2008

State of Utah v. Donald Dunlap: Reply Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff / Appellee, vs. DONALD DUNLAP, Defendant / Appellant.	Case No: 20080923-CA

REPLY BRIEF OF APPELLANT

APPEAL FROM THE FIFTH DISTRICT COURT, WASHINGTON COUNTY, STATE OF UTAH, FROM A CONVICTION OF DRIVING UNDER THE INFLUENCE, A THIRD DEGREE FELONY, BEFORE THE HONORABLE JUDGE JAMES L. SHUMATE

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ARGUMENT

As a preliminary matter Dunlap would like to readdress the standard of review. In the opening brief Dunlap cited *Salt Lake City v. Emerson*, 861 P.2d 443 (Utah App. 1993) for the proposition that when the trial court's interpretation of a statute controls the admission of evidence it is reviewed for correctness. Appellant's Brief at 1. In its brief, the State claimed that this Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. Appellee's Brief at 1 (*citing State v. Vialpando*, 2004 UT App 95, ¶ 8, 89 P.3d 209). Although both these claims are true this case requires more specificity. Dunlap has not only challenged the trial court's application of law to fact in its decision to admit the intoxilyzer results, he has also challenged the trial court's interpretation of the laws controlling the admission of evidence. Thus, this case requires the application of two standards of review. When reviewing the trial court's

interpretations of the Utah Rules of Evidence and the Administrative statutes regulating the use of intoxilyzers, this Court should review for correctness. When reviewing the trial court's application of those laws or rules to the facts of this case this Court should review for an abuse of discretion.

This Reply Brief will follow the State's brief issue by issue. Dunlap argues that the trial court erred by admitting evidence of the results of intoxilyzer tests performed upon him after the State failed to meet the statutory requirements for reliability. The trial court also erred by denying Dunlap's hearsay objections to two witness' statements regarding the digital readout of the intoxilyzer machine. Finally, Dunlap claims that the trial court's errors and abuse of discretion were harmful because there is a reasonable likelihood that admission of the intoxilyzer evidence affected the outcome of the proceedings.

I. THE INTOXILYZER MACHINE WAS NOT FUNCTIONING PROPERLY ACCORDING TO THE ADMINISTRATIVE STANDARDS, THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING THE RESULTS

As discussed in Dunlap's opening brief, in order for a trial court to admit evidence of an intoxilyzer breath test there must be proof "that (1) the intoxilyzer machine had been properly checked by a trained technician, and that the machine was in proper working condition at the time of the test; (2) that the test was administered correctly by a qualified operator; and (3) a police officer observed the defendant during the fifteen minutes immediately preceding the test to ensure that the defendant introduced nothing into his or her mouth during that time." *Vialpando*, 2004 UT App 95, ¶ 14. Dunlap has challenged the trial court's finding that the machine was in proper working condition

based on the undisputed fact that on both occasions when Dunlap was subjected to an intoxilyzer test the machine failed to print the results of the test because the "paper feed sensor was out of align." R. 138: 158. In the State's brief it has argued that the malfunctioning printer is insufficient to show that the intoxilyzer was 'not working properly.' *See* Appellee's Brief at 10-12.

A. The administrative standards require the intoxilyzer machines to produce printed results.

In response to Dunlap's opening brief the State criticizes Dunlap's use of R.714-500-7(C) which states that "[r]esults of breath alcohol concentration tests will be printed by the instrument" because "a functioning printer is not required for a finding that the instrument is working." Appellee's Brief at 11. The State cites Administrative Code R.714-500-6(D)(4) to support the notion that if a machine passes eight certification checks "it shall be deemed to be operating properly" and that a properly functioning printer is not among those eight items to be checked. Appellee's Brief at 11. Dunlap asserts that the State's reading of the statute is flawed, however, because the eight items listed in section 6(D)(2) are not the only items to be checked during certification. According to the statute, "[t]he program supervisor shall establish a standardized operating procedure for performing certification checks, following requirements set forth in R714-500 or by using such procedures as recommended by the manufacturer of the instrument to meet its performance specifications, as derived from:" and then the eight items are listed. UTAH ADMIN. R.714-500-6(D)(2). According to the statute the program supervisor will determine what must be properly functioning in order for a machine to

pass the certification check. As noted in that same section, the standard operating procedures created by the program supervisor are available at the Utah Highway Patrol Training Section and include functions beyond the eight listed in the statute and argued as the only criteria for 'operating properly' by the State. Dunlap has obtained a copy of the standard operating procedures and has attached them as addendum for the Court's convenience. *See* Addenda. Dunlap would specifically direct the Court's attention to "Certification Report Line 9, Printout Verification Check" where a technician must verify that the machine "gives readings in grams of alcohol per 210 liters of breath *on the printout.*" Addenda (emphasis added). According to the standard operating procedures established by the program supervior a machine that does not give a reading in grams of alcohol per 210 liters of breath on a printout is not "deemed to be operating properly." R.714.-500-6(D)(2).

