

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

CECIL G. PALOMINO,                    )  
Defendant Below,                    )  
Appellant,                            )  
  )  
  )     ID # 0807040189CLS  
  )  
v.                                        )  
  )  
STATE OF DELAWARE.                )  
Plaintiff Below,                    )  
Appellee.                            )

On Appeal from the Court of Common Pleas. **AFFIRMED.**

**ORDER**

Thomas A. Foley, Esq., 1905 Delaware Avenue, Wilmington, DE 19806. Attorney for Appellant.

Barzilai K. Axelrod, Esq., Deputy Attorney General, 820 N. French Street, 7th Floor, Wilmington, DE 19801. Attorney for Appellee.

**SCOTT, J.**

## **Introduction**

Before the Court is an appeal from the Court of Common Pleas and its decision to admit Intoxilyzer calibration logs through Trooper Walther. Having reviewed the parties' submissions and the record below, the decision of the Court of Common Pleas is affirmed.

## **Background**

On July 26, 2008, the Appellant, Defendant Below, Cecil Palomino ("Palomino") was arrested by Trooper Joshua Walther ("Trooper Walther") of Delaware State Police Troop 1, for Driving Under the Influence of Alcohol in violation of 21 *Del. C.* § 4177(a), Failure to have Proof of Insurance in violation of 21 *Del. C.* § 2118(p), Driving an Unsafe Motor Vehicle in violation of 21 *Del. C.* § 2115(6), and Driving with an Expired License in violation of 21 *Del. C.* § 2701(d).<sup>1</sup>

Just before 11:30 p.m. Trooper Walther responded to call from dispatch indicating a vehicle was broken down on the Marsh Road exit ramp of I-95 Northbound. Upon arrival, Trooper Walther noticed the vehicle was partially blocking the exit ramp and that there was thick fire smoke coming from underneath the engine compartment of the vehicle. Palomino was in the driver's seat attempting to start the vehicle. Trooper Walther noticed Palomino had bloodshot

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<sup>1</sup> At trial, the State entered a *nolle prosequi* for the charges of failing to have proof of insurance and driving an unsafe motor vehicle.

and glassy eyes, was very talkative, slurred his words together, and detected a strong odor of alcohol on his breath. Trooper Walther was approximately one to two feet away from Palomino while making these observations. After Palomino exited the vehicle, Trooper Walther noticed Palomino had a hard time standing and used the vehicle to prevent himself from falling.

Trooper Walther then administered the Horizontal Gaze Nystagmus (“HGN”) test on Palomino and he failed, exhibiting six out of six possible clues of intoxication. Palomino was unable to perform the walk and turn test and the one leg stand test. He also failed the portable breath test. In his experience, Trooper Walther believed Palomino to be under the influence of alcohol and brought him to Troop 1 for Intoxilyzer testing.

In order to determine whether Trooper Walther is qualified to introduce the Intoxilyzer calibration logs, the Court of Common Pleas requested briefing from both parties. They stipulated to the following facts:

1. Trooper Walther administered an Intoxilyzer Test to the defendant shortly after midnight on July 27, 2008, using DSP-Troop 1’s Intoxilyzer machine.
2. Trooper Walther properly conducted an appropriate 20 minute observation period prior to administering the Intoxilyzer test pursuant to standard operating procedure; and the Intoxilyzer’s calibration checks reflected that the machine was working within its acceptable ranges.
3. The relevant calibration check sheets are kept in a logbook in the Lieutenant’s office at DSP-Troop 1 in the ordinary course of business.

4. The relevant calibration check sheets are prepared in the ordinary course of business.
5. The DSP-Troop 1 Intoxilyzer (Serial No. 68-012158) was allegedly calibrated by Julie Willey (Delaware State Police Chemist) on 07/18/08 and 09/08/08.
6. These calibration checks were allegedly performed at DSP-Troop 2 by Julie Willey.
7. Trooper Walther is generally familiar with the proper method as to how an Intoxilyzer machine is routinely calibrated by Delaware State Chemists.
8. The relevant calibration sheets both indicate that the machine was certified to be working properly and accurately on 07/18/08 and 09/08/08.
9. Although Trooper Walther has never met Julie Willey, he testified that Julie Willey has emailed him her signature, and that the signature she emailed him is consistent with the signature at the bottom of the relevant calibration sheets maintained in the DSP-Troop 1 log book.
10. The “flimsies” generated by the Intoxilyzer machine during its calibration checks were placed into evidence by the State, purportedly to show that the State Chemist’s certification of the machine (per the certification sheets) was signed contemporaneously with the Intoxilyzer’s calibration.
11. Trooper Walther testified that he has witnessed both David Sockrider and Joy Tengonciang (former Delaware State Police Chemists) perform calibration checks on Intoxilyzer machines. However, he has never witnessed Julie Willey (current Delaware State Police Chemist) perform any calibration check on any Intoxilyzer machines.
12. Trooper Walther has not had the opportunity to watch Julie Willey check the calibration of the machines since Julie Willey took over calibration duties in New Castle County. Troopers in the past have

been encouraged by the Troop Commanders to witness a calibration check performed by a State Chemist.<sup>2</sup>

On September 3, 2009, the Court of Common Pleas ruled Trooper Walther was a qualified witness under D.R.E. 803(6), the business records exception to hearsay, and the calibration log books were admitted into evidence. Palomino was convicted of Driving Under the Influence of Alcohol and Driving with an Expired License. Palomino filed a motion for reargument which was denied on July 6, 2010. On August 30, 2010, Palomino was sentenced on both charges. On September 1, 2010, Palomino filed this appeal.

