

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEVIN D. TALLEY,	§	
	§	
Defendant-Below	§	No. 172, 2003
Appellant,	§	
v.	§	Cr. ID No. 0108005719
	§	
STATE OF DELAWARE,	§	Court Below: Superior Court
	§	of the State of Delaware, in
Plaintiff-Below	§	and for Sussex County
Appellee.	§	

Date Submitted: September 9, 2003
Date Decided: December 29, 2003

Before **VEASEY**, Chief Justice, **BERGER**, and **JACOBS**, Justices

ORDER

On this 29th day of December, 2003, upon consideration of the briefs submitted by the parties, it appears to the Court that:

(1) Kevin D. Talley, the defendant-below, appellant (“Talley”), was convicted and sentenced by the Superior Court as a fourth offense Driving Under the Influence (“DUI”) offender, in violation of 21 *Del. C.* §§ 4177 (a) and 4177 (d)(4). Talley has appealed from that conviction and sentence. For the following reasons the judgment of the Superior Court will be affirmed.

(2) In May 2001, Talley was arrested for DUI in Sussex County, Delaware, and was later indicted by a Grand Jury for DUI in violation of 21

Del. C. §4177 (a). During Talley's jury trial, the State called a witness to establish a foundation for admitting into evidence the certification log of the intoxilyzer machine used to test Talley's breath for the presence of alcohol. The trial court admitted the certification log, over Talley's objection, under the business record exception to the hearsay rule.¹ At the conclusion of the State's case, Talley moved for a judgment of acquittal of felony DUI, because only a non-specific DUI charge -- not a felony charge -- had been alleged in the indictment and proved before the jury. The trial court denied Talley's motion, ruling that Talley's prior DUI convictions were a consideration only for sentencing, but were not an element of the crime that had to be proved at trial.

(3) At the conclusion of the trial, Talley was convicted for DUI. At sentencing, the State filed a motion to declare Talley a fourth-time offender, and therefore guilty of a felony, under 21 *Del. C. §§ 4177 (d)(4) and (d)(6)*. The State attached to its motion evidence that that was Talley's seventh conviction for DUI. The trial court granted the State's motion, and Talley was sentenced for a fourth offense felony DUI. On appeal Talley advances three separate claims of error.

¹ See *D.R.E.* 903 (6).

(4) Talley's first claims that the trial court erred by ruling that the State was not required to identify the offense with which he was charged as a felony DUI in the indictment. The argument fails for two reasons. First, under the Superior Court Rules of Criminal Procedure, a defense or objection based on a defect in the indictment is waived unless it is raised before trial.² In this case, Talley did not object to the indictment until after the State had concluded its case at trial.

(5) Second, even if this claim were not procedurally barred, it lacks substantive merit, because the Delaware DUI statute specifically provides that a person who has been convicted of prior DUI offense "need not be charged as a subsequent offender in the Complaint, Information or Indictment..."³ Talley argues that that provision conflicts with Article 1, Section 8 of the Delaware Constitution, but this argument fails because Article 1, Section 8 relevantly provides that "no person shall for any indictable offense be proceeded against criminally by information,"⁴ and here the State proceeded against Talley by indictment, not by information. Accordingly, the Constitutional provision upon which Talley relies is inapplicable. Talley also argues that the indictment lacks specificity,

² *Super. Ct. Crim. R.* 12 (b)(2) and 12(f).

³ 21 *Del. C.* §4177 (d)(6).

⁴ DEL. CONST., Art 1, § 8.

because it did not charge him as a fourth time DUI offender. That argument lacks merit because this Court has specifically rejected it in *Stewart v. State*, where we stated that a valid indictment need only “contain a plain statement of the essential facts constituting the offense charged.”⁵ That was done here.

