

2010

The State of Utah v. Randall Matthew Relyea : Brief of Appellant

Utah Court of Appeals

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Case No. 20100077-CA

IN THE
UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellant,

vs.

RANDALL MATTHEW RELYEA,
Defendant/Appellee.

Brief of Appellant

Appeal from an interlocutory order granting a motion to exclude
Intoxilyzer results in the Fourth Judicial District Court of Utah,
Utah County, the Honorable Samuel D. McVey presiding

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Oral Argument Requested

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF JURISDICTION	1
STATEMENT OF THE ISSUES.....	1
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES	3
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	5
SUMMARY OF ARGUMENT	7
ARGUMENT.....	9
I. THE FOUNDATIONAL REQUIREMENT OF <u>BAKER</u> RULE COMPLIANCE FOR ADMISSION OF BREATHALYZER RESULTS SHOULD NOT APPLY FOR ADMISSION OF RESULTS FROM THE INTOXILYZER 8000.....	9
A. Utah law requires that tests measuring breath alcohol concentration measure deep lung air.....	10
B. Breathalyzer tests were susceptible to taint from mouth alcohol unless the <i>Baker</i> rule was followed.....	11
C. The Intoxilyzer 8000 recognizes the presence of mouth alcohol and aborts testing when it is detected.....	13
D. The State established the foundation necessary to admit the test results from the Intoxilyzer 8000.	15
II. IN ANY EVENT, THE OFFICER COMPLIED WITH THE <u>BAKER</u> RULE.....	17
CONCLUSION	21

ADDENDA

- Addendum A: Relevant statutory provisions and regulatory rules
- Addendum B: Ruling and Order on Defendant's Motion to Suppress Intoxilyzer Results
- Addendum C: Findings of Fact, Conclusions of Law, and Order

TABLE OF AUTHORITIES

STATE CASES

<i>Baker v. Schwendiman</i> , 714 P.2d 675 (Utah 1986).....	13
<i>People v. Bowers</i> , 716 P.2d 471 (Colo. 1986).....	16
<i>People v. McNeal</i> , 210 P.3d 420 (Cal. 2009).....	10, 11
<i>Powell v. Cox</i> , 608 P.2d 239 (Utah 1980).....	1, 10
<i>Salt Lake City v. Womack</i> , 747 P.2d 1039 (Utah 1987).....	2, 9
<i>State v. Baker</i> , 355 P.2d 806 (Wash. 1960).....	2, 9, 11, 12
<i>State v. Carson</i> , 988 P.2d 225 (Ida. App. 1999).....	18
<i>State v. Charan</i> , 971 P.2d 1165 (Ida. App. 1999).....	16, 17
<i>State v. Vialpando</i> , 2004 UT App 95, 89 P.3d 209.....	<i>passim</i>

STATE STATUTES AND RULES

Utah Admin. Code R714-500 (2008).....	1, 3, 10, 13
Utah Code Ann. § 41-6a-502 (West Supp. 2005).....	3, 10
Utah Code Ann. § 41-6a-515 (West Supp. 2005).....	3
Utah Code Ann. § 41-6a-516 (West Supp. 2005).....	3
Utah Code Ann. § 77-18a-1 (West Supp. 2010).....	1
Utah Code Ann. § 78A-4-103 (West 2009).....	1

SECONDARY AUTHORITY

<i>Breath Testing for Prosecutors</i> , Am. Pros. Res. Inst. (APRI), (Dec. 2004).....	11
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IN THE
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STATE OF UTAH,
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Brief of Appellant

STATEMENT OF JURISDICTION

The State appeals from an interlocutory order granting a motion to suppress Intoxilyzer results. This Court has jurisdiction under Utah Code Ann. § 77-18a-1(4) (West Supp. 2010), and Utah Code Ann. § 78A-4-103(2)(d) (West 2009).

STATEMENT OF THE ISSUES

Introduction. When testing a DUI suspect for his or her breath alcohol concentration (BrAC), the breath specimen analyzed must consist of alveolar, or “deep lung,” air. See Utah Admin. Code R714-500-6(A)(3) (2008); *Powell v. Cox*, 608 P.2d 239, 241 (Utah 1980). Older breath testing instruments – such as the Breathalyzer – measured the alcohol concentration of a breath sample, even if it was contaminated by residual alcohol in a subject’s mouth (“mouth alcohol”).

Accordingly, "to ensure a reliable breathalyzer result" of deep lung air, Utah courts have required that the test subject be "kept under observation for at least fifteen minutes prior to the test to insure that he has not ingested anything and to allow any alcohol present in the mouth to be absorbed." *Salt Lake City v. Womack*, 747 P.2d 1039, 1041 (Utah 1987). This 15-minute observation requirement was first articulated in *State v. Baker*, 355 P.2d 806 (Wash. 1960), and is commonly referred to as the "*Baker* rule."

The questions presented are:

1. Should compliance with the *Baker* rule be required as a foundational prerequisite for admission of evidence from an Intoxilyzer 8000, where, unlike the Breathalyzer, the Intoxilyzer 8000 has a built-in mechanism to identify mouth alcohol and abort testing when it is detected?

2. Assuming, arguendo, that *Baker* rule compliance is required for admission of Intoxilyzer results, did the officer comply with that rule?

Preservation. The issues were preserved in the State's Memorandum in Opposition to Motion to Suppress Intoxilyzer Results, filed June 1, 2009, R. 63-59, the Plaintiff's Notice of Intent to Appeal and Motion for Leave to Supplement the Record, filed July 16, 2009, R.93-91; the hearings held on June 15, 2009, R.153, August 10, 2009, R.155, and November 9, 2009, R.156; and in the trial court's order dated January 6, 2010, R.141-132.

Standard of Review. This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. See *State v. Vialpando*, 2004 UT App 95, ¶8, 89 P.3d 209.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following statutory provisions and administrative rules are reproduced in Addendum A: Utah Code Ann. § 41-6a-502 (West Supp. 2005); Utah Code Ann. § 41-6a-515 (West Supp. 2005); Utah Code Ann. § 41-6a-516 (West Supp. 2005); and Utah Admin. Code R714-500 (2008).

STATEMENT OF THE CASE

After Intoxilyzer results revealed a breath alcohol concentration (BrAC) of .237 following a traffic stop, Defendant was charged with (1) driving under the influence of alcohol, a third degree felony; (2) operating a vehicle with a measurable amount of alcohol in the body as an alcohol-restricted driver, a class B misdemeanor; (3) driving on a suspended license, a class B misdemeanor; and (4) assault, a class B misdemeanor. R.2-1, 12. A magistrate thereafter held a preliminary hearing and bound Defendant over to stand trial in the district court on all charges. R.49.

Defendant moved to suppress the Intoxilyzer results on the ground that the arresting officer did not comply with the *Baker* rule. R.55-52. In a memorandum decision following an evidentiary hearing, the trial court found

that the officers did not comply with the *Baker* rule and concluded that the Intoxilyzer results were thus inadmissible at trial for lack of foundation. See R.82-78 (Addendum B). Arguing that *Baker* rule compliance is unnecessary to establish foundation for Intoxilyzer results, the State moved for a second evidentiary hearing to supplement the record with expert testimony on the differences between the Intoxilyzer 8000 and Breathalyzer. See R.93-91, 112-09. The trial court granted a second hearing and agreed to reconsider its pretrial ruling excluding the Intoxilyzer results. See R.115-14; R.155; R.156:11.

After taking additional evidence, the trial court entered Findings of Fact, Conclusions of Law, and [an] Order affirming its original ruling excluding the Intoxilyzer results. R.141-32 (Addendum C). The court noted that the *Baker* rule was imposed to ensure deep lung air readings from the outdated Breathalyzer instrument. See R.136-35:¶¶24-25; R.133-32:¶3. It also acknowledged that “the Intoxilyzer 8000 is based on infrared technology and specifically designed to disallow a test where mouth alcohol is detected.” R.132:¶4. The court ruled, however, that it was “bound by the holding” in *State v. Vialpando*, 2004 UT App 95, ¶ 14, 89 P.3d 209, which extended the *Baker* rule to Intoxilyzer tests. R.132:¶¶4-5. This Court granted the State’s petition for petition for permission to appeal the trial court’s interlocutory order. See 150-49. The trial court stayed the trial proceedings pending disposition of this appeal. R.151.

STATEMENT OF FACTS¹

In the afternoon of November 18, 2008, Officer Jeremy Leonard activated his overhead lights to initiate a stop of Defendant to investigate a report of intoxication and domestic violence. R.140-39:¶¶1-3,5 (R.152:5-6,10,12). Defendant did not immediately pull over, but proceeded some seven blocks until he turned into a liquor store parking lot and stopped. R.140:¶3 (R.152:6). When he stopped, however, he failed to put the car in park and it began to roll backwards when he got out of the car. *See* R.139:¶4 (R.152:7). Officer Leonard yelled at Defendant, alerting him to the situation, and Defendant was able to stop the car before it rolled into the officer's patrol car. *See* R.139:¶5 (R.152:7).

