environmental Analysis (OEA) in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Serv. Rail Lines*, 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[2] Each OFA must be accompanied by the filing fee, which is currently set at $1,500. *See* 49 CFR 1002.2(f)(25).

Decided: June 11, 2012.

By the Board.

Rachel D. Campbell,

Director, Office of Proceedings.

Derrick A. Gardner,

Clearance Clerk.

[FR Doc. 2012–14575 Filed 6–13–12; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. MCF 21043]

Academy Express, L.L.C.—Acquisition of the Properties of Entertainment Tours, Inc.

AGENCY: Surface Transportation Board, DOT.

ACTION: Notice Tentatively Approving and Authorizing Finance Transaction.

SUMMARY: Academy Express, L.L.C., a motor carrier of passengers (Academy), has filed an application under 49 U.S.C. 14303 for its acquisition of the properties of Entertainment Tours, Inc., also a motor carrier of passengers (Entertainment).[1] The Board is tentatively approving and authorizing the transaction, and, if no opposing comments are timely filed, this notice will be the final Board action. Persons wishing to oppose the application must follow the rules under 49 CFR 1182.5 and 1182.8.

DATES: Comments must be filed by July 27, 2012. Academy may file a reply by August 13, 2012. If no comments are filed by July 27, 2012, this notice shall be effective on that date.

ADDRESSES: Send an original and 10 copies of any comments referring to Docket No. MCF 21043 to: Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001. In addition, send one copy of comments to Academy's representative: Fritz R. Kahn, Fritz R. Kahn, P.C., 1919 M Street NW., 7th Floor, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: Julia M. Farr, (202) 245–0359. Federal Information Relay Service (FIRS) for the hearing impaired: 1–800–877–8339.

[1] Academy filed its application for acquisition of the properties of Entertainment on April 5, 2012. However, the Board determined that the information provided was not sufficiently complete to provide the required notice to the Board and to the public as to the nature of the proposed transaction. In a Board decision served on May 4, 2012, Academy was directed to supplement its application, which it did on May 15, 2012. The filing date of an application is deemed to be the date on which the complete information is filed. *See* 49 CFR 1182.4(a). Thus, we will treat Academy's application as having been filed on May 15, 2012.

APPENDIX "S"

Effective Date: 12/07/2011
Title: Section 59.4 - Breath analysis instruments

59.4 Breath analysis instruments. (a) The commissioner approves, for use in New York State, breath analysis instruments found on the Conforming Products List of Evidential Breath Alcohol Measurement Devices as established by the U.S. Department of Transportation/National Highway Traffic Safety Administration (NHTSA), published in the Federal Register on March 11, 2010 (75 Fed. Reg. 11624-11627, available for public inspection and copying at the Department of Health Records Access Office, Corning Tower, Empire State Plaza, Albany, NY 12237). A facsimile of that list is set forth in subdivision (b) of this section. At the request of a training agency, the commissioner may approve a breath analysis instrument that has been accepted by NHTSA but in not on the Conforming Products List published in the Federal Register on March 11, 2010, if the commissioner determines that approval of such instrument is appropriate.

(b) Conforming Products List of Evidential Breath Measurement Devices

Federal Register / Vol. 75, No. 47 / Thursday, March 11, 2010 / Notices

Conforming Products List of Evidential Breath Measurement Devices

Manufacturer and model	**Mobile**	**Nonmobile**
Alcohol Countermeasure Systems Corp., Mississauga, Ontario, Canada:		
Alert J3AD *	X	X
Alert J4X.ec	X	X
PBA3000C	X	X
BAC Systems, Inc., Ontario, Canada:		
Breath Analysis Computer *	X	X
CAMEC Ltd., North Shields, Tyne and Ware, England:		
IR Breath Analyzer *	X	X
CMI, Inc., Owensboro, Kentucky:		
Intoxilyzer Model:		
200	X	X
200D	X	X
240 (aka: Lion Alcolmeter 400+ outside the U.S.)	X	X
300	X	X
400	X	X
400PA	X	X
1400	X	X
4011 *	X	X
4011A *	X	X
4011AS *	X	X
4011AS–A *	X	X

4011AS–AQ *	X	X
4011 AW *	X	X
4011A27–10100 *	X	X
4011A27–10100 with filter *	X	X
5000	X	X
5000 (w/Cal. Vapor Re-Circ.)	X	X
5000 (w/3/18" ID Hose option)	X	X
5000CD	X	X
5000CD/FG5	X	X
5000EN	X	X
5000 (CAL DOJ)	X	X
5000VA	X	X
8000	X	X
PAC 1200 *	X	X
S–D2	X	X
S–D5 (aka: Lion Alcolmeter SD–5 outside the U.S.)	X	X
Draeger Safety, Inc. (aka: National Draeger) Irving, Texas:		
Alcotest Model:		
6510	X	X
6810	X	X
7010 *	X	X
7110 *	X	X
7110 MKIII	X	X
7110 MKIII-C	X	X
7410	X	X
7410 Plus	X	X
7510	X	X
9510	X	X
Breathalyzer Model:		
900	X	X
900A *	X	X
900BG *	X	X
7410	X	X
7410–II	X	X
EnviteC by Honeywell GmbH, Fond du Lac, Wisconsin:		
AlcoQuant 6020	X	X
Gall's Inc., Lexington, Kentucky:		
Alcohol Detection System-A.D.S. 500	X	X

Guth Laboratories, Inc., Harrisburg, Pennsylvania:		
Alcotector BAC–100	X	X
Alcotector C2H5OH	X	X
Intoximeters, Inc., St. Louis, Missouri:		
Photo Electric Intoximeter *		X
GC Intoximeter MK II *	X	X
GC Intoximeter MK IV *	X	X
Auto Intoximeter *	X	X
Intoximeter Model:		
3000	X	X
3000 (rev B1) *	X	X
3000 (rev B2) *	X	X
3000 (rev B2A) *	X	X
3000 (rev B2A) w/FM option *	X	X
3000 (Fuel Cell) *	X	X
3000 D *	X	X
3000 DFC *	X	X
Alcomonitor		X
Alcomonitor CC	X	X
Alco-Sensor III	X	X
Alco-Sensor III (Enhanced with Serial Numbers above 1,200,000)	X	X
Alco-Sensor IV	X	X
Alco-Sensor IV XL	X	X
Alco-Sensor V	X	X
Alco-Sensor AZ	X	X
Alco-Sensor FST	X	X
Intox EC/IR	X	X
Intox EC/IR II	X	X
Intox EC/IR II (Enhanced with serial number 10,000 or higher)		X
Portable Intox EC/IR	X	X
RBT–AZ	X	X
RBT–III	X	X
RBT III–A	X	X
RBT IV	X	X
RBT IV with CEM (cell enhancement module)	X	X
Komyo Kitagawa, Kogyo, K.K., Japan:		
Alcolyzer DPA–2 *	X	X
Breath Alcohol Meter PAM 101B *	X	X

Lifeloc Technologies, Inc., (formerly Lifeloc, Inc.), Wheat Ridge, Colorado:		
PBA 3000B	X	X
PBA 3000-P *	X	X
PBA 3000C	X	X
Alcohol Data Sensor	X	X
Phoenix	X	X
Phoenix 6.0	X	X
EV 30	X	X
FC 10	X	X
FC 20	X	X
Lion Laboratories, Ltd., Cardiff, Wales, United Kingdom:		
Alcolmeter Model:		
300	X	X
400	X	X
400+ (aka: Intoxilyzer 240 in the U.S.)	X	X
SD–2 *	X	X
SD–5 (aka: S–D5 in the U.S.)	X	X
EBA*	X	X
Intoxilyzer Model:		
200	X	X
200D	X	X
1400	X	X
5000 CD/FG5	X	X
5000 EN	X	X
Luckey Laboratories, San Bernardino, California:		
Alco-Analyzer Model:		
1000 *		X
2000 *		X
Nanopuls AB, Uppsala, Sweden:		
Evidenzer	X	X
National Patent Analytical Systems, Inc., Mansfield, Ohio:		
BAC DataMaster (with or without the Delta-1 accessory):		
BAC Verifier DataMaster (w/or without the Delta-1 accessory)	X	X
DataMaster cdm (w/or without the Delta-1 accessory)	X	X
DataMaster DMT	X	X
Omicron Systems, Palo Alto, California:		
Intoxilyzer Model:		

4011 *	X	X
4011AW *	X	X
PAS International, Fredericksburg, Virginia:		
Mark V Alcovisor	X	X
Plus 4 Engineering, Minturn, Colorado:		
5000 Plus 4 *	X	X
Seres, Paris, France:		
Alco Master	X	X
Alcopro	X	X
Siemans-Allis, Cherry Hill, New Jersey:		
Alcomat *	X	X
Alcomat F *	X	X
Smith and Wesson Electronics, Springfield, Massachusetts:		
Breathalyzer Model:		
900 *	X	X
900A *	X	X
1000 *	X	X
2000 *	X	X
2000 (non-Humidity Sensor) *	X	X
Sound-Off, Inc., Hudsonville, Michigan:		
AlcoData	X	X
Seres Alco Master	X	X
Seres Alcopro	X	X
Stephenson Corp.:		
Breathalyzer 900 *	X	X
Tokai-Denshi Inc., Tokyo, Japan:		
ALC–PRO II (US)	X	X
U.S. Alcohol Testing, Inc./Protection Devices, Inc., Rancho Cucamonga, California:		
Alco-Analyzer 1000		X
Alco-Analyzer 2000		X
Alco-Analyzer 2100	X	X
Verax Systems, Inc., Fairport, New York:		
BAC Verifier *	X	X
BAC Verifier Datamaster	X	X
BAC Verifier Datamaster II *	X	X

* Instruments marked with an asterisk (*) meet the Model Specifications detailed in 49 FR 48854 (December 14, 1984) (i.e., instruments tested at 0.000, 0.050, 0.101, and 0.151 BAC.) Instruments not

marked with an asterisk meet the Model Specifications detailed in 58 FR 48705 (September 17, 1993), and were tested at BACs = 0.000, 0.020, 0.040, 0.080, and 0.160. All instruments that meet the Model Specifications currently in effect (dated September 17, 1993) also meet the Model Specifications for Screening Devices to Measure Alcohol in Bodily Fluids.

(c) No law enforcement agency shall use a breath analysis instrument unless the training agency has verified that representative samples of the specific make and model perform properly. Maintenance shall be conducted as specified by the training agency, and shall include, but shall not be limited to, calibration at a frequency as recommended by the device manufacturer or, minimally, annually.

(d) Training agencies shall be responsible for maintaining records pertaining to verification and maintenance (including calibration) of breath analysis instruments and standards; provided, however, that record keeping maintenance may be delegated, in whole or in part, to the law enforcement agency using the breath analysis instrument(s).

Volume: A-1

APPENDIX "T"

121 A.D.2d 73, 509 N.Y.S.2d 668

View National Reporter System version

The People of the State of New York, Respondent,
v.
Jafers Thomas, Appellant.
Supreme Court, Appellate Division, Fourth Department, New York
December 12, 1986

CITE TITLE AS: People v Thomas

SUMMARY

Appeal from a judgment of the Monroe County Court (Connell, J.), rendered upon a verdict convicting defendant of manslaughter in the second degree and other offenses.

HEADNOTES

Crimes
Fair Trial
Evidence of Alco-Sensor Test in Connection with Motor Vehicle Accident

A judgment convicting defendant of manslaughter in the second degree and other offenses in connection with a motor vehicle accident is reversed and a new trial ordered due to errors which cumulatively denied defendant a fair trial. Evidence concerning the Alco-Sensor test, a preliminary breath test administered at the scene of the accident to establish probable cause for the arrest, was not admissible to show intoxication since the People failed to lay a proper foundation showing its reliability for this purpose, and may have been used improperly by the jury as additional evidence of intoxication since the trial court did not sufficiently convey to the jury the limited purpose for which the Alco-Sensor test evidence was received. Further, since defendant did not controvert at trial the existence of grounds to administer a breathalyzer test, the question of whether the police had grounds to administer such a test presented a question of law and should not have been submitted to the jury. Because defendant raised a credible challenge to the accuracy of the breathalyzer test, evidence that defendant failed the Alco-Sensor test tended to corroborate the challenged questionable breathalyzer results and may not be deemed harmless. The prosecutor's misstatement on summation concerning the critical testimony of the breathalyzer operator also tended to bolster the credibility of the breathalyzer results. Finally, in view of defendant's claim that his car malfunctioned and accelerated out of control, the trial court improperly excluded defendant's expert from testifying as to a design modification concerning the placement of cruise control units on later model cars and as to the reasons for the change.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Criminal Law, §§ 646-651, 836-848.
NY Jur 2d, Criminal Law, §§86-93.

ANNOTATION REFERENCES

Federal prosecutor's pretrial statements as affecting defendant's right to fair trial. 22 ALR Fed 556.
Right of accused in State criminal courts to have expert inspect, examine, or test physical evidence in possession of prosecution--modern cases. 27 ALR4th 1188. ***74**
Modern status of rules and standards in State courts as to adequacy of defense counsel's representation of criminal client. 2 ALR4th 27.

APPEARANCES OF COUNSEL

Edward J. Nowak (Brian Shiffrin of counsel), for appellant.
Howard R. Relin, District Attorney (Elizabeth Clifford of counsel), for respondent.

OPINION OF THE COURT

Schnepp, J.

Defendant appeals from a judgment convicting him of manslaughter in the second degree, vehicular manslaughter, criminally negligent homicide, driving while under the influence of alcohol and other charges in connection with a series of motor vehicle accidents which occurred on October 6,

1984 on and near the Ford Street Bridge in the City of Rochester. Defendant's speeding car sideswiped two vehicles as it crossed the bridge from east to west and finally broadsided a car at the western approach to the bridge, killing the driver. When he emerged from his car, defendant told an off-duty police officer who witnessed the accident that he could not slow down because his car's accelerator stuck, causing him to lose control of the vehicle. Defendant has consistently maintained this claim throughout these proceedings and produced expert evidence at trial that his vehicle had mechanical and design defects which could have caused it to accelerate uncontrollably.

Police officers called to the scene of the accident observed that defendant's eyes were bloodshot, that he was unsteady on his feet and that there was a strong odor of alcohol on his breath. The police also administered a preliminary breath test on an Alco-Sensor device which apparently indicated that defendant had consumed alcohol *(see,* Vehicle and Traffic Law §1193-a). The trial testimony reflected that defendant was then arrested "based on the results of the test", although there was testimony that he had been earlier arrested based on the observations by the police. Within one hour following the Alco-Sensor screening and his arrest, defendant submitted to a breathalyzer test which indicated that his blood alcohol level was .14%. At trial, the People introduced the results of the breathalyzer test and also adduced testimony concerning ***75** the preliminary breath test on the Alco-Sensor. Defendant objected to any reference to the Alco-Sensor test; however, the trial court allowed the testimony as relevant to the question of whether the police had reasonable grounds to proceed with a breathalyzer test *(see,* Vehicle and Traffic Law §1194 [1] [1], [2]) and later instructed the jury that this proof could be considered "merely on the issue of the police officer's reasonable grounds to believe that the defendant was driving while intoxicated."

