

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

ERIN M. MCCOY,)	
)	
Defendant Below,)	
Appellant)	
)	ID No. 0909009694 CLS
v.)	
)	
STATE OF DELAWARE,)	
)	
Respondent.)	

Date Submitted: August 16, 2013
Date Decided: November 6, 2013

On Appeal from the Court of Common Pleas.
AFFIRMED.

ORDER

Louis B. Ferrara, Esq., Ferrara & Haley, Wilmington, Delaware, 19806. Attorney for Appellant.

Sean P. Lugg, Esq., Deputy Attorney General, Department of Justice, Wilmington, Delaware. Attorney for Respondent

Scott, J.

Introduction

Appellant Erin M. McCoy (“McCoy”), through counsel, appeals her conviction for violation of 21 *Del. C.* § 4177(a) from the Court of Common Pleas. McCoy argues that the court improperly admitted the results of an intoxilyzer test into evidence because the State failed to establish an uninterrupted twenty minute observation period, as required by *Clawson v. State*, 867 A.2d 187 (Del. 2005). The Court has reviewed the parties’ submissions.¹ For the following reasons, the decision of the Court of Common Pleas is **AFFIRMED**.

Background

On September 13, 2009, at about 1:13 a.m., Officer Jerold M. Huber (“Officer Huber”) observed McCoy cross the center line of the highway twice while driving on Philadelphia Pike in Wilmington. Officer Huber initiated a traffic stop and Field Sobriety Tests were eventually performed. Thereafter, McCoy was transported to Delaware State Police Troop 1, where she consented to an intoxilyzer test which resulted in a reading above the legal limit. Consequently, McCoy was arrested for driving under the influence of alcohol in violation of 21 *Del. C.* § 4177(a) and for Driving in the Wrong Direction in violation of 21 *Del. C.* § 4126(a)(3).

¹ On August 16, 2013, Appellant requested oral argument. After reviewing the parties’ submissions, the Court does not find oral argument necessary in this case.

On January 12, 2010, McCoy filed a Motion to Suppress based on a lack of Reasonable Articulable Suspicion and Probable Cause in the Court of Common Pleas. After the court denied the motion, the State filed a motion *in limine* based on the admissibility of the intoxilyzer calibration sheets. The court ruled that that Officer Huber was not an “otherwise qualified witness” for the admission of the sheets as required by the business records exception, D.R. E. 803(6). The court then dismissed the information after the State certified that the evidence was essential to the prosecution of its case. Upon the State’s appeal, this Court reversed and remanded the case for abuse of discretion.

When the trial resumed on May 17, 2012, the State provided a photocopy of the intoxilyzer card bearing the test results to Officer Huber before he began testifying.² The card contained handwritten notations showing that the twenty minute observation time began at 2:06 a.m. The card also contained a computer generated time of 2:30 a.m. for the first air blank, internal calibration tests, and when McCoy blew into the machine.³ During direct examination, the following exchange took place:

Q. And what time was this card entered?

A. It was entered into the machine at 0230 hours.

Q. And what time was the defendant’s test actually performed?

A. The test was actually performed at 0230 hours.

Q. And prior to that did you observed the defendant for a continuous 20 minute period?

² State’s Trial Ex. 5.

³ *Id.*

A. Yes, I did.⁴

When the State moved to enter the intoxilyzer card into evidence, the court permitted defense counsel to conduct a *voir dire* examination of Officer Huber.

Q. All right. Am I also accurate that the time that the defendant blew into the machine was actually 30 minutes after, was it 2:30? Is that the time you have?

A. Two-thirty is what it's showing on the Intoxilyzer card, yes.

Q. Well, that's your time, that's the time the card goes in based on the first cal check and it's also the time that the breath sample goes in, correct?

A. Correct.

[...]

Q. Okay. Alright. Now, so what happens is you take her into the Intoxilyzer room and you begin a 20 minute observation period, which in this case was actually a little longer than that.

A. Correct.

Q. It looks like it was maybe as much as 24 minutes?

A. I started the 20 minute observation at 0206 in the morning.

[...]

Q. All right. So, at what time in this case if you remember did you actually put the card into the machine?

A. I'm going to tell you I don't remember.⁵

At the close of *voir dire*, defense counsel informed the court that he did not have any other questions and that he did not object.⁶ Thereafter, the court admitted the copy of the intoxilyzer card. In closing argument, the defense asserted that the State failed to establish the twenty minute observation period as required by

⁴ Trial Tr., at 6 (Emphasis added).

⁵ *Id.* at 16 (emphasis added).

⁶ *Id.* at 17.