While speaking with Defendant, Officer Leonard smelled alcohol on Defendant's breath and noticed that his eyes were bloodshot and his speech slow and slurred. R.139:¶6 (R.152:7-8). Defendant, however, denied that he had been drinking. R.139:¶6 (R.152:8). Officer Leonard administered field sobriety tests, and Defendant failed them all. *See* R.139:¶7 (R.152:8). Officer Leonard concluded that Defendant was too impaired to safely drive and asked Officer

¹ The facts are taken from the trial court's factual findings, which were based on evidence taken at the preliminary hearing, R.152, and the evidentiary hearings held on June 15, 2009, R.153, and August 10, 2009, R.155. Citation to the trial court's factual findings includes the paragraph number where the finding appears, e.g., R.140:¶1. Citation to other parts of the record appears in parentheses.

Nathan Brimhall, who had arrived as backup, to place Defendant under arrest.

R.139:¶8 (R.152:8-9,11-12).

After Defendant was arrested and handcuffed, the two officers checked his mouth for foreign substances and found chewing tobacco. R.139:¶9 (R.152:16; R.155:15-16,18). The officers cleared Defendant's mouth of the tobacco and logged with dispatch the *Baker* time at 3:07 p.m. R.139:¶9 (R.152:16-17,19; R.155:15,17-18). Thereafter, Officer Brimhall escorted Defendant to his patrol car and transported him to the police station, which was about six blocks away. R.139:10 (R.152:17,19).

During the ride to the station, Officer Brimhall maintained visual observation of Defendant through his rear view mirror. R.139-38:¶¶10,12 (R.152:17,19-20). He did not see Defendant put anything into his mouth, but admitted that he would not have been able to notice whether Defendant burped or regurgitated. R.139-38:¶10 (R.152:19-20; R.155:19). Defendant later testified that he suffers from gastroesophageal reflux disease, which is aggravated by drinking alcohol, and that during the ride "he regurgitated into his throat and then quickly swallowed it down." R.138:¶11 (R.153:5-8).

When they arrived at the police station at 3:12 p.m., Officer Brimhall escorted Defendant to the Intoxilyzer room. R.138:¶12 (R.152:17; R.155:15,18). Officer Brimhall — a certified Intoxilyzer operator — then readied the Intoxilyzer

8000 for testing, following the required protocol for ensuring a valid test. R.138:¶13 (R.152:21). As he did so, he kept Defendant under observation and did not hear him burp or regurgitate. R.138:¶14 (R.155:16,23-24). At 3:28 p.m. — 16 minutes after arriving at the station and 21 minutes after clearing Defendant's mouth — Officer Brimhall administered the Intoxilyzer test to Defendant. R.139-38:¶¶9,12,15 (R.155:16-17).

“The Intoxilyzer 8000 used ... in this case was duly certified as operating properly before and after [Defendant's] breath test.” R.136:¶22; State Exhs. B, C, & D. Unlike the outdated Breathalyzer, the Intoxilyzer 8000 is equipped with a “slope detector” that identifies the presence of mouth alcohol that might taint the alcohol analysis of deep lung air. R.136:¶24; R.134:¶30. The Intoxilyzer 8000 aborts testing when mouth alcohol is detected. R.134:¶30. Trooper James Brierley, the State's expert on the Intoxilyzer, testified that “had alcohol been in [Defendant's] mouth as a result of regurgitation, ... the Intoxilyzer would have detected the alcohol and disallowed the test.” R.133:¶33 (R.155:54). It did not. Instead, the Intoxilyzer registered a result indicating that Defendant's BrAC was .237. R.138:¶15 (R.152:18,23); State Exh. A.

SUMMARY OF ARGUMENT

Relying on *State v. Vialpando*, 2004 UT App 95, 89 P.3d 209, the trial court ruled that the State failed to establish a proper foundation for admission of the

Intoxilyzer results, because it did not demonstrate that the officer complied with the *Baker* rule. But the *Baker* rule was imposed as a foundational requirement for Breathalyzers, which cannot distinguish between alcohol from deep lung air and mouth alcohol. *Baker* rule compliance ensures a reliable Breathalyzer analysis of deep lung air. Unlike the Breathalyzer, the Intoxilyzer 8000 has a "slope detector" that recognizes mouth alcohol and aborts testing if it is detected. Accordingly, *Baker* rule compliance is not necessary to ensure a reliable Intoxilyzer test of deep lung air. As such, compliance with the *Baker* rule should not be a foundational prerequisite for admission of Intoxilyzer 8000 test results.

In any event, the arresting officer in this case complied with the *Baker* rule. After handcuffing Defendant, officers cleared his mouth of all foreign objects and Defendant remained handcuffed through administration of the Intoxilyzer test 21 minutes later. He was thus prevented from putting anything in his mouth "from the outside" during that 21-minute period. Although the officer could not tell whether Defendant burped or regurgitated during the five-minute ride to the police station, he kept Defendant under continual observation during the ensuing 16 minutes and did not hear Defendant burp or regurgitate Defendant. This satisfied the *Baker* rule.

ARGUMENT

I.

THE FOUNDATIONAL REQUIREMENT OF BAKER RULE COMPLIANCE FOR ADMISSION OF BREATHALYZER RESULTS SHOULD NOT APPLY FOR ADMISSION OF RESULTS FROM THE INTOXILYZER 8000

State v. Baker, 355 P.2d 806 (Wash. 1960), was one of the first cases in the country to address the admissibility of breath test results from the Breathalyzer. The Washington Supreme Court held that for Breathalyzer results to be admissible at trial, the State must demonstrate that “the [test] subject had nothing in his mouth at the time of the test and that he had taken no food or drink within fifteen minutes prior to taking the test.” *Baker*, 355 P.2d at 809-10. The purpose of the *Baker* rule is to ensure that the BrAC result represents a reliable measure of alcohol in deep lung air, untainted by “any alcoholic liquor remaining in the mouth.” *Id.* at 812.

Utah adopted the *Baker* rule as a foundational requirement for admission of Breathalyzer results in *Salt Lake City v. Womack*, 747 P.2d 1039 (Utah 1987). In 2004, this Court extended the *Baker* rule to Intoxilyzer results:

To ensure that the results of an intoxilyzer test are reliable, the State must present evidence, inter alia, that ... 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.

State v. Vialpando, 2004 UT App 95, ¶ 14, 89 P.3d 209. But as explained by the State's expert witness below, *Baker* rule compliance is not required to ensure the reliability of test results from the Intoxilyzer 8000, because unlike the Breathalyzer, the Intoxilyzer 8000 recognizes the presence of mouth alcohol and aborts testing when it is detected. This Court should thus reverse the trial court's ruling below.

A. Utah law requires that tests measuring breath alcohol concentration measure deep lung air.

Under Utah law, a person is guilty of driving under the influence of alcohol if he or she operates or is in actual physical control of a vehicle and "has a blood or breath alcohol concentration of .08 grams or greater." Utah Code Ann. § 41-6a-502(1) (West Supp. 2005). As noted, *supra*, at 1, the breath specimen analyzed must consist of deep lung air. *See* Utah Admin. Code R714-500-6(A)(3) (2008); *Powell*, 608 P.2d at 241. Alveolar, or deep lung, air consists of the respiratory gases in "the pulmonary alveoli and alveolar sacs [of the lungs], where the oxygen-carbon dioxide exchange with pulmonary capillary blood occurs." The American Heritage Medical Dictionary (Houghton Mifflin Co. 2007), located at <http://medical-dictionary.thefreedictionary.com/alveolar+gas>.