The prosecution adduced proof that the breathalyzer test had been administered within two hours of defendant's arrest, that the breathalyzer was in proper working condition when the test was given and that the chemicals used in the test were of the proper kind and in the proper proportion *(see, People v. Gower,* 42 NY2d 117). Defendant challenged only the reliability of the test results, however, and did this through the testimony of the breathalyzer operator, developed on cross-examination, that defendant had a cut on his lip when tested, that the operator found blood on the outside of the disposable mouthpiece of the breathalyzer after the test, although he was not sure if there was any blood in defendant's mouth, and that, although the mouthpiece has a stop valve to prevent contamination of the machine, the presence of blood in the mouth can produce an inaccurate test result. On summation, after defense counsel theorized that blood from defendant's mouth or lip may have contaminated the breath sample, the prosecutor erroneously stated that there was no evidence of the effect of such blood on the breathalyzer test.

At trial defendant also produced a witness, whom the prosecution conceded to be an expert mechanic, to testify concerning the alleged defects in his vehicle. This witness testified that a cable controlling the throttle had partially unraveled and could have caused unintended acceleration and that the placement of the cruise control unit on defendant's model car was a design defect which could also result in such acceleration. The witness was apparently prepared to testify that the manufacturer had changed the design and relocated the cruise control units on later model cars; however, this testimony was excluded by the court as irrelevant.

In our view, the receipt of evidence concerning the Alco-Sensor test, the misstatement by the prosecutor on summation concerning the critical testimony of the breathalyzer operator and the exclusion of defendant's expert evidence on design ***76** changes in later model cars were errors which cumulatively denied defendant a fair trial and require a reversal.

The People argue that the Alco-Sensor test was not admitted for the purpose of showing that defendant was actually intoxicated but only to establish that the police had grounds to request him to submit to a breathalyzer test. Defendant contends that the evidence concerning the Alco-Sensor test was used improperly by the jury as additional evidence of intoxication. We agree that this proof, from which the only logical inference is that defendant failed the Alco-Sensor test, may have appeared to the jury to be additional reliable scientific evidence of intoxication, particularly since the officer testified that he had been "trained in the operation of this device" and had used it for five years and the court failed to caution the jury immediately that the testimony had been received for the limited purpose of establishing a basis to proceed with a breathalyzer test.

The Alco-Sensor testimony was clearly not admissible to show intoxication. It is well settled that "[t]here must be a sufficient showing of reliability of the test results before scientific evidence may be introduced" (*People v. Spaight*, 92 AD2d 734, 735; *compare*, *People v. Donaldson*, 36 AD2d 37, 40). "[S]cientific evidence will only be admitted at trial if the procedure and results are generally accepted as reliable in the scientific community" (*People v. Hughes*, 59 NY2d 523, 537). Thus, the Alco-Sensor evidence should have been excluded because as it was presented to the jury it served as proof of intoxication and the People failed to lay a proper foundation showing its reliability for this purpose. No expert testimony was submitted as to the accuracy of this device and the scientific principles on which it is based. The record is completely barren of scientific evidence which would establish the reliability of the test. Moreover, cases from other jurisdictions hold that the Alco-Sensor test is not reliable evidence of intoxication (*see*, *Boyd v. City of Montgomery*, 472 So 2d 694, 697 [Ala Crim App]; *State v. Thompson*, 357 NW2d 591, 593-594 [Iowa]; *State v. Smith*, 218 Neb 201, 352 NW2d 620, 624; *State v. Orvis*, 143 Vt 388, 465 A2d 1361, 1362-1363; *cf. State v. Albright*, 98 Wis 2d 663, 298 NW2d 196, 203 [Ct App]).

Although an Alco-Sensor test is not admissible as evidence of intoxication, breath screening devices have won acceptance as being sufficiently reliable to establish probable cause for an arrest (*see, Matter of Smith v. Commissioner of Motor Vehicles*, 103 AD2d 865, 866; *see also*, ***77** *Boyd v. City of Montgomery*, 472 So 2d 694, 697, supra.; *State v. Thompson*, 357 NW2d 591, 593, supra.; *State v. Orvis*, 143 Vt 388, 465 A2d 1361, 1362-1363, supra.) and may be used by the police to establish a basis to request a breathalyzer test (Vehicle and Traffic Law §§1193-a, 1194 [1] [2]). The People claim that the evidence was properly received for this limited purpose; however, as we have previously stated, this limitation was not sufficiently expressed to the jury. Moreover, the issue as to whether grounds existed to request a breathalyzer test was not raised in this case.

The People contend that they are required to prove reasonable grounds to require a breathalyzer test in every driving while intoxicated (DWI) case in order to lay a proper foundation for proof of the result of a breathalyzer test. Their view is supported by the "pattern" Criminal Jury Instructions which state that the jury must find "that the presence of [a percentage of alcohol] in the defendant's blood was determined in accordance with the law" (3 CJI [NY] V&TL 1192 [2] p 2277). According to the CJI, Vehicle & Traffic Law §§ 1192 and 1194 require the jury to find that five steps have been taken in order to conclude that the results of the chemical test are valid. Our concern is with the first of such steps which requires the jury to find either: "[T]hat [the arresting officer] had reasonable grounds to believe that the defendant was operating a motor vehicle" while he was intoxicated (at 2277; *see*, Vehicle and Traffic Law §1194 [1] [1]) or, that the arresting officer gave defendant a breath test to determine if defendant had consumed any alcohol, and the test administered showed that defendant had consumed alcohol (at 2278-2279; *see*, Vehicle and Traffic Law §1194 [1] [2]).

We disagree with the implication of these instructions that either reasonable cause to arrest or the results of a preliminary breath screening test must be shown in every DWI case regardless of whether the defendant has raised lack of reasonable grounds to require a breathalyzer test as an issue. Case law holds that there must be evidence in the record from which the trier of fact can determine whether a breathalyzer test was performed within two hours of arrest (*see*, *People v. Mertz*, 68 NY2d 136, 146; *People v. Ambrozik*, 104 AD2d 693, 694). The People argue that proof of probable cause to arrest or failure of a screening test is also required to establish a foundation for the breathalyzer test; that is simply not the case. It is only when the legality of such a test or an arrest is challenged, e.g., by a pretrial suppression motion, that the People have the burden "to come forward with evidence" of ***78** probable cause and a hearing Judge is faced with deciding whether the People have met their burden of proof. The analysis required is "largely the same as that used by a magistrate in passing on an application for an arrest or search warrant" (*People v. Dodt*, 61 NY2d 408, 415). Moreover, with relation to the admission of breathalyzer test results the only foundational requirement is that "evidence must be introduced both that the breathalyzer was in proper working condition when the test was given to defendant, and that the chemicals used in the test were of the proper kind and in the proper proportion" (*People v. Garneau*, 120 AD2d 112, 115). Section 1194 (1) provides that a test conducted more than two hours after arrest is stale, thus the time element also must be proved, but we can discern no requirement in the statute that reasonable grounds to require a breathalyzer test must be presented to the jury as an issue of fact in every DWI case.

The statutory requirement that the police have reasonable grounds, in the form of observation of behavior or failure of a screening test, to require that a person submit to a breathalyzer test is analogous to the requirement that an arrest must be founded on probable cause and creates similar issues for the court. "The question of probable cause is a mixed question of law and fact: the truth and existence of the facts and circumstances bearing on the issue being a question of fact, and the determination of whether the facts and circumstances found to exist and to be true constitute probable cause being a question of law" *(People v. Oden, 36 NY2d 382, 384; see, People v. Morales, 42 NY2d 129, 134, cert denied 434 U.S. 1018)*. "If the facts and circumstances adduced as proof of probable cause are controverted so that conflicting evidence is to be weighed, if different persons might reasonably draw opposing inferences therefrom, or if the credibility of witnesses is to be passed upon, issues as to the existence or truth of the facts and circumstances are to be passed upon as a question of fact; however, when the facts and circumstances are undisputed *** the issue as to whether they amount to probable cause is a question of law" *(People v. Oden, supra., p 384)*. Here, defendant did not controvert at trial the existence of grounds to administer a breathalyzer test. Under these circumstances, the question whether the police had grounds to administer such a test presented a pure question of law and should not have been submitted to the jury. Thus, proof that defendant failed the Alco-Sensor test, which was ostensibly admitted ***79** solely for the purpose of establishing the existence of reasonable grounds to administer a breathalyzer test under Vehicle and Traffic Law § 1192 (1) (1) or (2), should have been excluded as irrelevant to the issues before the jury. In our view, evidence regarding the Alco-Sensor test had no place in the trial and the objection to its admission should have been sustained. The jury should not have been given the opportunity "to use the screening test result to corroborate the evidential test result" (Brent & Stiller, Handling Drunk Driving Cases, ch 13, at 229; *see, State v. Thompson, 357 NW2d 591, 593, supra.; State v. Smith, 218 Neb 201, 352 NW2d 620, 624, supra.)*.

Although the receipt of evidence relating to the Alco-Sensor test was error, reversal is not required if the evidence was merely cumulative of other proof of intoxication and can be deemed harmless. Where the reliability of the results of a breathalyzer test showing defendant's blood alcohol content to be greater than .10% are not credibly challenged, improper references to preliminary screening tests may be disregarded as harmless error *(see, Boyd v. City of Montgomery, 472 So 2d 694, 697-698, supra. State v. Smith, 218 Neb 201, 352 NW2d 620, 624, supra.)*. Here, however, defendant raised a credible challenge to the accuracy of the breathalyzer test. The breathalyzer operator testified that the presence of blood in the subject's mouth may result in a false reading on the breathalyzer and that he observed a cut in defendant's lip and found blood on the mouthpiece of the breathalyzer after he tested defendant. Under these circumstances, evidence that defendant failed the Alco-Sensor test tended to corroborate the challenged questionable breathalyzer results and may not be deemed harmless *(see, State v. Thompson, 357 NW2d 591, 594, supra.)*. We conclude "that there is a significant probability, rather than only a rational possibility *** that the jury would have acquitted the defendant had it not been for the error *** which occurred." *(People v. Crimmins, 36 NY2d 230, 242.)*

The prosecutor's misstatement on summation concerning the critical testimony of the breathalyzer operator also tended to bolster the credibility of the breathalyzer results. While the jury was cautioned that its recollection of the evidence was controlling, the prosecutor's comments were improper and easily might have confused the jury.

Finally, the trial court improperly precluded defendant's expert from testifying as to a design modification concerning ***80** the placement of cruise control units on later model cars and as to the reasons for the change. The prosecutor stipulated that the witness was an expert and under these circumstances there was no basis to exclude the testimony. The evidence was certainly relevant to defendant's claim that his car malfunctioned and accelerated out of control and should have been allowed. Subsequent design modifications, although inadmissible in some civil cases *(see, Caprara v. Chrysler Corp., 52 NY2d 114, rearg denied 52 NY2d 1073)*, may be admitted in criminal cases if relevant; the rationale underlying excluding such evidence in civil cases where the defendant is the accused culpable designer or manufacturer is ill-applied in criminal cases. Public policy does not justify the exclusion of this evidence where the manufacturer of the product cannot be prejudiced by

its admission and the defendant has a constitutional right to present evidence. There is no reason to reject evidence of this character in criminal cases if relevant.

Accordingly, the judgment should be reversed and a new trial granted.

Denman, J. P., Boomer, Pine and Lawton, JJ., concur.

Judgment unanimously reversed, on the law, and new trial granted. ***81**

N.Y.A.D.,1986.
PEOPLE v. THOMAS
121 A.D.2d 73, 509 N.Y.S.2d 668

END OF DOCUMENT

APPENDIX "U"

103 A.D.3d 1038
(Cite as: 103 A.D.3d 1038, 962 N.Y.S.2d 408)

H

People v Kulk
103 A.D.3d 1038, 962 N.Y.S.2d 408
NY,2013.

103 A.D.3d 1038, 962 N.Y.S.2d 408, 2013 WL 709069, 2013 N.Y. Slip Op. 01299

The People of the State of New York, Respondent
v
Peter F. Kulk, Appellant.
Supreme Court, Appellate Division, Third Department, New York

February 28, 2013

CITE TITLE AS: People v Kulk

HEADNOTES

Crimes
Confession
Noncustodial Statements—Temporary Detainment Pursuant to Routine Traffic Stop

Motor Vehicles
Chemical Tests
Test Not Admissible to Establish Lack of Intoxication

Crimes
Lesser Included Offense
Stipulation Prevented Jury from Obtaining Information Necessary to Determine Whether Lesser Included Offense was Committed

Motor Vehicles
Chemical Tests
Sufficient Foundation for Admission of Results

Mark Schneider, Plattsburgh, for appellant.
Derek P. Champagne, District Attorney, Malone (Glenn MacNeill of counsel), for respondent.

Garry, J. Appeal from a judgment of the County Court of Franklin County (Main Jr., J.), rendered September 26, 2011, upon a verdict convicting defendant of the crimes of driving while intoxicated and aggravated unlicensed operation of a motor vehicle in the first degree.

In August 2010, police officer Leigh Wenske, who knew that defendant had a suspended or revoked driver's license, saw him driving a car in the Village of Saranac Lake, Franklin County. After stopping defendant's vehicle, the officer noticed and told defendant that he had an odor of alcohol on his person. Defendant made several incriminating statements and refused to submit to field sobriety tests. He was arrested and transported to the police station, where he agreed to submit to three field sobriety tests, two of which he passed, and to a breathalyzer test, which indicated that his blood alcohol count (hereinafter BAC) was .10. Defendant was indicted for aggravated unlicensed operation of a motor vehicle (hereinafter AUO) in the first degree and two counts of driving while intoxicated (hereinafter DWI). Following a jury trial, he was acquitted of one of the DWI charges and convicted of the remaining charges. County Court denied defendant's motion to set aside the verdict, and sentenced him to concurrent prison terms of 2 to 6 years for the DWI conviction and 1 1/3 to 4 years for the AUO conviction, followed by three years of conditional discharge. Defendant appeals.

Defendant contends that County Court erred in denying his motion to suppress the **2 statements he made during the traffic stop. At the suppression hearing, Wenske testified that he had learned during a previous encounter with defendant that his license was suspended or revoked, and advised defendant that he had stopped him for this reason. Defendant acknowledged his driving status and provided nondriver identification. Wenske then told defendant that he noticed an odor of alcohol on his person, and inquired how much he had had to drink that day. According to Wenske and police officer Jason Swain, who had *1039 been summoned to the scene as backup, defendant stated, among other

things, that he had consumed two alcoholic beverages, "had been drinking pretty hard" the night before, knew that he was over the limit and expected to go to prison as a result. Defendant also told the officers to "place handcuffs on him and take him in."

The record supports County Court's conclusion that *Miranda* warnings were not required before defendant made these statements, as he was not then "subject to custodial interrogation" (*People v Baggett*, 57 AD3d 1093, 1094 [2008]). "[I]ndividuals who are temporarily detained pursuant to a routine traffic stop are not considered to be in custody for the purposes of *Miranda* " (*People v Dougal*, 266 AD2d 574, 576 [1999], *lv denied*94 NY2d 879 [2000]; *see Pennsylvania v Bruder*, 488 US 9, 11 [1988]; *People v Hasenflue*, 252 AD2d 829, 830 [1998], *lv denied*92 NY2d 982 [1998]). Wenske's statement that he smelled alcohol and inquiry regarding alcohol consumption would not have caused a reasonable person innocent of any wrongdoing to believe that he or she was in custody (*see generally People v Yukl*, 25 NY2d 585, 589 [1969], *cert denied*400 US 851 [1970]; *People v Nehma*, 101 AD3d 1170, 1173 [2012]).