(6) Talley’s second claim is that the trial court erred by rejecting his argument that the State was required to prove his prior DUI convictions as elements of the DUI offense at trial. Relying on *Apprendi v. New Jersey*,⁶ Talley argues that the prior convictions not only increased the penalty, but also changed the crime with which he was charged from a misdemeanor to a felony DUI. This argument misreads *Apprendi*, which relevantly holds that “*other than the fact of a prior conviction, any fact that increases the crime beyond the prescribed statutory minimum must be submitted to a jury, and proved beyond a reasonable doubt.*”⁷ Here, because the increase in Talley’s sentence was occasioned solely by his prior convictions, *Apprendi* is inapplicable.⁸

⁵ No. 173, 2003 (July 30, 2003) (ORDER) (quoting *Corbin v. State*, 711 A.2d 1227; 1998 WL 188562 (Del. 1998).

⁶ 530 U.S. 466, 120 S. Ct. 2348 (2000).

⁷ *Id.*, 530 U.S. at 490, 120 S. Ct. at 2362-63 (italics added).

⁸ Talley also overlooks the fact that the Delaware General Assembly did not codify separate offenses for misdemeanor and felony DUI: in either case the substantive elements prescribed by the DUI statute are the same. *See 21 Del. C. §4177*, which allows a judge to increase the sentence based on the convicted defendant’s prior convictions.

(7) Talley’s third, and final, claim of error is that the trial court abused its discretion by admitting the intoxilyzer certification log into evidence under the business records exception to the hearsay rule. This Court reviews a trial court decision to admit or exclude evidence for abuse of discretion.⁹

(8) *D.R.E.* 803(6) provides that a business record may be admitted into evidence without the testimony of the person who made the record if: (a) the record was prepared in the regular course of business, (b) it was made “at or near the time of the event,” (c) the information and circumstances of recordation are trustworthy, and (d) a custodian or other qualified witness is available to testify.¹⁰ Talley contests only one of those requirements, namely that the certification log be made “at or near the time” the intoxilyzer was used to test his breath. He therefore concedes that the State successfully established the other requirements of the evidentiary Rule.

(9) We conclude that the contested element was successfully established as well. To admit the results of the intoxilyzer machine, the State was required to establish that the machine was properly functioning both before and after Talley’s breath was tested.¹¹ That machine was

⁹ *Bruce v. State*, 781 A.2d 544, 552 (Del. 2001).

¹⁰ *D.R.E.* 803(6); *Brown v. Liberty Mut. Ins. Co.*, 774 A.2d 232, 238-39 (Del. 2000).

¹¹ *McConnell v. State*, 639 A.2d 74, 1994 WL 43751 (Del. 1994) (ORDER).

routinely tested for accuracy by the State Chemist, who would certify the results in the certification log.¹² In this case, however, because the State Chemist was not available to testify at trial, the State sought the admission of the certification log into evidence under *D.R.E. 803(6)*, through the testimony of a qualified witness. To lay a foundation, the State elicited testimony from Detective Parsons of the Rehoboth Beach Police Department, concerning the logbook, which the Rehoboth Beach Police Department kept as a business record. The Detective testified that:

The pages inside of the book correspond to dates and times of when the State Chemist has come to the department and calibrated it to make sure that the Intoxilizer 5000 is working properly. It also corresponds to the serial number of the Intoxilizer that was used and the same one that was tested.¹³

(10) The witness was then asked about two specific entries in the certification log, both made by the State Chemist. The witness testified that the first entry had been made on April 25, 2001 at 1450 hours, and that the second had been made on June 4, 2001. The entries were certifications by the State Chemist that the machine was working properly on both dates. In this manner, the State established, through the certification log as authenticated and described by a qualified witness, that the machine was

¹² A57.

¹³ A50-A60; and A73-A75.

functioning properly both before and after May 27, 2001, the date on which Talley's breath was tested. Accordingly, the State established a proper foundation for the admission of the certification log into evidence under *D.R.E.* 803(6), and the trial court's determination to admit the certification log into evidence was not an abuse of discretion.

(10) For all of these reasons, the judgment of the Superior Court is affirmed.

BY THE COURT:

JACK B. JACOBS
Justice