Therefore, Dunlap's reliance on 7(C)'s print-out requirement was appropriate because standards for the certification checks established by the program supervisor were in part created by the requirements set forth in R.714-500-7(C). Any machine that does not print its results, and any machine that does not record its results in the proper terminology and decimal points, would not be following the standard requirements for certification set by the program supervisor. UTAH ADMIN. R.714-500-7(B)(2). Despite the State's assertion to the contrary, a functioning printer is a requirement for a finding that an instrument is working properly.

B. The failure of the machine to produce printed results has a direct effect on the reliability of the evidence.

The State has also alleged that *Vialpando* does not require a functioning printer because the printer has nothing to do with the reliability of the results of a test. Appellee's Brief at 12. The State argues that "Trooper Moore testified that the printer alignment problem on the Intoxilyzer in this case had no effect on the accuracy of the machine and that when she repaired the printer, no other repairs were required." Appellee's Brief at 12 (*citing* R. 138: 158-59). What the State fails to recognize is that the reliability requirements from and *Vialpando* extend beyond concern for the accuracy of the test results. While a malfunctioning printer may not have any effect upon the accuracy of the machine's internal analysis, the fact that the printer was malfunctioning unquestionably affects the reliability of the intoxilyzer as a whole because it affects the means of creating evidence, and the reliability of the test results as evidence presented at a criminal trial. While the maintenance records and the certification affidavits support the reliability of the internal analysis performed by the test, the printed card supports the reliability of the results evidence presented at trial.

It is not the case, as the State asserts, that the malfunctioning printer is unrelated to the reliability of the test results evidence. To the contrary, the printed cards are the means by which the Legislature has assured that accurate evidence of these tests can be preserved and presented as proof of intoxication. The printed card eliminates the threat of bias or mistake on the part of the reporting officer. The printed card itself is a requirement and useful in its own right and is not an insignificant part of the breath test

process. Where the police fail to create and present this record the trial court should not be allowed to ignore this requirement simply because it does not influence the reliability of another requirement, the internal analysis of the breath.

C. The trial court abused its discretion by admitting the results of the intoxilyzer tests after the State failed to meet its burden.

As noted in Dunlap's original brief, the trial court originally prevented evidence of the intoxilyzer results from Deputy Randall because from her testimony it was "absolutely conclusive that this machine was acting up." R. 137: 126-27. At that point it appears the trial court believed that the intoxilyzer was not functioning properly. Unfortunately, rather than making a formal finding whether or not that the intoxilyzer was properly functioning, after hearing Trooper Moore's testimony about his repairs of the machine, the trial court merely allowed Randall and Thompson to testify about the test results evidence. Oddly, nothing in Moore's testimony contradicted the fact that the machine was acting up; in fact he testified that he was called out to make a repair on the machine because there was a malfunction and that he repaired the broken paper feed sensor on October 11, 2005. R. 138:154-58. It does not follow that the trial court would, after hearing Moore's testimony, find that the machine was not malfunctioning. But the court disregarded its earlier adherence to the rule and more evidence supporting a continued finding that the machine was malfunctioning, and allowed Randall and Thompson to testify to the test result, in essence (although not explicitly) finding the machine was functioning properly. The court changed its mind after receiving more uncontroverted evidence that the machine was not operating properly according to the

rule. Dunlap asserts that admitting the test results following these facts was unreasonable, and an abuse of discretion.

This Court will not substitute its discretion for that of the trial court, even where there is reason to suspect that the trial court found some questionable evidence credible, because "such assessments clearly lie in the hands of the trial court[.]" *Vialpando*, at ¶ 17. But where a court finds a fact completely at odds with the evidence presented there is a clear error. *See State v. Hansen*, 2002 UT 125, ¶ 48-49, 63 P.3d 650, 663 (Utah Supreme Court upheld a trial court's finding of consent where there were alternative interpretations to the facts presented). Here there is no alternative, given the testimony, to the fact that the machine was malfunctioning. According to the court, Randall's initial testimony was "absolutely conclusive that this machine was acting up[.]" R. 137: 128-27. Moore then testified that "[t]he paper feed sensor was out of align" meaning that the printer will stop and print over itself. R. 138: 158. The trial court should not have found that the machine was operating properly after having found that it was malfunctioning after only hearing Moore's testimony supporting that position.

In this case there is no alternative explanation to these facts, the machine was malfunctioning, and there is no reason to think the trial court would not find these testimonies credible, especially where it is the State's burden to prove the machine was functioning and it was their witnesses testifying that it was not. Dunlap asserts that this, unlike *Hansen* or *Vialpando*, is a situation where the facts are clear and the trial court simply exceeded its discretion. Therefore, this Court should substitute its judgment for the trial court's clearly erroneous finding.