Defendant next contends that the People failed to turn over *Brady* material. In response to defendant's pretrial discovery demand for police video recordings, the People acknowledged the existence of a single video taken "during the defendant's arrest" and agreed to provide it. The People contend that this video—which is not part of the record—was provided as agreed and is, in any event, not exculpatory. However, the People also now acknowledge the existence of another police video, taken by a dashboard camera in the second officer's vehicle; this video was not turned over to defendant, allegedly because it was not discovered until after this appeal was filed. This second video, which the People claim is not exculpatory, has now been delivered to defendant's appellate counsel and to this Court; however, as it is not part of the record, we cannot address its substance on this appeal. Defendant's claims in this respect would more appropriately be raised in a motion pursuant to CPL article 440 (*see*CPL 440.10; *People v Bianca*, 91 AD3d 1127, 1130 [2012], *lv denied*19 NY3d 862 [2012]). As to the police list of drivers with suspended or revoked licenses, defendant failed to preserve any issue by demanding the list before trial, objecting when the list was referenced in testimony, or otherwise. In any event, as the list is not in the record, defendant's ***1040** claim that it should have been disclosed cannot be addressed upon this appeal (*see People v Bianca*, 91 AD3d at 1130).[FN***3]

We reject defendant's claim that County Court should have admitted into evidence the results of an alco-sensor preliminary breath test that allegedly measured his BAC at only .06. Although the alco-sensor test may be used to establish probable cause for an arrest, it is not admissible to establish intoxication, as its reliability for this purpose is not generally accepted in the scientific community (*see People v Thomas*, 121 AD2d 73, 76-77 [1986], *affd* 70 NY2d 823 [1987]; *see also Boyd v City of Montgomery*, 472 So 2d 694, 697 [Ct Crim App Ala 1985]; *State v Smith*, 218 Neb 201, 206, 352 NW2d 620, 624 [1984]). We are not persuaded that a test that is not deemed sufficiently reliable to measure and thus establish a level of intoxication should be admissible to establish the lack of such level of intoxication. Defendant failed to preserve his related claim that the alco-sensor results should have been admitted for the limited purpose of showing that the breathalyzer machine—which obtained a higher BAC reading—may not have been functioning correctly. In any event, in the absence of any showing that the test is scientifically accepted as reliable for this purpose, no modification in the interest of justice is warranted (*see generally People v Hughes* , 59 NY2d 523, 537 [1983]).

County Court did not commit reversible error by denying defendant's request to charge the jury with AUO in the second degree as a lesser included offense of the charge of AUO in the first degree. Defendant stipulated outside the jury's presence that

he knew at the time of the incident that his license had been revoked pursuant to Vehicle and Traffic Law § 511 (2) (a) (ii) as a result of prior DWI convictions, for the purpose of allowing the People to charge AUO in the first degree without prejudicing defendant by revealing to the jury the reason for the revocation of his license (*see*Vehicle and Traffic Law § 511 [3] [a] [i]; *see generally People v Boyles* , 210 AD2d 732, 732-734 [1994]). In accord with this agreement, the jury was told that defendant had stipulated that he did not have a driver's license, but was not told the reason. Defendant's counsel asked the court to charge AUO in the second degree "so long as the lesser included charge did not note to the jury the reason for the *1041 suspension" of defendant's license. However, the jury could not have decided whether defendant committed AUO in the second degree without knowing the circumstances under which his license was revoked (*see*Vehicle and Traffic Law § 511 [2] [a]). Therefore, as defendant's stipulation prevented the jury from obtaining this information, he was not entitled to the requested instruction.

Finally, we reject defendant's contention that an insufficient foundation was laid for the admission of the breathalyzer test results. During direct examination of Swain, who administered the test, the People established "evidence from which the trier of fact could reasonably conclude that the test results were derived from a properly functioning machine using properly constituted chemicals" (*People v Freeland* , 68 NY2d 699, 701 [1986]). The leading questions to which defendant now objects were asked during cross-examination and upon redirect questioning, after the foundation had been laid. Further, County Court properly prevented defendant from cross-examining Swain regarding the effect of time on BAC results, as he did not testify as an expert on such matters (*compare People v Mertz*, 68 NY2d 136, 140-141 [1986]); Swain was fully cross-examined as to his qualifications and the procedures he followed (*see People v Robinson*, 53 AD3d 63, 70 [2008], *lv denied*11 NY3d 857 [2008]). Similarly, the court properly precluded defense counsel from cross-examining Wenske about "chemical testing" as he had testified on direct examination that he conducted field sobriety testing but did not administer the breathalyzer test.

Defendant's remaining contentions have been examined and found to be without merit.

Peters, P.J., Stein and Egan Jr., JJ., concur. Ordered that the judgment is affirmed

FOOTNOTES

FN* Defendant argues briefly on appeal that his trial counsel was ineffective in failing to preserve issues for appeal, without specifying issues. To the extent that this argument may reference counsel's alleged failure to object to the nondisclosure of the list, it relies on evidence outside the record—specifically, the list itself—and thus would also best be addressed in a motion pursuant to CPL article 440 (*see People v McCray*, 96 AD3d 1160, 1161 [2012], *lv denied*19 NY3d 1104 [2012]).

People v Kulk
103 A.D.3d 1038, 962 N.Y.S.2d 4086022013 WL 7090699992013 N.Y. Slip Op. 012994603, 962 N.Y.S.2d 4086022013 WL 7090699992013 N.Y. Slip Op. 012994603, 962 N.Y.S.2d 4086022013 WL 7090699992013 N.Y. Slip Op. 012994603

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APPENDIX "V"

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 56

----------X

THE PEOPLE OF THE STATE OF NEW YORK

- against -

DECISION AND ORDER

Ind. No. 4773/2012

JONATHAN ROSAS

Defendant.

----------X

ARLENE D. GOLDBERG, J.:

After careful consideration of the parties' submissions and the oral argument heretofore held on the issue and in accordance with the oral decision rendered from the bench at the calendar call of the case on January 6, 2014, I find that I am bound by the decision of the Appellate Division, Third Department in People v. Kulk, 103 AD3d 1038 (3rd Dept 2013), leave denied, 22 NY3d 956 (2013). See, People v. Jose Trespalacios, Criminal Ct, NY County, May 22, 2013, Clott, J., Docket 2011 NY041033. Therefore, the defendant's motion to preclude the results of the SD-2 preliminary, portable breath test administered to the defendant at the scene of his arrest is granted to the extent that the People are precluded from eliciting such evidence on their direct case at trial.

The foregoing is the decision and order of the court.

Dated: New York, New York
January 13, 2014

ARLENE D. GOLDBERG, J.

Hon. A. Goldberg

PT. 56 JAN 13 2014

APPENDIX "W"

The City of New York

POLICE DEPARTMENT

NEW YORK, N.Y. 10038

NEW YORK CITY POLICE LABORATORY

BREATH TEST RULES

1. Use only authorized breath test equipment for all breath tests given in connection with arrests under any law or ordinance that permits the taking of a breath sample to determine blood alcohol content, particularly the following laws:

   The Vehicle and Traffic Law;

   The Parks and Recreation Law; AND

   The Environmental Conservation Law.

2. Breath tests must be given only by those Members who possess a valid Breath Analysis Operator's Permit issued by the Department of Health.

3. When you administer a breath test:

   Complete a Breath Test Operational Check List.

   Operate the breath test instrument in accordance with the steps outlined on that check list.

APPENDIX "X"

Westlaw.
938 N.E.2d 989
15 N.Y.3d 494, 938 N.E.2d 989, 912 N.Y.S.2d 556, 2010 N.Y. Slip Op. 08380
(Cite as: 15 N.Y.3d 494, 938 N.E.2d 989, 912 N.Y.S.2d 556)

H

Court of Appeals of New York.
The PEOPLE of the State of New York, Appellant,
v.
Dragan BOSCIC, Respondent.

Nov. 17, 2010.

Background: Following bench trial, defendant was convicted in the Bethel Justice Court, Howard J. Block, Town Justice, of driving while ability impaired by consumption of alcohol. He appealed. The Sullivan County Court, Frank J. LaBuda, J., 24 Misc.3d 1227(A), 2009 WL 2340690, reversed. The People were granted leave to appeal.

Holdings: The Court of Appeals, Graffeo, J., held that:
(1) there is no strict six-month calibration rule for breath testing evidence to be admissible at trial, and
(2) certificate attesting that last calibration of breath test machine occurred slightly more than six months prior to defendant's arrest was sufficient predicate as part of proper foundation to receive test results in evidence.

Reversed and remitted.

West Headnotes

|1| Automobiles 48A ⚿422.1

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Foundation or Predicate
48Ak422.1 k. In general. Most Cited Cases
It remains necessary for the proponent of breath-alcohol test evidence to establish an adequate evidentiary foundation for the admission into evidence of the results of the test.

|2| Automobiles 48A ⚿424

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Foundation or Predicate
48Ak424 k. Reliability of particular testing devices. Most Cited Cases
Breath-alcohol evidence is admissible if the People demonstrate that the breath test machine was in proper working order at the time it issued the test results in question.

|3| Automobiles 48A ⚿424

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Foundation or Predicate
48Ak424 k. Reliability of particular testing devices. Most Cited Cases
There is no strict six-month calibration rule for breath testing evidence to be admissible at trial. 10 NYCRR 59.4(c).

|4| Automobiles 48A ⚿424

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Foundation or Predicate
48Ak424 k. Reliability of particular testing devices. Most Cited Cases
Appropriate and adequate calibration procedures for breath test machines cannot be disregarded by law enforcement; rather, the admissibility of breath-alcohol analysis results remains premised on the People's ability to demonstrate, among other requirements, that the device was in "proper working order" when it was used to test an accused. 10 NYCRR 59.4(c).

|5| Automobiles 48A ⚿422.1

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Found-

ation or Predicate
48Ak422.1 k. In general. Most Cited Cases

Automobiles 48A ⇐424

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Foundation or Predicate
48Ak424 k. Reliability of particular testing devices. Most Cited Cases

Automobiles 48A ⇐426

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak426 k. Procedure; evidence and fact questions. Most Cited Cases
Although there is no strict six-month calibration rule with regard to foundation for breath-testing evidence, nothing prevents an accused from seeking to introduce relevant evidence that may affect other foundational issues or weight that should be given to results generated by particular breath-testing device.

|6| Automobiles 48A ⇐424

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Foundation or Predicate
48Ak424 k. Reliability of particular testing devices. Most Cited Cases
Certificate attesting that the last calibration of breath test machine occurred slightly more than six months prior to defendant's arrest was sufficient predicate as part of the proper foundation to receive test results in evidence in prosecution for driving while impaired, because it adequately assured that the instrument was capable of producing accurate information when defendant was tested. McKinney's Vehicle and Traffic Law §§ 1192(1), 1194(4)(c); 10 NYCRR 59.4(c).

***556** James R. Farrell, District Attorney, Monticello (Bonnie M. Mitzner, Scott Russell and Meagan Galligan of counsel), for appellant.

***557** Joel M. Proyect, Parksville, for respondent.

Gerstenzang, O'Hern, Hickey, Sills & Gerstenzang, Albany (Eric H. Sills of counsel), for New York State Defenders Association, amicus curiae.

***496 **990 OPINION OF THE COURT**
GRAFFEO, J.

In this case, we consider whether our decision in *People v. Todd,* 38 N.Y.2d 755, 381 N.Y.S.2d 50, 343 N.E.2d 767 (1975) adopted a standard requiring that breath-alcohol detection devices must be calibrated at least every six months in order for the test results to be admissible at trial. We hold that there is no per se, six-month rule and that the People must instead lay a foundation demonstrating that the particular device used was in proper working order when the test was administered.

On November 3, 2007, Constable McCarthy of the Town of Bethel police force observed a minivan parked on the side of a road directly underneath a "no standing" sign. A few minutes later, McCarthy saw defendant Dragan Boscic walk from a nearby convenience store and get into the minivan. As defendant started to drive the minivan forward, McCarthy pulled the police car in front of it and exited the vehicle.

According to McCarthy, when he approached the minivan, he smelled alcohol on defendant's breath, saw that his eyes were glassy and bloodshot, and noticed that his speech was slightly slurred. McCarthy asked defendant if he had consumed alcohol and defendant admitted to drinking three beers. McCarthy then requested that defendant perform five field sobriety tests. After defendant's poor performance on some of these tests, he was arrested for suspicion of drunk driving. Later, at the Sullivan County Sheriff's Office, McCarthy used a breath-alcohol machine—the BAC DataMaster—to test defendant. The device *497 issued a reading in-

dicating that defendant's blood alcohol level was .07%. Defendant was charged with violating Vehicle and Traffic Law § 1192(1)—driving while ability impaired by the consumption of alcohol.

During the bench trial in Bethel Justice Court, the People sought to introduce, through the testimony of Constable McCarthy, the results of the breath-alcohol test. As part of the foundation presented in support of the admissibility of the test results, the People offered a police record certifying that the DataMaster had been calibrated (i.e., checked and adjusted by a trained technician) by an employee of the State Division of Criminal Justice Services on April 6, 2007—approximately six months and three weeks before the test was administered to defendant. Defense counsel argued against admission of the test results on the basis that the People failed to lay an adequate foundation, asserting that *People v. Todd,* 38 N.Y.2d 755, 381 N.Y.S.2d 50, 343 N.E.2d 767 (1975) required that breathalyzer machines must be calibrated at least every six months and the calibration in this case was untimely. Justice Court rejected that contention and concluded that the People demonstrated that the DataMaster device was working properly at the time defendant was tested. Defendant was found guilty as charged.

On appeal, Sullivan County Court reversed and dismissed the accusatory instrument (24 Misc.3d 1227[A], 2009 N.Y. Slip Op. 51649[U], 2009 WL 2340690 [2009]). The court interpreted *Todd* as creating a six-month calibration rule and therefore held that the DataMaster results were inadmissible because the device had not been calibrated within six months of defendant's arrest. County Court also ruled that, without the breath-alcohol test **991 ***558 results, McCarthy's trial testimony was insufficient as a matter of law to prove defendant's guilt beyond a reasonable doubt. A Judge of this Court granted the People leave to appeal (13 N.Y.3d 937, 895 N.Y.S.2d 327, 922 N.E.2d 916 [2010]) and we now reverse.

[1] Breath-alcohol detection machines have long been considered scientifically reliable, but it remains necessary for the proponent of breath-alcohol test evidence to establish an adequate evidentiary foundation for the admission into evidence of the results of the test (*see e.g. People v. Mertz,* 68 N.Y.2d 136, 148, 506 N.Y.S.2d 290, 497 N.E.2d 657 [1986]). The issue here is whether, as a predicate to the admissibility of this evidence, there needed to be proof that the instrument used to test defendant had been calibrated during the past six months. Defendant claims that *498*People v. Todd,* 38 N.Y.2d 755, 381 N.Y.S.2d 50, 343 N.E.2d 767 1975) established a six-month calibration requirement that was not met here. Although *Todd* is susceptible to such an interpretation, we do not read it in such a rigid manner.

The trial evidence in *Todd* indicated that the breathalyzer machine "was constantly left on at the [state police] barracks and never turned off," and had been calibrated more than six months before it was utilized to test the defendant (79 Misc.2d 630, 633, 360 N.Y.S.2d 754 [County Ct., Delaware County 1974]). The intermediate appellate court believed that those "two factors taken together raise[d] a reasonable doubt ... as to the reliability of that particular machine" (*id.*). We agreed in a memorandum decision, explaining that "[t]he People failed to establish that the breathalyzer apparatus had been timely calibrated" and that "[i]t was incumbent upon the District Attorney to show that the machine was in proper working order" (38 N.Y.2d at 756, 381 N.Y.S.2d 50, 343 N.E.2d 767). Our decision was necessarily premised on both of these interrelated circumstances—a breathalyzer device that had never been deactivated and, in light of its continuous operation, had not been recently calibrated. Thus, *Todd* did not explicitly articulate a six-month standard or allude to a specific calibration time frame.

