

1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 Opinion Number: _____

3 Filing Date: December 22, 2015

4 **NO. 33,715**

5 **STATE OF NEW MEXICO,**

6 Plaintiff-Appellee,

7 v.

8 **TARRAH HOBBS,**

9 Defendant-Appellant.

10 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

11 **Briana H. Zamora, District Judge**

12 Hector H. Balderas, Attorney General

13 Santa Fe, NM

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15 Albuquerque, NM

16 for Appellee

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1 **OPINION**

2 **VANZI, Judge.**

3 {1} The Legislature has delegated to the Scientific Laboratory Division of the
4 Department of Health (SLD) administrative authority over blood and breath tests
5 administered to persons suspected of driving while under the influence of intoxicants.
6 See NMSA 1978, § 24-1-22 (2003). In *State v. Martinez*, 2007-NMSC-025, 141 N.M.
7 713, 160 P.3d 894, our Supreme Court held that “a threshold showing” that the
8 instrument used to administer a breath alcohol test (BAT) was SLD-certified at the
9 time of the test is a Rule 11-104(A) NMRA foundational requirement for admission
10 of the BAT results into evidence. *Martinez*, 2007-NMSC-025, ¶¶ 9, 11-12, 23.
11 *Martinez* went on to hold that this foundational requirement was satisfied by the
12 hearsay testimony of the officer who administered the BAT that he saw a “sticker”
13 on the breathalyzer instrument indicating that it was SLD-certified at the time of the
14 defendant’s BAT. *Id.* ¶ 23. Defendant Tarrah Hobbs contends that, although this
15 foundational requirement was satisfied in her case, the trial court should not have
16 admitted her BAT results into evidence because there was no testimony that the
17 officer who administered her BAT “witnessed documentation from SLD approving”
18 (1) the gas tank (also referred to as the gas canister) that was attached to the
19 breathalyzer instrument and (2) the gas reference standard inside the tank, “much less

1 that such documentation was present at the time the test was taken.”¹ The district
2 court affirmed and so do we, although on different grounds.

3 **BACKGROUND**

4 {2} In the early morning hours of January 14, 2012, Officer Richard Locke of the
5 Albuquerque Police Department (APD) pulled Defendant over for driving 51 miles
6 per hour in a 40 mile-per-hour zone. Defendant appeared to be intoxicated and,
7 pursuant to APD policy, Officer Locke requested a special unit to investigate her for
8 driving under the influence (DUI).

9 {3} Officer Jared Frazier responded to the scene and administered field sobriety
10 tests, which Defendant failed. Officer Frazier determined that Defendant was
11 impaired and placed her under arrest for DUI. After Defendant agreed to submit to
12 a BAT, Officer Frazier started the required twenty-minute deprivation period.

13 {4} Officer Frazier was certified by the SLD to administer BATs on the Intoxilyzer
14 8000 instrument (IR 8000), which he called the “machine,” and he administered
15 Defendant’s BAT on the IR 8000 located at the prisoner transport center. Officer
16 Frazier testified that he used a clean mouthpiece, explained the procedure to
17 Defendant, and ran a total of five air-blank checks. He testified that air-blank checks

18 ¹ The parties dispute whether Defendant preserved a foundational challenge to
19 the gas reference standard within the tank as well as to the tank itself. Given our
20 disposition, we need not and do not reach the preservation issue.

1 flush out the machine and check the ambient air for interference, and that all of the
2 air-blank checks he ran resulted in readings of .00. He also explained the range of
3 allowable results on calibration checks of the IR 8000 and testified that diagnostic
4 and calibration checks were run and passed. Officer Frazier further testified that he
5 saw a copy of the SLD certification affixed to the front of the IR 8000 and that the
6 machine appeared to be functioning normally. The machine collected two breath
7 samples from Defendant.

