

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4798-05T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

THOMAS R. HOWARD,

Defendant-Appellant.

Argued May 9, 2007 - Decided June 1, 2007

Before Judges Winkelstein and Baxter.

On appeal from the Superior Court of New Jersey, Law Division, Criminal Part, Salem County, Docket No. MCA-10-05.

Richard F. Klineburger, III argued the cause for appellant (Klineburger & Nussey, and Law Offices of Glenn A. Zeitz, attorneys; Jordan G. Zeitz, on the brief).

James C. Wright, Assistant Prosecutor, argued the cause for respondent (John T. Lenahan, County Prosecutor, attorney; Mr. Wright, on the brief).

PER CURIAM

Defendant Thomas Howard appeals from a conviction on a charge of driving while intoxicated (DWI), in violation of N.J.S.A. 39:4-50. After being found guilty in the municipal court of Alloway Township, defendant appealed to the Law

Division, where a trial de novo again resulted in his conviction. Because that infraction represented defendant's third driving while intoxicated conviction, Judge Forester sentenced him to a mandatory 180-day jail term and a mandatory ten-year loss of driving privileges. Appropriate fines and penalties were also assessed. The custodial portion of the sentence was stayed pending appeal.

On appeal, defendant argues:

I. UNCONTROVERTED EXPERT TESTIMONY CONCERNING THE IMPACT A DEFENDANT'S MEDICAL CONDITION HAD ON THE RELIABILITY OF BREATHALYZER TEST RESULTS IS ADMISSIBLE UNDER N.J.R.E. 703 WHEN SUCH TESTIMONY IS BASED ON THE EXPERT'S REVIEW OF THE DEFENDANT'S MEDICAL RECORDS, DISCOVERY, IN-COURT TESTIMONY OF OTHER WITNESSES AND AN IN-PERSON INTERVIEW OF THE DEFENDANT.

II. THE GUTH LABORATORIES CERTIFICATE OF ANALYSIS AND THE SIMULATOR SOLUTION CERTIFICATE SHOULD NOT BE ADMISSIBLE WHEN A DEFENDANT TIMELY OBJECTS TO THEIR ADMISSION AND IS DENIED EVEN THE MERE OPPORTUNITY PURSUANT TO CRAWFORD V. WASHINGTON, 541 U.S. 36 (2004) AND THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION TO CONFRONT THE ANALYSTS WHO PREPARED SAID CERTIFICATES.

III. THERE SHOULD BE A RIGHT TO INDEPENDENTLY TEST AMPOULES FROM A SPECIFIC "LOT NUMBER" WHEN EXPERT TESTIMONY DEMONSTRATES THAT PREVIOUSLY TESTED AMPOULES FROM TEN DIFFERENT LOT NUMBERS HAD SIGNIFICANT VARIATIONS IN THEIR PHYSICAL AND CHEMICAL COMPOSITION IN MORE THAN FIFTY PERCENT OF THE AMPOULES TESTED.

Each of these claims lacks merit, and we affirm defendant's conviction and sentence.

I.

On September 11, 2004, Trooper James Kopko was on routine patrol in Alloway Township when he stopped defendant's vehicle after observing it cross over the center line approximately three times. Defendant appeared dazed and had difficulty producing his license and registration. Kopko testified that defendant had bloodshot eyes, slurred and slow speech, and an odor of alcohol emanated from his breath. Kopko directed defendant to step out of the vehicle so that he could administer field sobriety tests. According to Kopko's testimony, defendant was unable to perform the heel-toe test or the one-leg stance. Defendant's inability to properly complete the field sobriety tests combined with the odor of alcohol caused Kopko to arrest him for driving while intoxicated. Kopko transported defendant to the Woodstown State Police Barracks so that a breathalyzer test could be administered.

Kopko testified that he followed the fifteen prescribed steps for administration of the breathalyzer test. Defendant's first breathalyzer examination resulted in a reading of 0.12%, and the second, conducted fourteen minutes later, resulted in an identical reading.