II. RESULTS OF AN INTOXILYZER TEST CONSTITUTE A STATEMENT FOR THE PURPOSES OF HEARSAY UNDER RULE 801, THUS THE TRIAL COURT ERRED BY RULING THAT HEARSAY DID NOT APPLY

To be clear, Dunlap does not assert that if the Court finds that the intoxilyzer test results were admitted properly according to R.714-500 and the requirements of *Vialpando*, that it may still be excluded as hearsay. R.714-500 is a statutory exception to the hearsay rule so long as its requirements are met. If the test results meet those requirements then there are no hearsay problems. But, if the Court finds, as has been asserted above, that the State failed to meet the requirements of R.714-500 and *Vialpando*, evidence of the police officers' witnessing the digital readout of the intoxilyzer should not be allowed as eye-witness accounts of an event because such testimony violates hearsay. In other words, if the evidence is not admissible as reliable results of a properly performed test from a certified instrument, the statutory hearsay exception does not apply, and thus the evidence must be subject to a traditional hearsay review. Dunlap asserts that although Deputy Randall and Thompson saw the digital readout of the intoxilyzer machine they should not have been permitted to testify to what they saw because it is inadmissible hearsay and not merely an observation.

In its brief, the State claims that the trial court correctly ruled that the testimony regarding the breath test was not hearsay and defends that position by arguing that hearsay can only come from declarants. It cites to Rule 801(b) of the Utah Rules of Evidence arguing a declarant is a person who makes a statement, and the intoxilyzer machine is not a person and therefore cannot be a declarant. Appellee's Brief at 13-14. The State's argument is essentially the logical reverse of the argument in Dunlap's

opening brief. *See* Appellant's Brief at 15 (hearsay is an out of court statement offered to prove the proof thereof, statements are assertions, the results of the intoxilyzer test are assertions other than made by the declarant/witness while testifying at trial offered to prove the truth of the matter). "[W]hether a statute prevents the admission of evidence depends on its interpretation, and the trial court's interpretation of a statute presents a question of law." *Salt Lake v. Emerson*, 861 P.2d 443, 445 (Utah App. 1993). These conflicting arguments arise as a matter of statutory interpretation, as did the trial court's decision that, because the machine could not be cross-examined, the test results were not hearsay. R. 138: 203. As a matter of statutory interpretation, this Court reviews the trial court's ruling for correctness. This Court "accord[s] a lower court's statutory interpretations no particular deference but assess[es] them for correctness[.]" *Emerson*, 861 P.2d 443, 445.

A. Hearsay does not require a declarant/person.

As mentioned above, Dunlap and the State have different positions as to the meaning of the hearsay rule. Dunlap asserts that the key to this disagreement can be found in 801(c). "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The State focuses on the "other than one made by the declarant while testifying at the trial or hearing" and argues that this means hearsay may only come from a declarant. The State then looks to section (b) and finds that "[a] 'declarant' is a person who makes a statement" and argues that declarants are people and only therefore only

people can make statements. This logic is flawed and does not accurately reflect a careful reading of the text of the rule.

The word declarant in section (c) is defining a situation where a statement would not be hearsay rather than defining what hearsay is. In other words, hearsay is not a statement made by a declarant while testifying at trial (otherwise known as a witness), meaning that statements made by witnesses at trial are not hearsay. But in all other cases, statements offered in evidence to prove the truth of the matter asserted is hearsay. That is the limit of section (c). In order to further understand what hearsay is logic then directs one to ask what a statement is, rather than ask what a declarant is. Rule 801(a) defines statement as two distinct things. A statement is either "(1) an oral or written assertion" or "(2) nonverbal conduct of a person, if it is intended by the person as an assertion." The 'or' in this case is disjunctive and means that a statement can be one of the following, and need not be both. A statement can just be an oral or written assertion, period. The State has emphasized the word 'person' to suggest that a person is required in order to have a statement however the word 'person' in section (a) clearly only creates a requirement for the (2) 'nonverbal conduct' kind of statement and not the (1) 'assertion' kind of statement. Therefore, a statement does not require a person nor does hearsay require a declarant.