When alcohol is consumed, "it is absorbed into the blood and carried through the carotid arteries to the brain." *People v. McNeal*, 210 P.3d 420, 424 (Cal. 2009). The alcohol then "travels through venous blood to the liver and

heart, and from there, to the lungs, where it diffuses into alveolar air space and is exhaled in the breath." *Id.* Science is unable to determine the amount of alcohol in the carotid arteries and brain. *Id.* "However, most experts agree that measurements of alcohol in venous blood or [alveolar] breath give a good indication of the amount of alcohol in the brain during the post-absorptive phase." *Id.*; accord *Baker*, 355 P.2d at 812 (recognizing that alcohol concentration of deep lung air generally "reflect[s] the alcohol concentration of the blood circulating through the lungs") (quoting Robert L. Donigan, *Chemical Tests and the Law*, Traffic Inst., Northwestern Univ, 1957, p. 173).²

B. Breathalyzer tests were susceptible to taint from mouth alcohol unless the *Baker* rule was followed.

The Breathalyzer, invented by Dr. Robert Borckenstein in 1954, was "the first truly practical breath-testing instrument" for use by law enforcement. *Breath Testing for Prosecutors*, Am. Pros. Res. Inst. (APRI), 4 (Dec. 2004). When a subject blew into a Breathalyzer, a piston forced the breath sample into an ampoule containing "a solution of sulfuric acid and potassium dichromate." R.136:¶23 (R.155:33-35). If alcohol was present in the breath, the solution would

² "The conversion from breath alcohol to blood alcohol is based on the chemistry principle of 'Henry's law,' which holds that there is 'a constant ratio between the concentration of alcohol in the blood and the concentration of alcohol in the alveolar air of the lungs.'" *McNeal*, 210 P.3d at 424 (Cal. 2009) (quoting Taylor & Tayac, *Cal. Drunk Driving Defense* (4th ed. 2008), *Forensic Chemist: Blood-Alcohol*, § 12.19, p. 770.)

lose some of its original color – “[t]he higher the concentration of breath alcohol, the more color [was] lost.” R.136:¶23 (R.155:33-35). The Breathalyzer then determined the subject’s BrAC by measuring the amount of light passing through the test solution against the amount of light passing through a control solution that had not been subjected to the breath sample. R.136:¶23.

“The breathalyzer is not capable of discriminating between residual alcohol that may be in the mouth (‘mouth alcohol’) and alcohol from deep lung air. Alcohol in a breath sample causes the [test] solution to lose its color, whatever the source of alcohol” – be it from deep lung air or mouth alcohol. R.136:¶24. Accordingly, “to ensure a reliable breathalyzer test of deep lung air, officers must clear a subject’s mouth of any foreign substances and observe a 15-minute waiting period to ensure that the BrAC reading does not reflect an erroneously high B[r]AC from mouth alcohol, rather than from deep lung air.” R.136:¶25. This procedure ensures the reliability of the Breathalyzer result by ensuring that mouth alcohol will be absorbed into the system before the test is administered. *See Baker*, 355 P.2d at 812; *Vialpando*, 2004 UT App 95, ¶ 14.

C. The Intoxilyzer 8000 recognizes the presence of mouth alcohol and aborts testing when it is detected.

The Intoxilyzer is now the breath testing instrument of choice in Utah. See Utah Admin. Code R714-500-6(2) (2008) (providing that “[b]reath alcohol concentration analysis of an instrument shall be based on the principle of infrared energy absorption or any other similarly effective procedure as specified by the Department”). Although law enforcement in the State used Intoxilyzers as early as 1986, see *Baker v. Schwendiman*, 714 P.2d 675 (Utah 1986), Utah courts have never addressed the differences between the two instruments and how those differences may affect their foundational requirements, including the *Baker* rule. This Court should do so now.

“[T]he Intoxilyzer determines B[r]AC of deep lung air through infrared absorption technology.” R.135:¶26 (R.155:26-28,37-38). As a subject blows into an Intoxilyzer 8000, IR light flashes into the sample chamber. R.135:¶27 (R.155:27-28). “An IR receiver at the end of the chamber measures the IR light [detected] on the alcohol frequencies ... and the instrument converts that measurement into a corresponding B[r]AC. The IR light is fired into the chamber four times per second, and as a result, the breath sample is analyzed sixteen times during a standard, four-second test.” R.135:¶27 (R.155:27-28).

“The Intoxilyzer 8000 analyzes all of the alcohol that is in the breath blown into the instrument, which may include mouth alcohol” from regurgitation. R.135:¶28 (R.155:31-32,43-44). But unlike the Breathalyzer, the Intoxilyzer 8000 is equipped to recognize the presence of mouth alcohol and abort testing if it is detected. *See* R.134:¶30 (R.155:31-32,43-45,56-60).

“To ensure a reliable deep lung air reading, the Intoxilyzer 8000 requires that the breath sample satisfy four requirements: the subject must blow with at least one pound of pressure (about what it takes to blow bubbles with a straw in a can of soda); (2) the subject must provide at least 1.1 liters of air in one continuous breath; (3) the subject must blow for at least four seconds; and (4) the breath alcohol reading must reach a plateau.” R.134:¶29 (R.155:31,41). If mouth alcohol is not present, “the B[r]AC readings gradually rise and then plateau as deep lung air reaches the sample chamber.” R.134:¶30 (R.155:31-32). The instrument then produces a corresponding BrAC reading. *See* R.155:28.

If, however, residual alcohol remains in the mouth, “there is an immediate rise in B[r]AC from the burst of mouth alcohol into the sample chamber, followed by a quick drop-off as the mouth alcohol evaporates. This is because the concentration of mouth alcohol is high, but volatile and thus evaporates into the air very quickly when exhaled.” R.135:¶28 (R.155:31-32,43-45,56-60). The Intoxilyzer 8000 includes a “slope detector” that recognizes and aborts testing

"[w]hen such a 'spike' in B[r]AC occurs." R.134:¶30 (R.155:32,44). In that case, "[t]he intoxilyzer then prints a result card indicating an invalid sample with three Xs for the B[r]AC." R.134:¶30 (R.155:44).³

D. The State established the foundation necessary to admit the test results from the Intoxilyzer 8000.

The evidence at the hearings below established that the Intoxilyzer 8000 used in this case was in proper working order when the test was administered on November 18, 2008. That very day, the instrument was subjected to the diagnostic checks required by rule and certified as "working properly." State Exh. C; *accord* R.136:¶22. The instrument was also certified as operating properly in October and December of 2008, without any intervening failures. *See* State Exhs. B & D; R.136:¶22. The evidence further established that Officer Nathan Brimhall, who administered the test, was "a certified Intoxilyzer operator," and that he "followed the protocol for ensuring that the Intoxilyzer was operating properly, which included several self-diagnostic tests and air blank checks." R.138:¶13.

³ The trial court further found, based on the testimony of the State's expert witness, that "[t]he only time mouth alcohol would not be recognized by the slope detector would be if the mouth alcohol was in equilibrium with the alcohol in the rest of the subject's body, i.e., if it was equal to the alcohol content of the subject's deep lung air. In that case, however, the B[r]AC reading would still be accurate." R.134:¶31 (R.155:57-60).

At the evidentiary hearing held August 10, 2009, Trooper Brierley testified that unlike the Breathalyzer, the Intoxilyzer 8000 recognizes and aborts testing when mouth alcohol is present, as discussed, *infra*, at 14-15. As found by the trial court, "had alcohol been in [Defendant's] mouth as a result of regurgitation, the slope detector on the Intoxilyzer 8000 would have detected the alcohol and disallowed the test." R.133:¶33. It did not, but printed a BrAC result of .237. See R.138:¶15 (R.152:18,23); State Exh. A

The foregoing evidence "la[id] a proper foundation showing that the testing method is reliable, that the testing equipment was in proper working order when the test was administered, and that the equipment was properly operated by a qualified person." *People v. Bowers*, 716 P.2d 471, 473 (Colo. 1986). Accordingly, the trial court should have admitted the Intoxilyzer results.

In *State v. Charan*, 971 P.2d 1165 (Ida. App. 1999), the Idaho Court of Appeals reached the same conclusion in a case involving the Intoxilyzer 5000, the predecessor to the Intoxilyzer 8000. The officer in *Charan* testified that although the operating manual requires *Baker* rule compliance, "it is not really necessary to ensure accurate tests from the Intoxilyzer 5000 because that instrument has a 'negative slope detector' that detects when mouth alcohol is present and indicates that the breath sample is invalid." *Id.* at 1167. Like Trooper Brierley in this case, see R.133:¶33, the officer in *Charan* testified that

"[i]t was his opinion that, because the negative slope indicator did not detect mouth alcohol in [the subject's] breath samples, the test was accurate." *Charan*, 971 P.2d at 1167. The Idaho Court of Appeals held that "this expert testimony regarding the reliability of the test presented an adequate foundation for its admission into evidence." *Id.* This Court should hold likewise under the facts of this case.⁴

II.

IN ANY EVENT, THE OFFICER COMPLIED WITH THE BAKER RULE

Even assuming, arguendo, that compliance with the *Baker* rule is required for admission of Intoxilyzer 8000 results, this Court should nevertheless reverse because the trial court erred in concluding that Officer Brimhall did not comply with the rule.