Clawson based on Officer Huber’s statement that he did not remember when he actually inserted the card into the machine.⁷ The court took the matter under advisement and allowed the parties to brief the issue concerning the timing of the insertion of the card into the machine.⁸ On January 31, 2013, the court found that, despite Officer Huber’s statement, the twenty-minute observation period was established between the start of the observation period and the time of the first air blank on the card.⁹ The court viewed the time of the first air blank as the time that the card was inserted into the machine.¹⁰ The court also found McCoy guilty of Driving While Under the Influence of Alcohol in violation of 21 *Del. C.* § 4177(a), but not Driving in the Wrong Direction in violation of 21 *Del. C.* § 5126(a)(3).¹¹

Standard of Review

When this Court reviews decisions from the Court of Common Pleas, pursuant to its authority under 11 *Del. C.* § 5301(c), it reviews legal questions *de novo* and factual findings under a “clearly erroneous” standard.¹² Where a timely objection was made, the admission or exclusion of evidence is reviewed for an “abuse of discretion.”¹³ “A court abuses its discretion when it ignores recognized

⁷ *Id.* at 31-33.

⁸ The Court also allowed briefing on an issue not raised in this appeal.

⁹ *State v. McCoy*, 2013 WL 424672, at *2, Smalls, C.J. (Del. Ct. Comm. Pl. Jan 31, 2013).

¹⁰ *Id.*

¹¹ *Id.* at *3.

¹² *State v. Munden*, 891 A.2d 193, 196 (Del. Super. 2005).

¹³ *Guest v. State*, 2009 WL 2854670, at *1 (Del. Super. Sept. 4, 2009) *aff’d*, 991 A.2d 18 (Del. 2010)(citing *Trump v. State*, 753 A.2d 963, 970-971 (Del.2000)).

rules of law or exceeds the bounds of reason, producing an unjust result.”¹⁴ In the absence of a timely objection, this Court reviews the decision to admit evidence for “plain error.”¹⁵ “Pursuant to the plain error standard, the error complained of must be so clearly prejudicial to an accused, and must clearly deprive an accused of a substantial right, that it jeopardizes both the fairness of and the integrity of the trial process.”¹⁶

McCoy initially argued that the trial court abused its discretion by admitting the intoxilyzer results. The State responded that the correct standard to apply was the “plain error” standard because McCoy expressly stated there was no objection before the results were admitted. In her reply brief, McCoy asserted that the argument could not be waived because it was foundational, but that “it was plain error to admit the reading.”¹⁷

In this particular instance, the Court will review the Court of Common Pleas’ decision for an abuse of discretion due to the procedural history of this case. After defense counsel raised the issue during closing argument, the trial court permitted the parties to submit briefs concerning the admissibility of the Intoxilyzer prior to rendering a decision after the trial. Therefore, the Court will view the objection as timely and apply the abuse of discretion standard.

¹⁴ *Palomino v. State*, 2011 WL 2552603, at *2 (Del. Super. Apr. 4, 2011)(citing *Harper v. State*, 970 A.2d 199, 201 (Del.2009)).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Reply Br., at 2.

Discussion

The only issue before this Court is whether the trial court abused its discretion by admitting the results of the Intoxilyzer test after finding that a twenty minute observation period was established. The Delaware Supreme Court dealt squarely with this issue in *Clawson*. In *Clawson*, an officer gave conflicting testimony regarding the duration of an observation period and the start of an intoxilyzer test. First, the officer stated that the intoxilyzer test began when he inserted the card and conducted three internal calibration tests, which was nineteen minutes after the observation period began. Then, the officer stated that the test started when the defendant blew into the machine, which was twenty-two minutes after the observation period started.¹⁸

The Court set forth three important standards for Delaware courts to follow when evaluating the twenty-minute observation period. First, the Court held that the twenty minute observation period was an evidentiary foundational issue that could be raised by pretrial motion or at trial.¹⁹ Second, the Court declared that Intoxilyzer results are admissible only if the State “lay[s] an adequate foundation showing that there was an uninterrupted twenty minute observation of the defendant prior to testing.”²⁰ Third, the Court adopted a bright-line rule that “testing commences when the officer inserts the intoxilyzer card into the

¹⁸ *Clawson*, 857 A.2d at 189-190.

¹⁹ *Id.* at 191-192.

²⁰ *Id.* at 192.

machine.”²¹ Applying these rules to the case, the Court found that the trial court abused its discretion by admitting the results because the record failed to show that the officer observed the defendant for twenty minutes before inserting the card into the machine.²²

In this case, the record supports the trial court’s finding that the State established a twenty-minute observation period in accordance with the Supreme Court’s decision in *Clawson*. The handwritten notations on the intoxilyzer card and Officer Huber’s testimony demonstrate that the observation period began at 2:06 a.m. Officer Huber testified twice that the card was entered into the machine at 2:30 a.m. before stating that he did not remember when it was entered. Despite Officer Huber’s conflicting testimony, the card itself shows a first air blank time at 2:30 a.m. Based on the time of the first air blank on the intoxilyzer card, the trial court reasonably concluded that the card was inserted at 2:30 a.m. and that, pursuant to *Clawson*, the test commenced at 2:30 a.m. In addition, Officer Huber testified that he observed the defendant for at least twenty minutes. Therefore, a twenty minute observation period was established and the trial court properly admitted the results of the intoxilyzer test.

²¹ *Id.*

²² *Id.* at 192-93.

Conclusion

For the aforementioned reasons, the decision of the Court of Common Pleas is **AFFIRMED**.

IT IS SO ORDERED.

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