In spite of the clear language of the rule the State rejects Dunlap's claim that the intoxilyzer results constitute hearsay because it claims that "the hearsay rule governs statements made by persons, not digital readouts from machines." Appellee's Brief at 13. To support that position, the State cites three cases, all of which are from outside Utah,

and one of which deals with confrontation and not hearsay. First the State cites *People v. Buckner*, __ P.3d __, 2009 WL 3297587 (Colo. App. 2009) where the defendant was convicted of distribution of a controlled substance for selling crack cocaine to an undercover officer. The defendant objected to the introduction of his cellular telephone into evidence claiming that it contained information that was inadmissible as hearsay. *Buckner*, *2. The prosecutor admitted the "telephone to show that the defendant had spoken to the undercover officer who had arranged the drug sale" by showing the officer's phone number was stored in the defendant's phone. *Buckner*, *3. The court found that such "information involve[d] neither a 'declarant' not a 'statement' within the meaning of the rules barring hearsay." *Id.*

Dunlap would assert that the 'declarant' part of this decision suffers from the same loose reading of the hearsay rule as does the State's position but the mistake is less important in that case because, as the court ruled, there was no assertion made by listing a telephone number in a call log. Dunlap would distinguish his case from *Buckner* by noting that the result of the intoxilyzer test is much more of an assertion than the automatic appearance of a number in a phone's call log, and in the case of the test results, they are admitted to prove the truth of the matter asserted therein.

Next, the State cites *Bowe v. State*, 785 So.2d 531 (Fla. App. 2001) where the defendant appealed his conviction based on admission of caller I.D. information and pager messages. An informant sent a pager message to the defendant from a police phone line with a coded message inferring he wanted to buy cocaine and the defendant called back. *Bowe*, 785 So.2d at 532. At trial the court allowed the prosecutors to

introduce both the defendant's pager with the coded message and the police's caller I.D. containing the defendant's name and phone number. The Florida's Appeals Court, interpreting a very similar hearsay statute, ruled that "only statements made by persons fall within the definition of hearsay." *Bowe*, at 532. Interestingly enough, the language of that court's ruling displays the hole in this logic. It said "Subsection 90.801(1), Florida Statutes (2000), defines hearsay as *including* an out-of-court 'statement' of a declarant..." and "defines a 'declarant' as a 'person who makes a statement.'" *Id.* (emphasis added). While it is true that hearsay *includes* statements by declarants, according to the rule, declarants are only *required* for a statement if it is a nonverbal conduct type of statement. The courts use of the word "including" reveals the flaw in its reasoning.

On motion for rehearing the Florida court came closer to conforming to the hearsay statute when it denied Bowe's motion for rehearing by clarifying that the information in the pager was a statement, and the information in the caller I.D. may have been a statement (if intended as an assertion), but because the prosecution did not offer them to prove the truth of the matter asserted, namely that the informant wanted 40 dollars of cocaine or that the defendant's phone number was #######, but instead they were offered to "show that the recipient of the numerical message was the defendant, since the numbers appeared on his pager.

Again Dunlap would argue that the Florida court misinterpreted the statute and the language of its own decision demonstrates that. According to these statutes, a declarant/person is not a necessary ingredient for a statement nor is a declarant necessary

for hearsay. When courts interpret their rules in this way they do it with disregard for the plain language of the rules and ignore the potential for out-of-court assertions to be admitted, for their truth, without proper reliability protection.

Finally, the cites *Wimbish v. Commonwealth*, 658 S.E.2d 715, 719-20 (Va. App. 2008) where the Virginia Court of Appeals held that admission of the "Certificate of Blood Alcohol Analysis", which contained statements made by the officer performing the test and the test results created by the intoxilyzer machine, did not violate the Confrontation Clause. With regard to the test results (the statements of the intoxilyzer), the court ruled that they did not violate the Confrontation Clause because they were not 'testimonial' under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) because the results of the test were not statements made by a witness.

Dunlap concedes that the Virginia Court of Appeals found that the data produced by the intoxilyzer machine was not a "statement produced by a witness" but would distinguish that holding from this case because the court in *Wimbish* was ruling in the context of a Confrontation Clause claim based on the right to confront witnesses rather than interpreting a hearsay rule. While the hearsay rules are related to the right of confrontation, confrontation is a more specific rule, explicitly requiring a 'witness', where hearsay more broadly deals with statements. U.S. CONST. amend. VI.

Rather than focusing on the cases of other jurisdictions, Dunlap asserts that the Court would be well served by considering what the alleged statement in this case is and what its context was in the State's case at trial. The assertion/statement is essentially that "Dunlap's BAC was .180 at the time he was tested." This statement was delivered at trial

through Randall and Thompson. R. 138: 187, 190. If asked "how do you know Dunlap's BAC was .180" these witnesses must answer "because that is what the machine said" or more precisely "that is what the digital readout on the machine said" or "that is what was written on the digital screen of the machine." To argue about the language used to describe how the machine communicates information is to miss the point of what is actually happening. Instead, Dunlap encourages this Court to consider what happens the meaning of the information on the digital readout.