In *Vialpando*, this Court held that "'the level of surveillance [during the 15-minute observation period] must be such as could reasonably be expected to ensure that no alcohol has been introduced into the suspect's mouth, 'from the

⁴ The reliability of the Intoxilyzer results was further buttressed by Trooper Brierley's testimony, and the trial court's finding, that "[a] study on the reliability of infrared absorption-based breath tests 'conclude[d] that the risk of alcohol erupting from the stomach into the mouth owing to gastric reflux and falsely increasing the result of an evidential breath test is highly improbable.'" R.134-33:¶32 (quoting A.W. Jones, *et al.*, *Reliability of Breath-Alcohol Analysis in Individuals with Gastroesophageal Reflux Disease*, 44 J. Forensic Sci. 814-18 (July 1999)); State Exh. G.

outside or by belching or regurgitation.’” 2004 UT App 95, ¶ 18 (quoting *State v. Carson*, 988 P.2d 225, 227 (Ida. App. 1999)). The rule “is satisfied if (1) the suspect was in the officer’s presence for the entire period; (2) it is clear that the suspect had no opportunity to ingest or regurgitate anything during the minimum observation period; and (3) nothing impeded the officer’s powers of observations during the observation period.” *Id.* Contrary to the trial court’s conclusion, *see* R.133:¶1, Officer Brimhall complied with the rule.

Once Defendant was placed in handcuffs, Officers Brimhall and Leonard checked his mouth for foreign substances and found chewing tobacco. R.139:¶¶8-9. After making Defendant spit out the tobacco, the officers “rechecked his mouth and determined that there was now nothing in it.” R.139:¶9. This occurred at 3:07 p.m. R.139:¶9. Officer Brimhall then drove Defendant to the police station, arriving at 3:12 p.m. R.139-38:¶¶ 10,12. He escorted Defendant to the Intoxilyzer room and there the two remained until Defendant submitted to the Intoxilyzer test at 3:28 p.m. R.138:¶¶12-15. Defendant, therefore, was in Officer Brimhall’s presence from the moment his mouth was cleared of tobacco at 3:07 p.m. until he submitted to the Intoxilyzer test at 3:28 p.m. — a total of 21 minutes.

Thus, like the defendant in *Vialpando*, Defendant’s hands were handcuffed behind his back during the entire observation period, *see* R.139-38:¶¶8,14

(R.155:16), "preventing [him] from placing anything in his mouth." *Vialpando*, 2004 UT App 95, ¶ 19. Officer Brimhall admitted, however, that during the five-minute ride to the police station, "he would not have been able to notice whether [Defendant] burped or regurgitated." R.138:¶10. Accordingly, he could not be assured that during the ride "no alcohol ha[d] been introduced into [Defendant's] mouth . . . 'by belching or regurgitation.'" *Vialpando*, 2004 UT App 95, ¶ 18 (citation omitted). And indeed, Defendant claimed that he suffers from gastroesophageal reflux disease and "that during the ride to the police station, he regurgitated into his throat and then quickly swallowed it down." R.138:¶11 (R.153:7).

Although Officer Brimhall may not have been in a position to adequately monitor Defendant for regurgitation during their ride to the station, his "powers of observation[]" were not so "impeded" once they reached the station at 3:12 p.m. See *Vialpando*, 2004 UT App 95, ¶ 18. Officer Brimhall escorted Defendant into the Intoxilyzer room. R.138:¶12. Then, with Defendant "sitting handcuffed in front of him," Officer Brimhall watched Defendant "straight on" while "entering case data into the Intoxilyzer and preparing it for operation," as per required protocol. R.138:¶¶13-14 (R.155:16). At 3:28 p.m., Defendant blew into the Intoxilyzer, registering a BrAC of .237. R.138:¶15. From the time he removed Defendant from the car at 3:12 p.m. until the time he administered the

test at 3:28 p.m. — a total of 16 minutes — Officer Brimhall never heard Defendant burp or regurgitate into his mouth. R.138:¶14 (R.155:16).

Although Officer Brimhall was preparing the Intoxilyzer for operation during this period, he continued to “watch[] [Defendant], who was sitting handcuffed in front of him.” R.138:¶14. This level of surveillance was more than sufficient to satisfy the *Baker* rule. As explained in *Vialpando*, the rule does “not . . . require[] the undivided attention of the observing officer.” *Id.* at ¶ 18. Indeed, the facts in this case are similar to, if not more compelling than, those in *Vialpando*, where this Court concluded that the officer’s surveillance was sufficient. In *Vialpando*, the Court held that the officer’s surveillance was sufficient as he drove to the police station with Vialpando seated next to him. *Id.* at ¶ 19. The Court held that “[t]he late hour and the minimal traffic presented little or no distraction to the trooper during the observation period, allowing the trooper to focus on *driving and observing* Vialpando.” *Id.* (emphasis added).

In sum, the record establishes that Defendant did not introduce anything into his mouth “‘from the outside’” during the 21 minutes immediately preceding the Intoxilyzer test, and that he did not introduce anything into his mouth “‘by belching or regurgitation’” during the 16 minutes immediately

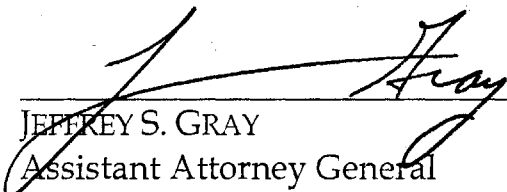
preceding the test. This period of observation fully satisfied the *Baker* rule. See *Vialpando*, 2004 UT App 95, ¶ 14.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the district court.

Respectfully submitted October 27, 2010.

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Utah Attorney General



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Assistant Attorney General
Counsel for Appellant

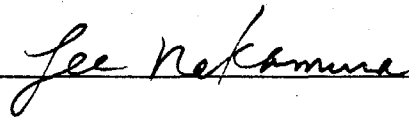
CERTIFICATE OF SERVICE

I certify that on October 27, 2010, two copies of the foregoing brief were

mailed hand-delivered to:

Margaret P. Lindsay
Utah County Public Defender Ass'n
P.O. Box 1058
Spanish Fork, UT 84660

A digital copy of the brief was also included: Yes No



Addenda

ADDENDUM A

Relevant Statutory Provisions and Regulatory Rules

Utah Code Ann. § 41-6a-502 (West Supp. 2005)

(1) A person may not operate or be in actual physical control of a vehicle within this state if the person:

(a) has sufficient alcohol in the person's body that a subsequent chemical test shows that the person has a blood or breath alcohol concentration of .08 grams or greater at the time of the test;

(b) is under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree that renders the person incapable of safely operating a vehicle; or

(c) has a blood or breath alcohol concentration of .08 grams or greater at the time of operation or actual physical control.

(2) Alcohol concentration in the blood shall be based upon grams of alcohol per 100 milliliters of blood, and alcohol concentration in the breath shall be based upon grams of alcohol per 210 liters of breath.

(3) A violation of this section includes a violation under a local ordinance similar to this section adopted in compliance with Section 41-6a-510.

Utah Code Ann. § 41-6a-515 (West Supp. 2005)

(1) The commissioner of the department shall establish standards for the administration and interpretation of chemical analysis of a person's breath or oral fluids, including standards of training.

(2) In any action or proceeding in which it is material to prove that a person was operating or in actual physical control of a vehicle while under the influence of alcohol or any drug or operating with a blood or breath alcohol content statutorily prohibited, documents offered as memoranda or records of acts, conditions, or events to prove that the analysis was made and the instrument used was accurate, according to standards established in Subsection (1), are admissible if:

(a) the judge finds that they were made in the regular course of the investigation at or about the time of the act, condition, or event; and

(b) the source of information from which made and the method and circumstances of their preparation indicate their trustworthiness.

(3) If the judge finds that the standards established under Subsection (1) and the conditions of Subsection (2) have been met, there is a presumption that the test results are valid and further foundation for introduction of the evidence is unnecessary.

Utah Code Ann. § 41-6a-516 (West Supp. 2005)

(1)(a) In any civil or criminal action or proceeding in which it is material to prove that a person was operating or in actual physical control of a vehicle while under the influence of alcohol or drugs or with a blood or breath alcohol content statutorily prohibited, the results of a chemical test or tests as authorized in Section 41-6a-520 are admissible as evidence.

(b)(i) In a criminal proceeding, noncompliance with Section 41-6a-520 does not render the results of a chemical test inadmissible.

(ii) Evidence of a defendant's blood or breath alcohol content or drug content is admissible except when prohibited by Rules of Evidence or the constitution.

(2) This section does not prevent a court from receiving otherwise admissible evidence as to a defendant's blood or breath alcohol level or drug level at the time relevant to the alleged offense.

R714-500. Chemical Analysis Standards and Training.

- R714-500-1 Authority.
- R714-500-2 Definitions.
- R714-500-3 Purpose.
- R714-500-4 Application for Certification.
- R714-500-5 Program Certification.
- R714-500-6 Instrument Certification.
- R714-500-7 Breath Alcohol Concentration Test Analytical Results.
- R714-500-8 Operator Certification.
- R714-500-9 Technician Certification.
- R714-500-10 Program Supervisor Certification.
- R714-500-11 Previously Certified Personnel.
- R714-500-12 Revocation or Suspension of Certification.
- R714-500-13 Adjudicative Proceedings.

R714-500-1. Authority.

A. This rule is authorized by Section 41-6a-515 which requires the commissioner of the Department of Public Safety to establish standards for the administration and interpretation of chemical analysis of a person's breath, including standards of training.