The State called Trooper William Cross, the coordinator for the Alcohol Drug Test Unit of the State Police in Salem and three other counties, who testified regarding the reliability of the machine. Cross explained that he had tested the particular Breathalyzer Model 900 located at the Woodstown Barracks that had been used to measure defendant's alcohol consumption on the night in question. He had tested the machine both before and after defendant's arrest for DWI on September 11, 2004, with those two tests occurring on August 18, 2004 and September 30, 2004. On each of those two occasions, Cross performed six tests to determine the accuracy of the machine, and all test results were within the accepted tolerance, which demonstrated that breathalyzer examination results from the machine would be reliable.

During Cross's testimony, the municipal court permitted the State to introduce, over defendant's hearsay objection, the Guth Laboratories Certificate of Analysis¹ and a State Police Simulator Solution Test Certificate.²

¹ The Guth Laboratories Certificate of Analysis shows the results of the testing of random ampoules from a certain lot number. Here, the certificate attests to the accuracy of an ampoule from Lot 00501. Guth Laboratories is the company that manufactures the ampoules.

² The simulator solution test determines the accuracy of the breathalyzer results by testing the solution to determine if it contains the correct volume and the proper ratio of ethyl alcohol concentration. The certificate showing the results of
(continued)

Defendant called three expert witnesses. The first, Dr. Gary Lage, an expert in the fields of pharmacology and toxicology, testified at trial that seven or eight days prior to defendant's arrest for DWI, defendant had been diagnosed with gastro-esophageal reflux disease (GERD). Lage explained that a person suffering from that condition undergoes "fairly constant [stomach] eruptions," which bring stomach gases into the esophagus, and eventually into the mouth, causing the machine to measure stomach gases, rather than only breath from the lungs, and thereby distort the readings. Lage opined that to a reasonable degree of medical certainty, defendant's GERD had artificially inflated the breathalyzer results. In his opinion, without the presence of stomach gases, defendant's true reading would have been well below .08% and very likely less than .05%.

Dr. Gerald DeMenna, an expert in analytical chemistry and analytical spectroscopy, testified to possible defects in ampoules from lot number 00501, which Kopko had used during the breathalyzer test of defendant. DeMenna testified that in the preceding twelve years, he had conducted 120 tests on breathalyzer ampoules from different lots, but none from lot number 00501. Although he had never performed any tests on an

(continued)

the test is prepared by the Forensic Laboratory Director of the Division of State Police.

ampoule from that lot number, his experience in testing other ampoules demonstrated that "fifty percent . . . have been below the prescribed 3.00 milliliter minimum volume defined by Guth Laboratories Certificate of Analysis." DeMenna explained that the volume of an ampoule is critical to the accuracy of the test because a low volume can give an artificially high breathalyzer reading.

DeMenna testified that the result of the low volume in an ampoule results in a reading that is five to ten percent in excess of what the reading would have been if the ampoule had been filled to the proper level. Even at the higher error rate of ten percent, DeMenna conceded that the largest deviation that there could have been in defendant's breathalyzer reading was approximately .012%, which would result in a reading for defendant of .108%, rather than the .12% reading that Kopko had obtained. DeMenna acknowledged that a reading of .108% would still have exceeded the .10% legal limit allowed in New Jersey at that time.

Defendant's third expert, James Beatty, a retired police officer, testified about defects in the way the field sobriety tests were administered. Judge Forester did not rely on the testimony concerning the field sobriety tests in finding defendant guilty; therefore, we find it unnecessary to describe Beatty's testimony.

In his written opinion, Judge Forester first addressed defendant's argument that his GERD had resulted in an artificially-inflated breathalyzer result. In rejecting the conclusions reached by Lage, Judge Forester made the following findings:

Judge Krell [the municipal court judge] found the following concerning the testimony of Dr. Lage: "Dr. Lage has not done any clinical testing on gastroenteritis or GERD. He ha[s] not published anything on the subject. Dr. Lage did not know the pharmacological facts of certain drugs mentioned in the reports." Judge Krell found Dr. Lage not to be credible and concluded that "I do not . . . put any weight at all in Dr. Lage's testimony." Judge Krell . . . questioned the competency of Dr. Lage with respect to the issue of how long alcohol remains in the stomach, the interaction of alcohol with the quantity of food consumed and the absorption of alcohol from the stomach into the intestines. Accordingly, suffice it to say that there were issues of credibility with . . . the defense expert.