Imagine if, instead of having intoxilyzer machines, in order to test a suspect's BAC the police hired a chemist who would take breath sample and perform the test exactly like the intoxilyzer but without the aid of a machine. Imagine the chemist directed infrared light through the breath sample and measured the amount of light absorbed by the alcohol in the sample.[1] If, after the chemist had reached conclusion based on the test, he told the police "this guy's BAC is .180" his comment would no doubt be considered a statement. It would be an oral assertion of fact. The same would be true if, instead of answering out loud when asked for the results, the chemist typed ".180" on to his computer and showed the police, except it would be a written assertion. Either way, the result of the test communicated to the police is an assertion, alleging that a certain fact exists based on an analysis.

Dunlap asserts that the chemist's assertions are exactly like the digital readout of the intoxilyzer. The digital readout is also, therefore, a statement, specifically a statement in response to a request made by the police asking, "what is this guy's BAC?" The

[1] See Infrared Spectrometry (IR) Breath Analysis, http://alcoholtest.com/ir.htm.

digital readout statement of the intoxilyzer should function just like the oral or written statements by the chemist, as far as the hearsay rule is concerned. The fact that a person makes the assertion does not make it more of an assertion than if it was made by a machine performing the same task. What the intoxilyzer and the chemist 'say' at the end of the test are both assertions and both statements for the purposes of hearsay.

If the police acted as witnesses at trial and testified that a chemist told them "this guy's BAC is .180" there would most certainly be a sustained objection as to hearsay. But, according to the trial court, not because it would be a "statement, other than one made by the witness at trial, offered to prove the truth of the matter asserted," but because the chemist could be cross-examined. *See* R. 139: 203 ("I don't find it as hearsay. I don't see it as an out of court declaration, even if we had the machine here. I think I'm a pretty good cross-examiner. I don't think I could cross examine that machine."). The trial court used the wrong test. When considering whether the evidence was hearsay the court should have asked (1) was it a written or oral assertion, (2) is it from a source other than a declarant at trial, and (3) is it offered to prove the truth of the matter asserted. This test conforms to the rule and does not use flawed logic to superimpose a person upon the definition of statement. Furthermore, this test for determining hearsay extends the reliability protections provided by the hearsay rule to statements made by non-persons.

B. This Court has characterized breath test results as hearsay.

In its brief, the State has been critical of Dunlap's use of two Utah cases where this Court analyzed the admission of breath alcohol test results according to the rules of hearsay. *See* Appellee's Brief at 14 fn 4. The more substantive of the two cases is *Kehl v.*

Schwendiman, 735 P.2d 413 (Utah App. 1987) where this Court reviewed an administrative suspension of the defendant's driver's license. The State has called Dunlap's reliance on *Kehl* "misplaced" because the State claims it only stands for "the proposition that breath tests results are admissible so long as the State lays a sufficient foundation by introducing an affidavit or other evidence establishing that the breath test instrument was properly maintained and the test was administered by a qualified operator." Appellee's Brief at 14 fn 4 (*citing Kehl*, 416-17). Presumably it bases its argument on the language of the case where the Court noted "[i]nasmuch as Utah Code Ann. § 41-6-44.3 (1983) allows affidavits to establish the necessary foundation for breathalyzer evidence, it is less restrictive than the business records exception to the hearsay rule... [t]herefore, we examine the Department's position under" the administrative rule. *Kehl*, at 416.

In *Kehl* the district court had reversed the administrative suspension and the Department of Public Safety was appealing that order. The Department claimed that the "operational checklist and the breathalyzer test result [were] admissible as public records." *Kehl*, 735 P.2d at 416. This Court found these to be "reports of a public agency" and as such analyzed the admission of the breathalyzer results under the public records exception to the hearsay rule. *Kehl*, at 416. The Court found that because the officer was not shown to be qualified to administer the test nor was it shown that the machine was properly calibrated the hearsay exception was not satisfied ("Consequently, neither report is admissible as a public record"). *Kehl*, at 417. When the Department tried to admit the test results through DUI report of the officer who performed the test and

observed the machine this Court characterized that attempt as trying to admit "double-hearsay... through the back door[.]" *Kehl*, at 417.[2] This Court clearly put the admission of the results of a breath test in terms of hearsay where the Department attempted to admit the assertion of the breathalyzer though the observation of the officer.