R714-500-2. Definitions.

A. Certification Report means document prepared by a technician detailing the results of a certification check.

B. Certification Check means analysis of instrument function and calibration performed by technician.

C. Instrument means breath alcohol concentration testing instruments employed by law enforcement officers for evidentiary purposes and approved by the department.

D. Operator means individual certified by the department to administer breath alcohol concentration tests.

E. Breath Alcohol Concentration Test Results means analytical results of a breath alcohol concentration test provided by an approved instrument. Results are deemed to be an exact representation of breath alcohol concentration at the time of test.

F. Program means all breath alcohol concentration testing techniques, methods, and programs.

G. Program Supervisor means authorized representative of the Commissioner of Public Safety for the breath alcohol concentration testing program and supervisor of said program.

H. Technician means individual certified by the department to operate, provide training on, and perform maintenance, repairs, and certification checks on breath alcohol concentration testing instruments.

I. Breath Test means test administered by an operator or technician on an instrument for the purpose of determining breath alcohol concentration.

R714-500-3. Purpose.

A. It is the purpose of this rule to set forth:

(1) Procedures whereby the department may certify:

- (a) breath alcohol concentration testing programs;
- (b) breath alcohol concentration testing instruments;
- (c) breath alcohol concentration analytical results;
- (d) breath alcohol concentration testing operators;
- (e) breath alcohol concentration testing technicians; and
- (f) breath alcohol concentration testing program supervisors.

(2) Adjudicative procedure concerning:

- (a) application for and denial, suspension or revocation of the aforementioned certifications; and
- (b) appeal of initial department action concerning the aforementioned certifications.

R714-500-4. Application for Certification.

A. Application for certification shall be on forms provided by the department in accordance with Subsection 63G-4-201(3)(c).

R714-500-5. Program Certification.

A. All programs must be certified by the department.

B. Prior to initiating a program, an agency or laboratory shall submit application to the department for certification. The application shall show the brand or model, or both, of the instrument to be used and contain a resume of the program followed. The department shall inspect to determine compliance with all applicable provisions under R714-500.

C. Certification of a program may be denied, suspended, or revoked by the department if, based on information obtained by the department, program supervisor, or technician, the agency or laboratory fails to meet the criteria as outlined by the department.

R714-500-6. Instrument Certification.

A. Criteria: To be approved, each manufacturer's brand or model of instrument shall meet the following criteria:

1. The instrument shall provide accurate and consistent analysis of breath specimen for the determination of breath alcohol concentration for law enforcement purposes;

2. Breath alcohol concentration analysis of an instrument shall be based on the principle of infra-red energy absorption or any other similarly effective procedure as specified by the Department;

3. Breath specimen analyzed shall be essentially alveolar or end expiratory in composition according to the analysis method utilized;

4. Measurement of breath alcohol concentration shall be reported in grams of alcohol per 210 liters of breath;

5. The instrument shall analyze a reference sample during certification checks, following procedures outlined in R714-500-6-D;

6. Other criteria, deemed necessary by the Department, may be required to correctly and adequately evaluate the instrument as practical and reliable for law enforcement purposes.

B. Acceptance: The Department shall approve all breath alcohol concentration testing instruments employed for law enforcement evidentiary purposes.

1. The Department shall maintain an approved list of accepted instruments. Law enforcement entities shall select instruments from this list, which list shall be available for public inspection upon request from

the Department, Utah Highway Patrol Training Section, 410 West 9800 South, Sandy, UT 84070.

2. A manufacturer may apply for approval of an instrument by brand or model not on the list. The Department shall subsequently examine each instrument to determine if it meets criteria specified by R714-500 and applicable purchase requisitions.

3. Upon compliance with R714-500, an instrument may be approved by brand or model and placed on the list of accepted instruments.

4. Certification Reports verifying the certification of all instruments shall be kept on file by the program supervisor and made available upon request through the Department, Utah Highway Patrol Training Section, 410 West 9800 South, Sandy, UT 84070.

C. Initial Instrument Certification: All breath alcohol concentration testing instruments used for law enforcement evidentiary purposes shall be certified prior to being placed into service at a specific location.

1. The program supervisor shall determine that each individual instrument, by serial number, conforms to the brand or model that appears on the commissioner's accepted list.

2. Prior to an instrument being placed into service at a specific location, a technician shall perform a certification check, following the standardized operating procedure and requirements outlined in R714-500-6-D.

3. Upon successful completion of these requirements, the instrument shall be deemed to be operating correctly and may be placed into service.

D. Regular Instrument Certification Checks

1. Once an instrument has been placed into service at a specific location, it shall be certified by a technician on a routine basis, not to exceed 40 days between certification checks.

2. The 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:

- a. electrical power check;
- b. operating temperature check;
- c. internal purge check;
- d. invalid test procedures check;
- e. diagnostic measurements check;
- f. internal calibration check;

- g. known reference sample check; and
- h. measurements of breath alcohol concentration, displayed in grams of alcohol per 210 liters of breath.

A copy of these standard operating procedures may be made available upon request through the Department; Utah Highway Patrol Training Section, 410 West 9800 South, Sandy, UT 84070.

3. For known reference sample checks set forth in R714-500-6-D-2-g, the instrument shall analyze a reference sample, such as headspace gas from a mixture of water and a known weight or volume of ethanol held at a constant temperature or a compressed inert gas and alcohol mixture from a pressurized cylinder.

a. The result of the analysis shall agree with the reference sample's predicted value, within parameters of calibration set at plus or minus 5% or 0.005, whichever is greater, or such limits as set by the Department.

i. For example, if a known reference sample has a value of 0.100, the parameters of calibration set at plus or minus 5% would equal 0.005 ($0.100 \times 5\% = 0.005$). Acceptable parameters of calibration using a known 0.100 reference sample would therefore range from 0.095 to 0.105.

b. Analytical results of the known reference sample check shall be reported to three decimal places.

1. Other checks, deemed necessary by the Department or program supervisor, may be required to correctly and adequately evaluate the instrument.

2. Technicians shall follow the standardized operating procedure as set forth by the program supervisor when performing certification checks.

4. If an instrument successfully passes all the certification checks, it shall be deemed to be operating properly.

5. A report of the certification results with the serial number of the certified instrument shall be recorded on the approved Certification Report form by the technician, sent to the program supervisor, and placed in the file for certified instruments.

6. Results of certification checks shall be kept in a permanent record retained by the technician or program supervisor.

E. Instrument Repair and Recertification

1. The Department may at any time determine if a specific instrument is unreliable or unserviceable. Upon such a finding, the instrument shall be removed from service and certification withdrawn.

2. A report of the certification results showing the certification has been withdrawn shall be recorded on the approved Certification Report form by the technician, sent to the program supervisor, and placed in the file for certified instruments.

3. Upon proper repair, the instrument may be recertified and again placed into service at a specific location.

a. Minimum requirements for recertification are identical to those outlined in R714-500-6-D, sub-sections 2, 3, and 4.

4. A report of the certification results with the serial number of the recertified instrument shall be recorded on the approved Certification Report form by the technician, sent to the program supervisor, and placed in the file for certified instruments.

R714-500-7. Breath Alcohol Concentration Test Analytical Results.

A. The instrument should be operated by either a certified operator or technician.

B. Breath specimen analyzed for breath alcohol concentration shall be essentially alveolar or end expiratory in composition according to the analysis method utilized.

1. The results of tests to determine breath alcohol concentration shall be expressed as equivalent grams of alcohol per 210 liters of breath.

2. Analytical results on a breath alcohol concentration test shall be recorded using terminology established by State statute and reported to three decimal places.

a. For example, a result of 0.237g/210L shall be reported as 0.237.

C. Results of breath alcohol concentration tests will be printed by the instrument.

D. Results are deemed to be an exact representation of breath alcohol concentration at the time of test.

E. The printed results of a breath alcohol concentration test will be retained by the operator or the operator's individual agencies' designated record or evidence custodian.

F. Instrument internal standards on a breath alcohol concentration test do not have to be recorded numerically.

R714-500-8. Operator Certification.

A. All breath alcohol testing operators must be certified by the department.

B. All training for initial and renewal certification will be conducted by a program supervisor or technician.

C. Initial Certification

(1) In order to be certified as a breath alcohol concentration testing instrument operator, an individual must successfully complete a course of instruction approved by the department, which must consist of eight hours of training, including as a minimum the following:

- a. Effects of alcohol in the human body;
- b. Operational principles of breath testing;
- c. D.U.I. Summons and Citation, D.U.I. Report Form, and courtroom testimony;
- d. Legal aspects of chemical testing, DUI case law, and other alcohol related laws;
- e. Laboratory participation performing simulated tests on the instruments, including demonstrations under the supervision of a class instructor;
- f. Examination and critique of course.

