

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ERIN H. McCOY,	§	
	§	No. 650, 2013
Defendant Below-	§	
Appellant,	§	Court Below: Superior Court
	§	of the State of Delaware in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE,	§	No. 0909009694
	§	
Plaintiff Below-	§	
Appellee.	§	

Submitted: February 25, 2014

Decided: April 3, 2014

Before **STRINE**, Chief Justice, **JACOBS**, and **RIDGELY**, Justices.

O R D E R

On this 3rd day of April 2014, it appears to the Court that:

(1) Defendant-Below/Appellant Erin McCoy appeals from a bench trial conviction in the Court of Common Pleas of Driving While Under the Influence of Alcohol. McCoy raises two claims on appeal. She argues that the State failed to properly establish a foundation for the admission of an intoxilyzer calibration certification in violation of Rule 803(6) of the Delaware Rules of Evidence. She further contends that the State failed to establish that officers observed McCoy for an uninterrupted twenty-minute period as required by our decision in *Clawson v. State*. We find no merit to McCoy's claims and affirm.

(2) In September 2009, McCoy was arrested for driving under the influence and failure to drive in the proper lane. She was transported back to the police station where she consented to an intoxilyzer test. At the station, Corporal Jerry Huber commenced the intoxilyzer test by observing McCoy for a continuous twenty-minute period. This period began at 2:06 a.m. and lasted until 2:30 a.m., when Corporal Huber inserted the intoxilyzer card into the machine. He then completed a series of three internal calibration tests on the intoxilyzer machine and ordered McCoy to blow into the machine. The intoxilyzer test determined that McCoy had a blood-alcohol content of 0.087, above the legal limit of 0.08.

(3) McCoy was charged with driving under the influence and failure to drive in the proper lane in the Court of Common Pleas. The State filed a Motion *in Limine* on the admissibility of the intoxilyzer calibration logs. The State presented Corporal Huber as an otherwise qualified witness to authenticate the calibration logs. The trial court denied the State's motion, ruling that Corporal Huber was not a qualified witness under D.R.E. 803(6). The State appealed this ruling to the Superior Court under 10 *Del. C.* § 9902(b). The Superior Court reversed the ruling of the Court of Common Pleas and remanded the case for trial.¹ Following a bench trial, the trial judge found McCoy guilty of driving under the influence and not guilty of failure to

¹ *State v. McCoy*, 2012 WL 1415698 (Del. Super. Ct. Feb. 21, 2012).

drive in the proper lane. McCoy appealed to the Superior Court, which affirmed the conviction.² This appeal followed.

(4) “In an appeal from the Court of Common Pleas to the Superior Court, the standard of review is whether there is legal error and whether the factual findings made by the trial judge are sufficiently supported by the record and are the product of an orderly and logical deductive process.”³ “Findings of the trial court that are supported by the record must be accepted by the reviewing court even if, acting independently, it would have reached a contrary conclusion.”⁴ “The formulation and application of legal concepts to undisputed facts is reviewed *de novo*.”⁵ We apply this same standard in our review of the Superior Court’s decision.⁶

(5) McCoy first argues that the Superior Court erred when it reversed the decision of the Court of Common Pleas and ruled that Corporal Huber was allowed to testify that the intoxilyzer machine was operating accurately.⁷ “It is well-established in Delaware that the prerequisite to introducing the result of an intoxilyzer test into evidence is to present the certifications of the State Chemist that the intoxilyzer machine was operating accurately before and after testing the breath of the defendant

² *McCoy v. State*, 2013 WL 6052880 (Del. Super. Ct. Nov. 6, 2013).

³ *Onkeo v. State*, 957 A.2d 2, 2008 WL 3906076, at *1 (Del. 2008) (citing *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972)).

⁴ *Wright v. Platinum Fin. Servs.*, 930 A.2d 929, 2007 WL 1850904, at *2 (Del. 2007) (citing *Levitt*, 287 A.2d at 673).

⁵ *Virdin v. State*, 780 A.2d 1024, 1030 (Del. 2001) (citing *Jones v. State*, 745 A.2d 856, 860 (Del. 1999)).

⁶ *Onkeo*, 2008 WL 3906076, at *1 (citing *Baker v. Connell*, 488 A.2d 1303, 1309 (Del. 1985)).

⁷ McCoy only challenges the admission of Corporal Huber’s testimony under the Delaware Rules of Evidence. Thus, any issues involving the Confrontation Clause are inapplicable.

on trial.”⁸ But the State Chemist is not required to personally authenticate the certification. Instead, such evidence can be introduced through the business records exception to the hearsay rule.⁹

(6) The business records exception to the hearsay rule provides for the admission of:

[a] memorandum, report, record or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness . . . , unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.¹⁰

As the Superior Court has explained, “[i]n order to be a qualified witness, the witness ‘need only have knowledge of the procedures under which the records were created.’”¹¹ Thus, the witness need not “personally observe the State Chemist conduct a calibration of the intoxilyzer machine in order to admit the calibration log into evidence.”¹²

⁸ *McConnell v. State*, 639 A.2d 74, 1994 WL 43751, at *1 (Del. 1994) (citing *Best v. State*, 328 A.2d 141 (Del. 1974)); see also *Anderson v. State*, 675 A.2d 943, 944–45 (Del. 1996) (reaffirming the *McConnell* requirements for certification).