### **Issue**

The sole issue on appeal is whether the Court of Common Pleas abused its discretion by admitting the Intoxilyzer calibration logs into evidence through Trooper Walther, whom it found to be an otherwise qualified witness under D.R.E. 803(6) despite having never met the current State Chemist or watch her conduct a calibration test. The Court of Common Pleas did not abuse its discretion.

### **Standard of Review**

This Court will review a decision by the Court of Common Pleas to admit or exclude evidence for abuse of discretion.<sup>3</sup> A court abuses its discretion when it ignores recognized rules of law or exceeds the bounds of reason, producing an

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<sup>2</sup> Appellant's Opening Brief and the State's Answering Brief.

<sup>3</sup> *Harper v. State*, 970 A.2d 199, 201 (Del. 2009) (citing *Hicks v. State*, 913 A.2d 1189, 1197 (Del. 2006)).

unjust result.<sup>4</sup> The burden is on Palomino to establish a clear abuse of discretion in order for this Court to reverse the Court of Common Pleas.<sup>5</sup>

### **Discussion**

This Court agrees with the Court of Common Pleas that Trooper Walther is a qualified witness under D.R.E. 803(6)<sup>6</sup> and was able to introduce the calibration logbook of Troop 1 into evidence. The business records exception to hearsay permits the admission of Intoxilyzer records without the testimony of the person making the record if: “(a) the record was prepared in the regular course of business, (b) it was made at or near the time of the event, (c) the information and circumstances of recordation are trustworthy, and (d) a custodian or other qualified witness is available to testify.”<sup>7</sup> A qualified witness needs to be someone who understands the system and must be able to testify that the declarant has the knowledge to make accurate statements, the declarant recorded those statements at the time when the actions were taken, the records were made in the regular course of business activity, and the records were regularly kept by the business.<sup>8</sup> In order to be a qualified witness, the witness “need only have knowledge of the procedures

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<sup>4</sup> *Id.* (citing *Culp v. State*, 766 A.2d 486, 489 (Del. 2001)).

<sup>5</sup> *Id.* (citing *Kiser v. State*, 769 A.2d 736, 739 (Del. 2001)).

<sup>6</sup> D.R.E. 803(6) is almost identical to F.R.E. 803(6). *See State v. McCabe*, 1995 WL 562130 (Del. Super. Ct.). Therefore, federal case law is also instructive on the issue of whether Trooper Walther is a qualified witness under D.R.E. 803(6).

<sup>7</sup> *Talley v. State*, 841 A.2d 308 (Del. 2003) (TABLE) (internal quotations and citations omitted); D.R.E. 803(6).

<sup>8</sup> *Trawick v. State*, 845 A.2d 505, 508-09 (Del. 2004) (internal quotations and citation omitted).

under which the records were created.”<sup>9</sup> Therefore, Trooper Walther did not need to personally observe the State Chemist conduct a calibration of the Intoxilyzer machine in order to admit the calibration log into evidence, as Palomino contends.

Finding Trooper Walther was a qualified witness under D.R.E. 803(6) is consistent with established case law. In *Trawick*, the chief of the felony narcotics unit in Baltimore City, Maryland, was ruled a qualified witness because he had “an adequate familiarity with the records and record-keeping process such that he would be a person qualified to authenticate these records for the purposes of the business records exception.”<sup>10</sup> In *Vickers*<sup>11</sup> and *Boyer*<sup>12</sup>, the testifying officers were found to be qualified witnesses because they were familiar with the calibration process, knew the records were prepared contemporaneously with the tests, kept in the normal course of business, and had observed the State Chemist perform the calibration tests on the Intoxilyzer at a different point in time.

Despite the fact that Trooper Walther did not see the current State Chemist conduct a calibration test he has witnessed previous State Police Chemists perform the test, demonstrating an adequate familiarity with the records and record-keeping process. Since Trooper Walther met the standard set forth in *Trawick*, it was

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<sup>9</sup> *United States v. Wables*, 731 F.2d 440, 449 (7th Cir. 1984) (citation omitted); *See also Conoco Inc. v. Dep’t. of Energy*, 99 F.3d 387, 391 (Fed. Cir. 1996).

<sup>10</sup> *Id.* at 509.

<sup>11</sup> *State v. Vickers*, 2010 WL 2299001 (Del. Com. Pl.).

<sup>12</sup> *State v. Boyer*, 2006 WL 2666207 (Del. Com. Pl.).

proper for the Court of Common Pleas to find he was a qualified witness under D.R.E. 803(6).

Palomino contends the Court of Common Pleas erred in finding Trooper Walther as a qualified witness to admit the calibration logs because he has never met the current State Chemist or watched her conduct a calibration test. However, when an officer has not been permitted to testify, it was because he had never observed the calibration test, did not know whether the records were created contemporaneously with the performance of the test, and had only been told how the test was conducted.<sup>13</sup> Here, the Court of Common Pleas found Trooper Walther was qualified because he knew the records were made contemporaneously with the calibration test, the records were kept in the regular course of business, and he was familiar with the signature of the current State Chemist, per the stipulated facts. Therefore, there was no abuse of discretion in finding Trooper Walther to be a qualified witness under D.R.E. 803(6).

### **Conclusion**

For the above-stated reasons, the decision rendered by the Court of Common Pleas is hereby **AFFIRMED**.

**IT IS SO ORDERED.**

/S/CALVIN L. SCOTT  
Judge Calvin L. Scott, Jr.

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<sup>13</sup> *State v. Arnold*, 2003 WL 23112735 (Del. Com. Pl.).