(2) After successful completion of the initial certification course a certificate will be issued that will be valid for three years.

D. Renewal Certification

(1) The operator is required to renew certification prior to its expiration date. The minimum requirement for renewal of operator certification will consist of eight hours of training, including as a minimum the following:

- a. Effects of alcohol in the human body;
- b. Operational principles of breath testing;
- c. D.U.I. Summons and Citation, D.U.I. Report Form, and courtroom testimony;
- d. Legal aspects of chemical testing DUI case law, and other alcohol related laws;
- e. Examination and critique of course;
- f. Or the operator must successfully complete the web-based computer program including successful completion of exam. Results of exams must be forwarded to program supervisor and a certification certificate will be issued.

(2) After successful completion of the re-certification course a certificate will be issued that will be valid for three years.

(3) Any operator who allows their certification to expire one year or longer must retake and successfully complete the initial certification course as outlined in R714-500-8.

R714-500-9. Technician Certification.

A. All technicians, must be certified by the department.

B. The minimum qualifications for certification as a technician are:

(1) Satisfactory completion of the operator's initial certification course and/or renewal certification course;

(2) Satisfactory completion of the Breath Alcohol Testing Supervisor's course offered by Indiana University or an equivalent course of instruction, as approved by the program supervisor;

(3) Satisfactory completion of the manufacturer's maintenance and repair technician course;

(4) Maintenance of technician's status through a minimum of eight hours training each calendar year. This training must be directly related to the breath alcohol testing program and must be approved by the program supervisor.

C. Any technician who fails to meet the requirements of R714-500-9-B and allows their certification to expire for more than one year, must renew their certification by meeting the minimum requirements as outlined in R714-500-9-B.

D. Only certified breath alcohol testing technicians shall be authorized to provide expert testimony concerning the certification and all other aspects of the breath testing instrument under their supervision.

R714-500-10. Program Supervisor Certification.

The program supervisor will be required to meet the minimum certification standards set forth in R714-500-9. Certification should be within one year after initial appointment or other time as stated by the department.

R714-500-11. Previously Certified Personnel.

A. This rule shall not be construed as invalidating the certification of personnel previously certified as operators under programs existing prior to the promulgation of this rule. Such personnel shall be deemed certified, provided they meet the training requirements as outlined in R714-500-8.

B. This rule shall not be construed as invalidating the certification of personnel previously certified as a technician under programs existing prior to the promulgation of this rule. Such personnel shall be deemed certified, provided they meet the training requirements in R714-500-8.

R714-500-12. Revocation or Suspension of Certification.

A. The department may, on the recommendation of the program supervisor, revoke or suspend the certification of any operator or technician:

- (1) Who fails to comply with or meet any of the criteria required in this rule; or
- (2) Who falsely or deceitfully obtained certification; or
- (3) Who fails to show proficiency in proper operation of the breath testing instrument; or
- (4) For other good cause.

R714-500-13. Adjudicative Proceedings.

A. Purpose of section. It is the purpose of this section to set forth adjudicative proceedings in compliance with Title 63G Chapter 4.

B. Designation. All adjudicative proceedings performed by the department shall proceed informally as set forth herein and as authorized by Sections 63G-4-202 and 63G-4-203.

C. Denial, suspension or revocation. A party who is denied certification or whose certification is suspended or revoked, will be informed within a period of 30 days by the department the reasons for denial, suspension, or revocation.

D. Appeal of denial, suspension, or revocation. A party who is denied certification or whose certification is suspended or revoked may appeal to the commissioner or designee on a form provided by the department in accordance with Subsection 63G-4-201(3)(C). The appeal must be filed within ten days after receiving notice of the department action.

E. No hearing will be granted to the party. The commissioner or designee will merely review the appeal and issue a written decision to the party within ten days after receiving the appeal.

October 15, 2008

Notice of Continuation October 5, 2009

ADDENDUM B

**Ruling and Order on Defendant's
Motion to Suppress Intoxilyzer Results**

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

FILED
JUN 18 2009
4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

STATE OF UTAH

Plaintiff,

v.

RANDALL MATTHEW RELYEA

Defendant,

**RULING AND ORDER ON
DEFENDANT'S MOTION TO
SUPPRESS INTOXILYZER RESULTS**

Case No: 081403708

Judge Samuel D. McVey
June 17, 2009

The Court held an Evidentiary Hearing June 15, 2009 on the defendant's Motion to Suppress Intoxilyzer Results. Barbara Gonzales, Esq., represented defendant, Mr. Relyea, and Jason Sant, Esq., represented the State.

FACTS

1. On the afternoon of November 18, 2008, Officer Jeremy Leonard ("Leonard") responded to a dispatch concerning a possible DUI.
2. Having located the vehicle described in the dispatch, Leonard initiated his lights and followed the vehicle seven blocks until it turned into the parking lot of a liquor store and stopped. Randall Relyea ("Relyea") got out of the vehicle as it was slowly rolling toward Leonard's patrol car. Leonard had to yell at Relyea to get back in the vehicle and stop it.
3. Leonard approached the Relyea and noticed he smelled of alcohol, had blood-shot eyes and slow, slurred speech.
4. Suspecting Relyea had been drinking, Leonard administered field sobriety tests. Officer Nathan Brimhall ("Brimhall") arrived during one of the tests.
5. Brimhall arrested Relyea after he failed the field tests. Brimhall and Leonard checked his mouth for foreign substances that would interfere with a proper result of an intoxilyzer test. Relyea had chewing tobacco in his mouth, which he spit out after being instructed to. The officers checked Relyea's mouth again and determined there was now nothing in it.
6. Brimhall put Relyea in the back seat of his patrol vehicle and drove him to the Springville Police Station.
7. Brimhall maintained visual observation of Relyea through his rear-view mirror and a video camera. Brimhall was unable to notice whether Relyea burped or regurgitated during the ride to the station.
8. Brimhall administered the intoxilyzer test at the Springville Police Station twenty-two minutes after last checking Relyea's mouth, indicating a blood alcohol content of .237

9. Defendant testified he suffers from gastric reflux and on the ride to the station he regurgitated into his throat. He stated the condition is aggravated by drinking alcohol.

DISCUSSION

Utah adopts the requirement of *State v. Baker*, 56 Wash.2d 846, 355 P.2d 806, 809-10 (1960), that police check a suspect's mouth for foreign substances and observe the suspect for the following 15 minutes before administering an intoxilyzer test. *State v. Vialpando*, 2004 UT App 95, ¶ 14, 89 P.3d 209. Utah also requires police to observe the suspect for the full 15 minutes with sufficient attention to tell whether he burps or regurgitates into his mouth, *id.* If police do not do this, the test results are inadmissible, *id.*

"The foundation requirements for admission of breath test results are: (1) the machine is in proper working condition at the time of the test; (2) 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.'" *Palmer v. Boyden*, 2005 UT App 467 (2005) (quoting *State v. Vialpando*, 2004 UT App 95, ¶ 14 (2004)).

The purpose of the observation period is to ensure that a defendant does not introduce anything into his mouth that might taint the test results. While this requirement serves to ensure that the defendant places no food, drink, or smoke into his mouth during the observation period, its most important function is to ensure that any alcohol in a suspect's mouth is absorbed into the system before the test is administered. *See State v. Gardner*, 1998 NMCA 160, 126 N.M. 125, 967 P.2d 465, 469 (N.M. Ct. App. 1998). We do not believe that this requires the undivided attention of the observing officer. Instead, the level of surveillance must be such as could reasonably be expected to "ensure that no alcohol has been introduced into the suspect's mouth, "from the outside or by belching or regurgitation," during the entire observation period. *State v. Carson*, 133 Idaho 451, 988 P.2d 225, 227 (Idaho Ct. App. 1999). The purpose of the observation period is satisfied if (1) the suspect was in the officer's presence for the entire period; (2) it is clear that the suspect had no opportunity to ingest or regurgitate anything during the minimum observation period; and (3) nothing impeded the officer's powers of observations during the observation period. *See id.*

Id. at ¶18.