The State is correct that the holding in *Kehl* is based on the Department's failure to produce a sufficient foundation for the reliability of the machine and the administration of the test but this Court did not limit its review to foundation. Not only were the test results inadmissible for a lack of proper maintenance foundation but secondarily as a violation of hearsay. The Department in *Kehl* also tried to introduce the test results through a written report of the officer based on the officer's observation rather than admitting the test results directly. These facts make *Kehl*, incredibly similar to this case. Just as in *Kehl*, where the State failed to meet the foundational requirements enacted by the legislature designed to ensure that breath test results are accurate, the State tried to introduce the test result evidence through the officer's observation of the machine. In accordance with *Kehl* the evidence must satisfy an exception in the hearsay rule or a statutory exception; here the test result evidence did not satisfy either. *See Murray City v. Hall*, 663 P.2d at 1321 (the foundational requirements of U.C.A. § 41-6-44.3 (1983) are

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[2] "Section X of the DUI Report form is entitled 'Chemical Tests.' This Section requires the arresting officer to record the results of the breathalyzer test. However, we have previously found the test result in this case unreliable. To allow the double-hearsay, ultimate conclusion of the breathalyzer test in through the back door without the foundational affidavits required under Utah Code Ann. § 41-6-44.3 (1983), would violate the spirit of *Murray City v. Hall*, 663 P.2d 1314 (Utah 1983)." *Kehl*, 735 P.2d at 417. The two levels of hearsay are the written assertion of the BAC level made by the police officer on the form and the assertion of the BAC level made by the machine from which the officer gets his information. Thus the machine is making an assertion.

merely a statutory exception to the hearsay rule); *see also* Utah R. Evid 802 ("Hearsay is not admissible *except as provided by law* or by these rules") (emphasis added).

C. The trial court's statutory interpretation was erroneous.

As we see in *Kehl,* Utah has recognized that the results of a breath test machine are subject to the hearsay rule and without an exception, either in the rule or designated by statute, may not be admitted as evidence. When the trial court ruled that the test results were not hearsay because the intoxilyzer could not be cross-examined it made an error based on an incorrect statutory interpretation. The trial court's interpretation of the hearsay statute is subject to a review for correctness with no particular deference as found in *State v. Emerson*, 861 P.2d 443, 444 (citing *Ward v. Richfield*, 798 P.2d 757, 759 (Utah 1990). That this error was harmful and, therefore reversible, will be discussed in the last section.

Because the State failed to introduce the intoxilyzer evidence under the conditions set forth in R.714-500, as a statutory exception to hearsay, the evidence should have been excluded by the hearsay rule unless another exception applied. Because the evidence does not satisfy the business records or public records exceptions, or any other exception to the hearsay rule, the intoxilyzer test results should have been excluded. The evidence was introduced as out of court statements offered to prove the truth of the matter asserted with no reliability protection or assurance of trustworthiness. As such the evidence violated the hearsay rule. The trial court committed error by admitting the evidence over Dunlap's objections and should be reversed.

III. DUNLAP'S GENERAL CHALLENGE TO THE INTOXILYZER TEST PRESERVED THE ISSUE OF INSUFFICIENT SAMPLE

The State argues that because failed to specifically object to admission of the intoxilyzer test results on the basis of an insufficient sample the objection was not preserved. Appellee's Brief at 14. Dunlap agrees that neither the written motion nor oral objections at trial specifically identify the insufficient sample as an independent basis for the objection. As mentioned in the State's brief, Dunlap objected to introduction of the intoxilyzer test result during direct examination of Deputy Randall. R. 137: 102. Dunlap objected after the following exchange. Counsel for the State asked: "It didn't have enough of a sample?" Deputy Randall then replied: "No. It went with the amount of air that he had actually exhaled in the machine and registered a .180." R. 137: 102. The State alleges that "[a] review of the record... demonstrates that the objections were based on Defendant's pretrial motion claiming that the Intoxilyzer was not working properly due to a printer malfunction" and that after the State laid further foundation the results were admitted. Appellee's Brief at 13. Dunlap disagrees. Although not specifically preserved in the written motion or in the oral objection at trial, in context of the testimony directly related insufficient sample Dunlap's objection arguably preserved this issue.

In general Dunlap was objecting to the admission of the intoxilyzer evidence on the basis that the State had not, and could not, lay the proper foundation as required by *Vialpando*, which includes not only evidence that the machine was operating and maintained properly but also that the test was performed properly. *Vialpando*, ¶ 14. After

Dunlap's objection was sustained (R. 137: 102) the State proceeded to introduce foundation evidence related to the operation of the machine through Gaylin Moore. R. 138: 142-82. After hearing Moore's testimony the trial court presumably found that the machine was operating properly, despite the broken printer, because the State was then allowed to admit testimony of the test results through Officer Thompson and Deputy Randall over Dunlap's repeated and unspecified objection. R. 138: 187.

The question is whether Dunlap's general objection to the introduction of the intoxilyzer evidence sufficiently raised the issue for appeal or whether Dunlap is prevented from arguing the failure to administer the test properly. According to *State v. Brown*, 856 P.2d 358, 361 (Utah App. 1993), in order "for an issue to be sufficiently raised, even if indirectly, it must at least be raised to a level of consciousness such that the trial judge can consider it." (internal citations omitted); *see also State v. Schultz*, 2002 UT App 366, ¶ 19, 58 P.3d 879. Dunlap asserts that his objection to the introduction of the evidence immediately following the testimony that samples were insufficient raised the issue of proper administration to the trial court's consciousness. The court should have been aware that it must find that the test was performed properly, it was aware that Dunlap was contesting the State's admission of the test results, and it was aware that Dunlap objected to the test results immediately following testimony about insufficient samples.

