

*for review
Law Review*

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FILED

15 JUN 1990

Clerk
Superior Court
Northern Marianas Islands

B. act
Deputy Clerk of Court

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN)
MARIANA ISLANDS,)
)
Plaintiff,)
)
vs.)
)
ABRAHAM HANSINTO,)
PENI MAILLO, and)
HANDY W. JOHNNY,)
)
Defendants.)

TRAFFIC CASE NOS. 90-1698,
90-1916, 90-1998,
and 90-2004

ORDER

This matter is before the Court on the Defendants' ^{1/} Motion to Suppress the results of a "Breathalyzer 2000" test administered to them by police after being arrested for driving a motor vehicle while under the influence of alcohol, in violation of 9 CMC §7105(a)(1). ^{2/} Briefs were filed and arguments on the

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- Although the Defendants are being prosecuted separately, because the facts and issues of law in each case are identical, the Court entertains these motions together for purposes of efficiency and expediency.

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- The Defendants' Motion also requested that the Court prohibit all further use of the Breathalyzer Models 2000 and 7010 in all future DUI cases prosecuted before the Court. At the hearing on the Motion, the Defendants withdrew this request.

motion were heard on May 24, 1990.

The Defendants were represented at the hearing by Public Defender Oldiais Ngiraikelau and Assistant Public Defenders Jeffrey Cohen and Brien Nicholas. The Government was represented by Assistant Attorneys General Stephen Nutting and James Hollman.

The particular facts surrounding each Defendant's arrest are neither disputed nor relevant to the resolution of the matter before the Court. Rather, the dispute between the Defendants and the Government centers on whether the admissability of breath test results is governed by 9 CMC §7107(a) or the Court's Rules of Evidence.

The Defendants begin their argument by pointing out that 9 CMC §7107(a) mandates that evidence of breathalyzer tests shall be admissible. The pertinent part of 9 CMC §7107(a) provides:

"... evidence of the concentration of alcohol or drugs in a person's breath at the time alleged, as determined by analysis of the person's breath, shall be admissible."

However, the Defendants also refer the Court to 7 CMC §3301, which provides:

"Except as provided in this Chapter, the admission and inclusion of evidence shall be in accordance with the Rules of Evidence adopted by the Commonwealth Judiciary pursuant to §3402 of Title 1."

Pursuant to 1 CMC §3402(a), the Legislature granted the Commonwealth Judiciary the authority to propose rules governing civil and criminal procedure in the CNMI. This grant of rule making authority was a codification of Article IV, Section 8 of the CNMI Constitution which provides in pertinent part:

"The judiciary of the Commonwealth may propose rules governing civil and criminal procedure ..."

Rules of evidence have generally been regarded as procedural in nature. Ammerman v. Hubbard Broadcasting, Inc., 551 P. 2d 1354. Consistent with this constitutional and legislative mandate, the Commonwealth Judiciary adopted rules of evidence patterned after the Federal Rules of Evidence.

Pursuant to 7 CMC §3301, the Rules of Evidence as adopted by the Commonwealth Judiciary control the admission or inclusion of evidence in matters before the Court unless 7 CMC §§3301-08 provides otherwise. A review of these sections reveals that the Legislature made no exception to the Judiciary's Rules of Evidence governing the admission or exclusion of scientific evidence such as the results of breathalyzer tests. However, the 9 CMC §7107(a) mandate that breath test evidence " shall be admissable" appears to be such an exception.

The Defendants argue that 9 CMC §7107(a) has no force and effect because the Legislature may not repeal the Rules of Evidence adopted by the Court pursuant to Article IV, Section 8 of the CNMI Constitution.^{3/} See State ex rel. Collins v. Seidel,

^{3/} At the hearing on this motion, the Defendants also argued that 9 CMC §7107(a), as written, does not apply to DUI cases. The Court's reading of this section compels the opposite conclusion. Moreover, the legislative intent to have this section apply to DUI cases is abundantly clear by the fact that it is situated among those Code sections addressing DUI violations. The Defendants also argued that the failure of the Chief of the Bureau of Motor Vehicles (BMV) to develop rules and regulations to carry out the provisions of Title 9 pursuant to 9 CMC §1204(b) render 9 CMC §7107(a) impotent. This argument is without merit. The directive of 9 CMC §1204(b) pertains only to laws which are administered by BMV. 9 CMC §7107(a) is not such a law.

691 P. 2d 678, 682. Proceeding on this premise, the Defendants maintain that Comm.R.Evidence 702 controls the admissability of scientific evidence such as breath test results.

Ordinarily, admission of testimony regarding scientific evidence would primarily be governed by Rule 702, which reads:

Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Cases construing Rule 702 have held that the proponent of evidence based on scientific, technical or specialized knowledge must make a showing of general acceptance of the proffered scientific test or method within the scientific community under the rule of Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923). State ex rel. Collins v. Seidel, 691 P. 2d 678. Also required is a foundational showing by a qualified expert that the accepted technique was properly used and the results accurately measured and recorded. Id.

If the Court accepts the Defendants' argument, it must find that 9 CMC §7107(a) is inapplicable to the issue of the admissability of breath test results. The Defendants' cite Seidel, supra, as supporting such a finding.

In Seidel, the Arizona State Constitution gave that State's Supreme Court the power to make rules relative to all procedural matters in any Court. 691 P. 2d at 681. The CNMI Constitution

only gives the Commonwealth Judiciary authority to propose rules subject to review by the Legislature. CNMI Constitution, Article IV, Section 8. While the Arizona Constitution gave its Supreme Court unqualified authority to issue procedural rules, the CNMI Constitution limits the Commonwealth Judiciary's role to that of proposing procedural rules which may subsequently be approved or disapproved by the Legislature.

Such a limitation on the judiciary's rule-making power evinces an intent on the part of the framers to reserve ultimate procedural rule-making authority with the Legislature. Therefore, the Court finds that the basis of procedural rule-making power discussed in Seidel rests on an entirely different constitutional grant of power than that found in Article IV, Section 8 of the CNMI Constitution and is inapplicable.

While there may still remain the appearance of conflict between 9 CMC §7107(a) and 7 CMC §3302, this issue is resolved in favor of the applicability of 9 CMC §7107(a) to the issue of admissibility of breath test results. To this end, 1 CMC §3403 provides in pertinent part:

"Nothing in this section shall limit the authority of the Legislature to enact laws regarding the subjects mentioned in §3402 and any rule may be annulled or amended by a law limited to that purpose.

In light of this language, the Court finds that 9 CMC §7107(a) acts as an amendment to Comm.R.Evidence 702.

The meaning of a statute must, in the first instance, be

sought in the language in which the act is framed, and if that is plain, the sole function of the courts is to enforce it according to its terms. Caminetti v. U.S., 242 U.S. 470, 37 S.Ct. 917, 61 L.Ed. 442. 7 CMC §7107(a) mandates that breath test results shall be admissable. The Legislature attached no qualifications or conditions to its admissability, although it could have. Therefore, the Court holds that breath test results shall be admissable pursuant to the legislative mandate of 9 CMC §7107(a) without the laying of the usual foundation for such scientific evidence. Because of the relative ease with which breath tests may be admitted, the weight to be accorded such test results will necessarily be proportionately diminished.

In order to bolster the evidentiary weight of breath test results, it will be incumbent upon the proponent to present further evidence^{4/} including evidence:

1. that the breath test instrument is reliable and accurate;
2. that the instrument was in proper working condition at the time of the test;
3. that the instrument has been properly maintained pursuant to the manufacturer's instructions;
4. that its operator was qualified; and
5. that the test was properly administered according to the manufacturer's operating instructions.

^{4/}
— Many police departments on the mainland now videotape a DUI defendant operating a motor vehicle prior to a police stop, during the administration of field sobriety tests and at other relevant times, to corroborate breath test results.

The admission of breath test results under 7 CMC 7107(a) does not violate the Defendants' rights to due process. The burden is still on the prosecution to convince the trier of fact that the test result was accurate and that the Defendants' blood alcohol content was above the prohibited level at the time of driving. Moreover, the Defendants may challenge the test results using the traditional defense tools in confronting the Government's evidence or witnesses.

The Court notes at this time that it has grave concerns regarding the reliability and accuracy of the Breathalyzer 2000 being used by the Commonwealth. The Defendants point out that the first issue of the Breathalyzer 2000 used a humidity detector and frequencies different than those of competing infrared machines. Acting on reports that the humidity detector was unreliable, which cast doubts on the machine's accuracy, the manufacturer modified the Breathalyzer 2000 in 1983.^{5/} Moreover, the manufacturer issued an advisory in 1982 that its Breathalyzer models 1000, 900 and 900A may be subject to radio frequency interferences (RFI) from police department radios affecting the machines' accuracy and subsequently published test procedures to insure that RFI was not affecting breath test results.^{6/} While not mentioned specifically in the manufacturer's advisory, the

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— See Defendants' Brief, fn 11 at 21, citing 2 ERWIN, DEFENSE OF DRUNK DRIVING.

6/
— See Thayer v. Municipality of Anchorage, 686 P. 2d 721.

fact that the Breathalyzer 2000's frequency was changed leads this Court to believe that it too may have been affected by RFI. Based on the Court's own knowledge that the Commonwealth's Breathalyzer 2000 was purchased in the early 1980's, the Court must factor in the possibility that this machine is an unmodified version when determining the weight to be given breath test results attained with it unless evidence is produced to the contrary.

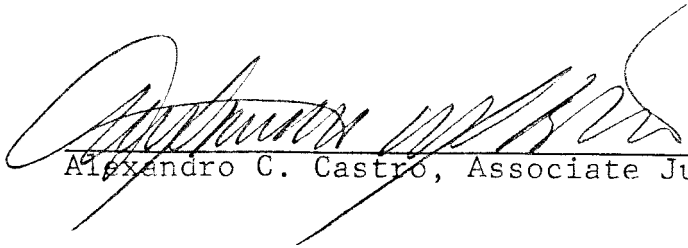
Another concern the Court has with the reliability and accuracy of breathalyzers used in the Commonwealth is the degree of susceptibility to damage or malfunction as a result of electrical power surges that are frequent in the CNMI. Finally, the Court has questions concerning the maintenance, repair and remaining useful life of the breathalyzers used in the Commonwealth. Such evidence would certainly have an effect on the weight given to breath test results.

CONCLUSION

9 CMC §7107(a) operates to amend Comm.R.Evidence 702 by relieving the proponent of breath test results of the burden of laying the usual foundation for such scientific evidence. As a result, the weight accorded breath tests by the Court is correspondingly reduced. The breath test proponent must therefore introduce further evidence in order to add to the weight the Court assigns to breath test results.

NOW THEREFORE, Defendants' Motion to Suppress is DENIED.

Entered this 15 day of June, 1990.



Alejandro C. Castro, Associate Judge