

IN THE UTAH COURT OF APPEALS

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State of Utah,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Plaintiff and Appellee,	)	
	)	Case No. 20040328-CA
v.	)	
	)	
Shawn Keith,	)	F I L E D
	)	(October 20, 2005)
	)	
Defendant and Appellant.	)	<u>2005 UT App 445</u>

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Fifth District, Cedar City Department, 025501031  
The Honorable J. Philip Eves

Attorneys: J. Bryan Jackson, Cedar City, for Appellant  
            Jeffery E. Slack, Cedar City, for Appellee

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Before Judges Greenwood, Orme, and Thorne.

ORME, Judge:

We have determined that "[t]he facts and legal arguments are adequately presented in the briefs and record[,] and the decisional process would not be significantly aided by oral argument." Utah R. App. P. 29(a)(3). Moreover, the issues presented are readily resolved under applicable law.

Defendant Shawn Keith argues that the result of his breath test should have been suppressed by the trial court because, at the time of the test, the administering officer was not certified in accordance with standards promulgated by the Department of Public Safety. Neither party disputes that Utah Code section 41-6-44.3 directs the Department to adopt standards that must be met in order for the presumption of admissibility to apply, see Utah Code Ann. § 41-6-44.3 (1998),<sup>1</sup> or that Officer Guyman was not in compliance with the applicable certification standards, see Utah Admin. Code R714-500-6, when he administered the test. The

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<sup>1</sup>A 2005 amendment renumbered section 41-6-44.3 as 41-6a-515. See Utah Code Ann. § 41-6a-515 (Supp. 2005) (amendment note). As a convenience to the parties, who have cited in their briefs to the statute as it was formerly numbered, we cite to section 41-6-44.3. See id. § 41-6-44.3 (1998).

dispute, then, is over what effect Officer Guyman's failure to keep his certification current has on the admissibility of the breath test he administered to Keith.

"Utah law specifically provides that breath test results are presumptively admissible and accurate if certain standards and safeguards are met." Salt Lake City v. Emerson, 861 P.2d 443, 445 (Utah Ct. App. 1993). Concerning the standards adopted by the Department of Public Safety pursuant to section 41-6-44.3, this court has stated that "[w]hile full compliance with the standards, coupled with a finding as to the additional safeguards described in the statute, creates a presumption of validity and establishes the evidence's foundation, failure to fully comply with such standards does not necessarily destroy the admissibility of the breath test evidence." Id. at 447. Noncompliance with the Department's standards "simply means that the foundation and validity of the evidence may not be presumed, but rather that they will have to be established in order for the evidence to be admitted." Id. Indeed,

[s]ection 41-6-44.3 does not purport to address the admissibility of breath test evidence in all cases. Rather, it merely defines those conditions under which a prosecutor may invoke a rebuttable presumption that breath test evidence is accurate and reliable. If the conditions are not met, the statutory presumption is not available. The statute reaches no further.

State v. Garcia, 965 P.2d 508, 515 (Utah Ct. App. 1998). Thus, "[t]he purpose of section 41-6-44.3 is 'to relieve [prosecutors] of the financial burden of calling . . . a witness in every DUI case'" to establish the accuracy of the breath test result "by allowing replacement of such 'live' testimony with affidavits and other documentary evidence." Id. at 513 (second alteration in original) (citation omitted).

Here, the trial court correctly concluded that because of Officer Guyman's failure to keep his certification current, the standards established pursuant to section 41-6-44.3 had not been met. The trial court also correctly concluded, however, that Officer Guyman's lack of current certification did not foreclose the possibility that a proper foundation could otherwise be established to admit the breath test result into evidence. Thus, the presumption that the test results were valid did not apply, and the State was forced to bear the burden of establishing the accuracy of the breath test through expert testimony. See Utah Code Ann. § 41-6-44.3(3); Emerson, 861 P.2d at 447.

After a separate hearing on the foundation issue, the trial court concluded that the State had provided sufficient foundation to admit the breath test result through the testimony of Officer Guyman and Trooper Moore. Indeed, Keith does not directly challenge the trial court's determination that a proper foundation was established. Keith instead argues, from a policy standpoint, that allowing Officer Guyman, who was uncertified at the time of the breath test, to testify as an expert eliminates the need for officers to comply with the certification standards under rule 714-500-6 of the administrative code.

We disagree. The carrot-and-stick approach built into section 41-6-44.3, i.e., obtaining the presumption of admissibility versus having to establish a foundation for the introduction of the evidence through expert testimony, see Utah Code Ann. § 41-6-44.3(3); Garcia, 965 P.2d at 513, provides sufficient incentive for the State to assure that its officers comply with the statutory certification standards.

Affirmed.

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Gregory K. Orme, Judge

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WE CONCUR:

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Pamela T. Greenwood, Judge

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William A. Thorne Jr., Judge