Based upon an examination of the entirety of the record, this court concludes that Judge Krell's assessment of credibility had merit and, based on his ability to make that assessment on a first-hand basis, there is no need for this court to disturb Judge Krell's credibility findings. N.J.R.E. 703 contemplates that an expert's opinion will be based upon "facts or data." Those "facts or data" may be [themselves] inadmissible as long as they are of a type "reasonably relied upon by experts" in the field. An expert must rely on something, however. Thus, Dr. Lage's bare conclusions, unsupported by factual evidence or other data, are inadmissible as a mere "net

opinion." [Dr. Lage] conducted no studies, wrote no papers and had no peer review of his opinion on the influence of GERD on breathalyzer results.

Judge Forester also rejected defendant's argument that the admission in evidence of the Guth Laboratories Certificate of Analysis and the State Police Simulator Solution Certificate, both in the absence of the preparers, violated his Sixth Amendment right of confrontation. The judge disagreed with defendant's argument that Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), established that the two certificates were testimonial evidence, thereby affording him the right of confrontation.

II.

In point I, defendant claims error in the rejection of Lage's testimony. We conclude that such argument lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). Suffice it to say that both the municipal court judge and Judge Forester gave ample reasons for disregarding Lage's testimony and his conclusions. Defendant has presented no meritorious arguments to persuade us that we should disagree with either judge's findings or conclusions.

III.

In point II, defendant maintains that the Guth Laboratories Certificate of Analysis and the Simulator Solution Certificate

prepared by the State Police were admitted without any testimony from the analysts who prepared them, and without the State demonstrating that the preparer was unavailable. He argues that because both certificates were prepared solely for use in a criminal prosecution, and he made a timely objection to their admission, dispensing with confrontation solely because that evidence is deemed reliable is violative of his rights under the Sixth Amendment to the United States Constitution. Id. at 68-69, 124 S. Ct. at 1374, 158 L. Ed. 2d at 203. In both State v. Kent, 391 N.J. Super. 352, 370-71 (App. Div. 2007) and State v. Renshaw, 390 N.J. Super. 456, 468-69 (App. Div. 2007), we applied Crawford and held that a document prepared by a nurse certifying that a defendant's blood had been drawn in a medically-acceptable manner in a DWI prosecution was "testimonial" under Crawford, thereby triggering a defendant's right of confrontation.

In State v. Dorman, ___ N.J. Super. ___, ___ (App. Div. 2007), we distinguished Kent and Renshaw, and held that where the report in question is not created with any specific case in mind and is intended only to document the regular business function of maintaining a particular breathalyzer machine, the documents are properly admissible as a business record under N.J.R.E. 803(c)(6). (slip op. at 7-8).

Dorman concerned the certificate prepared by a State Trooper attesting to the proper functioning of the breathalyzer machine when it was tested by a trooper several weeks before and after the day it was used to test the defendant's alcohol consumption.³ (slip op. at 6). Here, the two documents challenged as impermissible hearsay address slightly different aspects of the breathalyzer procedure than we discussed in Dorman. The first, the simulator solution certificate prepared by the director of the forensic laboratory of the New Jersey State Police on June 15, 2004, certified that the alcohol simulator solution used in the breathalyzer machine at the Woodstown Barracks met all required specifications. The second, prepared on June 27, 2002, by Guth Laboratories, certified that each of the breath alcohol ampoules in lot number 00501 satisfied all requirements as to volume and chemical content.

