

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

SUSSEX COUNTY COURTHOUSE
1 THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947
TELEPHONE (302) 856-5264

October 13, 2015

Rebecca Anderson, Esquire
Department of Justice
114 East Market Street
Georgetown, DE 19947

Michael Capasso, Esquire
Office of the Public Defender
14 The Circle, 2nd Floor
Georgetown, DE 19947

RE: **State of Delaware v. Lamontra Fountain**
Case ID: 1411013133

Dear Counsel:

During this case, I initially found that the State laid a proper foundation for the admission of the test results from defendant's blood sample. In my rulings I found that the tube(s) appeared to be filled near the top and were pretty full. Therefore, it appeared that there was compliance as reasonably possible with instruction #2. Instruction #2 requires that when the blood is withdrawn, the tube must be filled to maximum volume. Later, it appeared that my impression was not correct, that is the 10 milliliter tube was closer to being one-half filled, an amount

measuring between 5 - 7 milliliters. In that event, I reversed the ruling finding that the tube was not filled to maximum volume.

The State reargues the ruling. The essential contention is that “maximum volume,” however interpreted, does not require that a tube be filled up to the top of a 10 milliliter tube. The notion is that a blood sample taken from a half or slightly half filled tube would be sufficient. The State contends the ruling exhorts form over substance. Testimony was proffered from Julie Willey, a State Chemist and Director of the Delaware State Police Crime Lab, that a proper sample did not require maximum volume.

The Delaware law is straightforward. As stated by our Supreme Court:

In *Clawson v. State*, we stated that “the admissibility of intoxilyzer test results center on the State providing an adequate evidentiary foundation for the test result’s admission”.¹ We held that it was error for the trial court to admit into evidence the results of an Intoxilyzer 5000 test when it was determined that the manufacturer’s protocol was not complied with before the test was administered.² Following the manufacturer’s use requirements ensures the reliability of the scientific test.³ It is this guarantee of reliability and accuracy that is the foundational cornerstone to the admissibility of the results of a scientific test. Without that guarantee of reliability, there exists too great a risk that a jury will be persuaded by scientific evidence that is unreliable.

In *Clawson*, we held that “the admission of a test result that was not in compliance with the manufacturer’s requirements jeopardized the fairness

¹*Clawson v. State*, 867 A.2d 187, 191 (Del. 2005).

²*See id.* at 192.

³*Id.*

of [a] trial”⁴. In Hunter’s case, using the expired vacutainer tubes in the blood test kit was in direct contravention of the manufacturer’s specification sheet for the vacutainer tubes. In Hunter’s case, shaking the tubes vigorously was in direct violation of the manufacturer’s instructions for use of the kit.

In accordance with our holding in *Clawson v. State*, those two independent deviations from the manufacturer’s required protocol, standing alone, each rendered the BAC test inadmissible due to the lack of a proper foundation. It was an abuse of discretion for the trial judge to deny Hunter’s motion to suppress the results of the BAC test. Therefore, Hunter’s DUI conviction must be reversed.⁵

Considering this precedent, proffered testimony from a State Chemist would have minimal probative value as to what the instructions of the manufacturer(s) mean and what the manufacturer(s) require(s) to insure a reliable result. Indeed, in *Hunter*, the Court looked solely to compliance with the manufacturer’s directions and not to contrary evidence from a State’s witness that the result was not compromised by a deviation from the instructions. Therefore, I asked if the State also would be proffering testimony from the manufacturer(s) that a partially-filled tube would satisfy the directives for a reliable result.

In response, the State represented it will proffer testimony from the manufacturer(s) of the blood kit and tube(s). Testimony from the manufacturer(s) would be essential to explain the meaning and reason for instruction #2's direction to fill a tube to maximum volume. It would be essential to determine if half or

⁴*Id.* at 193

⁵*Hunter v. State*, 55 A.3d 360, 365-6 (Del. 2012).

slightly more than a half tube nonetheless satisfies the maximum volume language contained in instruction #2.

In light of the above, there may be a misapprehension of law or fact. The motion to re-argue is granted. It is important to reach a fully informed decision. The State is required, within the next 30 days, to provide the defense with all the proffered opinions and the basis for them. The defense will be afforded additional time to obtain rebuttal opinions, if desired.⁶

The Motion to Re-Argue is GRANTED. There is no prejudice to the defendant as a mistrial was declared. Further, he failed to appear at later proceedings and continues on *capias* status. Commissioner

Very truly yours,

/s/ **Richard F. Stokes**

Richard F. Stokes

RFS:tls
Enclosure(s)

cc: Prothonotary

⁶ Since a hearing will be required, I also would like similar information on Step 5 of the Instructions. It instructs the blood collector as follows: "Place sealed blood tube(s) in bubble-pack bag and seal bag using bag flap. Place bubble -pack bag in the ziplock bag provided then seal ziplock bag". At trial, there was a factual issue whether the nurse or officer did this step.