[2] We have not relied on a six-month, bright-line rule in subsequent cases that dealt with the foundation requirements for breath-alcohol evidence. Rather than applying a specific temporal lim-

itation, our *post- Todd* decisions have repeatedly emphasized that the applicable principle is whether the detection instrument was in "proper working order" at the time a test was administered (*People v. Gower,* 42 N.Y.2d 117, 120, 397 N.Y.S.2d 368, 366 N.E.2d 69 [1977]; *People v. Freeland,* 68 N.Y.2d 699, 700, 506 N.Y.S.2d 306, 497 N.E.2d 673 [1986]; *People v. Kinne,* 71 N.Y.2d 879, 880, 527 N.Y.S.2d 754, 522 N.E.2d 1052 [1988]; *see People v. Alvarez,* 70 N.Y.2d 375, 380, 521 N.Y.S.2d 212, 515 N.E.2d 898 [1987]; *People v. Mertz,* 68 N.Y.2d at 148, 506 N.Y.S.2d 290, 497 N.E.2d 657). The Third and Fourth Departments have interpreted our precedent similarly and rejected the notion that it is impossible for a breath-alcohol device to function properly simply because it has not been calibrated for six months (*see e.g. People v. Dargento,* 302 A.D.2d 924, 755 N.Y.S.2d 535 [4th Dept.2003]; *People v. Manino,* 147 A.D.2d 926, 537 N.Y.S.2d 720 [4th Dept.1989]; *People v. English,* 103 A.D.2d 979, 980 n. *, 480 N.Y.S.2d 56 [3d Dept.1984]). We concur with that view and therefore hold that such evidence is admissible if the People demonstrate that the machine was in proper working order at the time it issued the test results in question.

***559 **992 *Todd* was decided almost 35 years ago and in the ensuing decades, scientific knowledge has advanced dramatically, leading *499 to significant technological changes in breath-alcohol detection devices. The scientific methods incorporated in modern-day breath testing instruments are substantially different from the earlier generations of these devices. For instance, in 1975 when *Todd* was decided, the prevalent scientific process for breath-alcohol analysis involved chemical oxidation, wherein a breath sample was passed through an ampule containing a chemical mixture (usually potassium dichromate in sulfuric acid). The degree of ethanol content in the breath stimulated changes in the absorption abilities of the solution that could be detected by transmitting light through the sample. Results were then compared with an unreacted sample of the solution to achieve a blood-alcohol concentration reading (*see* Faigman et al., 5 Modern Scientific Evidence: The Law and Science of Expert Testimony § 41:55; 2 Giannelli and Imwinkelried, Scientific Evidence § 22.03 [b], at 380 [4th ed.]). More recent technology relies on infrared absorption spectrometry. This technology—which is used in the BAC DataMaster—calculates blood-alcohol concentration by passing infrared light through a chamber holding the breath sample to gauge the absorption rate of "infrared radiation at specific wavelengths" (Faigman et al., 5 Modern Scientific Evidence: The Law and Science of Expert Testimony § 41:52; *see* 2 Giannelli and Imwinkelried, Scientific Evidence § 22.03[b], at 389 [4th ed.]; Rose, New York Vehicle and Traffic Law § 35:21 [2d ed.]). Given the technological advances that have occurred and will continue to evolve, paired with the proliferation of available breath-alcohol detection devices approved for use by the New York State Department of Health (DOH) (*see* 10 NYCRR 59.4),[FN*] we do not believe that a court-imposed calibration timing rule for all current technologies would be helpful in achieving the primary objective, which is to provide the factfinder a basis to determine whether the particular instrument used produced reliable results in a specific instance. Even if we had articulated a bright-line calibration rule more than three decades ago, the changes in scientific testing methods would have provided reason to revisit it.

> FN* DOH currently lists about 100 different models of breath-alcohol testing devices (including the DataMaster) that are approved for use by law enforcement agencies (*see* 10 NYCRR 59.4[b]).

It further bears noting that both parties to this litigation recognize that DOH has been charged by the Legislature to evaluate and approve specific models of breath-alcohol testing machines (*see* Vehicle and Traffic Law § 1194[4] [c]). In its *500 regulatory capacity, DOH has determined that such instruments must be calibrated "at a frequency as recommended by the device manufacturer" but not less than once a year (10 NYCRR 59.4[c] [eff. Apr.

23, 2010, as amended July 22, 2010]). The promulgation of these regulations will, for arrests occurring after the effective date of the regulations, provide courts with information regarding recommended calibration intervals, not to exceed one year, when assessing the adequacy of foundation requirements for the admissibility of breath-alcohol test results. But here, there is no question that section 59.4(c) of the regulations—the provision addressing calibration standards—was not effective at the time of defendant's arrest, and the People do not assert that this regulation supplies the applicable standard in this case.

[3][4][5][6] We therefore rely on our holding that there has been no strict six-month **993 ***560 calibration rule pronounced by this Court for breath testing evidence. Our conclusion does not mean that appropriate and adequate calibration procedures can be disregarded by law enforcement. Rather, the admissibility of breath-alcohol analysis results remains premised on the People's ability to demonstrate, among other requirements, that the device was in "proper working order" when it was used to test an accused (*People v. Freeland,* 68 N.Y.2d at 700, 506 N.Y.S.2d 306, 497 N.E.2d 673). And nothing prevents an accused from seeking to introduce relevant evidence that may affect other foundational issues or the weight that should be given to results generated by a particular device, as defendant attempted during his trial. In this case, the certificate in evidence attesting that the last calibration occurred slightly more than six months prior to defendant's arrest was a sufficient predicate as part of the proper foundation to receive the Data–Master results in evidence because it adequately assured that the instrument was capable of producing accurate information when defendant was tested. Consequently, Justice Court did not err as a matter of law in concluding that the DataMaster results could be considered during the trial. We therefore remit to County Court for consideration of whether the trial evidence, including the DataMaster results, was legally sufficient and, if necessary, whether the weight of the evidence supported the conviction.

Accordingly, the order of County Court should be reversed and the case remitted to that court for further proceedings in accordance with this opinion.

*501 Chief Judge LIPPMAN and Judges CIPARICK, READ, SMITH, PIGOTT and JONES concur.

Order reversed, etc.

N.Y.,2010.
People v. Boscic
15 N.Y.3d 494, 938 N.E.2d 989, 912 N.Y.S.2d 556, 2010 N.Y. Slip Op. 08380

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APPENDIX "Y"

Effective Date: 12/07/2011
Title: Section **59.5** - Breath analysis; techniques and methods

59.5 Breath analysis; techniques and methods. The following breath analysis techniques and methods shall be a component of breath analysis instrument operator training provided by training agencies and shall be used by operators performing breath analysis for evidentiary purposes:

(a) A breath sample shall be collected at the direction and to the satisfaction of a police officer and shall be analyzed with breath analysis instruments meeting the criteria set forth in section 59.4 of this Part.

(b) The subject shall be observed for at least 15 minutes prior to the collection of the breath sample, during which period the subject must not have ingested alcoholic beverages or other fluids, regurgitated, vomited, eaten, or smoked, or have placed anything in his/her mouth; if the subject should regurgitate, vomit, smoke or place anything in his/her mouth, an additional 15-minute waiting period shall be required.

(c) A system purge shall precede both the testing of each subject and the analysis of the reference standard.

(d) The result of an analysis of a reference standard with an alcoholic content greater than or equal to 0.08 percent must agree with the reference standard value within the limits of plus or minus 0.01 percent weight per volume, or such limits as set by the commissioner. An analysis of the reference standard shall precede or follow the analysis of the breath of the subject in accordance with the test sequence established by the training agency. Readings for the reference standard, a blank and the subject's breath, shall be recorded.

(e) Results of an analysis of breath for alcohol shall be expressed in terms of percent weight per volume, to the second decimal place as found; for example, 0.237 percent found shall be reported as 0.23 percent.

Volume: A-1

APPENDIX "Z"

INDIANA UNIVERSITY

BORKENSTEIN COURSE

Center for Studies *of* Law in Action

Quality Assurance in Breath-Alcohol Analysis

by
Kurt M. Dubowski, Ph.D., LL.D., DABCC, DABFT

Quality Assurance in Breath-Alcohol Analysis*

Kurt M. Dubowski

The University of Oklahoma Health Sciences Center, Department of Medicine and Forensic Science Laboratories, P. O. Box 26901, Oklahoma City, OK 73190 and Office of the State Director of Tests for Alcohol and Drug Influence, State of Oklahoma

Abstract

Evidential breath-alcohol testing requires an adequate quality assurance (QA) program to safeguard the testing process and validate its results. A comprehensive QA program covers (a) test subject preparation and participation; (b) the analysis process; (c) test result reporting and records; (d) proficiency testing, inspections, and evaluations; and (e) facilities and personnel aspects. Particularly important are the following necessary scientific safeguards as components of quality control: (a) a pretest deprivation–observation period of at least 15 minutes; (b) blank tests immediately preceding each breath-collection step; (c) analysis of at least duplicate breath specimens; and (d) a control test accompanying every subject test. These safeguards have withstood adversarial challenges in the judicial system for more than 30 years.

Introduction

The concept of quality assurance (QA) is intuitively recognized and accepted by most persons engaged in providing products or services as necessary to assure that the latter meet defined standards. As applied to breath-alcohol† analysis, QA is a comprehensive ongoing program of activities designed and intended systematically to identify, control, and monitor all major factors that can affect the process and its outcome, namely the test result. The ultimate purpose of the QA program is to ensure to the maximum extent feasible that the entire testing process is valid and reliable and that the results obtained are true and correct. The QA concept as applied to measurements and other laboratory activities, of course, evolved and was adapted from its original application to quality control of manufactured products. As considered herein, quality control and quality assessment (1) are component elements of the overall QA program.

Some key QA elements and practices were proposed more than 30 years ago as "necessary scientific safeguards" for forensic breath-alcohol testing‡ (2) and have become widely recognized and practiced in such testing applied to traffic law enforcement. Since then, QA, and quality control in particular, have continuously evolved into an accepted body of knowledge, and the relevant practices have become standardized and refined. Two forces have been particularly involved in and responsible for these developments. The Committee on Alcohol and Other Drugs of the National Safety Council (NSC), established in 1936, has been concerned with many aspects and issues of the drinking–driving problem and has paid particular attention to the technology of breath-alcohol analysis; it has pioneered and implemented many standards for breath-alcohol testing (3). Under the impetus of vigorous legal challenges to forensic alcohol analysis and the testing of allegedly drinking drivers in particular (4–8), a massive body of appellate case law has arisen on both legal and technical issues of alcohol testing. This has also stimulated development and use of increasingly comprehensive and sophisticated QA practices in forensic alcohol testing. Still, a few now near-universal laboratory QA practices, such as use of control charts, have only rarely been used in connection with breath-alcohol testing (9). QA principles and practices as applied to chemical measurements have been much expanded and formalized in recent decades (10–13). An evolving body of appellate case law on QA issues has focused on certain judicial requirements for admissibility of alcohol test results as evidence. Lastly, the ongoing extension of Federally regulated breath-alcohol testing into the transportation workplace (14) will greatly expand the future scope of breath-alcohol testing and, undoubtedly, the extent of scrutiny it will undergo.

QA has become an indispensable accompaniment to forensic breath-alcohol analysis. Given the above background, this article is intended to serve as a ready reference on planning and implementation of such a QA program, especially for organizations and persons newly entering the breath-alcohol testing arena. However, most details of implementation are beyond the scope of this article. In governmentally regulated programs of breath-alcohol testing, the key QA components and elements

* Presented in part at the American Academy of Forensic Sciences 1990 Annual Meeting, Cincinnati, Ohio.

† The unmodified term *alcohol* in this article refers to ethanol.

‡ The term *forensic breath-alcohol testing* in this article refers to such testing performed under mandate of law or under equivalent circumstances.

should be incorporated into the pertinent administrative rules, and operational minutiae should be omitted.

Components and Elements of a QA Program for Breath-Alcohol Analysis

In designing an adequate QA program, it is useful to recognize the most common problems currently causing operational difficulties in forensic breath-alcohol testing programs and underlying successful legal challenges of breath-alcohol analysis results. These problems, shown in Table I, long ago superseded the technical limitations and inadequacies of early instrumentation used in breath-alcohol testing as sources of difficulty, especially since the advent, in 1973, of Federal standards, model specifications, and conforming products lists for such devices (15–17).

Table I. The Most Common Problems and Lapses in Forensic Breath-Alcohol Analysis

- inadequate rules and regulations
- lack of a comprehensive quality assurance program
- lack of control test(s) accompanying every subject test
- failure to observe and adequately document a proper pretest deprivation–observation period
- failure to test replicate breath specimens
- lack of periodic personnel retraining

A comprehensive QA program must address all relevant preanalytical, analytical, and postanalytical factors. It should thus cover (a) test subject preparation and other preparations; (b) the analysis process; (c) test result reporting and records; (d) performance and proficiency testing, inspections, and evaluations; and (e) facilities and personnel aspects. The elements of a comprehensive QA program are enumerated in Table II.

Table II. Elements of a Quality Assurance Program for Forensic Breath-Alcohol Testing

- comprehensive Federal- or state-level regulation of the system
- facilities, apparatus, and equipment
- personnel aspects
- the testing process
- performance and proficiency testing
- records and reports
- inspections, reviews, and evaluations

The components of the several QA program elements are set forth in Tables III through IX. Many of those components are encompassed within Good Laboratory Practice standards for laboratories. Many of them also appear, in one form or another, in current regulations or guidelines for forensic urine drug testing (FUDT) or for human performance forensic toxicology. The former are exemplified by the Department of Health and Human Services' guidelines for Federal workplace drug-testing programs (18) and by standards for accreditation of FUDT laboratories adopted by the College of American Pathologists (19); the latter are exemplified by the SOFT/AAFS forensic toxicology laboratory guidelines (20).