⁹ *E.g., McLean v. State*, 482 A.2d 101, 105 (Del. 1984).

¹⁰ D.R.E. 803(6).

¹¹ *Palomino v. State*, 2011 WL 2552603, at *3 (Del. Super. Ct. Apr. 4, 2011) (citing *United States v. Wables*, 731 F.2d 440, 449 (7th Cir. 1984)).

¹² *Id.*

(7) In addition to his or her familiarity with the record-keeping system, a qualified witness must attest to the following foundational requirements of Rule 803(6):

(1) [that] the declarant in the records had knowledge to make accurate statements; (2) that the declarant recorded statements contemporaneously with the actions which were the subject of the reports; (3) that the declarant made the record in the regular course of business activity; and (4) that such records were regularly kept by the business.¹³

(8) In this case, the record demonstrates that Corporal Huber was a qualified witness to admit the intoxilyzer calibration certification sheets under the business records exception. Corporal Huber provided testimony demonstrating his familiarity with the procedures in which the records were created, which is all that is necessary to be a qualified witness. Even though he had not witnessed a calibration check by a chemist, he had sufficient knowledge of the procedure by which the intoxilyzer records were created. Thus, he is a qualified witness.

(9) In addition to meeting the requirements of a qualified witness, the State also provided sufficient evidence to satisfy the foundational requirements of Rule 803(6). Corporal Huber testified that he recognized the handwriting of Julie Willey, the State Chemist, on the certification documents. Willey is responsible for conducting regular, periodic checks of the calibration of the intoxilyzer machines used at the police division. He also testified that Willey produces the certification

¹³ *Trawick v. State*, 845 A.2d 505, 508–09 (Del. 2004) (alteration in original) (quoting *United States v. Console*, 13 F.3d 641, 657 (3d Cir. 1993)).

sheets contemporaneously with the calibration checks. Corporal Huber further explained that these calibration certification sheets are made in the ordinary course of business by Willey as the State Chemist. Finally, Huber explained that the certifications are kept as business records by the traffic lieutenant for every troop. Thus, the State properly introduced evidence of the intoxilyzer certification sheets under the business records exception of Rule 803. Accordingly, McCoy's first claim lacks merit.

(10) In her second claim, McCoy contends that the trial court erred when it admitted the intoxilyzer card into evidence because the State failed to demonstrate an uninterrupted twenty-minute observation period.¹⁴ In *Clawson v. State*, this Court held that "in order for the result of the intoxilyzer test to be admitted, the State must lay an adequate evidentiary foundation showing that there was an uninterrupted twenty minute observation of the defendant prior to testing."¹⁵ We further explained that timing of the test "commences when the officer inserts the intoxilyzer card into the machine."¹⁶

(11) In this case, the record supports a finding that Corporal Huber complied with the requirements in *Clawson* and observed McCoy for an uninterrupted period of

¹⁴ The State argues that McCoy waived this claim under Supreme Court Rule 8 because she did not specifically object during the testimony of Corporal Huber. But the record indicates that McCoy raised the objection before the trial court rendered a verdict in a bench trial. The trial court then had the parties to brief the matter, allowing for a full consideration of the merits. Thus, there is no waiver of McCoy's second claim.

¹⁵ *Clawson v. State*, 867 A.2d 187, 192 (Del. 2005).

¹⁶ *Id.*

at least twenty minutes. Corporal Huber started his observation of McCoy at 2:06 a.m. and watched her for twenty-four minutes. He then inserted the intoxilyzer card into the machine at 2:30 a.m. to conduct a series of three internal calibration tests. The record then shows that McCoy blew into the machine at 2:30 a.m.

(12) McCoy argues that because Corporal Huber testified on cross-examination that he did not remember the exact time he put intoxilyzer card into the machine, we must reverse her conviction. But the record also indicates that Corporal Huber testified that he inserted the card into the machine at 2:30 a.m. As a result, the factual finding by the trial judge was one of credibility. Because McCoy fails to provide any basis as to why a finding that the test commenced at 2:30 a.m. is clearly erroneous,¹⁷ the trial court's finding of fact must stand. Accordingly, McCoy's second claim is without merit.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

¹⁷ See *State v. Cagle*, 332 A.2d 140, 143 (Del. 1974) (holding that the Court of Common Pleas judge's determination of credibility "may not be rejected on appeal unless it is clearly erroneous and the doing of justice requires its rejection").