

JD Supra

"California Supreme Court Limits Challenges to Breath Test Machines in DUI/Drunk Driving Cases"

**CASE:** The People v Vangelder; (California Supreme Court, Opinion No. D059012, November 21, 2013).

**FACTS:**

On December 22, 2007, a California Highway Patrol officer observed the defendant (Terry Vangelder) driving a pickup truck in excess of 100 miles per hour in San Diego County. He followed the defendant for approximately five miles. At that point, the officer activated his patrol vehicle's lights and stopped the defendant.

After providing his license and registration, the defendant admitted that he had consumed two glasses of wine. During the DUI/drunken driving investigation, the defendant exhibited few signs of impairment. The defendant was given a portable breath test examination on the scene. The portable breath test device showed an alcohol concentration of .095 percent on the first test and .086 percent on the second test (which was administered two minutes later). Based upon the observations and the preliminary breath test results, the defendant was arrested for driving under the influence of alcohol (DUI) and transported to the county jail. At the jail, the defendant provided two more breath samples through an Intoximeter. The first breath test from that device registered an alcohol concentration of .08 percent; with the second test, taken two minutes later, producing the same result.

The San Diego City Attorney's office subsequently charged the defendant with two offenses; the first being "DUI" and the second being "driving with an unlawful alcohol concentration .08 percent or more."

**PROCEDURAL HISTORY:**

Prior to trial, the defendant filed motions to exclude evidence of the portable breath tests to establish blood-alcohol content, asserting that they were not conducted in accordance with the applicable California regulations; and also to allow evidence concerning "partition ratio variability" with regard to the DUAC offense. The People filed opposing motions. The trial court deferred ruling on the defenses motions and the matter proceeded to trial.

The People presented testimony and records to show that the portable breath test given to the defendant was reliable and found to be operating within the acceptable limits of error. Additionally, the People offered the same type evidence that the Intoximeter at the county jail was in proper working order when used to take and measure samples from the defendant [that the Intoximeter breath-testing machine in question was found to be in an operational range and within the accepted limits of error in the case at bar]. The defendant called Dr. Michael P. Hlastala, a professor of medicine, physiology, biophysics and bioengineering at the University of Washington to testify concerning the reliability of breath testing machines. Dr. Hlastala testified that even if breath testing machines operate as designed, they do not perform a scientifically reliable test because the machine cannot ensure that a proper "deep lung" air sample is provided by the person taking the test. In other

words, Dr. Hlastala testified to the jury that although breath testing machines are designed to sample and analyze the concentration of alcohol contained in deep lung air, that they often fail to do so. The prosecutor objected to Dr. Hlastala's testimony. Outside the jury's presence, the trial court questioned whether testimony by Dr. Hlastala would constitute evidence concerning "partition ratio variability", which had been earlier ruled in Bransford to be inadmissible in prosecutions under the California DUAC statute. Responding to questions from the Court Dr. Hlastala testified that various other factors can cause a breath alcohol test to be scientifically inaccurate. Ultimately, the trial court overruled the defendant's objections - that Dr. Hlastala's proposed testimony was speculative and did not materially differ from evidence concerning "partition ration variability", which the California Supreme Court has previously held (see Bransford) to be inadmissible in prosecutions under the California DUAC statute. Accordingly, the trial court ruled that Dr. Hlastala would not be allowed to testify to the jury, as a general matter, that properly working breath testing machines do not sample accurately for alcohol concentration as they are designed to do.

The jury found the defendant guilty of violating the California DUAC per se statute; but the jury could not reach a unanimous verdict as to the charge of DUI/drunk driving.

On appeal, the California Court of Appeals overruled the trial court with the holding that Dr. Hlastala should have been allowed to testify as proffered to the inherent difficulties of breath testing devices used in California.

The People appealed the California Court of Appeals ruling to the California Supreme Court.

**ISSUE:**

Did the trial court properly exclude expert witness testimony offered by the defendant challenging the reliability of breath-alcohol testing machines?

**HOLDING:**

Yes. The trial court correctly excluded expert witness testimony offered by the defendant challenging the reliability of breath-alcohol testing machines in general.

The State of California has enacted a policy of adopting, incorporating and deferring to federal specifications for, and certifications of, models of breath testing machines in DUI/drunk driving cases. By both statute and legislatively endorsed regulations, California has in essence determined that all models of breath testing machines meeting the federal standards produce sufficiently reliable results for purposes of California's DUAC statute. Dr. Hlastala's proposed testimony sought to nullify determinations necessarily previously made by the appropriate federal agencies, adopted by the California State Department of Health Services, and endorsed by the California legislature in 2004. The California legislature has endorsed breath testing machine models that conform to state and federal specifications and have approved them for evidentiary use in California prosecutions of DUI/drunk driving cases.

"We must defer to and honor the legislature's determinations made in the course of its efforts to protect the safety and welfare of the public." When "scientific opinions

conflict on a particular point, the legislature is free to adopt the opinion it chooses, and the court will not substitute its judgment for that of the legislature." As the trial court correctly observed, the defendant remained free to argue and present evidence that the particular machine used in this case malfunctioned, or that they were improperly calibrated or employed. But the fundamental reliability of the breath testing models used in this case to produce results that are pertinent to the DUAC statute have been determined by our legislature; and that legislative determination is not subject to rebuttal as a defense in a criminal prosecution. A defendant, through an expert witness, cannot invite a jury to substitute the expert's judgment for that of the legislature in these type cases. In summary, a defendant in a DUI/drunk driving case cannot offer expert testimony to attack the general reliability of breath testing machines used in California that were working properly (at the time of the tests) pursuant to federal and state regulations and guidelines.

**ACCORDINGLY, THE CALIFORNIA COURT OF APPEALS DECISION IS REVERSED AND THE TRIAL COURT'S RULING IS HEREBY REINSTATED.**