8 {5} The State moved to admit Defendant's BAT results. At defense counsel's
9 request, the trial court deferred ruling on the admission of the BAT results until after
10 cross-examination. On cross-examination, Officer Frazier conceded that he did not
11 know who had prepared the SLD certification of the IR 8000; nor did he have
12 anything to do with ensuring that the machine complied with SLD regulations, or
13 with inspections, or other accuracy aspects of the machine.

14 {6} When questioned specifically about the gas canisters used on the machine,
15 Officer Frazier testified that he has nothing to do with their approval, selection, or
16 purchase, and that he did not know the make, model, or serial number of the canister
17 used on the day of Defendant's test. About eight months after Defendant's BAT,
18 Officer Frazier went to SLD and the APD Crime Lab, where he learned that the gas

1 canisters used on the machine were the same make and model as those listed in the
2 SLD regulations.

3 {7} At the end of Officer Frazier’s testimony, defense counsel moved to exclude
4 Defendant’s BAT results on the ground that they lacked a sufficient foundation to
5 support their admission into evidence. Specifically, defense counsel argued that the
6 gas canister is a piece of equipment separate from the IR 8000, and that Officer
7 Frazier failed to “make the connection that this is a SLD approved piece of
8 equipment” because he did not know the canister’s serial number, the manufacturer,
9 or its expiration date.

10 {8} The trial court admitted the BAT results over Defendant’s objection. Officer
11 Frazier was recalled to the stand and testified that Defendant’s two BAT results were
12 .11. The trial court found Defendant guilty of DUI under New Mexico’s “per se” DUI
13 statute, which provides that it is illegal for a person to drive a vehicle with “an
14 alcohol concentration of eight one hundredths [.08] or more in [his or her] blood or
15 breath.” *See* NMSA 1978, § 66-8-102(C)(1) (2010). Defendant appealed to the
16 Second Judicial District Court, challenging the admission of her BAT results on the
17 basis that the State failed to establish that the gas canister complied with “accuracy
18 ensuring” SLD regulations. The district court affirmed on the ground that “Officer

1 Frazier’s testimony was sufficient to establish, by a preponderance of the evidence,
2 the [gas reference standard] was approved by SLD.” This appeal timely followed.

3 **DISCUSSION**

4 **Standard of Review**

5 {9} “The interpretation of an administrative regulation is a question of law that we
6 review de novo,” applying the same rules we use to interpret statutes. *State v. Willie*,
7 2009-NMSC-037, ¶ 9, 146 N.M. 481, 212 P.3d 369. “The principal command of
8 statutory construction is that the court should determine and effectuate the intent of
9 the [L]egislature, using the plain language of the statute as the primary indicator of
10 legislative intent.” *Id.* (alteration, internal quotation marks, and citation omitted). If
11 the plain meaning is “doubtful, ambiguous, or if an adherence to the literal use of the
12 words would lead to injustice, absurdity or contradiction, we will construe the statute
13 according to its obvious spirit or reason.” *Id.* (alteration, internal quotation marks, and
14 citation omitted).

15 {10} “We review an alleged error in the admission of evidence for an abuse of
16 discretion” and will overturn a trial court’s evidentiary ruling “only when the facts
17 and circumstances of the case do not support [its] logic and effect.” *Martinez*,
18 2007-NMSC-025, ¶ 7 (internal quotation marks and citation omitted).

1 **Statutory Structure**

2 {11} New Mexico’s Implied Consent Act (ICA) requires that “[a] test of blood or
3 breath or both, approved by the [SLD] pursuant to the provisions of Section 24-1-22
4 NMSA 1978, shall be administered at the direction of a law enforcement officer
5 having reasonable grounds to believe the person to have been driving a motor vehicle
6 within this state while under the influence of intoxicating liquor or drug.” NMSA
7 1978, § 66-8-107(B) (1993). Such test results “may be introduced into evidence in
8 any civil action or criminal action arising out of the acts alleged to have been
9 committed by the person tested for driving a motor vehicle while under the influence
10 of intoxicating liquor or drugs.” NMSA 1978, § 66-8-110(A) (2007). Pursuant to
11 Section 24-1-22, the Legislature has delegated authority over all aspects of such
12 testing to SLD. That statute provides, in pertinent part, as follows:

