

IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,

v.

ALICIA SERRANO,

Defendant.

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Case ID#1712007220

Reserved: May 31, 2019

Decided: June 24, 2019

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**OPINION AND ORDER ON DEFENDANT'S  
OBJECTION TO INTOXILYZER RESULTS**

**WELCH, J.**

## FACTUAL AND PROCEDURAL HISTORY

On December 13, 2017, Alicia Serrano (hereinafter “Defendant”) was arrested and charged with the offenses of Driving a Vehicle Under the Influence of Alcohol (DUI) in violation of 21 Del. C. § 4177(a), Failure to Have Insurance Identification in Possession in violation of 21 Del. C. § 2118(p)(1), Failure to Have Registration Card in Possession in violation of 21 Del. C. § 2108, Failure to Remain Within a Single Lane in violation of 21 Del. C. § 4122(1), and Turning a Vehicle at Intersection Other Than Directed and Required by Traffic Control Device in violation of 21 Del. C. §4152(b).

Trial took place on April 17, 2019. The facts which gave rise to these proceedings indicate that Corporal John Betsch (hereinafter “Cpl. Betsch”) of the Newport Police Department observed Defendant driving over the fog line on West Ayre Street in New Castle County and almost striking a curb. Accordingly, Cpl. Betsch initiated a traffic stop and approached the vehicle. Upon conversing with the Defendant, Cpl. Betsch observed Defendant’s eyes were “bloodshot”, “watery”, “glassy”, and her speech was “slow and slurred.” In addition, Cpl. Betsch detected a “moderate odor” of alcohol coming from Defendant’s breath. The Defendant informed Cpl. Betsch that she had consumed a “grasshopper” and a shot earlier on in the day. Therefore, Cpl. Betsch administered three Standardized Field Sobriety Tests in accordance with to the National Highway Traffic Safety Association (NHTSA) standards, all of which Defendant failed.

Based on Cpl. Betsch’s observations, he took the Defendant into custody and transported her to Delaware State Police Troop 6 and administered an intoxilyzer test. When the State sought to admit the intoxilyzer results into evidence, the Defendant requested, and was granted, *voir dire* of Cpl. Betsch. During *voir dire* examination, Cpl. Betsch testified to the mandatory

twenty (20) minute observation period related to his administration of the intoxilyzer test to the Defendant. Cpl. Betsch testified he used his wristwatch to account for the twenty (20) minute observation period. Further, he testified he began the observation period at 02:35 and finished the observation period at 02:55, as determined by his wristwatch. Cpl. Betsch testified to the hours and minutes of his start and end time; however, he did not account for the seconds. Moreover, Cpl. Betsch did not testify to the time he inserted the intoxilyzer card according to his wristwatch. The intoxilyzer card was inserted into the intoxilyzer at 02:57 according to the intoxilyzer clock, not his wristwatch. Notably, it is undisputed that Cpl. Betsch did not synchronize his wristwatch with the intoxilyzer clock.

At the conclusion of Defendant's *voir dire* of Cpl. Betsch, the Defendant objected to the admission of the intoxilyzer results on the basis that Cpl. Betsch failed to synchronize his wristwatch with the intoxilyzer machine to prove the required twenty (20) minute bright line observation period was met before administering the breath test. The Court called a recess, reserved decision and requested briefing on the dispositive issue. On May 1, 2019, the Defendant filed its Opening Brief. On May 17, 2019, the State filed its Answer Brief. On May 31, 2019, the Defendant filed its Reply.

### **PARTIES' CONTENTIONS**

The issue before the Court is whether Cpl. Betsch was required to calibrate the wristwatch time with the intoxilyzer machine to meet the bright line twenty (20) minute observation period set out in *Clawson*.<sup>1</sup> The Defendant argues the State has failed to lay adequate foundation to establish the bright line twenty (20) minute observation period prior to the administering of the intoxilyzer test was met. More specifically, the Defendant asserts the

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<sup>1</sup> See *Clawson v. State*, 867 A.2d 187 (Del. 2005).

intoxilyzer test is inadmissible because the State failed to establish Cpl. Betsch inserted the intoxicilyzer card into the machine after completing a full twenty (20) minute observation period. In support of this position, the Defendant relies on Cpl. Betsch's undisputed testimony that he did not account for the seconds of the start and end time, nor did he synchronize the time kept on his wristwatch with the time on the intoxicilyzer clock. Thus, the Defendant avers since the State did not show Cpl. Betsch waited until the expiration of the twentieth minute before inserting the card into the intoxicilyzer machine, the State did not prove it complied with the twenty (20) minute observation period required by *Clawson*.

The State, however, contends it has put forth sufficient evidence to lay an adequate foundation to establishing Cpl. Betsch observed the Defendant for twenty (20) minutes prior to inserting the intoxicilyzer card into the intoxicilyzer machine. The State relies on Cpl. Betsch's testimony that he began the observation period at 02:35 and finished the observation period at 02:55. Moreover, the State argues *Clawson* does not require Cpl. Betsch to testify to the seconds recorded on his wristwatch for the State to satisfy its burden.<sup>2</sup> Furthermore, the State asserts Cpl. Betsch did not use different time pieces for the starting and ending times of the observation period, and that Cpl. Betsch was not required to synchronize his wristwatch to the intoxicilyzer machine clock to ensure an uninterrupted twenty (20) minute observation period.<sup>3</sup> Therefore, the State argues Cpl. Betsch's testimony is sufficient to establish that he complied with the *Clawson* twenty (20) minute observation period prior to inserting the intoxicilyzer card into the intoxicilyzer machine.