The officer's observation via a rearview mirror and camera would have to satisfy the third requirement just stated by including the ability to see and hear whether Relyea was regurgitating and belching before the test results could be admitted. *Carson*, 988 P.2d at 227. In *Carson*, an officer put a driver arrested for DUI in the back seat of a patrol car and took him to the police station for an intoxilyzer test. *Id.* at 226. The officer testified he observed the individual intermittently via the rearview mirror and "listened for any indication of belching or regurgitation." *Id.* The officer did not encounter other traffic on the road but it was raining and the windshield wipers were on. *Id.* The officer also had a hearing aid in his left ear. *Id.* The court

ruled that while the officer is not required to “stare fixedly” at the subject during the observation, “the level of surveillance must be such as could reasonably be expected to accomplish the purpose of the requirement.” *Id.* at 227. The court determined the intermittent visual observation was insufficient to meet the required standard set forth in the intoxilyzer user manual. *Id.* It further noted the officer’s aural observation was not a sufficient substitute because the “noise from the automobile engine, tires on the road surface, rain and windshield wipers” impeded his ability to hear. *Id.* In addition, the officer’s hearing impairment compromised his aural observation. *Id.* The court distinguished the case from other cases in which officers’ aural observations were not impeded and therefore had sufficient foundation. *Id.*

In the present case, Officer Brimhall testified he would not have been able to notice if Relyea was belching or regurgitating. By contrast, in *Palmer*, 2005 UT App 467, the Court of Appeals approved intoxilyzer results after noting the trial court’s findings that two officers involved both had the driver in their presence the entire period and further noting their testimony that they understood the requirements of the observation period and complied with them, including checking for regurgitation. *Id.* The driver testified he had burped, but did not recall whether liquid came into his mouth during the observation period. The trial court found the driver’s testimony not credible. The Court of Appeals stated, “[e]ven assuming [the driver] was inside the patrol vehicle alone for one or two minutes before [the officer] entered the vehicle, [the driver] was handcuffed at that time, he answered in the negative when asked if he had vomited prior to administration of the test, and he was within the observation of one or both officers” during the entire observation period. *Id.*

While “undivided attention” or a fixed stare is not required to satisfy the *Baker* rule, the level of surveillance must reasonably ensure no alcohol was introduced into the subject’s mouth either by ingestion, regurgitation or burping. Here, the observing officer was unable to provide that level of detail in his observation.

CONCLUSION

There is insufficient foundation for admission of the intoxilyzer test result and evidence of it is suppressed. However, since that is the only evidence suppressed, there remains sufficient evidence to support probable cause to go to trial given the officers’ observation of defendant failing to pull over in response to code lights, failure to secure his vehicle from rolling before exiting, his smelling of alcohol, his failure of the field sobriety test, and the inference from his testimony that he drank alcohol before driving which led to more pronounced gastric reflux .

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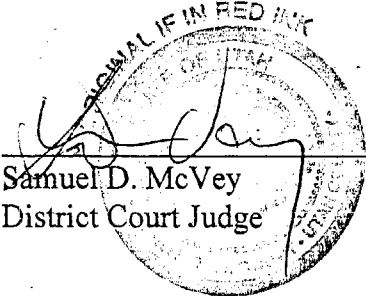
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ORDER

WHEREFORE IT IS ORDERED: Defendant's Motion to Suppress Intoxilyzer Results is GRANTED. This case may proceed to trial or other resolution.

DATED this 18th day of June, 2009

BY THE COURT:

A circular court seal for the District Court of Utah, County of Provo. The seal contains the text "NORMAL IF IN RED INK" at the top, "DISTRICT COURT OF UTAH" in the center, and "PROVO, UTAH" at the bottom. A handwritten signature in black ink is written across the seal. A horizontal line is drawn across the seal and the text below it.

Samuel D. McVey
District Court Judge

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this ____ day of June 2009.

Barbara A. Gonzales
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Clerk

ADDENDUM C

Findings of Fact, Conclusions of Law, and Order

FILED

JAN 07 2010

6 4TH JUDICIAL DISTRICT
CLERK OF COURT
UTAH COUNTY

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IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

STATE OF UTAH

Plaintiff,

vs.

RANDALL RELYEA,

Defendant.

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER

Case No. 081403708

Judge Samuel D. McVey

The issues before this Court are: (1) whether Defendant was kept under adequate observation for at least fifteen minutes prior to his breath test, as required under the so-called *Baker* rule, adopted in *Salt Lake City v. Womack*, 747 P.2d 1039, 1041 (Utah 1987) (adopting the foundational requirements for breathalyzer results set forth in *State v. Baker*, 355 P.2d 801, 811 (Wash. 1960)); and (2) whether compliance with the *Baker* rule is required to establish the foundation for admission of breath test results from an Intoxilyzer 8000.

This matter first came before the Court on Relyea's motion to suppress the Intoxilyzer results on the ground that police did not comply with the *Baker* rule. After considering testimony from the preliminary hearing, held April 27, 2009, and taking testimony from Defendant at an evidentiary hearing, held June 15, 2009, the Court granted Defendant's motion to suppress in a ruling issued June 18, 2009.

The State thereafter filed a motion to supplement the record and argued that compliance with the *Baker* rule was not necessary to meet the foundational requirements for admission of breath test results from an Intoxilyzer. This Court permitted the State to introduce additional evidence at an evidentiary hearing, held August 10, 2009. After taking the evidence, the Court offered to take any additional evidence that Defendant might wish to introduce, but he declined.

Now, therefore, having considered the evidence taken at the preliminary hearing and the evidentiary hearings held on June 15, 2009 and August 10, 2009, having considered the arguments of the parties, and otherwise being fully advised on the issues raised, the Court enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

Traffic Stop, Arrest, and Breath Test

1. On the afternoon of November 18, 2008, dispatch broadcast an ATL (“attempt to locate”) for the driver of a white, four-door Dodge Intrepid, with no license plates, based on suspicion of intoxication and a recent report of domestic violence.

2. Springville City Detective Jeremy Leonard (“Leonard”), who was on patrol with Sergeant Allen Tipton, spotted the suspect vehicle at approximately 3:00 p.m. at 800 South 800 East, Springville, Utah.

3. After making a U-turn and verifying that the vehicle had no license plates, Leonard activated his overhead lights to initiate a stop. The vehicle did not immediately stop, but proceeded some seven blocks before finally pulling into a liquor store parking lot and stopping.

4. As Leonard was exiting his patrol car, the driver also exited his car. Leonard, however, yelled at the driver to get back into his car because it was rolling backwards towards his patrol car.

5. After approaching the suspect car, Leonard identified the driver as Randal Matthew Relyea, the defendant ("Relyea").

6. In speaking with Relyea, Leonard smelled the odor of alcohol coming from Relyea's breath. He also noticed that Relyea's eyes were bloodshot and his speech was slow and slurred. Leonard asked Relyea if he had been drinking, but Relyea denied it.

7. On Leonard's request, Relyea performed a series of field sobriety tests. He exhibited all six clues of impairment on the horizontal gaze nystagmus (HGN) test, three of six clues on the one-leg stand, and five clues on the nine step walk-and-turn.

8. Leonard concluded that Relyea was impaired to the point he could not safely operate a motor vehicle. Officer Nathan Brimhall ("Brimhall"), who had arrived as backup during one of the field sobriety tests, then handcuffed Relyea and informed him that he was under arrest for driving under the influence of alcohol.

9. Leonard and Brimhall checked Relyea's mouth for any foreign substances and found chewing tobacco. After the officers made Relyea spit out the tobacco, they rechecked his mouth and determined that there was now nothing in it. Brimhall logged the "Baker" time with dispatch at 3:07 p.m.

10. Brimhall placed Relyea in the backseat of his patrol car and transported him to the police station, which was approximately six blocks away. Brimhall maintained visual observation of Relyea through his rear view mirror and a video camera. Brimhall did not see

Relyea put anything into his mouth during the ride to the police station, but admitted that he would not have been able to notice whether Relyea burped or regurgitated.

11. Relyea testified that he suffered from gastroesophageal reflux disease. He claimed that during the ride to the police station, he regurgitated into his throat and then quickly swallowed it down. He also stated that his condition was aggravated by drinking alcohol.

12. Brimhall arrived with Relyea at the police station at 3:12 p.m. Upon their arrival, Brimhall escorted Relyea into the room where the Intoxilyzer 8000 was set up.

13. Brimhall, a certified Intoxilyzer operator, then followed the protocol for ensuring that the Intoxilyzer was operating properly, which included several self-diagnostic tests and air blank checks.

14. While entering case data into the Intoxilyzer and preparing it for operation, Brimhall watched Relyea, who was sitting handcuffed in front of him. During that time, Brimhall did not hear Relyea burp or regurgitate. Brimhall, however, did not ask Relyea if he had burped or regurgitated.

15. At 3:28 p.m., Relyea blew into the Intoxilyzer as instructed and the instrument measured his breath alcohol content (BAC) at .237.

Trooper Brierley's Qualifications as an Expert

16. Trooper James Elden Brierley is a breath alcohol concentration testing technician ("alcohol technician") with the Utah Highway Patrol (UHP). (*See* UT Admin. Code R714-500-2.H).

17. Trooper Brierley has received training on the science, mechanics, operation, maintenance, and repair of the Intoxilyzer. He also has knowledge of the mechanics and

operation of the breathalyzer, the instrument used in *State v. Baker*, 355 P.2d 806 (Wash. 1960). The Intoxilyzer applies infrared absorption technology to determine BAC. The breathalyzer applies chemical analyses to determine BAC.