Table III. Quality Assurance in Forensic Breath-Alcohol Analysis: Subject Matter of Administrative Rules Regulating the System

- statutory, regulatory, or other authority for the system
- organization, operations, procedures, and policies of the regulatory agency or entity; rule making
- powers, authority, and duties of the rule-making agency or entity
- conferral and delegation of authority and responsibility for system elements (central control, local operations, testing protocols, training, inspections, etc.)
- personnel aspects (including training and supervision)
- sites, facilities, and laboratories
- licenses, permits, and fees
- specimens
- apparatus, devices, equipment, and materials
- analysis of alcohol in breath (and other specimens), operating procedures, and protocols
- records, reports, and information
- evaluation of the system, inspections, etc.
- administrative law: orders, challenges, petitions, hearings, individual proceedings, disciplinary actions, appeals

Table IV. Quality Assurance in Forensic Breath-Alcohol Analysis: Facilities, Apparatus, Equipment, and Materials

Centralized functions

- specifications of site and facilities requirements
- specifications of equipment, apparatus, and materials
- type approval of devices and modifications; amendments and deletions
- type approval of materials; amendments and deletions
- review and evaluation of local records and reports concerning equipment and devices

Local functions

- routine inspection and maintenance of sites, facilities, and equipment
- repair and servicing of equipment
- performance and device-parameter testing (operating temperatures, blanks, control tests, etc.)
- recording and reporting of incidents, problems, and actions taken concerning equipment and devices

Table V. Quality Assurance in Forensic Breath-Alcohol Analysis: Personnel Aspects

- classification and nomenclature of personnel
- qualifications of testing program director(s), instructors, supervisors, and analysts
- initial training and certification of instructors, supervisors, and analysts
- periodic retraining and recertification of instructors, supervisors, and analysts
- personnel performance reviews
- remedial actions

Table VI. Quality Assurance in Forensic Breath-Alcohol Analysis: The Testing Process

- detailed analysis protocol(s); operating procedures
- subject preparation
  - deprivation–observation period
  - elimination of foreign objects or substances from mouth
  - exclusion of emesis, eructation, regurgitation
- operational safeguards
  - purging of analyzers
  - blank analysis before and after each breath specimen
  - analysis of duplicate breath specimens
  - retention of breath or breath-alcohol specimens
  - use of procedural checklists
  - printout of test results
  - control tests
- records and reports
- performance and proficiency testing
- inspections, reviews, and evaluations

Table VII. Quality Assurance in Forensic Breath-Alcohol Analysis: Performance and Proficiency Testing

- purpose, intent, and effect of performance and proficiency testing (P/T)
- internal and external P/T schemes
- establishment and validation of target values of P/T specimens
- combined system P/T testing: analyst, analyzers, testing protocol, reports, and records
- frequency, scheduling, and logistics of P/T activities
- remedial actions

Table VIII. Quality Assurance in Forensic Breath-Alcohol Analysis: Records and Reports

- enumeration of records, reports, and forms authorized and required; purpose and contents
- preparation of records and reports
- distribution of reports and forms; disclosure of information
- retention and destruction of records
- confidentiality, security of, and access to records, reports, and information

Table IX. Quality Assurance in Forensic Breath-Alcohol Analysis: Inspections, Reviews, and Evaluations

- purpose and objectives of inspections, reviews, and evaluations; fact-finding
- authority and responsibility for inspections, reviews, and evaluations
- subject matter and extent of inspections: sites, facilities, apparatus and equipment, operations, and records
- conduct of inspections and reviews
- frequency, scheduling, and logistics
- reports and records of inspections and reviews; feedback and other uses of the information developed

Quality Control: Necessary Scientific Safeguards

Quality control constitutes a system of activities, techniques, and procedures to promote, protect, and assure the validity and reliability, to a stated level of confidence, of the measurement process and its output (i.e., breath-alcohol analysis results). Probably the longest standing and most recognized components of quality control in this context are the necessary scientific safeguards. They have undergone little change since I addressed them in 1960 (2) and have successfully withstood adversarial challenges in the judiciary system. Those safeguards that I consider to be indispensable in forensic breath-alcohol measurement appear in Table X, and their integration into the breath-alcohol analysis is shown in Figure 1. Each of the safeguards appearing in Table X has been endorsed and recommended by the NSC Committee on Alcohol and Other Drugs (21,22) and incorporated into many state-level regulations, for example, those of Oklahoma (23).

Table X. Necessary Scientific Safeguards in Forensic Breath-Alcohol Measurement

- a pretest deprivation–observation period of at least 15 minutes
- blank tests immediately preceding each breath specimen collection step
- analysis of at least two separate consecutive breath specimens
- an appropriate control test accompanying every subject test

Two other highly desirable safeguards are a result printout produced by a printer integral to or externally linked to the analyzer and contemporaneous use and marking of a step-by-step checklist when nonautomated, manual analyzers are employed. Several other, related safeguards have been recommended by

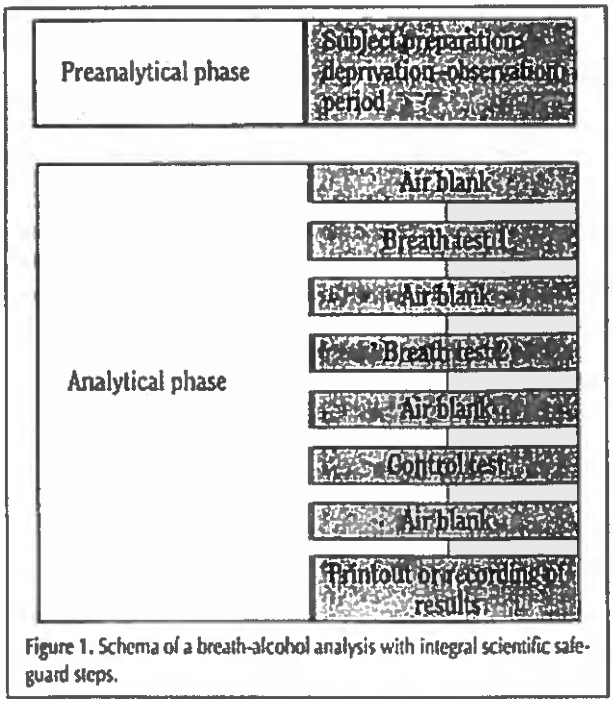

Figure 1. Schema of a breath-alcohol analysis with integral scientific safeguard steps.

the NSC Committee on Alcohol and Other Drugs. The committee has stated that "Suitable breath specimens are those in which the ethyl alcohol was substantially in equilibrium with the alcohol of the pulmonary arterial blood plasma. 'Deep lung air' (alveolar air) is such a specimen" (21). It has also recommended that "The quantity of breath analyzed for its alcohol content shall be established only by direct volumetric measurement, or by collection and analysis of a fixed breath volume" (21). The predominant breath-sampling features of current generation breath-alcohol analyzers are in accord with these precepts (24).

Control tests in breath-alcohol analysis are performed chiefly with breath-alcohol simulators, which are devices for the preparation and delivery of vapor specimens of known alcohol concentration, prepared by equilibrating a flowing gas such as air with an aqueous alcohol solution of known concentration, at fixed temperature (24–27). The resultant vapor effluent has a predictable and controllable alcohol concentration and appropriately simulates alcohol-containing breath for use in calibrating analyzers, control tests, and analyst training. Simulators are critically dependent upon properly prepared and validated alcohol reference solutions for producing vapor-alcohol effluents of specified, known alcohol concentration. The NSC Committee on Alcohol and Other Drugs has issued recommendations for preparation and validation of alcohol reference solutions for this application (28). Alcohol mixtures in inert gases, such as argon or nitrogen, stored under high pressure in cylinders or at lower pressure in disposable cans, are another form of alcohol standard for calibrating and control test purposes (24).

The nomenclature and units employed in reporting the results of analyses for alcohol in human biological specimens have tended to be somewhat esoteric and, at times, confusing. There are also distinctive international differences. Fortunately, a universal convention on the units to be used for reporting breath-alcohol concentrations has arisen in North America, and the matter is now settled. Based on a proposal by Mason and Dubowski (29) and the subsequent 1975 recommendation of the NSC Committee on Alcohol and Other Drugs (30), the Uniform Vehicle Code and Model Traffic Ordinance in 1979 adopted the following definition of alcohol concentration: "Alcohol concentration shall mean either grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath" (31). The latter units for stating breath-alcohol concentration have been widely adopted and employed in the scientific literature and incorporated into state traffic laws, state regulations on alcohol testing, and relevant Federal regulations (32,33). For law enforcement applications, the convention is to report alcohol concentrations (in g/210 L for breath-alcohol or g/dL for blood-alcohol) to two decimal places and to truncate (i.e., drop entirely) the third decimal place.

Discussion and Recommendations

A comprehensive and up-to-date set of regulations governing all important aspects of a given program of forensic breath-alcohol testing is fundamental and indispensable. It needs to be a living document and thus should be revised as often as necessary to reflect ongoing statutory changes, case law, and other controlling events. Equally important is a comprehensive written quality assurance plan. It should be reviewed frequently and referred to constantly; therefore, it should also be succinct and organized in such a way that its key elements are easy to locate.

It is understandable that the most attention in a QA program and in quality control measures for breath-alcohol analysis tends to be fixed on the testing aspects. Though not as prominent, the preanalytical and postanalytical aspects of forensic breath-alcohol testing enumerated in Table III are as important as the analytical aspect for maintaining the desired quality and standards. Of particular significance are the facilities and personnel aspects of both overall regulations and the QA plan because they are often slighted inappropriately. For both fixed facilities and equipment and for personnel, the tendency is to attend to these matters only at the onset of a program. Further changes or modifications in sites, equipment, and other facilities should be held to the same standards as the original factors and proper documentation used. The same policy pertains to personnel replacements (e.g., breath-alcohol analysts). Especially to be avoided with respect to the latter is on-the-job "echelon training", that is, the unofficial and informal inheriting of information about the task from a departing incumbent. As in the children's game of "telephone," the end product of such hand-me-down instruction often bears little or no resemblance to the original.

Although all aspects of the actual testing process are important in a QA sense, the scientific safeguards are the most critical. A pretest deprivation–observation period of at least 15 minutes should precede the subject test. During that time period, the test subject must refrain from intake of food or drink, smoking, or presence of foreign objects or substances in the mouth (especially use of breath-fresheners and mouthwash), and there must also be assured absence of regurgitation of gastric content or emesis. In any of the latter events, the mouth is rinsed thoroughly with water at body temperature, and the 15-minute deprivation–observation period is repeated. The 15-minute pretest period is amply sufficient to assure that prior intentional ingestion of alcoholic beverages or inadvertent intake of other alcohol-containing substances will not affect the accuracy of the breath-alcohol analysis through contamination by "mouth alcohol" (34,35). Purging of the analyzer with ambient air free of volatile substances prior to collection and analysis of breath or alcohol-vapor specimens is a fundamental requirement for accuracy of the analysis. With automated devices, the microprocessor-controlled operation can be, and usually is, factory-programmed so as to perform an ambient air purge cycle and initial blank test automatically whenever the test sequence is initiated. A blank test result within acceptable preestablished limits is a prerequisite to the next step, as illustrated in Figure 1. With most manual devices, a purge step is not automatically performed but is equally indispensable, as is the subsequent manual rezeroing of the result scale for analyzers so equipped. Use of an appropriate checklist, which can be incorporated into the report form, and marking of each step as it is performed are recommended safeguards with manual analyzers.

Repeating an analysis is a widely employed QA practice in chemical analysis. Collection and sequential analysis of at least two separate breath specimens has become accepted practice, as recommended by the NSC Committee on Alcohol and Other Drugs. The Committee recommended that "The breath samples should be collected at intervals of not less than 2 nor more than 10 minutes, after an initial deprivation period of at least 15 minutes" (22). Any difference between the duplicate results greater than a predefined maximum should be regarded as an indication of a potential problem. Conversely, acceptable agreement of the duplicate results eliminates the unrecognized presence of such actual or supposed irregularities as the effects of mouth alcohol, alleged radio frequency interference with the instrumental analysis, and other confounding factors (36). The sequence of a positive initial, or screening, test followed by another breath-alcohol test after a specified waiting period does not constitute duplicate breath testing nor is such a second test correctly designated as a confirmatory analysis unless it utilizes a different chemical principle (37). Although it is useful in reducing the possibility of random error, repeating an initial or screening test by the same method or equipment does not truly constitute confirmation of the result (38). It is, however, designated as such in the U.S. Department of Transportation (DOT) workplace alcohol testing rule if an evidential breath-testing device approved by the National Highway Traffic Safety Administration is employed (39); the difference in philosophy is there termed merely "semantic".

Control tests accompanying every human subject test are an essential form of scientific safeguard. In essence, a control test constitutes a total system check because it tests the contribution of the alcohol analyzer, its calibration, the analysis process, the analyst's function, the environment, and the reporting process. Virtually all automated breath-alcohol analyzers and certain manual analyzers are factory-calibrated rather than calibrated at or near the time of a subject test by means of verified standard reference materials. Given these circumstances, a control test result within acceptable preestablished limits of its independently established target value, combined with a negative blank result, provides adequate assurance of proper calibration. That combination also eliminates any potential for unacceptable effects due to the testing environment, such as contamination of the analyzer by chemical interferents in the ambient air. The generally accepted course of action in the event that a control test result (termed by DOT to be an "external calibration check") is unacceptable is to take the involved analyzer out of service and to sequester and invalidate all subject test results obtained with it since the most recent satisfactory control test prior to the occurrence. The frequency and regularity of control tests are, therefore, of practical concern for the system. The optimal arrangement is at least one control test accompanying every subject test, as proposed in Table X. Validation and verification of the control test target value is a critical step in this quality control activity. When simulators are used for control tests, as required under the DOT workplace alcohol testing rule (40), at least two variables controlling the control target value need to be checked and properly validated: the ethanol concentration of the aqueous simulator solution and the simulator temperature at which the alcohol equilibration occurs. The former is a laboratory task in which the ethanol standards used should be traceable to National Institute of Standards and Technology (NIST) SRM 1828. The latter must necessarily be performed at the test site, at the time of the control test; it should be done by thermometry using a device with calibration traceable to a NIST-certified thermometer, such as NIST SRM 934. Lastly, performance of control tests does not constitute calibration and should not be termed as such.

As previously mentioned, QA principles and practices applied to breath-alcohol testing have become highly refined in most respects. One missing component is external performance or proficiency testing, which is often termed P/T. In contrast with the situation in blood-alcohol analysis for forensic and other purposes, there is no nationwide program of external P/T activities or surveys for breath-alcohol analysis. Simulator solutions of known alcohol concentration could be so used, but the local results obtained are critically dependent upon the characteristics and functioning of the simulator used, especially the accuracy and stability of the intended equilibration temperature, which is usually 34°C. Preparation and distribution of small disposable containers with pressurized gas or vapor samples of known, validated ethanol concentration are feasible but not currently practiced for P/T purposes. Ultimately, demand for recognized external P/T programs will undoubtedly arise, probably as the result of adversarial proceedings, for example, litigation challenging breath-alcohol results and personnel actions based on them. There is a school of thought on decentralized testing that holds that the more limited and rudimentary the training and supervision of the analysts, the greater the need for an effective external P/T program.

In concluding this consideration of QA and related topics, the following recommendations are offered to persons responsible for establishing and conducting breath-alcohol testing programs: (a) Periodically review the entire program and the QA scheme for problems, omissions, and needed changes; (b) conduct mandatory control tests accompanying all subject tests; (c) conduct analysis of at least duplicate breath specimens; and (d) monitor the pertinent appellate court case law, and be guided by it. Also suggested is the following strategy for identifying inadequacies in the QA program: Engage in reversal-of-roles. If you were a qualified expert consultant for a party challenging your testing program or an outcome, were fully informed about your breath-alcohol analysis system, and had access to all records, what would you criticize or challenge?

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Manuscript received April 4, 1994.

APPENDIX "AA"

NATIONAL SAFETY COUNCIL
COMMITTEE ON ALCOHOL AND OTHER DRUGS

RECOMMENDATIONS OF THE SUBCOMMITTEE ON ALCOHOL TECHNOLOGY, PHARMACOLOGY, AND TOXICOLOGY

ACCEPTABLE PRACTICES FOR EVIDENTIAL BREATH ALCOHOL TESTING

A. Forensic breath alcohol test programs differ between jurisdictions for a variety of sound and important reasons. Programs differ with regard to instrumentation, protocols, personnel training and responsibility, documentation, etc. Programs also differ because of jurisdictional variations in statutory language, case law, administrative rules, political concerns, program funding, penalties associated with convictions, etc.