13 A. The [SLD] is authorized to promulgate and approve satisfactory
14 techniques or methods to test persons believed to be operating a motor
15 vehicle . . . under the influence of drugs or alcohol and to issue
16 certification for test operators and their instructors. . . . The [SLD] is
17 further authorized to establish or approve quality control measures for
18 alcohol breath testing and to establish or approve standards of training
19 necessary to ensure the qualifications of individuals conducting these
20 analyses or collections.

21 B. The [SLD] shall establish criteria and specifications for equipment,
22 training, quality control, testing methodology, blood-breath relationships
23 and the certification of operators, instructors and collectors of breath
24 samples.

1 Section 24-1-22(A), (B).

2 **The Regulations**

3 {12} Under its statutory authority, the SLD has promulgated regulations in the form
4 of a rule (Rule) governing “the certification of laboratories, breath alcohol
5 instruments, operators, key operators, and operator instructors of the breath alcohol
6 instruments as well as establish[ing] the methods of taking and analyzing samples of
7 blood and breath testing for alcohol or other chemical substances under the [ICA].”
8 7.33.2.2 NMAC. The stated objective of the many regulations set forth in the Rule is
9 “to establish standards and procedures” for certification and “methods of taking and
10 analyzing samples” for such testing. *Id.* 7.33.2.6 NMAC.

11 {13} The Rule defines “Breath alcohol instrument” as “[a]ny evidential breath
12 testing device that is capable of analyzing breath to establish the concentration of
13 alcohol contained in a breath sample” and requires that “[s]uch *instruments must be*
14 *approved and individually certified by SLD* for use in testing pursuant to the [ICA]
15 and this rule.” 7.33.2.7(G) NMAC (emphasis added). It defines “Equipment” as
16 “[d]evices which are not a component of the breath alcohol instrument but assist in
17 meeting the requirements of an evidentiary breath test, including but not limited to
18 simulators, gas tanks, gas brackets, and reference standards.” 7.33.2.7(L) NMAC.
19 Defendant’s argument presumes that the Rule 11-104(A) foundational requirements

1 applicable to an individual “breath alcohol instrument” also apply to individual pieces
2 of “equipment”—here, the gas tank attached to the instrument and the gas reference
3 standard it contains. The Rule itself, however, treats the “breath alcohol instrument”
4 (hereinafter, instrument) very differently from “equipment.”

5 {14} SLD selects the instruments used in New Mexico based on criteria that include
6 performance in SLD’s evaluation process, field history, manufacturer support
7 capability, and evaluations by other users, including approval by the National
8 Highway Traffic Safety Administration. 7.33.2.9 NMAC. The Rule requires that both
9 instruments and equipment (as relevant here, gas tanks and reference standards) must
10 be *approved* by SLD before they may be used in BATs. *See* 7.33.2.9(A) NMAC
11 (stating that manufacturers of instruments and reference standards must “submit their
12 instrumentation and equipment to SLD for approval”); 7.33.2.9(H) NMAC (stating
13 that SLD may withdraw approval of instrument and equipment “if the manufacturer
14 fails to comply with the provisions of the approval criteria or the terms of any
15 contracts with SLD”). It also requires that SLD maintain a list of the instruments and
16 equipment it has approved for use under the ICA. *See* 7.33.2.16(B) NMAC. Finally,
17 as the State notes in its answer brief, the SLD publishes a list of SLD approved breath
18 and blood alcohol testing or collection devices. Although there is nothing in the
19 record concerning the contents of the list in 2012, the current list, updated on April

1 2, 2014, identifies the IR 8000 as the approved instrument; identifies by manufacturer
2 and model approved gas reference standard tanks; and clarifies that “[a]ll tanks,
3 which are compatible with the [IR] 8000, containing an approved reference standard,
4 are approved for use.” N.M. Dep’t of Health, List of Approved Breath & Blood
5 Alcohol Testing or Collection Devices & Accessories, *available at*
6 <http://nmhealth.org/publication/view/general/1537/>.