18. Trooper Brierley is a member of the Intoxilyzer Users Group, a worldwide organization of those who administer Intoxilyzer tests. The group holds an annual conference to keep abreast of studies and case law relating to breath tests. During these conferences, Trooper Brierley has received instruction from CMI, Inc., the manufacturer of the Intoxilyzer; Guth Laboratories, the company that produces the simulators used to ensure the Intoxilyzers are properly calibrated; and others. Trooper Brierley hosted the conference in 2008.

Operator and Instrument Certification

19. As an alcohol technician, Trooper Brierley provides officers with training necessary for certification and renewal certification to operate Intoxilyzers. He also performs maintenance, repairs, and certification checks on twenty-three Intoxilyzers across the State of Utah, including the Intoxilyzer 8000 used by the Springville Police Department.

20. Trooper Brierley certifies each Intoxilyzer instrument every 40 days. Certification includes a calibration check with a .10 sample solution. The instrument must accurately measure the sample within five percent, or between .095 and .105. Trooper Brierley also tests the Intoxilyzers by pushing the Start button at the incorrect time, blowing into the mouthpiece at the incorrect time, and creating conditions where the ambient air contains alcohol.

21. During each certification check of the subject Intoxilyzer 8000, Trooper Brierley tests the reliability of the instrument in detecting mouth alcohol by placing a dab of alcohol

(cognac) in his mouth, then blowing into the instrument, and ensuring that it then interrupts the test. (R. 47).

22. The Intoxilyzer 8000 used by the Springville Police Department in this case was duly certified as operating properly before and after Relyea's breath test.

Breathalyzer in *Baker*

23. Breathalyzers of the type used in *Baker* determine BAC of deep lung air through a process of chemical analysis. When a subject blows into the instrument, it captures a breath sample, which is then forced into a solution of sulfuric acid and potassium dichromate by a piston. If the breath sample contains alcohol, the solution loses some of its original color as that breath sample bubbles through the solution. The higher the concentration of breath alcohol, the more color will be lost in the test solution. The operator then turns on a light that shines through the solution. The amount of light shining through the test solution is measured against the amount of light that passes through a control solution (which had not been subjected to a breath sample). The difference in light passing through the two solutions corresponds to a particular BAC, which is indicated by a needle. *Accord Baker*, 355 P.2d at 809.

24. The breathalyzer is not capable of discriminating between residual alcohol that may be in the mouth ("mouth alcohol") and alcohol from deep lung air. Alcohol in a breath sample causes the solution to lose its color, whatever the source of alcohol.

25. Trooper Brierley explained that to ensure a reliable breathalyzer test of deep lung air, officers must clear a subject's mouth of any foreign substances and observe a 15-minute waiting period to ensure that no mouth alcohol remains (known as the "*Baker* rule"). He explained that

this procedure is necessary to ensure that the BAC reading does not reflect an erroneously high BAC from mouth alcohol, rather than from deep lung air. *Accord Baker*, 355 P.2d at 809-12.

Intoxilyzer

26. Unlike the aforesaid breathalyzer, the Intoxilyzer determines BAC of deep lung air through infrared absorption technology. The Intoxilyzer 8000 meets the evidential breath testing instrument standards promulgated by the National Highway Safety and Transportation Administration (NHTSA). (*Accord* 79 Fed. Reg. 71480, 71481 (Dec. 17, 2007)).¹

27. When a subject blows into an Intoxilyzer 8000, his or her breath passes through an open-ended sample chamber. As the breath sample passes through the chamber, the instrument emits IR light into the chamber. Alcohol present in the breath sample absorbs IR light at particular wavelength frequencies. An IR receiver at the end of the chamber measures the amount of IR light on the alcohol frequencies passing through the chamber and the instrument converts that measurement into a corresponding BAC. The IR light is fired into the chamber four times per second, and as a result, the breath sample is analyzed sixteen times during a standard, four-second test.

28. The Intoxilyzer 8000 analyzes all of the alcohol that is in the breath blown into the instrument, which may include mouth alcohol, e.g., regurgitation. (R. 31-32, 43). Although the concentration of mouth alcohol is high, it is volatile and thus evaporates into the air very quickly when exhaled.

¹ Like the Intoxilyzer 5000, the Intoxilyzer 8000 has a heated breath tube and sample chamber to prevent condensation, as well as a radio frequency interference antenna to detect radio frequencies that would interfere with the test. Unlike the Intoxilyzer 5000, the Intoxilyzer 8000 has no moving parts on the optical bench, making it less susceptible to breaking down. The Intoxilyzer 8000, used in this case, also includes a digital read out and a keyboard where the

29. To ensure a reliable deep lung air reading, the Intoxilyzer 8000 requires that the breath sample satisfy four requirements: (1) the subject must blow with at least one pound of pressure (about what it takes to blow bubbles with a straw in a can of soda); (2) the subject must provide at least 1.1 liters of air in one continuous breath; (3) the subject must blow for at least four seconds; and (4) the breath alcohol reading must reach a plateau.

30. In the absence of mouth alcohol, the BAC readings gradually rise and then plateau as deep lung air reaches the sample chamber. However, if mouth alcohol is present, there is an immediate rise in BAC from the burst of mouth alcohol introduced into the sample chamber, followed by a quick drop-off as the mouth alcohol evaporates. This is because the concentration of mouth alcohol is high, but volatile and thus evaporates into the air very quickly when exhaled. When such a "spike" in BAC occurs, a "slope detector" recognizes it as mouth alcohol and the test is interrupted. The Intoxilyzer then prints a result card indicating an invalid sample with three Xs for the BAC.²

31. The only time mouth alcohol would not be recognized by the slope detector would be if the mouth alcohol was in equilibrium with the alcohol in the rest of the subject's body, i.e., if it was equal to the alcohol content of the subject's deep lung air. In that case, however, the BAC reading would still be accurate.

32. A study on the reliability of infrared absorption-based breath tests "conclude[d] that the risk of alcohol erupting from the stomach into the mouth owing to gastric reflux and falsely increasing the result of an evidential breath alcohol test is highly improbable." *See* A.W. Jones,

officer can enter case information.

² Both the Intoxilyzer 5000 and the Intoxilyzer 8000 include a slope detector.

et al., *Reliability of Breath-Alcohol Analysis in Individuals with Gastroesophageal Reflux Disease*, 44 J. Forensic Sci. 814-18 (July 1999).

33. In Trooper Brierley's expert opinion, had alcohol been in Relyea's mouth as a result of regurgitation, the slope detector on the Intoxilyzer 8000 would have detected the alcohol and disallowed the test.

34. Trooper Brierley explained that *Baker's* 15-minute observation period is not necessary to ensure the reliability of the test results of an Intoxilyzer, as it is with a breathalyzer. He explained that officers should nevertheless follow the *Baker* rule to ensure that the test will not be disallowed because of mouth alcohol, in which case the test would have to be retaken (after clearing the mouth of the source of the mouth alcohol and waiting 15 minutes for any residual alcohol to dissipate).

CONCLUSIONS OF LAW

After considering the additional evidence and reconsidering the issues presented, the Court makes the following legal conclusions:

1. For the reasons identified in the Court's ruling dated June 18, 2009, the Court concludes that Officer Brimhall was unable to provide the level of detailed observation required to ensure that no alcohol was introduced into Relyea's mouth for a period of 15 minutes prior to the breath test.

2. Trooper Brierley is qualified to testify as an expert on the Intoxilyzer 8000 breath test instrument and how it differs from the breathalyzer.

3. The Utah Supreme Court has long recognized that compliance with the so-called *Baker* rule is a necessary prerequisite to establishing foundation for admission of breath test

results from a breathalyzer. See *In Salt Lake City v. Womack*, 747 P.2d 1039, 1041 (Utah 1987) (recognizing that the “test subject must be kept under observation for at least fifteen minutes prior to the test to insure that he has not ingested anything and to allow any alcohol present in the mouth to be absorbed to ensure a reliable breathalyzer result”).

4. Although the Intoxilyzer 8000 is based on infrared technology and specifically designed to disallow a test where mouth alcohol is detected, the Utah Court of Appeals has held that “[t]o ensure that the results of an intoxilyzer test are reliable, the test must present evidence, inter alia, that . . . a police officer observed the defendant during the fifteen minutes immediately preceding the test to ensure that the defendant introduced nothing into his mouth during that time.” *State v. Vialpando*, 2004 UT App 95, ¶ 14, 89 P.3d 209.

5. This Court is bound by the holding in *Vialpando* and thus concludes that the State has failed to meet the foundational requirements for admission of the breath test results in this case.

ORDER

IT IS HEREBY ORDERED that Defendant’s Motion to Suppress the Intoxilyzer Results is granted.

DATED this 6 day of January, 2009.

ORIGINAL IF IN RED INK
BY THE COURT
JUDGE SAMUEL D. MCVEY
DISTRICT COURT • TRIP COUNTY