Neither of these two documents was prepared solely in connection with the breathalyzer test used to determine defendant's alcohol consumption on September 11, 2004. The documents in question were produced in one instance several months, and in the other several years, before defendant's

³ Here, unlike in Dorman, the State did not seek to admit the breath testing instrument inspection certificate as hearsay. Instead, when Trooper Cross testified, the before and after documents were admitted without objection after affording defendant the opportunity to cross-examine him regarding the operability of the breathalyzer machine on those two occasions.

alcohol consumption was tested. Although the specific document that we held was non-testimonial in Dorman differs from the two certificates at issue here, all three share the common element of not being created with any specific defendant in mind. For the same reasons that we concluded in Dorman that the certificates of operability prepared before and after the machine was used to test the defendant were not testimonial in nature, we reach the identical conclusion here concerning the simulator solution certificate and the Guth Laboratories Certificate of Analysis.

Defendant further argues that although the certificates at issue here were not prepared with a particular DWI prosecution in mind, they were nonetheless prepared for the sole purpose of prosecuting individuals suspected of driving while intoxicated; therefore, he argues, the documents were prepared in anticipation of criminal prosecutions and should be deemed testimonial in nature. Although it is true that a breathalyzer machine is only used in connection with a DWI prosecution, we disagree that such intended law enforcement use should necessarily cause us to characterize these routine inspection documents as testimonial. The certificates at issue here were prepared in the ordinary course of business, at or about the time that the testing in question was completed, and accordingly, they qualify as business records under N.J.R.E.

803(c)(6). As we determined in Dorman, supra, slip op. at 7-8, these documents were not created with any particular prosecution in mind, and accordingly can properly be admitted without affording a defendant the right of confrontation.

IV.

In point III of his brief, defendant argues that the municipal court judge erred when he denied defendant's request to subject an ampoule from lot number 00501 to testing by his expert. That argument was not raised in the Law Division, and accordingly we will not reverse on the ground of such error unless it was "clearly capable of producing an unjust result." R. 2:10-2.

Defendant argues that "[b]ecause there was uncontroverted expert testimony demonstrating that previously tested ampoules from ten different lot numbers were defective in both physical and chemical composition, it is reasonable to infer that if [defendant's] expert [had been] given the opportunity to test ampoules from lot number 00501, he would have found that they were also defective and at a minimum caused a disproportionately higher breathalyzer reading by at least ten percent."

We agree with the State's argument that defendant had no right to examine ampoules from the lot number used in the breathalyzer machine on the day in question. We begin by noting

that as Trooper Cross explained, in any given lot number there are 25,000 individual ampoules.

A defendant has no right to independently test ampoules of the same batch used in his breathalyzer test unless there is a reasonable basis to believe it will assist in his defense. State v. Young, 242 N.J. Super. 467, 471 (App. Div. 1990). In Young, we held that the production of ampoules for testing by a defense expert was not required because there was no reasonable basis to believe that testing the contents would reveal any defect. Ibid. Shortly thereafter, we held in State v. Maure, 240 N.J. Super. 269, 284 (App. Div. 1990), aff'd o.b., 123 N.J. 457 (1991) that "breathalyzer ampoules are rarely defective."

Here, like the defendant in Young, defendant has not presented any basis upon which to conclude that had an ampoule from lot number 00501 been tested, any defects would have been established. Defendant's expert DeMenna testified that he has found defects in other lot numbers, but he has never tested an ampoule from lot number 00501. Under those circumstances, we are unable to conclude that defendant has made the showing required by Young, supra, that would have entitled him to test an ampoule from this particular lot number. 242 N.J. Super. at 471.

Additionally, even if there were some irregularity in one of the ampoules from lot number 00501, as DeMenna conceded it

would have produced an error rate no greater than ten percent, which would only have reduced defendant's reading to .108%, rather than the .12% at which he was tested. Even a reading of .108% is in excess of the .10% reading constituting a per se violation of N.J.S.A. 39:4-50 at the time. Accordingly, there was no error, let alone plain error "clearly capable of producing an unjust result." R. 2:10-2.

Affirmed. We remand to the Law Division for dissolution of the stay of imposition of the custodial term.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION