

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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

SANDY B. QUEMADO,
Defendant-Appellant.

SUPREME COURT NO. 2011-SCC-0012-TRF
SUPERIOR COURT NO. 09-01399

OPINION

Cite as: 2013 MP 13

Decided November 7, 2013

Eden Schwartz (Argued), Assistant Public Defender, and Daniel Guidotti (On Brief), Assistant Public Defender, Office of the Public Defender, Saipan, MP, for Defendant-Appellant Sandy B. Quemado.

Brian Flaherty, Assistant Attorney General, Office of the Attorney General, Saipan, MP, for Plaintiff-Appellee Commonwealth of the Northern Mariana Islands.

BEFORE: ALEXANDRO C. CASTRO, Chief Justice; PERRY B. INOS, Associate Justice; TIMOTHY H. BELLAS, Justice Pro Tem.

CASTRO, C.J.:

¶ 1 Appellant-Defendant Sandy Quemado (“Quemado”) appeals his conviction for driving under the influence of alcohol on the grounds: (a) the trial court abused its discretion in admitting his .170 percent blood alcohol content (“BAC”) test result without a properly laid foundation; and (b) there was insufficient evidence to show his BAC was, in fact, .08 percent or above. For the reasons set forth herein, Quemado’s conviction for driving under the influence is AFFIRMED.

I. Facts and Procedural History

¶ 2 Quemado’s tribulations began with a vehicular accident. Responding to the scene of an accident, Police Officer Joseph M. Magofna (“Officer Magofna”) arrested Quemado after conducting field sobriety tests. After his arrest, Quemado was taken to Department of Public Safety (“DPS”) headquarters. Once there, Officer Magofna administered (approximately) fifteen breath tests before the last test indicated that Quemado’s BAC was above the legal limit. These tests were administered between 2:30-3:10 a.m.

¶ 3 The collision occurred due to Quemado’s erratic driving. According to Maria Aguon (“Aguon”), she was driving north around 12:55 a.m. on August 30, 2009, while Quemado was driving south. He crossed into the northbound lane causing her to turn into the middle lane. He then swerved back toward the southbound lane, colliding into Aguon’s car.

¶ 4 Not long after, Officer Magofna arrived on the scene. Officer Magofna arrested Quemado for driving under the influence. Quemado exhibited symptoms of alcohol consumption: blood shot eyes and the smell of alcohol on his breath. In response to these symptoms, Officer Magofna conducted field sobriety tests of Quemado. Quemado cooperated, admitted that he consumed two beers earlier that evening between 6:00-7:00 p.m., and failed the field sobriety tests. Officer Magofna transported Quemado to DPS headquarters.

¶ 5 At DPS headquarters around 2:00 a.m., Officer Magofna conducted a second field sobriety test, which Quemado also failed. Officer Magofna proceeded to administer a series of breath tests to determine Quemado’s BAC. The (approximately) first fifteen tests resulted in five insufficient sample readings; but the final test, which took place at 3:06 a.m., indicated Quemado’s BAC was .170 percent, nearly twice the legal limit. After the final breath test, Officer Kwon observed Quemado’s flushed face, swaying, and other behavior suggesting some degree of inebriation.

¶ 6 Officer Magofna administered the breath tests using an Intoximeter EC/IR-2 (“the Intoximeter”). He was certified to operate and calibrate the device in 2007. The device works by measuring BAC with an electrochemical fuel cell while simultaneously testing for mouth alcohol with an infrared instrument.

¶ 7 Officer Magofna regularly inspected the electrochemical fuel cell component, conducting monthly accuracy checks. The accuracy checks nearest to Quemado's tests occurred on August 3, August 28, and October 6, 2010. According to Officer Magofna, the Intoximeter operated properly during these checks. He conducted these tests exclusively with dry gas. No other maintenance or calibration occurred on this machine.

¶ 8 Dry gas accuracy checks, however, do not test the accuracy of the infrared component. Without testing the infrared component, it is impossible to determine whether the device was correctly detecting the presence of mouth alcohol.

¶ 9 Officer Magofna utilized a (seemingly) irregular procedure for measuring Quemado's BAC: Officer Magofna took (approximately) fifteen insufficient samples using the Intoximeter prior to the reading of .170 percent BAC. And it took over a half-hour to administer. The Intoximeter produces an insufficient sample slip if the "minimum requirements for a breath test are unmet." Trial Tr. at 240. A slip is automatically printed after three insufficient samples. This can happen when the examinee provides an insufficient breath sample or when the Intoximeter detects mouth alcohol.

¶ 10 To explain these irregularities, Officer Magofna testified that Quemado did not cooperate in following his breath test instructions because he did not breath sufficiently into the Intoximeter. He also noted that Quemado did not ingest anything while under his observation, beginning at 12:55 a.m. (over an hour before he began administering the BAC tests). In particular, he testified that he observed no liquid substances in Quemado's mouth at least fifteen minutes prior to the breath tests. In addition, he claimed that DPS regulations governing Intoximeter tests did not mandate any waiting period between test administrations.

¶ 11 At trial, Quemado disputed the veracity of the administered tests because of inadequate waiting periods. He called Jan Semenoff as a breath test expert. After reviewing the five insufficient sample slips, Semenoff concluded that either Quemado did not sufficiently breathe into the machine during these tests, or the minimum requirements for a sample were not met—possibly indicating breath alcohol contamination. Semenoff reached this determination by observing that each inconclusive test occurred within a few minutes of the next. A similar time period elapsed between the second-to-last and final test. Semenoff opined that if mouth alcohol was present during a previous test, it would take twelve-to-fifteen minutes to dissipate; thus, three-to-five minute intervals may not have been sufficient.

¶ 12 Notwithstanding Semenoff's testimony, the court admitted the .170 percent BAC test result into evidence. Following the bench trial, the Court convicted Quemado of reckless driving in violation of 9 CMC § 7104(a) and (b), and driving under the influence of alcohol in violation of 9 CMC § 7105(a)(1). Quemado timely appealed his conviction for driving under the influence.

II. Jurisdiction

¶ 13 We have jurisdiction over Superior Court final judgments and orders, 1 CMC § 3102(a), which includes all criminal actions. 1 CMC § 3202. Because Quemado timely appealed his conviction, we have jurisdiction. 1 CMC § 3105; NMI SUP. CT. R. 4(b)(1)(A)(i).

III. Standards of Review

¶ 14 This Court reviews a trial court's decision to exclude or admit evidence for an abuse of discretion. *Sablan v. Elameto*, 2013 MP 7 ¶ 15 (Opinion, June 3, 2013). In considering the sufficiency of the evidence, the Court must “consider the evidence in the light most favorable to the government and [then] determine whether any reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Commonwealth v. Islam*, 2013 MP 4 ¶ 7 (Slip Opinion, May 21, 2013) (quoting *Commonwealth v. Minto*, 2011 MP 14 ¶ 38).

IV. Discussion

A. *The Admission of Quemado's .170 Percent BAC Test into Evidence*

¶ 15 Quemado argues that the trial court erred in admitting the .170 BAC test (Exhibit 2) because the Commonwealth did not properly lay foundation. More specifically, Quemado contends that the test was not “reliable” and, therefore, the trial court should have excluded Exhibit 2 from evidence. Appellant's Opening Br. 7-8.

¶ 16 In reviewing a trial court's decision to admit evidence for an abuse of discretion, we assess whether the Court's decision “clearly exceeds the bounds of reason or disregards rules or princip[le]s of law and practice to the substantial detriment of a party or litigant.” *Fitial v. Kim Kyung Duk*, 2001 MP 9 ¶ 2. To preserve a trial court evidentiary ruling on appeal, Quemado must also show: (1) a timely objection or motion to strike; and (2) a substantial right of the objecting party was affected. *Commonwealth v. Peters*, 1 NMI 466, 475 (1991).

¶ 17 The parties initially disagree as to the foundational requirements for admitting a BAC test result. Both parties cite to the controlling statute, 9 CMC § 7107,¹ for different purposes. Quemado believes this statute does not offer foundational requisites for admitting a BAC test into evidence, Appellant's Opening Br. 6, while the Commonwealth contends this statute stands for the proposition that “challenges to the

¹ The statute states:

Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a vehicle while under the influence of alcohol or drugs, 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.

9 CMC § 7107(a) (emphasis added).

credibility of the test should go to the weight the evidence carries and not to its admissibility,” and any foundational requirement should be minimal. Appellee’s Resp. Br. 6.

¶ 18 This Court has not directly addressed the issue of foundation in this context. In *Peters*, this Court indicated that the statutory provision at issue, 9 CMC § 7107(a), did not allow a defendant to argue for the exclusion of a BAC test: “[A defendant] will not be able to exclude the [test] result as evidence, but he will be able to argue the weight that such result will be given.” 1 NMI at 475. This language cannot be read to require admission of *all* BAC test results, however, because that would serve as a provision eliminating the need to demonstrate compliance with any of the Commonwealth Rules of Evidence. See NMI Const. art. IV § 9 (reserving to the Commonwealth legislature *only* the right to disapprove of court rules submitted by the Chief Justice). Additionally, the Commonwealth concedes that some safeguards are necessary to establish the reliability of the test: proper device calibration and a trained operator. Appellee’s Resp. Br. 6. Since then, we have observed that *Peters* held that a proper foundation was not laid to introduce the BAC test result—thus implying that foundational requisites exist. *Commonwealth v. Mettao*, 2008 MP 7 ¶ 38. Which raises the question: under 9 CMC § 7107(a), what steps must the Commonwealth take to lay a proper foundation for introducing a BAC test result?

¶ 19 Both parties offer competing tests for establishing a proper foundation for admitting a BAC test result. The Commonwealth specifically points to two of our cases, *Commonwealth v. Mettao*, 2008 MP 7 ¶ 38, and *Peters*, 1 NMI at 474-75, to support the contention that only two foundational requisites exist for admitting chemical tests pursuant to 9 CMC § 7107 into evidence: (1) proof of proper calibration of the testing device; and (2) a trained test administrator conducting the test with the device. Appellee’s Resp. Br. 6. In contrast, Quemado believes three foundational elements exist for admitting such an exhibit: (1) a reliable test; (2) a trained individual conducted the test; and (3) a fact-finder who heard expert testimony explaining the test results. Appellant’s Opening Br. 7 (citing *State v. Bender*, 382 So.2d 697, 699 (Fla. 1980), and *State v. Brockway*, 441 N.E.2d 602, 606 (Ohio Ct. App. 1981)).²

¶ 20 The vast majority of states now have statutes allowing admission of a breathalyzer test if it is properly conducted (according to regulations promulgated by a law enforcement agency) by trained personnel utilizing an approved instrument. See, e.g., *Commonwealth v. Zeininger*, 947 N.E.2d 1060,

² “[S]anctions are appropriate for failure to provide adequate legal authority and reasoning.” *Matsunaga v. Cushnie*, 2012 MP 18 ¶ 35 (Opinion, Dec. 28, 2012). Former Assistant Public Defender Daniel Guidotti, writing in a brief for Quemado, crossed this line when he neglected to discuss controlling precedent on a point of law. In a gross deviation from acceptable practice, Mr. Guidotti did not bother addressing the only binding cases on point, *Mettao* or *Peters*, in his opening brief on behalf of Quemado; nor did Mr. Guidotti file a reply brief in an attempt to correct his error after the Commonwealth cited to these cases in their responsive brief. We have not previously sanctioned any attorney under similar circumstances, so we are reluctant to do so without offering a clear warning first. We offer this warning today: ignoring binding precedent that squarely addresses a legal issue before this Court is sanctionable conduct. And to the credit of the Office of the Public Defender, Assistant Public Defender Eden Schwartz offered counsel to this Court regarding these binding precedents at oral argument.

1065 (Mass. 2011) (noting that a statute, MASS. GEN. LAWS ANN. ch. 90 § 24K (LexisNexis 2013), only allows admittance of a breath test if such analysis has been “performed by a certified operator using a certified infrared breath-testing device” according to methods approved by the secretary of public safety). These states, in allowing BAC test results into evidence without expert witness testimony (when performed consistent with statutory requirements), emphasize that reliability is presumed. *See, e.g., In re Source Code Evidentiary Hearings in Implied Consent Matters*, 816 N.W.2d 525, 528 n.3 (Minn. 2012) (recognizing the presumption of reliability created when using an “‘approved’ infrared breath-testing instrument” pursuant to MINN. STAT. ANN. § 634.16 (LexisNexis 2013)); *see generally* 8 AM. JUR. 2D *Automobiles and Highway Traffic* § 988 (“When the prosecution presents evidence which includes an approved blood alcohol test method by a properly licensed operator, the fact finder may presume that the test procedure is reliable, the operator is qualified, and the presumptive meaning of the test as set forth in the pertinent state statute is applicable.”).

¶ 21 Crucially, our statute on the subject, 9 CMC § 7107(a), says very little regarding foundational requisites, much less about the reliability of testing procedures. If this Court were to infer such a requirement, we would do so without a textual anchor and little to establish the legislature intended such a reading. Yet, at the same time, neither party has pointed to any reason to support the proposition that the legislature intended to admit all BAC tests into evidence (so long as no valid objection under the Commonwealth Rules of Evidence was lodged), no matter who administered the test and no matter what device was utilized. The latter reading is especially problematic in light of the fact this is a strict-liability crime and, as even the Commonwealth concedes, some “minimal” foundational requisites likely exist. Appellee’s Resp. Br. 6.

¶ 22 In resolving these competing considerations, we decline Quemado’s invitation to read into the statute unnecessary requirements lacking any textual anchor. For instance, his suggestion that a BAC test result must be interpreted by an expert witness, while potentially helpful, does not explain why this is a *necessary* foundational requisite. After all, the statute is constructed based upon an objective, .08 percent threshold. Quemado’s call for an expert witness would, as a practical matter, lead to dueling expert witnesses. This proposition would (at least partially) obviate the purpose for installing an objective threshold in the statute. Nonetheless, despite our rejection of expert witnesses as a foundational requirement, parties remain free to consult or call expert witnesses at trial regarding BAC test results. We simply find no support for the proposition that the Commonwealth *must* call an expert witness to admit a BAC test result into evidence.

¶ 23 Along a similar vein, Quemado also asserts that a BAC test result may only be admitted after the moving party establishes that the result flowed from a reliable test. But the point of a test result derived from properly-conducted breath analysis *is* that a presumption of reliability inheres; so we do not

disagree, as explained below. If, however, Quemado sees reliability as a separate element to admit a BAC test result (which likely requires the participation of an expert witness), we disagree for the reasons articulated above.

¶ 24 The real trouble with Quemado's suggestions is that they do not square with the categorical nature of the admonition to admit this kind of evidence in § 7107(a): "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." (emphasis added); *Peters*, 1 NMI at 474-75. And as we note above, we do not take this language to mean that any BAC test result is automatically admissible (absent a valid objection under the Commonwealth Rules of Evidence). Rather, as this Court suggested in *Peters*, *id.* at 470, and observed in *Mettao*, 2008 MP 7 ¶ 38, basic foundational requirements exist for admitting a BAC test result. These foundational requirements emanate from statutory presumptions in § 7107(a).

¶ 25 These statutory presumptions suggest two foundational requirements. First, a trained operator (generally indicated through proper certification) administers the BAC test. And, second, such a person utilized an appropriate method, device, or both for accurately testing a person's BAC. These are derived from our review of § 7107(a), which recognizes that evidence containing the "analysis of the person's breath" is admissible. Given its presumptive admissibility, the term "analysis" necessarily includes results only from a scientific test properly administered by an appropriate person.

¶ 26 If this were not so, the Commonwealth could convict defendants under § 7105(a)(1) simply on the basis of test results that appear scientific, without demonstrating that those results flow from an objective, scientific test performed by proper personnel because § 7105(a)(1) punishes solely on the basis of a test result, as it lacks any scienter requirement. We do not believe the legislature intended finders of fact to consider every BAC test result without a court first examining whether a scientific test was actually performed. Thus, we hold that two foundational requisites exist for admitting BAC test results into evidence: (1) a trained operator administers a BAC test, which (2) utilizes an appropriate method, device, or both for accurately testing a person's BAC.

¶ 27 In applying these foundational requirements here, both the parties agree the first element is met. The evidence indicates that Officer Magofna had the proper training to operate the Intoximeter. As for the second element, both parties also do not dispute that the Intoximeter was an appropriate device for testing a person's BAC. Therefore, the only remaining question is whether the Intoximeter was shown to accurately test a person's BAC.

¶ 28 Quemado argues that DPS conducted insufficient testing to establish the Intoximeter accurately tested Quemado's BAC because DPS only tested the electrochemical fuel cell component (which measures BAC). He also points to a lack of regular maintenance to the Intoximeter, as well as the lack of testing performed on the infrared component (which monitors whether mouth alcohol contaminates a

test). The trouble with these assertions is that even Quemado's own expert, Jan Semenoff, could only postulate whether they affected Quemado's test result.³ Even if we assume Quemado's speculations are true,⁴ evidence presented by the Commonwealth (including the dry gas checks and Officer Magofna's field sobriety tests) supports the trial court's contrary conclusion. Therefore, the trial court did not abuse its discretion because its conclusion does not "clearly exceed[] the bounds of reason or disregards rules or princip[le]s of law and practice to the substantial detriment of a party or litigant." *Fital v. Kim Kyung Duk*, 2001 MP 9 ¶ 2. Consequently, we AFFIRM the Superior Court's conclusion that a proper foundation was laid to admit the .170 percent BAC test result.

B. *The Sufficiency of the Evidence*

¶ 29 We proceed to consider whether sufficient evidence supports Quemado's conviction for driving while intoxicated pursuant to 9 CMC § 7105(a)(1). In considering the sufficiency of the evidence, the Court cannot "weigh conflicting evidence or consider the credibility of witnesses." *Commonwealth v. Camacho*, 2002 MP 6 ¶ 108. The Court must "'consider the evidence in the light most favorable to the government and [then] determine whether any reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Commonwealth v. Islam*, 2013 MP 4 ¶ 7 (Slip Opinion, May 21, 2013) (quoting *Commonwealth v. Minto*, 2011 MP 14 ¶ 38).

¶ 30 Under 9 CMC § 7105(a)(1), the following conduct is proscribed: "A person shall not drive, operate or be in actual physical control of any vehicle while[] [h]aving a Blood Alcohol Concentration (BAC) of 0.08 percent or more as measured by a breath or blood test."

¶ 31 Quemado challenges the weight the fact-finder should place on what he characterizes as a flawed BAC test. More specifically, Quemado asserts that an improperly conducted test, mouth alcohol contamination, or both is to blame for his .170 percent BAC test result. The fact that Quemado drove a car is not at issue. He also argues that his physical characteristics and cooperative behavior at the time of the accident indicate that he was not inebriated. But we cannot consider these under § 7105(a)(1) to determine whether the Intoximeter properly measured Quemado's BAC at .170 percent. We only consider circumstances related to the test itself.

¶ 32 A reasonable trier of fact could have determined that Quemado's BAC was accurately tested at .170 percent. Monthly dry gas tests of the electrochemical fuel cell component support the accuracy of the Intoximeter. Officer Magofna, the administrator of Quemado's test, noted his training and certification both to calibrate and conduct BAC tests using the Intoximeter, and that he conducted Quemado's BAC

³ Of course, a criminal defendant's counsel or expert witness may obtain reasonable access to the device used to test BAC, which must include an opportunity to test whether the machine performs its function(s) accurately.

⁴ Semenoff theorized that the electrochemical fuel cell component of the Intoximeter could "drift" without proper inspection and maintenance, without offering any specific factual support to substantiate this theory for the machine at issue. Trial Tr. at 279.

test in compliance with all police procedures. Quemado's expert witness, without actually testing the accuracy of the Intoximeter in question, could only speculate regarding whether the electrochemical fuel cell component no longer performed accurately. Therefore, a reasonable trier of fact could have concluded the .170 percent BAC test result accurately reflected Quemado's BAC at the time of the test.

¶ 33 The only question remaining is whether a reasonable trier of fact could have found that mouth alcohol contamination did not occur during the test, which resulted in a .170 percent BAC reading.

¶ 34 We hold that a reasonable fact-finder could have concluded no mouth alcohol contamination occurred. The infrared component of the Intoximeter, as described above, serves to detect mouth alcohol that would contaminate the test. While DPS apparently does not test this component (as it probably should), the trial court noted that Officer Magofna testified that Quemado had not imbibed anything since Officer Magofna spoke to him at the crash scene. Moreover, Officer Magnofa explained how he checked Quemado's mouth for liquids prior to the test. Jan Semenoff, Quemado's expert witness, however, testified that Officer Magnofa's failure to wait longer between each of the tests may indicate contamination (positing that mouth alcohol could not dissipate within the short period of time allowed between each of the tests if mouth alcohol was present during the antecedent tests). But Semenoff also suggested that Quemado may have simply not provided a sufficient volume of breath. After reviewing the evidence, the trial court found Officer Magnofa's testimony credible and concluded no mouth alcohol contamination occurred. Additionally, Quemado has not pointed to evidence indicating that a reasonable trier of fact could not have found that mouth alcohol contamination did not occur. In contrast, a significant amount of evidence suggests that no contamination occurred. As a result, in considering the evidence in the light most favorable to the Commonwealth, as this Court must, *Islam*, 2013 MP 4 ¶ 7, we AFFIRM the trial court's decision regarding the sufficiency of the evidence presented.

V. Conclusion

¶ 35 For the foregoing reasons, we find the trial court did not abuse its discretion in admitting Quemado's .170 percent BAC test result. We further hold there is sufficient evidence to convict Quemado for driving under the influence of alcohol in violation of 9 CMC § 7105(a)(1). Quemado's conviction is, therefore, AFFIRMED.

SO ORDERED this 7th day of November, 2013.

/s/
ALEXANDRO C. CASTRO
Chief Just

/s/

PERRY B. INOS
Associate Justice

/s/

TIMOHTY H. BELLAS
Justice Pro Tem

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JUDGMENT

¶ 1 Defendant-Appellant Sandy B. Quemado (“Quemado”) appeals his conviction for Driving under the Influence of Alcohol in violation of 9 CMC § 7105(a)(1). The Supreme Court concludes that the trial court did not abuse its discretion in admitting Quemado’s blood alcohol content test result. The Court also holds that sufficient evidence exists for any reasonable fact-finder to convict Quemado for driving under the influence of alcohol. As a result, the Court AFFIRMS the Superior Court’s conviction of Quemado for Driving under the Influence of Alcohol.

ENTERED this 7th day of November, 2013.

/s/
DEANNA M. MANGLONA
Clerk of the Supreme Court