B. The significant weight assigned to breath alcohol results, along with the serious consequences arising from conviction on an impaired driving offense require evidential breath alcohol testing programs to implement appropriate quality assurance measures. [1-7]

C. The purpose of this subcommittee's recommendations is to outline the basic elements necessary for establishing quality assurance and fitness-for-purpose in evidential breath alcohol measurements.

   1. These recommendations apply to both fixed location and roadside evidential breath alcohol testing.
   2. Roadside evidential breath alcohol testing may require additional consideration for factors such as:
      a. testing for radio frequency interference, [7, 8a, 9]
      b. use and type of control standards, [1, 2, 7, 8b, 8c, 10-17]
      c. operating environment, [8d]
      d. instrument mounting,
      e. adequate electrical power supply.

D. The following recommendations are considered necessary for establishing reliable evidential breath alcohol test performance and enabling meaningful measurement interpretation.

   1. Instruments should be operated, and tests administered by, trained and qualified breath alcohol test instrument operators. [1, 2, 7, 8e, 8f, 9]
   2. Instruments should be approved by an appropriate agency and, if used in the United States, also appear on the National Highway Traffic Safety Administration's Conforming Products List. [8f, 8g, 8h, 9]
   3. Testing protocols should employ a minimum pre-exhalation mouth alcohol deprivation period of 15 minutes. [1, 2, 7, 8b, 8i, 9, 10, 18, 19]

The use of the term "alcohol" in this document refers to "ethanol" unless otherwise noted.

4. Breath alcohol measurements should be conducted on at least duplicate independently exhaled end-expiratory breath samples; the breath sample results should agree within the applicable established and documented criteria. [1, 2, 7, 8i, 9, 18]
5. At least one control analysis should be performed as a part of each subject test sequence as an assessment of within-run accuracy and/or verification of calibration. [1, 2, 7, 8b, 9]
    a. Controls should consist of either wet bath simulator ethanol vapor or dry gas ethanol standard.
    b. Predetermined and documented acceptable control results should be established.
    c. Control results found to be unacceptable during a test sequence should require the performance of a complete new test sequence or result in disabling the breath alcohol test instrument until it is inspected by appropriately trained personnel.
6. An ambient air blank/analysis should be performed before and after each breath and control sample analytical measurement. [1, 7, 8b, 8d, 9]
7. Any non-compliance or non-conformity with established and documented evidential test sequence protocol criteria should require the performance of a complete new evidential test sequence.
8. Printouts of all completed tests should show the results of all breath samples, ambient air analyses/blanks and control analyses performed during a subject test sequence. [2, 7, 9]
    a. Jurisdictions may choose to report a reduced or statistically adjusted result in addition to the actual analytical results. [7]
    b. The date of analysis, instrument serial number and all measurement times should appear on the printout. [1, 7]
    c. Any error messages generated during the test sequence should appear on the printout.
    d. If a test is invalid, the reason for the invalidity should appear on the printout.
9. Periodic calibration, verification of calibration and/or certification of instruments must be performed in conformance with the documented and approved protocol recognized by the applicable jurisdiction. [1, 2, 9]
10. Periodic recertification of breath test instrument operators should be done in compliance with documented and established training criteria recognized by the applicable jurisdiction at least every five years. [2, 8j, 8k]

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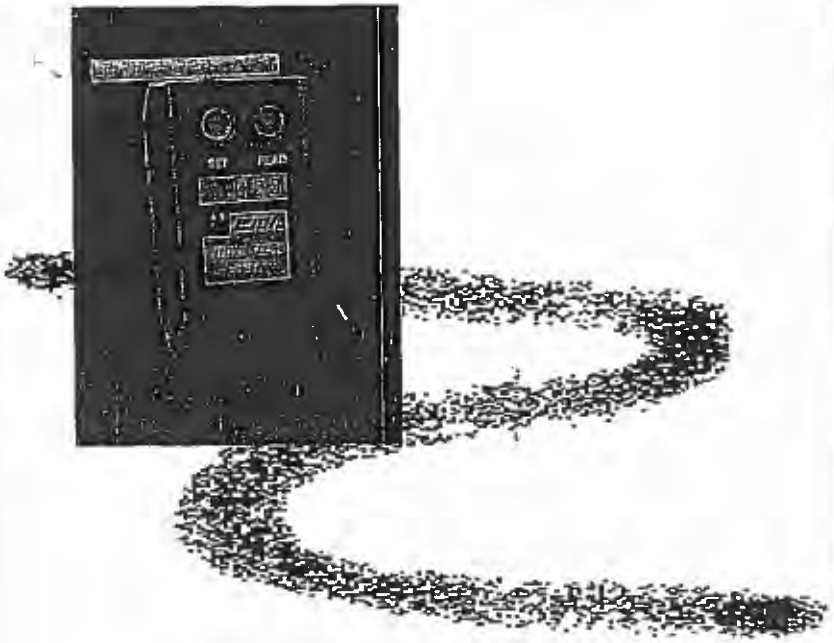
APPENDIX "BB"

CMI INC.
316 E. 9th St. • Owensboro, KY 42303
800-835-0690 • Fax: 270-685-6268
www.alcoholtest.com

INTOXILYZER® S-D2

OPERATOR'S MANUAL



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Operator's Manual

INTOXILYZER® S-D2

INTOXILYZER® CMI Inc.

P/N 650132
Rev. 10/98
IV.—

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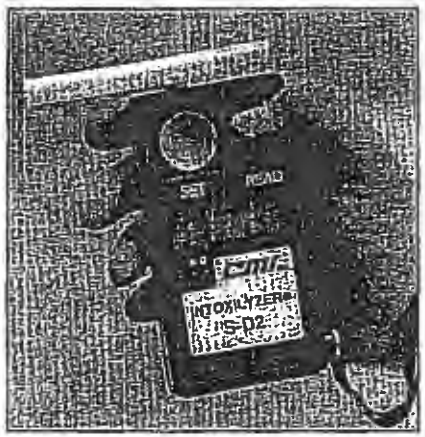


INTRODUCTION

The Intoxilyzer® S-D2 represents a well established concept in breath alcohol testing analysis. It is used worldwide in law enforcement, transportation and workplace safety applications. The S-D2 is just one of the range of instruments manufactured by CMI, Inc. for these purposes.

The Intoxilyzer® S-D2 is accurate and reliable, allowing a complete breath test procedure to be conducted in about one minute.

This manual describes the operation, maintenance, calibration check, and calibration adjustment of the S-D2. This manual should be read completely and fully understood by each operator prior to testing a subject. It is further recommended that operators practice the breath testing process before giving an actual "in the field" test.

PRINCIPLES OF OPERATION

The Intoxilyzer® S-D2 uses an electrochemical fuel cell, containing two platinum electrodes, to detect and measure the concentration of alcohol vapor in expired breath. When breath is drawn into this fuel cell, by means of the sampling system, a small voltage is generated in proportion to its breath alcohol concentration. This fuel cell is fed to an electronic amplifier and displayed on a digital meter (liquid crystal).

The S-D2 incorporates two breath sampling lights, controlled by an interlinked pressure switch and timer system. The sampling lights show the operator if the subject is blowing correctly, and when he has provided a suitable sample of breath for analysis.

The instrument is simple to operate and may be used as often as required, provided that a suitable delay is allowed between successive tests. This time delay allows the fuel cell to clear itself of alcohol and prevents the possibility of additive readings. If no alcohol is present in a test, a second test may be analyzed immediately, since the fuel cell voltage is already at zero. Unless the breath alcohol level of the subject is very high,

the instrument will generally be clear enough to receive and analyze the second sample in less than two minutes.

INSTRUMENT FEATURES

1) Mouthpiece

This is attached to the sampling port. For hygenic reasons, mouthpieces are supplied separately packed and are disposable. A new mouthpiece must be used for each breath test. This minimizes health concerns and prevents cross-sample alcohol contamination.

2) Sampling Port

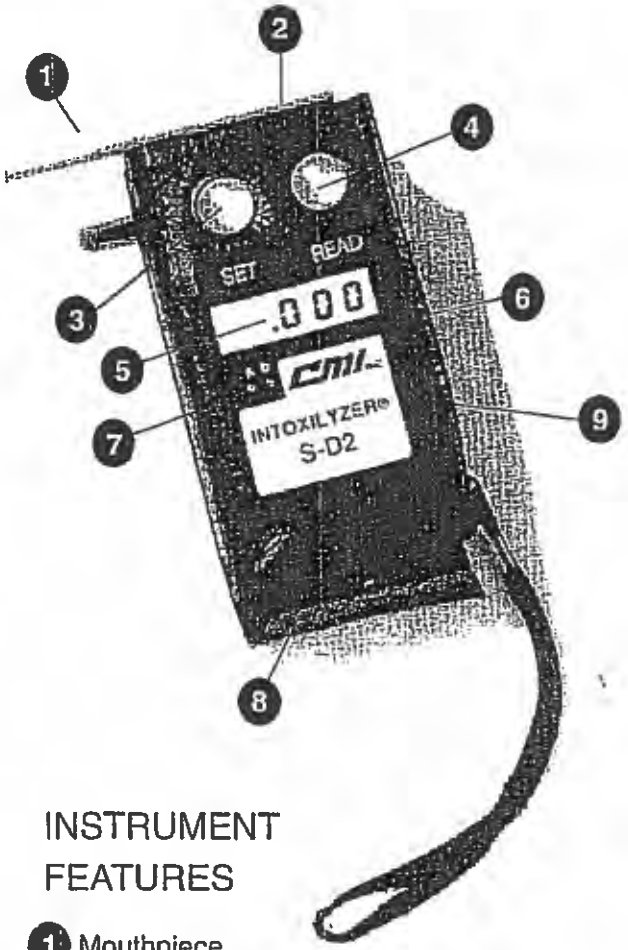
This forms the entrance to the fuel cell detector. When inserted into the small hole in the side of the mouthpiece, it allows a small portion of breath to be drawn into the instrument for analysis.

3) **'SET'** Button

This button forms part of the sampling system. When fully depressed, the button locks to set the instrument ready for sampling. When the **'SET'** button rises, the sample to be analyzed is drawn directly into the fuel cell detector.

4) **'READ'** Button

This button has two functions:
1) to release the **'SET'** button and take the sample,
2) to switch on the amplifier and display systems



INSTRUMENT FEATURES

1. Mouthpiece
2. Sampling Port
3. **'SET'** Button
4. **'READ'** Button
5. Alcohol Level Display
6. Calibration Control (on side)
7. Breath Sampling Lights
8. Battery (on bottom)
9. Leather Case

The **'READ'** button is spring loaded. Momentary depression will take the breath sample. Constant pressure is required to switch on the amplifier and display systems.

5) Alcohol Level Display

This three digit, liquid crystal display shows the breath alcohol concentration of the subject. The display has built-in illumination and is activated by depressing the **'READ'** button.

If the figure on the left shows **'L'** when the **'READ'** button is depressed, the battery needs to be replaced.

6) Calibration Control

This screw control, located on the right side of the case, is used for periodic calibration adjustments with either a dry gas standard or wet bath simulator.

7) Breath Sampling Lights

Light **'A'** illuminates to indicate that the subject is blowing *hard enough* to obtain a proper breath sample. Light 'B' illuminates when the subject has blown *long enough* and indicates when the **'READ'** button should be pressed. In other words, light 'B' illuminates when the subject has provided a suitable sample for breath analysis.

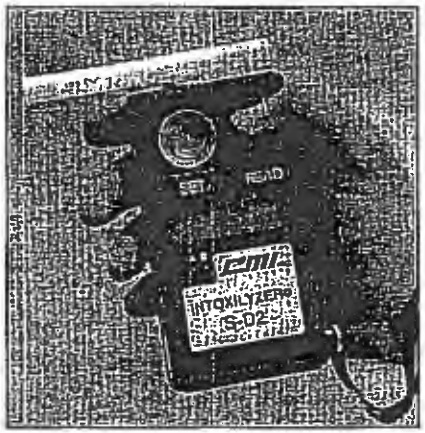
8) Battery

The battery is located directly behind the sliding base on the bottom of the S-D2. It powers the amplifier, digital display and sampling lights and

should be replaced when the letter **'L'** appears on the left side of the display.

9) Leather Case

The S-D2 is supplied in a leather protective case. The unit should be kept inside the case at all times, except when calibrating, changing the battery or during maintenance.



SUBJECT BREATH TEST

The operating sequence for testing a subject with the Intoxilyer® S-D2 is simple, consisting of the following basic steps. These should be understood and followed to insure maximum efficiency of operation.

OPERATION CHECK LIST

1. Ready Check
2. Set
3. Attach Mouthpiece
4. Instruct the Subject
5. Take Sample
6. Observe Reading
7. Remove and Discard Mouthpiece
8. Reset and Wait

AMBIENT TEMPERATURE

The Intoxilyzer® S-D2 is designed primarily for use in the 32-104° degrees Fahrenheit (0-40° Celsius) temperature range. Keeping the instrument within this range insures minimum condensation of alcohol and water from the

breath and permits both accurate and rapid breath alcohol measurements.

It is recommended that in very cold weather the instrument is stored in a pocket (preferably inside a coat) and returned there after use.

PRELIMINARY

Ask the subject when he/she last took anything by mouth. Some foods and even "non-alcoholic" drinks may contain traces of alcohol, which the subject may later claim affected the result of the test through a "mouth alcohol" effect. To prevent this, wherever possible, insure that a delay of about 20 minutes has elapsed since the subject took anything by mouth—even medicines which may contain alcohol.

Do not even allow the subject a glass of water prior to the test since this will cool the mouth and dilute the saliva, temporarily reducing the amount of alcohol in the breath, and, consequently, the instrument reading.

Insure that no radio transmitter is currently being used in the immediate vicinity of the test.

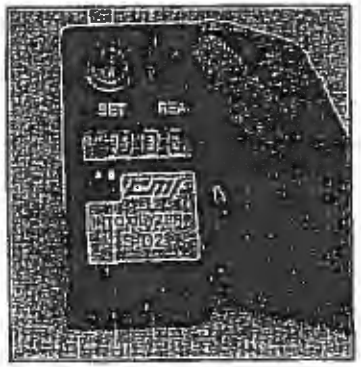
DETAILED PROCEDURE

This section describes in detail how the Intoxilyzer® S-D2 is used in a breath test and examines what is actually happening at each stage of the operation. These instructions are also given in the form of a checklist on the card which accompanies the instrument as well as in the "Introduction" section of this operator's manual.

1) READY CHECK

The instrument should first be checked to insure it is ready to receive a sample. This is accomplished by

checking to insure the fuel cell is discharged and free of alcohol from any previous sample. Elimination of alcohol from the fuel cell should take no longer than two minutes—except in unusual cases—depending on how much alcohol was actually present in the last sample.

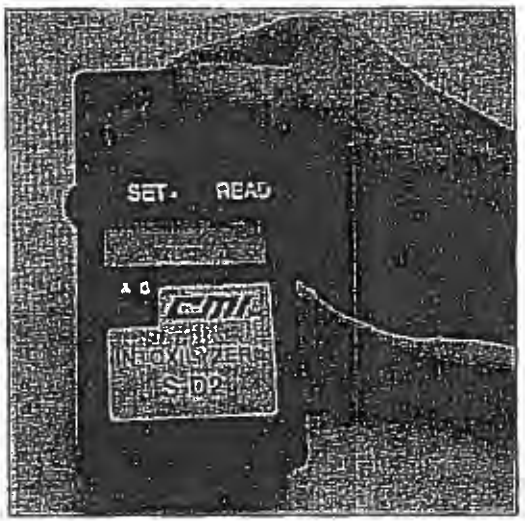


To complete the READY CHECK, depress the 'READ' button for at least ten seconds.