7 {15} As to equipment, the only other requirements stated in the Rule are that breath
8 alcohol samples “shall be collected and analyzed pursuant to the procedures
9 prescribed by SLD and *employing only SLD approved equipment*[,]” 7.33.2.15(B)(1)
10 NMAC (emphasis added), and that “calibration checks” of instruments must be
11 performed using gas reference standards that have been approved by SLD.
12 7.33.2.14(C)(2)(b) NMAC. The Rule defines “Calibration check” as “[t]he analysis
13 of an externally delivered, controlled, ethanol vapor specimen of known alcohol
14 concentration” and requires that “SLD shall determine the breath alcohol simulators²
15 or gases to be used.” 7.33.2.7(I) NMAC. In a calibration check, the instrument is
16 checked to ensure that its analysis of one or more reference standards (here, gas) of

17 ² The BAT in this case was conducted with an instrument that uses a gas
18 reference standard. “Simulator solutions” are reference standards used with
19 instruments that measure breath alcohol by a different methodology. Defendant
20 sometimes refers to the reference standards as the “simulator solution” or “solution,”
21 but there is no dispute that a gas reference standard was used in this case.

1 known alcohol concentration produces a reading within a specified range.

2 7.33.2.14(C)(2)(b)(i)-(iii) NMAC.

3 {16} In contrast to equipment, instruments, once approved, must also be *certified* by
4 SLD. See 7.33.2.10(A) NMAC (“[B]reath alcohol instruments to be used for implied
5 consent evidential testing must be approved and certified by SLD.”). The Rule’s
6 certification requirements for instruments are extensive. 7.33.2.10 NMAC. So too, are
7 the certification requirements for operators, 7.33.2.11 NMAC; key operators,
8 7.33.2.12 NMAC; and operator instructors, 7.33.2.13 NMAC. For example, each
9 individual instrument must be certified “for a period of up to one year,” and “[a]
10 certificate shall be issued for each instrument and shall be maintained by the
11 responsible agency.” 7.33.2.10(A) NMAC. The certification of each instrument must
12 be renewed annually based on compliance with the Rule and, again, a certificate must
13 be issued for each instrument and maintained by the responsible agency. 7.33.2.10(C)
14 NMAC. To obtain initial certification an individual instrument must be inspected and
15 calibration-checked by SLD, 7.33.2.10(A)(1) NMAC, and at least one certified key
16 operator must be responsible for its maintenance. 7.33.2.10(A)(2) NMAC. The Rule
17 contains numerous continuing requirements for individual instruments, including
18 submission of logbooks and records at scheduled times; annual analysis of four
19 proficiency samples; calibration checks at least once every seven days or with each

1 subject test or both; biannual inspections that include evaluation of the instrument's
2 electronic functions and settings, analysis of a series of alcohol controls with an
3 accuracy requirement of the greater of +5 percent or .005 on all target values, and
4 review of the instrument's sensitivity for the detection of any interfering substances.
5 7.33.2.10(B)(1) NMAC. For instruments used at fixed locations, the Rule imposes
6 additional requirements. 7.33.2.10(B)(2) NMAC. SLD may deny, suspend, or revoke
7 the certification of any instrument for ICA testing on grounds including that the
8 instrument is not on the SLD-approved list and that calibration results do not meet
9 criteria established by SLD. 7.33.2.10(D)(1) NMAC.

