Cite as 2012 Ark. App. 383

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR11-1195

	Opinion Delivered June 13, 2012
DEREK D. CHAMBERS APPELLANT	APPEAL FROM THE SALINE COUNTY CIRCUIT COURT, FIRST DIVISION
V.	[NO. CR2011-73T-1]
STATE OF ARKANSAS APPELLEE	HONORABLE BOBBY MCCALLISTER, JUDGE
	AFFIRMED

ROBIN F. WYNNE, Judge

Derek D. Chambers appeals from his conviction in Saline County Circuit Court on charges of driving while intoxicated (DWI) and following too close.[1] He contends in his brief that his rights under the Confrontation Clause of the Sixth Amendment to the Constitution of the United States were violated by the State's failure to produce at trial the person who calibrated the machine used to administer his blood-alcohol-content test. We affirm.

Chambers was found guilty of DWI and following too close in Saline County District Court. He appealed to circuit court. Prior to his trial in circuit court, Chambers filed a motion for discovery in which he gave notice of his intent to cross-examine "the BAC operator, any person employed by law enforcement who was in any way associated with the calibration, certification, or operation of the BAC Datamaster, and any person from the

[1]Chambers challenges only the DWI conviction on appeal.

Department of Health blood alcohol program, who was in any way associated with the calibration, certification, or operation of the BAC Datamaster used in determining [his] blood alcohol concentration."

Chambers stood trial on June 23, 2011. Sergeant Jeff Kling with the Benton Police Department testified that he followed Chambers in the early morning hours of April 9, 2010, after he saw Chambers leave the parking lot of a local restaurant. Sergeant Kling stopped Chambers when he observed Chambers following too closely behind another vehicle on Interstate 30. Sergeant Kling smelled an odor of intoxicants on Chambers and noticed that his eyes were bloodshot, he swayed as he stood, and his speech was slurred. Sergeant Kling testified that he believed Chambers's blood-alcohol level was above the legal limit.

Steven Beck with the Benton Police Department testified that Sgt. Kling asked him to take Chambers to the police department for a blood-alcohol-content test. The State introduced certificates showing that Officer Beck was qualified to administer the blood-alcohol-content test and that the machine used to perform the test had been calibrated. Chambers objected to the admission of the certificates because the State had not produced as a witness the person who calibrated the machine. The trial court overruled his objection and allowed the certificates into evidence. Chambers was administered two breath tests. The first test showed a result of .105. The second test showed a result of .108. The trial court admitted the results of the tests over Chambers's objection.

The trial court found Chambers guilty of DWI and following too close. He was sentenced to one day in jail with credit for time served. He was also assessed a $930 fine and $300 in costs. This appeal followed.

Chambers's sole point on appeal is that the trial court erred in admitting the results of the BAC tests and the certificates showing that Officer Beck was certified to administer BAC tests and that the machine used to administer the tests had been calibrated, because the documents were testimonial hearsay and triggered his constitutional right under the Confrontation Clause of the Sixth Amendment to confront the witnesses against him. The decision to admit or exclude evidence is within the sound discretion of the circuit court, and we will not reverse a circuit court's decision regarding the admission of evidence absent a manifest abuse of discretion. *Decay v. State*, 2009 Ark. 566, 352 S.W.3d 319 (2009).

In support of his argument, Chambers relies upon the Supreme Court of the United States's decision in *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009). In *Melendez-Diaz*, the Court held that the defendant's right to confrontation was violated when the trial court admitted into evidence certificates of analysis showing that substances seized from the defendant were cocaine when the analysts who performed the testing were not called to testify. Chambers argues that the holding in *Melendez-Diaz* applies to the certificates reflecting Officer Beck's certification and the BAC Datamaster's calibration.

The trial court ruled that *Melendez-Diaz* was not applicable in this case and admitted the disputed evidence. In prosecutions for driving while intoxicated, a record or report of a

certification, rule, evidence analysis, or other document pertaining to work performed by the Office of Alcohol Testing of the Department of Health under the authority of this chapter shall be received as competent evidence as to the matters contained in the record or report in a court of this state, subject to the applicable rules of criminal procedure when duly attested to by the Director of the Office of Alcohol Testing of the Department of Health or his or her assistant, in the form of an original signature or by certification of a copy. Ark. Code Ann. § 5-65-206(d)(1)(A) (Supp. 2011). Such documents are self-authenticating. Ark. Code Ann. § 5-65-206(d)(1)(B). Despite the self-authenticating nature of the documents, defendants retain the right to confront the person who performs the calibration test or check on the instrument, the operator of the instrument, or a representative of the office. Ark. Code Ann. § 5-65-206(d)(3). The testimony of the appropriate analyst or official may be compelled by the issuance of a proper subpoena by the party who wishes to call the appropriate analyst or official given ten days prior to the date of hearing or trial, in which case the record or report is admissible through the analyst or official, who is subject to cross-examination by the defendant or his or her counsel. Ark. Code Ann. § 5-65-206(d)(4) (Supp. 2011).

The Supreme Court held in *Melendez-Diaz* that certificates that include testimonial statements trigger the application of the Confrontation Clause. 129 S.Ct. at 2532. The Court further held that the failure of the prosecution to call a witness who provided testimonial statements could not be excused by the fact that the defendant could likewise have subpoenaed the witness. 129 S.Ct. at 2541. The application of these holdings in the instant

case would render the decision of the trial court to admit the results of the blood-alcohol tests erroneous. Thus, the question before this court is whether the trial court erred in finding that the holdings in *Melendez-Diaz* are not applicable in this case.

We hold that the trial court did not err in finding that *Melendez-Diaz* did not apply in this case and did not abuse its discretion in admitting the disputed evidence. Although the *Melendez-Diaz* court held that the certificates at issue in that case were testimonial statements subject to the Confrontation Clause because they were affidavits that the declarants would reasonably expect to be used prosecutorily, the majority noted in a footnote that documents pertaining to routine machine maintenance might not be considered testimonial. 129 S.Ct. at 2532 n.1. In *Seely v. State*, 373 Ark. 141, 152, 282 S.W.3d 778, 787 (2008), our supreme court held that the test for determining whether the introduction of a statement violates the Confrontation Clause "should remain focused on the circumstances surrounding the statement and whether those circumstances objectively indicate that the primary purpose of the statement is to prove events relevant to criminal prosecution."

The certificates at issue in this case are not testimonial statements. These particular certificates were not prepared for the purpose of prosecuting Chambers. They were prepared for the purposes of certifying that Officer Beck had received training on how to use the machine and certifying that the machine at issue was calibrated at a particular time and found to be accurate. The certificates are no more testimonial than a diploma or a certificate

indicating that an elevator or a fire extinguisher has been tested and is operable. The certificates fall within the possible exception noted by the *Melendez-Diaz* court.

As the certificates showing that Officer Beck is certified to administer the test and that the machine was calibrated are not testimonial in nature and do not trigger the application of the Confrontation Clause, the trial court did not abuse its discretion in admitting the disputed evidence. The judgment of the trial court is affirmed.

Affirmed.

PITTMAN and HART, JJ., agree.