To conduct a READY CHECK, depress the **'READ'** button and hold it down for at least ten seconds. This will release the **'SET'** button and switch on the amplifier and display circuits. Observe the display; it should not exceed .002 after ten seconds. If the display does not show .002 or less during the ten second READY CHECK, the fuel cell may have traces of residual alcohol from a previous sample. If this occurs after a previous test, depress the 'SET' button to lock and wait one minute before repeating the READY CHECK. If the left digit shows **'L'**, replace the battery.

2) SET

Once the READY CHECK is complete, the sampling system must now be SET to prepare it to draw a breath sample into the fuel cell for analysis. Press down the **'SET'** button until it locks. This pushes down the diaphragm and holds it against a spring-loaded catch. This action also places a short-circuit across the fuel cell, which accelerates its inter-sample recovery time.

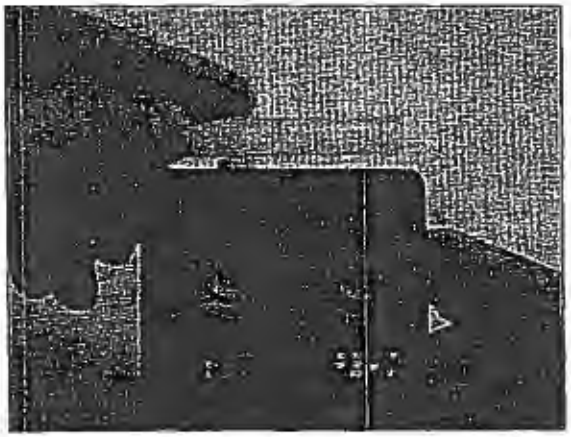


Press the 'SET' button until it locks.

3) ATTACH MOUTHPIECE

Attach a mouthpiece to the sampling port on the top of the S-D2. This sampling port forms the entrance to the fuel cell and pressure switch and it is essential that the mouthpiece is pushed fully onto it.

The subject must be offered the wide-bore, lipped end of the mouthpiece to blow through. If the subject blows into the other end, the pressure switch will not be activated and the sampling lights will not operate. The instrument



Firmly attach a new mouthpiece to the sampling port.

is now ready to receive a breath sample from the subject for analysis.

A WORD ABOUT MOUTHPIECES

The S-D2's sampling port is designed specifically for the particular S-D2 mouthpieces sold by CMI, Inc. It is strongly recommended that mouthpieces for the S-D2 be ordered from CMI at 1-800-835-0690.

4) INSTRUCT THE SUBJECT

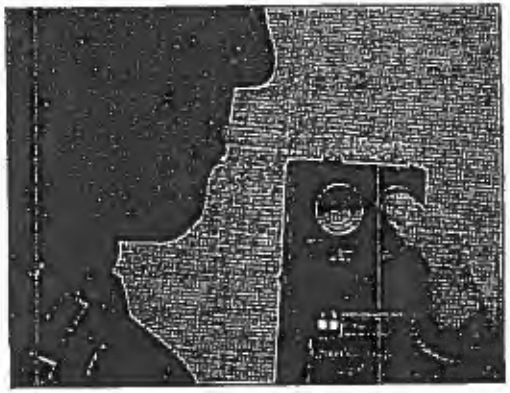
Instruct the subject exactly what must occur to provide a suitable sample of breath for analysis. Tell the subject to take a deep breath, blow strong enough to bring on light **'A'** and keep blowing at that pressure long enough to bring on light **'B'**. The subject must then continue blowing until told to stop and you have taken the sample by pressing the **'READ'** button. Warn the subject that if both sampling lights fail to come on, there will not be a suitable sample of breath for analysis.

If the subject blows too hard then he/she may run out of breath before the **'B'** light comes on: just a *moderate* breath flow rate is required.

Finally, the subject should keep hands away from the instrument. If the subject clasps it, your view of the sampling lights or your operation of the sampling mechanism could be obstructed .

5) TAKE SAMPLE

Tell the subject to take a deep breath and blow through the wide-bore, lipped end of the mouthpiece. The subject must blow strongly enough to bring on sampling light **'A'** and then continue to blow at this pressure until the **'B'** light is activated. At this point, the subject will have expelled tr ing air so that deep lung air is now being blown



The subject blows until light 'B' is activated. The operator then pushes the 'READ' button.

through the mouthpiece. Press the **'READ'** button to release the catch holding down the **'SET'** button, allowing it to rise. This pulls up the diaphragm, drawing a small portion of breath from the mouthpiece directly into the fuel cell detector.

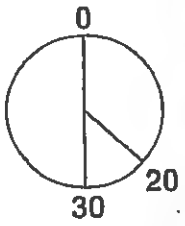
It is imperative that the subject is still blowing when the sample is taken. Both sampling lights must be on when the sample is taken. The subject must, therefore, continue blowing until told to stop. If the subject stops blowing prematurely, the sampling lights will go out.

6) OBSERVE DISPLAY

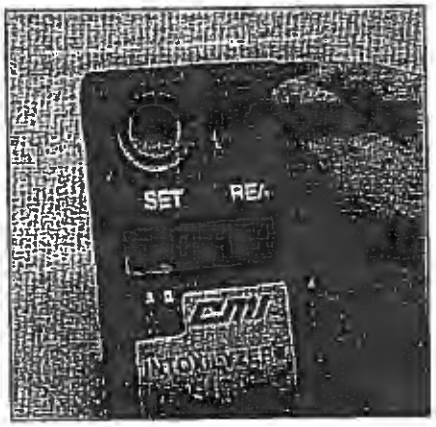
Withdraw the instrument from the subject and continue to hold down the **'READ'** button. The fuel cell now develops its signal, which takes about 30 seconds to complete from the time of sampling. The maximum sample reached is a measure of the amount of alcohol in the breath sample.

As the fuel cell charges, it will cause the display reading to rise. The final value will be displayed after 20-30 seconds and is the alcohol concentration of the subject.

If the **'READ'** button is accidentally released during this time, the fuel cell signal will not be affected as long as the **'SET'** button is not depressed. Simply re-press the



The fuel cell will take 20-30 seconds to reach its maximum voltage and produce a final reading.



'READ' button within the 30 second signal development time to continue reading the alcohol level on the digital display.

It is important that the 'SET' button is not touched during the reading development time. This would flush the alcohol from the cell and partly discharge its voltage and reduce the alcohol level.

7) DISCARD MOUTHPIECE

Having completed the test and observed the alcohol reading, you should now remove and discard the mouthpiece. Never use the same mouthpiece for subsequent tests, on either the same or different subjects.

8) RESET AND WAIT

The instrument must now be RESET so it will be ready for another test. This RESET is done by depressing the 'SET' button until it locks. This flushes out the fuel cell and short-circuits its electrodes, allowing its voltage to return more quickly to zero.

If the display shows .003 or higher as a result of the test, it may take several minutes before a satisfactory READY CHECK can be obtained before re-use of the S-D2.

CALIBRATION REQUIREMENTS: USE OF THE DRY GAS STANDARD

The Intoxilyzer® S-D2 uses an electrochemical fuel cell to detect and measure the concentration of alcohol in expired breath. The sensitivity of the instrument changes slowly with time, due to aging of the platinum electrode within the fuel cell. This change in sensitivity is very slight and calibration will not normally change significantly over a six month or longer period.

Monthly calibration checks are recommended to determine when calibration adjustment is needed.

Either a dry gas standard or wet-bath simulator may be used to generate the standard alcohol vapor required.

THE ALCOHOL STANDARD

Calibration checks and adjustments can be conveniently done using a dry gas standard. This consists of a mixture of alcohol in air or nitrogen.

The quantity of alcohol in the gas is accurately known and is shown on the label. Therefore, when

the instrument is calibrated using a dry gas standard, subsequent breath tests will indicate the subject's blood alcohol concentration (BAC).

Dry gas standards are supplied in one of three ranges, each range based around a legal limit which is in wide use: .045% BAC, .085% BAC and .105% BAC.

THE GAS STANDARD

The gas canister is a high-pressure, disposable cylinder fitted with a regulator. It contains enough gas for approximately 300 calibration checks or adjustments.

The label on each cylinder is marked with an expiration date. The gas should not be used after that time due to deviation of alcohol concentration of the gas mixture outside the analytical specifications of the instrument. The value shown on the label is within 2% of the true value of the gas mixture.

When the cylinder is empty or time-expired, the regulator can be safely unscrewed from the cylinder and retained for use with a new cylinder. The old cylinder can then be disposed or recycled.

USING A DRY GAS STANDARD AT HIGH ALTITUDE

The concentration of alcohol in the dry gas standard is calculated and carefully controlled to give the correct vapor concentration when the cylinder is used at sea level at normal atmospheric pressure. At lower atmospheric pressures, the concentration of alcohol in the vapor leaving the cylinder will be less. The change in alcohol concentration due to normal atmospheric pressure changes at sea level is so small as to be negligible, but if the dry gas standard was used at a high altitude, significant errors would result if suitable corrections were not made.

It should be emphasized that the sensitivity of the S-D2

ALTITUDE CORRECTION CHART

Elevation from Sea Level	Correction Factor
0	1.000
500	.981
1000	.962
1500	.943
2000	.925
2500	.907
3000	.889
3500	.872
4000	.854
4500	.837
5000	.820
5500	.804
6000	.787
6500	.771
7000	.755
7500	.740
8000	.724

itself to alcohol is not affected by changes in atmospheric pressure; it is only the concentration of the alcohol in the vapor from the dry gas standard that is affected.

The Altitude Correction Chart on the preceding page gives the correction factors which should be applied to the stated dry gas value when calibration checks or adjustments are made at various altitudes above sea level.

Correction factor sample:

> *Suppose the dry gas standard you are using has a value of .045% BAC at sea level, but it is being used at an altitude of 500 feet. Using the chart on page 16, the correction factor would be (0.981). Therefore, the corrected value of the dry gas standard would now be (.045 x .981 = .044% BAC).*

USE OF A WET BATH SIMULATOR

If required, a wet bath simulator can be used instead of a dry gas standard to perform calibration checks and adjustments on the S-D2.

A wet bath simulator should be used according to its own instructions. Pay particular attention to the alcoholic strength and temperature of the solution used.

A mouthpiece should be attached to the simulator outlet for direct attachment to the sampling port on the instrument. A flow rate of air of about 1.5-2 liters per second should be used. Any higher rate may result in the formation of an aerosol and lead to excessive cooling of the solution itself.

The simulator vapor must be allowed to pass through the mouthpiece for at least ten seconds before the sample is taken for analysis.

CALIBRATION CHECK PROCEDURE

The calibration check procedure insures that the Intoxilyzer® S-D2 is reading alcohol levels correctly and alerts the operator that a calibration adjustment is needed.

CALIBRATION CHECK CHECKLIST

1. Ready Check
2. Set
3. Sample the Standard
4. Read the Display
5. Reset and Wait

DETAILED PROCEDURE

It is recommended that a calibration check be performed at least once every month.

To insure that the instrument's fuel cell is at its optimum sensitivity, there should be no breath tests done on the unit in the previous ten minutes before a calibration check is done.

1) READY CHECK

This insures that the instrument is ready to take a sample of the dry gas standard and tests whether the fuel cell is completely discharged and free of alcohol from a previous sample. It also insures that the battery has sufficient power to drive the electronic circuitry.

Press the **'READ'** button and hold down for at least ten seconds. This will release the **'SET'** button and activate the electronics. During these ten seconds, the display should not read more than .002. A higher reading shows that alcohol may still be present in the fuel cell. If this occurs, depress the **'SET'** button to lock, wait one minute and repeat the ten-second READY CHECK.

If the letter **'L'** is displayed, replace the unit's battery.

2) SET

Assuming the READY CHECK has been completed, depress the 'SET' button to lock. This prepares the instrument to sample the dry gas standard.

3) SAMPLE THE DRY GAS STANDARD

Follow the procedure below to sample the standard:

a) Use a new mouthpiece and attach its lipped end to the outlet on the regulator button.
b) Insert the S-D2's sampling port into the hole on the mouthpiece.
c) Hold the instrument with your thumb near the **'READ'** button.
d) Depress the regulator button so that gas begins flowing through the mouthpiece.
e) After about five seconds of continuous gas flow, AND WHILE GAS IS STILL FLOWING, press the **'READ'** button which draws a sample of gas into the unit. Continue to hold down the **'READ'** button.
f) When the sample has been taken, release the regulator button to stop the gas flow.

IT IS ESSENTIAL THAT THE GAS IS STILL FLOWING WHEN THE **'READ'** BUTTON IS PUSHED.

4) READ THE DISPLAY

Disconnect the instrument from the mouthpiece—continuing to hold down the **'READ'** button—and observe the display. The value shown on the S-D2 should rise steadily and then stop, about 20-30 seconds from the time the sample was initially "taken".

If the final reading is within ±.005% BAC of the known value of the gas standard, the instrument is calibrated properly and no adjustments are needed.

If the maximum reading displayed shows a deviation from the value of the standard, then calibration adjustment is required, which is outlined in the next section.

5) RESET AND WAIT

After the final alcohol reading is noted, depress the **'SET'** button to lock. This allows the fuel cell to clear itself of alcohol before using the instrument for more tests. This will take approximately two minutes.

CALIBRATION ADJUSTMENT

Calibration adjustment is required when a calibration check indicates the S-D2 has deviated from a known standard of alcohol vapor. Adjusting the S-D2's calibration compensates for any change in sensitivity of the fuel cell detector over a period of time. Calibration adjustment should not normally be required more than two or three times per year.

It is very important that this section be read and understood completely before attempting to recalibrate the S-D2.

THE CALIBRATION CONTROL

Calibration is done by using the small screw adjustment located on the right side of the instrument. It is accessed through a hole in the S-D2's outer case. Turning the control clockwise decreases the reading on the alcohol level display in response to the sampling of the gas standard.

THE DRY GAS CALIBRATION VALUE

Since the fuel cell detector responds linearly to the concentration of alcohol vapor in the standard, the actual value of the dry gas standard used for calibration is not important, provided that the instrument is actually calibrated to this value.

CALIBRATION ADJUSTMENT CHECKLIST

1. Preliminary
2. Ready Check
3. Set
4. Sample the Dry Gas Standard
5. Adjust the Display to the Value of the Dry Gas Standard
6. Reset and Wait

DETAILED PROCEDURE

The calibration adjustment process assumes three conditions:

- The instrument has not analyzed more than two samples containing alcohol within the previous hour or any sample within the previous ten minutes,
- The instrument is in its normal operating temperature range, and
- The battery does not need replacement.

1) PRELIMINARY

The instrument must first be removed from its protective leather pouch. Remove the wrist strap by detaching the split ring from the metal pillar. Then, insert the screwdriver included with the S-D2 into the hole in the pouch and ease the leather upwards taking care to prevent the pillar from catching on the pouch. At the same time, push the instrument upwards from the bottom of the pouch, easing the pillar under the edges of the hole.