10 {17} As noted, the Rule requires that breath samples must be collected and analyzed
11 "pursuant to the procedures prescribed by SLD and employing only SLD approved
12 equipment and certified instruments." 7.33.2.15(B)(1) NMAC. These procedures
13 include collection and analysis by certified operators or certified key operators, a
14 good faith attempt to collect and analyze at least two samples, taken not more than
15 fifteen minutes apart and after a twenty-minute period (often referred to as the
16 "deprivation period") during which the subject has not had anything to eat, drink or
17 smoke. 7.33.2.15(2) NMAC. As relevant here, the Rule also specifies the following
18 "minimum requirements" for an ICA breath sample: (a) a system air-blank analysis
19 before each sample; and (b) a calibration check using SLD-approved gas standards

1 in accordance with one or both of the following procedures: (i) the instrument must
2 be maintained and calibration-checked by the key operator, with calibration checks
3 at least once every seven days resulting in readings within prescribed ranges upon
4 analysis of two separate gas standards, each simulating a different specified alcohol
5 concentration; (ii) a single calibration check with each subject test using a gas
6 standard that simulates 0.08 grams per 210 liters, resulting in a reading within ± 0.01
7 of the specified standard. 7.33.2.14(C)(2) NMAC.

8 **Confirmation That SLD Has Approved the Equipment On a Breath Alcohol**
9 **Instrument Is Not Required by SLD Regulations and Is Not a Foundational**
10 **Prerequisite to Admission of BAT Results**

11 {18} Our Supreme Court has held that, to meet foundational requirements under
12 Rule 11-104(A), the State need not show strict compliance with all SLD regulations
13 set forth in the Rule, but only with those regulations that are “accuracy-ensuring.”
14 *Martinez*, 2007-NMSC-025, ¶ 11 (citing *State v. Dedman*, 2004-NMSC-037, ¶ 13,
15 136 N.M. 561, 102 P.3d 628, *overruled on other grounds by State v. Bullcoming*,
16 2010-NMSC-007, 147 N.M. 487, 226 P.3d 1). In *Martinez*, our Supreme Court held
17 that SLD regulations governing certification of instruments “clearly exist to ensure
18 that the result of a test conducted on a breathalyzer is accurate[,]” and thus, a
19 threshold showing of current SLD certification of an instrument at the time of the
20 BAT is a foundational prerequisite for admission of BAT results into evidence.

1 2007-NMSC-025, ¶¶ 11-12. In *Dedman*, the Court held that the purpose of an SLD
2 regulation requiring collection of a blood alcohol sample by “veni-puncture” was not
3 to ensure the accuracy of the test and, as a result, a showing of compliance with that
4 requirement was not a foundational prerequisite to the admissibility of blood alcohol
5 reports. 2004-NMSC-037, ¶¶ 14-19.

6 {19} Defendant asserts that SLD approves tanks and gases because they are used in
7 “self-calibration checks by an [IR 8000] during a breath test” and that “[i]t follows
8 that both the process of approval and the purpose of the tanks and gases should
9 ensure the accuracy of breath test results.” She concludes that “[t]he minimum
10 foundation for showing approval of the simulator solution [sic] is the same as that for
11 showing certification of a breath machine[,]” and therefore, “upon objection, the
12 officer testifying for this foundation should be aware of SLD documentation asserting
13 the approval of both the certification of the breath machine and approval of
14 accessories.” The argument lacks merit.

15 {20} The certification requirements for the instrument relate to its “routine function
16 . . . in order to [ensure] that it gives accurate readings.” *Dedman*, 2004-NMSC-037,
17 ¶ 12 (internal quotation marks and citation omitted). Similarly, “[t]he purpose of
18 calibration is to ensure that the machine is working properly so that a valid
19 breathalyzer test result is obtained.” *State v. Montoya*, 1999-NMCA-001, ¶ 12, 126

1 N.M. 562, 972 P.2d 1153. The calibration check specified in the Rule checks the
2 instrument to ensure that its analysis of one or more gas reference standards of known
3 alcohol concentration produces a reading within a specified range.
4 7.33.2.14(C)(2)(b)(i)-(iii) NMAC. If it does, the instrument is deemed to be
5 functioning properly; if it does not, there is a problem. While it is possible that a
6 given tank may contain a gas that is not at the alcohol concentration specified by the
7 Rule, the defect presumably would be revealed in an instrument reading outside the
8 range prescribed by the Rule. In this case, Officer Frazier testified that calibration
9 checks were run and passed.