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<sup>2</sup> See State's Br., the State cites to *Zarco v. State*, 2014 WL 2111696 (Del. Super. 2014).

<sup>3</sup> See State's Br., the State cites to *State v. Stephens*, Cr. A. #94-0200686, Disabatino, J. (Del. Ct. Com. Pl. May 22, 1995).

Finally, the State insists it is still presenting its case in chief and its witness, Cpl. Betsch, is still on the stand. Thus, the State submits that it should be permitted to continue direct examination of Cpl. Betsch to further develop his testimony to meet the *Clawson* burden. However, the Defendant contends Cpl. Betsch was asked and answered the questions regarding the observation period; thus, the state must be bound by his answers and precluded from supplementing his answers.

### DISCUSSION

The State has the burden of proof in demonstrating an “uninterrupted twenty minute observation of the defendant prior to testing” as adequate evidentiary foundation to submit an intoxilyzer test result as evidence.<sup>4</sup> In *Clawson*, the officer began the observation period at 11:32 and inserted the intoxilyzer card at 11:51.<sup>5</sup> The court held the record failed to show any officer observed *Clawson* for an uninterrupted period of twenty minutes before inserting the card in the machine.<sup>6</sup> Under *Clawson*, failure to follow procedure is sufficient in failing to meet the evidentiary foundation. In the absence of evidence demonstrating an uninterrupted period, admission of an intoxilyzer test result is an abuse of discretion.<sup>7</sup>

In distinguishing *Clawson*, the *Zarco* Court found that State must only prove an uninterrupted 20 minutes, nothing longer.<sup>8</sup> In *Zarco*, the administering officer began the observation period at 10:20 and concluded at 10:40; thus, the Court allowed for the insertion of the intoxilyzer card following the twentieth minute of the observation period.<sup>9</sup> The court in *Zarco* accepted the officer’s testimony as sufficient factual basis that the observation period had

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<sup>4</sup> *Clawson*, 867 A.2d at 193.

<sup>5</sup> *Id.* at 190.

<sup>6</sup> *Id.* at 193.

<sup>7</sup> *Id.*

<sup>8</sup> *Zarco v. State*, 2014 WL 2111696, at \*3 (Del. Super. 2014).

<sup>9</sup> *Id.* at 2.

been met and in addition, the defendant conceded the observation period was exactly twenty minutes.<sup>10</sup> *Zarco* does not change the *Clawson* standard requiring an uninterrupted, complete twenty (20) minute observation period.

When examining the admissibility of a breath test, the State must present evidence “that a true twenty minute observation period was observed as a necessary foundation.”<sup>11</sup> In *Stephens*, the administering officer used his wristwatch to begin the observation period and the intoxilyzer clock to determine twenty minutes had passed without synchronizing the two time pieces.<sup>12</sup> Evidence may be considered if it can demonstrate the twenty minute period was truly observed.<sup>13</sup> If the State is unable to determine whether this true period took place, the results must be excluded.<sup>14</sup>

The plain meaning of *Clawson* as a bright line rule clearly denotes that a complete twenty minute period of observation must occur before conducting an intoxilyzer test. Here, given the testimony provided by Cpl. Betsch, the State cannot demonstrate sufficient evidentiary foundation to admit the results of the intoxilyzer results. Cpl. Betsch failed to synchronize his wristwatch with the intoxilyzer machine; thus, a conclusion cannot be drawn as to whether the card was inserted at 02:56, or after, according to his wristwatch. If a mere two minute differential between the machine and the watch were to exist, it would mean there was a clear violation of *Clawson*. Regardless of the possibility of this occurrence, the burden is upon the State to demonstrate that there was an uninterrupted, complete twenty (20) minute period before administration of the test. In *Zarco*, the defendant conceded the observation was the requisite

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<sup>10</sup> *Id.*

<sup>11</sup> *State v. Stephens*, Cr. A. #94-0200686, DiSabatino, J., at \*156 (Del. Ct. Com. Pl. May 22, 1995) (unreported decision)

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

time; however, the Defendant here has not conceded that point and has rather disputed it. As the State cannot demonstrate the observation period was at least exactly twenty minutes, the evidence may not be admitted.

The State has moved to reopen the matter should the evidence be found insufficient to pass its burden under *Clawson*. However, this point is moot. The question has been asked and answered, and to allow Cpl. Betsch to continue testifying would be a fruitless attempt to supplement the record needlessly. In addition to Cpl. Betsch's testimony in the record, the evidence presented is sufficient to show the State will not be able to pass the required foundational evidentiary requirements for submission of the intoxilyzer test results. The failure to follow proper procedure, or in this case, the inability to show procedure was properly followed, is sufficient under *Clawson* to exclude the results of the intoxilyzer test.

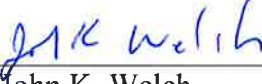
#### **CONCLUSION**

ACCORDINGLY, I find the State has failed to provide an adequate evidentiary foundation showing that there was an uninterrupted twenty (20) minute observation period prior to testing. Thus, the Defendant's objection to the admission of the intoxilyzer results is SUSTAINED.

For the reasons set forth above, the State's Motion to re-open is DENIED.

Trial shall be re-scheduled at the earliest convenience of The Court and Counsel.

**IT IS SO ORDERED.**

  
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John K. Welch,  
Judge

cc: Ms. Patricia Thomas, Civil Clerk