

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

LEONE L. CAHILL, )  
Appellant-Defendant below, )  
 )  
v. ) I.D. No.: 0511010665  
 )  
STATE OF DELAWARE, )  
Appellee – Plaintiff below. )  
 )  
 )

Submitted: April 6, 2009  
Decided: August 31, 2009

Upon Appeal from the Decision of the Court of Common Pleas.  
**AFFIRMED.**

Samantha Lukoff, Esq., Department of Justice, 820 N. French St.,  
Wilmington, DE 19801, *Attorney for Appellee.*

Louis B. Ferrara, Esq., Ferrara & Haley, 1716 Wawaset St., P.O. Box 188,  
Wilmington, DE 19899, *Attorney for Appellant.*

**Scott, J.**

## **Introduction**

This is an appeal following Defendant's conviction by the Court of Common Pleas of Driving Under the Influence of Alcohol. At trial, Defendant objected to the admissibility of her Intoxilyzer test results. The trial judge overruled the objection and admitted the Intoxilyzer results into evidence. On appeal, Defendant argues that the trial judge erred by admitting the Intoxilyzer results into evidence because the device had not been recalibrated once it was relocated from the police station to the DUI checkpoint.

## **Facts**

On the evening of November 4, 2005, the Delaware Checkpoint Strikeforce set up a DUI checkpoint on Delaware Avenue in Newark, Delaware. On the early morning of November 5, 2005, Defendant Leone L. Cahill ("Cahill") was stopped at the checkpoint by Detective Andrew Rubin of the Newark Police Department. Upon encountering Cahill, Detective Rubin detected a moderate odor of alcohol on her breath and observed that her eyes were bloodshot. Cahill admitted that she had been drinking alcohol. Detective Rubin led Cahill through a series of field sobriety checks and concluded that Cahill had been driving under the influence of alcohol.

Detective Rubin placed Cahill under arrest and administered an Intoxilyzer test to determine her blood alcohol content.

### **Court of Common Pleas Trial**

Cahill was charged with Driving Under the Influence in violation of 21 *Del. C.* §4177(a), and her case proceeded to bench trial in the Court of Common Pleas. At trial, the State sought to introduce the results of Cahill's Intoxilyzer test into evidence. In doing so, the State proffered the testimony of Detective Rubin.

Detective Rubin testified that he transported the Intoxilyzer approximately two miles from the Newark Police Department to the DUI checkpoint site on November 4, 2005 without incident. He testified that upon plugging in the machine at the checkpoint site, the Intoxilyzer ran through its own internal self calibrations. He did not, however, perform any manual calibrations on the machine. Detective Rubin explained that the State Chemist performed required calibration checks on the Intoxilyzer and recorded the results in a logbook. The logbook reflected the State Chemist had certified that the Intoxilyzer was operating properly and accurately before and after Cahill's test (on October 18, 2005, and November 16, 2005).

The State moved to introduce the results of Cahill's Intoxilyzer test based on Detective Rubin's testimony. Defense counsel objected to the admission of this evidence on the ground that the Intoxilyzer had not been recalibrated after being moved from the police station to the checkpoint site. To support his contention that the test results were inadmissible, defense counsel cited *State v. Johnson*,<sup>1</sup> a 1983 Court of Common Pleas case. The trial judge overruled the objection and admitted the Intoxilyzer results into evidence. He found the results to be admissible based on the admission of the certifications of the State Chemist that the Intoxilyzer was operating properly and accurately shortly before and after Cahill's test. He also relied on Detective Rubin's testimony regarding his transportation of the Intoxilyzer, which distinguished the facts of this case from the facts in *Johnson*.

### **Standard of Review**

11 *Del. C.* § 5301(c) provides statutory authority for Superior Court appellate review of Court of Common Pleas decisions in criminal actions. Questions of law are reviewed *de novo*, while factual findings are reviewed under a "clearly erroneous" standard.<sup>2</sup> Hence, this Court's role on appeal is to "correct errors of law and to review the factual findings of the court below

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<sup>1</sup> Cr. A. No. 83-05-0223T (Del. CCP, Ellis, J.) Dec. 12, 1983.