10 {21} The Legislature has delegated full authority to SLD over the testing of persons
11 believed to be DUI, including the establishment of criteria and specifications for
12 equipment, quality control, testing methodology and standards, and the certification
13 of breath alcohol instruments, operators, and instructors. Section 24-1-22(A), (B).
14 And the regulations embodied in the SLD Rule plainly treat instruments very
15 differently from equipment used with instruments. As discussed, the Rule imposes
16 extensive and explicit certification requirements on instruments (as well as operators,
17 key operators, and operator instructors), including that each individual instrument
18 have a current certificate evidencing compliance with SLD regulations. In contrast,
19 the only requirements for equipment stated in the Rule are that SLD approve and

1 maintain a list of approved manufacturer's equipment, *see* 7.33.2.9(A) NMAC;
2 7.33.2.16(B) NMAC; that SLD-approved equipment be used to collect and analyze
3 breath alcohol samples, *see* 7.33.2.15(B)(1) NMAC; and that instrument calibration
4 checks be performed using SLD-approved gas reference standards, *see*
5 7.33.2.14(C)(2)(b) NMAC. The Rule contains no requirement that SLD or certified
6 instrument operators must confirm that each individual tank and its contents are
7 SLD-approved before a BAT is administered. The Rule itself contains no indication
8 that such individual confirmation is necessary to ensure the accuracy of a BAT result.
9 And the SLD's current approved list suggests the contrary, stating that "[a]ll tanks,
10 which are compatible with the [IR] 8000, containing an approved reference standard,
11 are approved for use." N.M. Dep't of Health, List of Approved Breath & Alcohol
12 Testing or Collection Devices & Accessories, *available at* [http://nmhealth.org/
13 publication /view/general/1537/](http://nmhealth.org/publication/view/general/1537/).

14 {22} Neither the plain language nor the "obvious spirit or reason" of the SLD Rule
15 even suggests that the regulations requiring SLD approval of equipment are "accuracy
16 ensuring" in the same manner as the regulations imposing numerous certification
17 requirements on SLD-approved instruments on a per-instrument basis. And
18 Defendant has provided no basis from which to conclude that confirmation by the
19 certified instrument operator at the time of the BAT that the gas tank and the

1 reference standard it contains are SLD-approved is necessary to ensure the accuracy
2 of the BAT. We conclude that the State need not make a threshold showing that the
3 certified operator of a certified breath alcohol instrument confirmed at the time of the
4 test that equipment attached to the instrument is SLD-approved in order to lay a
5 sufficient foundation under Rule 11-104(A) for the admission of BAT results into
6 evidence. As noted in *Martinez*, “once the trial court determines that the [s]tate has
7 met the foundational requirements for the admission of a BAT card, a defendant may
8 successfully challenge the reliability of the breath test.” 2007-NMSC-025, ¶ 24. And
9 a defendant is entitled to discovery concerning SLD-approved equipment to use in
10 challenging the foundation for or the reliability of his or her BAT results. *Id.*

11 **CONCLUSION**

12 {23} The trial court did not abuse its discretion in admitting Defendant’s BAT
13 results into evidence. We affirm.

14 {24} **IT IS SO ORDERED.**

15

16

LINDA M. VANZI, Judge

17 **WE CONCUR:**

18

19 **JAMES J. WECHSLER, Judge**

20

21 **TIMOTHY L. GARCIA, Judge**