Dunlap asserts that his objections gave the trial court sufficient notice, opportunity and obligation to make findings of fact and conclusions of law with respect to the admissibility of the intoxilyzer test results in all three of the required areas, (1) that the

machine was properly checked and working, (2) the test was properly administered, and (3) 15 minute observation period before the test, before admitting the evidence. *Vialpando*, ¶ 14. Either the trial court found as a matter of law that the test need not have been administered properly, which prompts review for correctness, or the court found as a matter of fact that the test was administered correctly, despite uncontested testimony to the contrary, which prompts an abuse of discretion. The trial court abused its discretion by finding the test was administered correctly after hearing undisputed evidence that Dunlap never provided a sufficient sample. In either case Dunlap alleges the trial court erred and asks this Court to find error for failing to require the proper foundation before admitting the intoxilyzer test results.

IV. ADMISSION OF THE INTOXILYZER TEST RESULTS WAS NOT A HARMLESS ERROR

The State alleges that "any error admitting the BAC was harmless" because evidence that Dunlap was seen stopped in his truck facing oncoming traffic, he drove across two lanes of traffic, he backed his truck off the road, he smelled of alcohol, acted belligerently, was found lying on the ground, admitted to drinking a beer, tested positive for some alcohol on a portable breath test, his eyes were red, his speech was slurred, he urinated his pants, and had trouble standing. Appellee's Brief at 16-17. The State calls this "overwhelming" evidence that Dunlap was incapable of safely operating his vehicle due to intoxication. Appellee's Brief at 16 (citing R. 114). Dunlap disagrees and points to relevant and factually similar case law to contradict the State's position.

In order to avoid rehashing matters discussed in the earlier brief Dunlap would merely again encourage the Court to review *State v. Kinne*, 2001 UT App 373, and recall that the Court upheld a trial court's denial of a motion to reconsider where the State failed to provide sufficient evidence to establish probable cause to believe that the defendant was under the influence of alcohol to a degree that rendered him incapable of safely operating a vehicle with very similar facts to this case. See Appellant's Brief at 19. Here the standard is even lower. The Court need only find that the errors below were not inconsequential and may have affected the outcome of the proceedings. While some evidence of Dunlap's incapacity was admitted at trial, Dunlap reminds the Court that there was not a valid set of field sobriety tests administered, nor a valid portable breath test result, there was no driving pattern observed other than being parked in the road, and the police presented none of the traditional direct evidence of incapacity. Dunlap admits that there is anecdotal evidence of incapacity and it is not inconceivable that a jury could have found him guilty without the BAC evidence, however, the amount and type of alternative evidence presented by the State did not rise to the level that made the BAC evidence inconsequential. Clearly the invalid intoxilyzer results played a significant role in the trial and cannot be characterized as inconsequential when compared to the rest of the evidence presented.

Dunlap asserts that it is at least reasonably likely that, had the intoxilyzer test results been excluded, the outcome of his trial may have been more favorable. Because his conviction was based primarily upon the BAC evidence, and because the remainder of the evidence showing incapacity could arguably be explained in other ways, Dunlap

adamantly asserts that the admission of the BAC evidence was not inconsequential. Dunlap need not show that had the BAC evidence been properly excluded that he would have been acquitted. Instead, Dunlap asserts that he has met his burden on the harmfulness issue by the fact that it is not unreasonable to suggest that an elderly man who suffers from illness and infirmity may have been acquitted on a DUI charge with evidence of driving off the road, acting belligerent, having trouble walking, urinating his pants and being alternatively cooperative and uncooperative with the police. These facts support Dunlap's claim that the alternative evidence was not overwhelming and therefore the intoxilyzer evidence was not inconsequential making the error harmful.

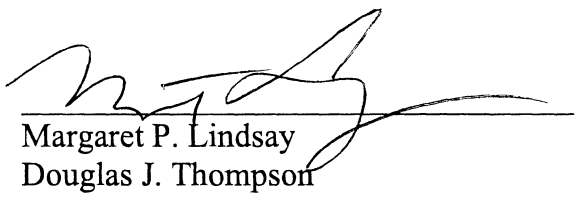
CONCLUSION AND PRECISE RELIEF SOUGHT

The results of the intoxilyzer test were admitted improperly according to R.714-500 because the machine was malfunctioning, the printed results were not presented or even created, and the test was not administered properly. The trial court erred by allowing the State to admit the BAC evidence. In the event that the trial court admitted the police officers' testimony of the intoxilyzer results merely as an eyewitness account of the digital readout, rather than as reliable test results according to R.714-500, the trial court erred and abused its discretion by denying Dunlap's objections to hearsay because the evidence was derived from out-of-court assertions of facts offered to prove the truth of the assertion.