2) READY CHECK

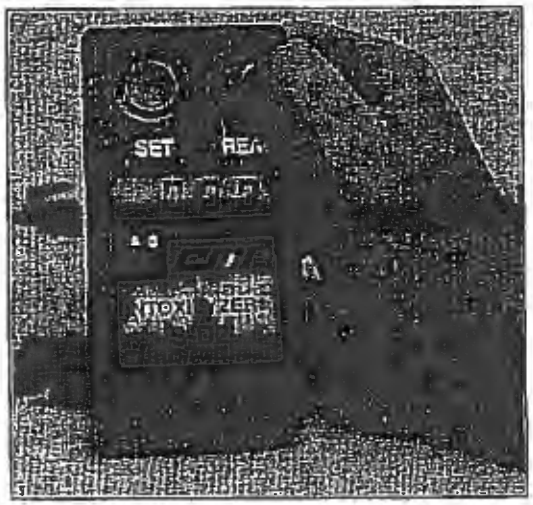
This insures that the instrument is ready to take a sample of the dry gas standard and tests whether the fuel cell is completely discharged and free of alcohol from a previous sample. It also insures that the battery has sufficient power to drive the electronic circuitry.

Press the **'READ'** button and hold down for at least ten seconds. This will release the **'SET'** button and activate the electronics. During these ten seconds, the display should not read more than .002. A higher reading shows that alcohol may still be present in the fuel cell. If this occurs, depress the **'SET'** button to lock, wait one minute and repeat the ten-second READY CHECK.

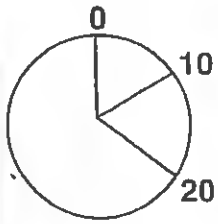
If the letter **'L'** is displayed, replace the unit's battery.

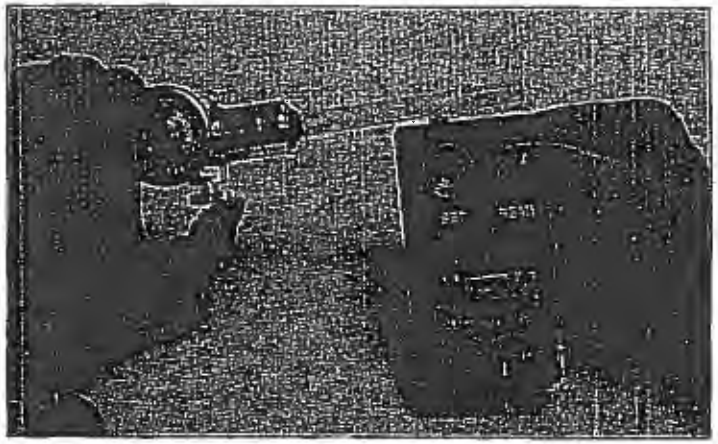
3) SET

Assuming the READY CHECK has been completed, depress the **'SET'** button to lock. This prepares the instrument to sample the dry gas standard.



Perform a READY CHECK and then SET the instrument.





Sample the dry gas standard.

4) SAMPLE THE DRY GAS STANDARD

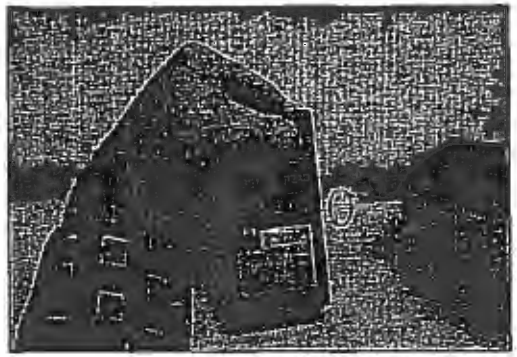
Follow the procedure below to sample the standard:

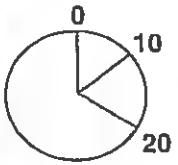
a) Use a new mouthpiece and attach its lipped end to the outlet on the regulator button.
b) Insert the S-D2's sampling port into the hole on the mouthpiece.
c) Hold the instrument with your thumb near the **'READ'** button.
d) Depress the regulator button so that gas begins flowing through the mouthpiece.
e) After about five seconds of continuous gas flow, AND WHILE GAS IS STILL FLOWING, press the **'READ'** button which draws a sample of gas into the unit. Continue to hold down the **'READ'** button.
f) When the sample has been taken, release the regulator button to stop the gas flow.

IT IS ESSENTIAL THAT THE GAS IS STILL FLOWING WHEN THE **'READ'** BUTTON IS PUSHED.

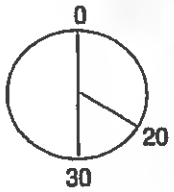
5) ADJUST THE DISPLAY TO THE VALUE OF THE DRY GAS STANDARD

Continue to hold down the **'READ'** button and turn the calibration control screw on the right side of the S-D2 counter-clockwise until, after about ten seconds, the display reading exceeds the value of the dry gas standard. As the display rises still further, due to continued charging of the fuel cell, turn the control clockwise to maintain the display at the dry gas standard value. As the fuel cell reaches its peak voltage, the control will require no further adjusting. The instrument is now calibrated. Do not turn the control to increase the reading once the display (fuel cell voltage) has passed its peak reading.

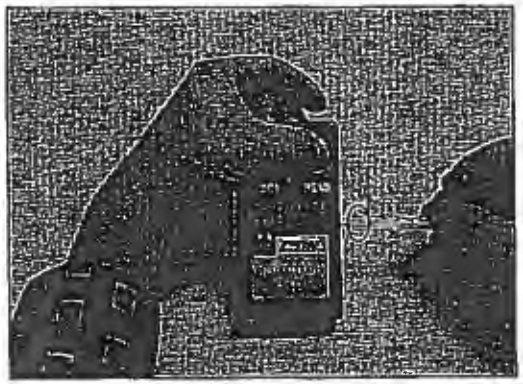




Adjust the display slightly counter-clockwise to exceed the dry gas standard value.



Turn the screw slightly clockwise to hold the display at the dry gas standard value.



If the display reading cannot be brought up to the dry gas standard value, the fuel cell has reached the end of its life and should be replaced. See the next section for more information.

6) RESET AND WAIT

After the final alcohol reading is noted, depress the **'SET'** button to lock. This allows the fuel cell to clear itself of alcohol before using the instrument for more tests. This will take approximately two minutes.

ROUTINE FIELD SERVICE CHECKS

Although the calibration check procedure shows whether the instrument reads the dry gas standard correctly, performing the following checks at monthly intervals will insure that your S-D2 is in proper working order with regard to its other functional systems.

BATTERY CHECK AND REPLACEMENT

If, when the **'READ'** button is depressed fully down, the left digit on the display shows the letter **'L'**, then the battery is low in voltage and must be replaced. The battery compartment is at the base of the instrument,

Insure that the new 9-volt battery is correctly connected to the contacts.

which must be removed from its protective pouch to change its battery. The S-D2 requires one 9-volt battery. First, remove the wrist strap by detaching the split ring from the metal pillar. Then, insert the screwdriver included with the S-D2 into the hole in the pouch and ease the leather upwards as to prevent the pillar from catching on the pouch. At the same time, push the instrument upwards from the bottom of the pouch, easing the pillar under the edges of the hole. Access to the battery is obtained by sliding away the cover at the base of the instrument. When replacing the battery, be sure to separate the contact carefully and insure that the replacement battery is securely connected and fitted inside its compartment inside the instrument. After the battery is in place, the cover and protective pouch can be reinstalled.

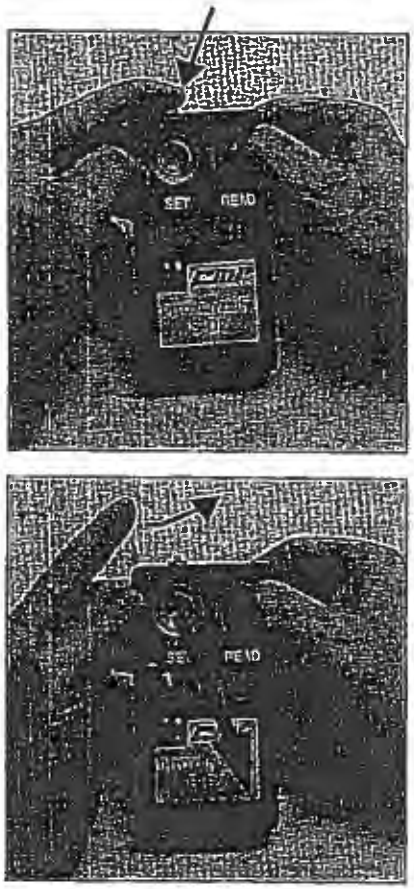
SAMPLING SYSTEM CHECK

A simple routine check on the operating efficiency of the sampling system may be done by the following steps:

a) Press the **'SET'** button to lock in the down position and place a forefinger tightly over the sampling port forming an airtight seal.
b) Press the **'READ'** button fully down and observe the **'SET'** button. It should not rise since air cannot be drawn into the system. If the **'SET'** button DOES rise at this time, then there is probably a leak in the system, and a qualified technician should be consulted. Remove your finger from the sampling port and the **'SET'** button should immediately rise. If the **'SET'** button rises slowly after you remove your finger from the sampling port, the sampling system may be blocked, and the instrument should be returned to a qualified technician.

DO NOT, FOR ANY REASON, COVER THE SAMPLING PORT AND FORCE DOWN THE 'SET' BUTTON FROM

ITS UP POSITION. THIS WOULD RUPTURE THE SAMPLING DIAPHRAGM OR FUEL CELL ELECTRODE AND NECESSITATE THE REPLACEMENT OF EITHER OR BOTH OF THESE PARTS.

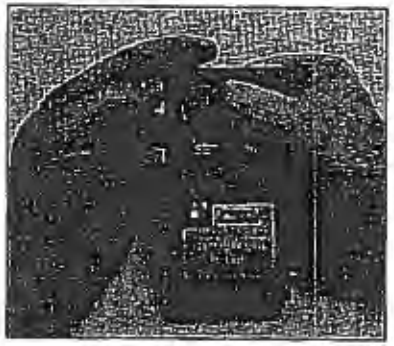


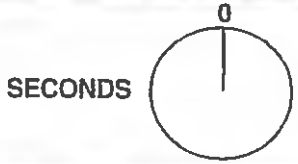
Check the S-D2's sampling system by 1) pressing the 'SET' button to the locked position and placing a forefinger over the sampling port. 2) Press the 'READ' button down and observe the 'SET' button, which should not rise.

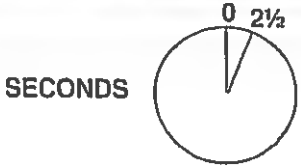
BREATH SAMPLING LIGHT CHECK

This procedure checks the operation of the breath pressure switch and the timing and operation of the breath sampling lights:

a) Insure that the 'SET' button is in the locked down position.
b) Place a forefinger over the sampling port and apply continuous pressure to the 'SET' button. This should activate the pressure switch and cause sampling light 'A' to illuminate, followed by light 'B' approximately 2½ seconds later.







Check the S-D2's sampling lights by 1) locking the 'SET' button, and then 2) placing a forefinger over the sampling port and applying continuous pressure to the 'SET' button. The 'A' light should activate, followed about 2½ seconds later by the 'B' light.

TEST FUEL CELL SWITCH

When an alcohol sample has been taken, the reading is cleared from the display and fuel cell recovery is accelerated by depressing the **'SET'** button. This short circuits the fuel cell electrodes and accelerates its discharge; immediate discharge is not generally possible since alcohol will still be present on the electrode surface.

To test and insure that this circuiting switch is working properly, the following procedure should be done:

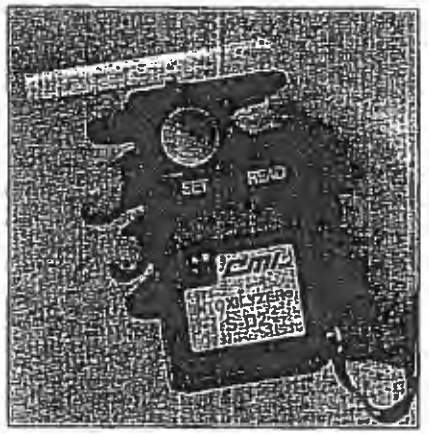
a) Take a sample of dry gas standard into the S-D2.
b) Hold down the **'READ'** button and observe the display as it starts to increase to the standard value. While still holding down the **'READ'** button, press the **'SET'** button fully down—you will be holding both buttons down at the same time. This should cause the display to reset to **.000**.
c) Allow the instrument to clear before using for further breath tests.

If the fuel cell reset switch test fails, the instrument should be returned to an authorized agent for inspection and repair.

FUEL CELL REPLACEMENT

When the fuel cell has reached the end of its working life, as seen by the inability to calibrate the instrument (see previous section), the complete instrument should be returned to the manufacturer for a replacement fuel cell to be fitted.

POINTS TO REMEMBER



The following information, if applied to the operation of your S-D2, will help prevent any problems.

TEST PROCEDURES

Learn the operating sequence thoroughly, and with a little practice, you will soon be completing tests in a little more than one minute:

1. Ready Check
2. Set
3. Attach Mouthpiece
4. Instruct the Subject
5. Take Sample
6. Observe Display
7. Discard Mouthpiece
8. Reset and Wait

READY CHECK

Each breath test must be preceded by a satisfactory READY CHECK.

MOUTH ALCOHOL

Twenty (20) minutes should pass between the

consumption of alcohol and a breath test using the S-D2. This period allows for any "mouth alcohol" to be dispersed.

MOUTHPIECE

Use a new mouthpiece for every test and insure that the subject blows through the lipped edge, wide-bored end. It is strongly recommended that only mouthpieces from CMI, Inc. be used.

SMOKING

Smoking just prior to a breath test will not influence the result, but tobacco smoke should not be blown through a mouthpiece attached to the instrument. Tobacco smoke could damage the fuel cell.

FOOD AND DRINK

Do not allow the subject to eat or drink before a breath test. Although this will not generally affect the result of the analysis, certain cough drops may contain alcohol. A subject could later claim that the coffee to calm his nerves was laced with something stronger causing a high blood alcohol concentration.

STORAGE BETWEEN TESTS

Always store the S-D2 with the 'SET' button down. This will keep the cell discharged so that the instrument is always ready for a breath test, provided that a satisfactory READY CHECK was obtained prior to taking the sample.

Avoid storing the unit in temperature extremes.

RADIO TRANSMITTERS

Do not use the S-D2 in close proximity to radio transmitters while they are transmitting.

PHYSICAL SHOCK

The S-D2 is rugged and reliable but should be treated with respect. Normal physical shock encountered in the field will be no problem, but a hard jolt like a drop on the floor or ground could be damaging. If you suspect that a drop may have damaged the unit, perform a calibration check.

INTOXILYZER® S-D2 SPECIFICATIONS

MODEL:	Intoxilyzer® S-D2
DETECTOR:	Electrochemical fuel cell sensor
SPECIFICITY:	Alcohol detector is unaffected by acetone, paint and glue fumes, foods, confectionery, methane and practically any other substance likely to be found in breath (apart from those which contain alcohol).
ACCURACY:	Better than ±5% around the calibrated level of a known alcohol standard.
BREATH SAMPLING:	Aspirating sample system with subject blowing through disposable mouthpiece.
DISPLAY:	Illuminated three-digit liquid crystal display giving direct alcohol level readout.

ANALYSIS TIME:	Approximately one minute per test.
CALIBRATION:	With dry gas standard or "wet bath" simulator.
RECOMMENDED OPERATING TEMPERATURE	32-104° degrees Fahrenheit (0-40° Celsius).
POWER SUPPLY:	9-volt battery with sufficient power for at least 500 tests.
DIMENSIONS:	2¾" wide x 1½" deep x 5" high (in pouch).
WEIGHT:	7½ ounces (including pouch and battery).
WARRANTY:	12 month warranty, excludes damage caused by mishandling or improper use. Please consult CMI, Inc. or your local agent for full details of the warranty.