<sup>2</sup> See e.g. *State v. Karg*, 2001 WL 660014, at \*1 (Del. Super., May 31, 2001).

to determine if they are sufficiently supported by the record and are the product of an orderly and logical deductive process.”<sup>3</sup>

### **Discussion**

Under Delaware law, in order to admit the results of an intoxilyzer test into evidence, the State must first introduce the certifications of the State Chemist that the intoxilyzer was operating accurately before and after testing the breath of the defendant.<sup>4</sup> In *Anderson v. State*,<sup>5</sup> the Delaware Supreme Court further held that calibrations of an intoxilyzer must occur within a reasonable temporal proximity of the defendant’s test. In so ruling, the Court rejected a bright-line rule that an intoxilyzer must be calibrated every 30 days in order to be admissible.<sup>6</sup>

The State laid a proper evidentiary foundation to admit the results of Cahill’s Intoxilyzer test. The State introduced into evidence, without objection, the certifications of the State Chemist that the Intoxilyzer had been operating properly and accurately shortly before and after Cahill’s test. Cahill failed to offer any evidence to the contrary. She made no allegation that the machine was malfunctioning or that the lack of recalibration affected

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<sup>3</sup> *Disabatino v. State*, 808 A.2d 1216, 1220 (Del. Super., 2002) (citing *Steelman v. State*, 2000 WL 972663, at \*1 (Del. Super., May 30, 2000)).

<sup>4</sup> See *McConnell v. State*, 1994 WL 43751 (Del. Feb. 3, 1994).

<sup>5</sup> *Anderson v. State*, 1995 WL 717245 (Del. Super., Nov. 20, 1995) citing *Best v. State*, 328 A.2d 141 (Del. 1974).

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

the accuracy of the results. Therefore, the Court finds that the trial judge properly exercised his discretion in admitting the results.

In rendering his verdict, the trial judge stated that he was not overturning the decision in *Johnson*. Rather, he was distinguishing it on a factual basis. Cahill disagrees and contends that the trial judge overturned settled legal precedent set forth in *Johnson* requiring recalibration of an intoxilyzer after it has been moved to a new location. The Court does not agree with Cahill's characterization. In *Johnson*, the intoxilyzer at issue was calibrated by the State Chemist in his laboratory in Dover and then transported 30 miles to the State Police Department in Dewey Beach. The State was unable to show how the Intoxilyzer was transported or even who transported it. The uncertainty of the mode of transportation led the trial judge to conclude that "the testing of the device in different environments, subsequent transportation in what is bound to be changed and varying temperatures and possible rough treatment during transportation raise questions of accuracy. Testing at the location assures control and custody not only of the device, but the records as well which accompany the testing."<sup>7</sup>

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<sup>7</sup> Cr. A. No. 83-05-0223T (Del. CCP, Ellis, J.) Dec. 12, 1983.

The court in *Johnson* was concerned with possible rough treatment of the intoxilyzer which could have compromised the accuracy of its results. Those concerns arose from the lack of information regarding the control and custody of the intoxilyzer during relocation. Those concerns are not present in this case. Here, Detective Rubin testified that he transported the Intoxilyzer a short distance of approximately 2 miles without any incident. Therefore, unlike in *Johnson*, the Court has no reason to suspect that the accuracy of the Intoxilyzer had been compromised upon being transported to the checkpoint site. Because Cahill fails to offer any evidence that the Intoxilyzer was not operating properly and accurately on November 5, 2005, her appeal must fail.

### **Conclusion**

For the reasons discussed above, Cahill's conviction for Driving Under the Influence of Alcohol is **AFFIRMED**.  
**IT IS SO ORDERED.**

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**Judge Calvin L. Scott, Jr.**