These errors and abuse of discretion constituted harmful error because admission of the intoxilyzer test results was a significant factor at trial. The proper exclusion of the test results would have created a reasonable likelihood of a more favorable result for

Dunlap. Accordingly, Dunlap asks this Court to reverse his conviction and remand this case to the District Court for further proceedings with instructions for the exclusion of the intoxilyzer test results.

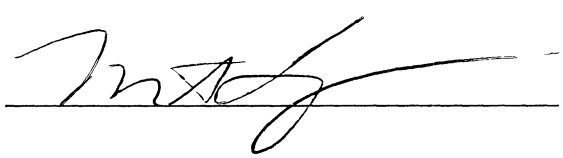
RESPECTFULLY SUBMITTED this 3 day of March, 2010.



Margaret P. Lindsay
Douglas J. Thompson
Counsel for Appellant

CERTIFICATE OF MAILING

I hereby certify that I delivered two (2) true and accurate copies of the foregoing Reply Brief of Appellant to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114-0854, this 3 day of March, 2010.



ADDENDA

- Note from Sergeant Michael Irvine, Representative for the Commissioner of Public Safety and Director of the Intoxilyzer Certification Program

- Standard Operating Procedures for Alcohol Technicians

GARY HERBERT
Governor

GREG BELL
Lieutenant Governor

Utah Highway Patrol
COLONEL DANIEL FUHR
Superintendent

February 1, 2010

To Whom It may concern:

In accordance to rule 714-500-6- D this is the Standard Operating Procedures for the 40-day calibration check done by the Alcohol Technicians.

Sincerely

Sergeant Michael Irvine
Representative for the
Commissioner of Public Safety
Utah of Utah

Operating Procedures:

The Alcohol Technician will complete the following during Instrument Certification

Certification Report Line 10, Simulator Solution:

- Check solution lot number and expiration date.

Certification Report Line 1, Electrical Power Check:

- Take steps to reach the "Push Button to Start Test" (5000) or "Ready Mode" (8000) confirming that the electrical power system is functioning properly.
  * If the Intoxilyzer does not pass, attempt repairs or remove it from service.

Certification Report Line 2, Internal Temperature Check:

- When Intoxilyzer display reads "Push Button To Start Test" (5000) or Ready Mode" (8000) this confirms that the internal temperature is at standard.
  * If the Intoxilyzer does not pass, attempt repairs or remove it from service.

Certification Report Line 6 Diagnostic Check: (and)
Certification Report Line 4, Internal Calibration Check:

- Begin a diagnostic check and verify the results all display "Passed (5000) or "Pass (8000).
  * If the Intoxilyzer does not pass, attempt repairs or remove it from service.

Certification Report Line 8, Reference Sample Check:

- Using a wet-bath simulator
  * Run a series of three known reference sample checks. Results within 5% or 0.005 of the target value, whichever is greater, indicate that the Intoxilyzer has passed.
  * If results are outside of 5% or 0.005, check the simulator and repeat checks.
  * If results remain outside the 5% or 0.005, replace the solution and repeat checks.
  * If results remain outside the 5% or 0.005, utilize a second wet-bath simulator.
  * If the Intoxilyzer does not pass, remove it from service.

Certification Report Line 9, Printout Verification Check:

- Verify the Intoxilyzer gives readings in grams of alcohol per 210 liters of breath on the printout.

Certification Report Line 3, Internal Purge Check:

- Ensure the Intoxilyzer begins a test routine by drawing an air blank and purging the system.
  * If the Intoxilyzer does not pass, attempt repairs or remove it from service.

Certification Report Line 5, Invalid Test Check:

- While in the air blank mode, press the Start Test button. Verify the display reads "Invalid Test" (5000) or "Sequence Aborted" (8000), discontinues the test and prints "Invalid Test".
  * If the Intoxilyzer does not pass, attempt repairs or remove it from service.

Certification Report Line 7, Exemption Checks:

- Perform the following Exception checks:
  * Blow into the Intoxilyzer at the wrong time to verify it will detect a sample introduced at an improper time.
  * Hold a solution containing ethanol near the breath sample tube during an air blank cycle to verify the Intoxilyzer will detect ambient alcohol vapor.
  * During a test routine. Place a small amount of an ethanol solution in the mouth. When the Intoxilyzer reads "Please Blow". Verify that the slope detector functions properly.
  * If the Intoxilyzer does not pass, attempt repairs or remove it from service.

Certification Report Line 11, Final Results:

- Complete and submit Certification Report.

Revised 10/2008