



IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEVIN STEVENS,)	
)	
Defendant—Below,)	
Appellant)	
)	
v.)	No. 298, 2024
)	
)	
)	
STATE OF DELAWARE)	
)	
Plaintiff—Below,)	
Appellee.)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S OPENING BRIEF

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NATURE AND STAGE OF PROCEEDINGS

On March 13, 2023, Kevin Stevens was indicted on Driving a Vehicle while Under the Influence, and Driving a Vehicle while License is Suspended. A7—8. Stevens was tried before a jury on March 26—28, 2024. A6—7, D.I. #38. On March 28, 2024, the jury found Stevens guilty of all charges. A6—7, D.I. ##37—38.

During trial Stevens objected to the introduction of results of blood-intoxicant testing because the State had not established the testing machine was properly calibrated. A167; A180; A194. After trial, Stevens filed a motion for new trial, which argued similarly and supplemented that argument with *McConnell v. State*, which notes “a long-standing rule in Delaware law ... that the prerequisite to introducing the result of an intoxilyzer test into evidence is to present the certifications of the State Chemist that the intoxilyzer machine was operating accurately.” A296 (citing *McConnell v. State*, 639 A.2d 74 (Del. 1994)).

The trial court denied Stevens’ Motion based on its conclusion that *McConnell* only requires the introduction of certified calibration logs when there is reason to doubt that the machine was properly calibrated. Exhibit B.

On July 12, 2024, Stevens was sentenced to two years of incarceration, suspended after six months, for probation. Exhibit A.

This is Stevens’ opening brief to his timely filed notice of appeal.

SUMMARY OF ARGUMENT

1. This Court has adopted, and for more than thirty years continued to cite favorably to, clear foundational criteria which must be met before introducing the results of a blood-intoxicant testing device. In particular, in *McConnell v. State*, this Court held that “the prerequisite to introducing the result ... is to present the certifications of the State Chemist that the intoxilyzer machine was operating accurately before and after testing the breath of the defendant on trial.”¹ In this DUI prosecution, Stevens’ blood-intoxicant content was tested with a liquid chromatograph tandem mass spectrometer (“LC-MS/MS”), and over objection, the trial court admitted the results despite an absence of any calibration records, let alone calibration records from before and after the test certified by the State Chemist. Because the State did not meet the foundational requirements for admitting the results, the trial court committed error.

¹ *McConnell v. State*, 639 A.2d 74 (Del. 1994).

STATEMENT OF FACTS

Alexander Batt

On December 18, 2022, Alexander Batt was parked in an Acme parking lot on Marsh Road in New Castle County, Delaware. A32—33. He testified that a white truck drove past his car and then hit a parked car. A33—34. According to Batt, the driver of the white truck, whom he identified as Stevens (A35), then “hunched over” for twenty to thirty seconds, and then drove away. A34—36. Batt followed the truck, which he claims stopped at a green light, and then drove through when the light turned red. A37—38. Batt admitted that there might have been vehicles between him and the truck at this point. A52.

Batt followed the truck into the Graylyn Shopping Center, where he testified it parked in such a way that it blocked in four other cars. A39—40. He claims the driver then “slumped over again” and then “stumbled across the parking lot and into the Rite-Aid.” A40. Batt testified that he followed the driver into the Rite-Aid and “saw him with his hands on his knees swaying around” and then ask where the dog food was. A41. Batt claims that the man then knocked over a display in the store, and then sat on the ground with his head down. A42. Finally, Batt told an employee to call the police and that he had seen “this guy driving recklessly.” A42.

Trooper Sean Setting

At the time of trial, Trooper Sean Setting had been a Delaware State Police patrol officer for approximately three years. A58. Trooper Setting is a certified drug recognition expert. A59.

On December 18, 2022, Trooper Setting responded to the Rite-aid Graylyn Shopping Center. A59. He understood that there had recently been a hit and run. A59. He testified that Stevens' truck was unoccupied, obstructing the flow of the parking lot and its ignition was on. A60.

When he arrived, he encountered Batt. A60. He testified that he didn't recall Batt saying anything about Stevens' truck almost hitting Batt's car at the acme. A101. He testified that a trooper canvased the acme parking lot, couldn't locate any signs of a crash, and nobody had reported one. A101—02. Trooper Settings also inspected Stevens' truck and did not observe any obvious damage or paint transfers. A103. Overall, there was nothing to corroborate Batt's account of what happened in the Acme parking lot. A103. Trooper Settings also testified that he did not recall seeing any merchandise knocked over, as alleged by Batt. A104—05.

Trooper Setting also made contact with Stevens inside the store and testified that he was hunched over with droopy eyelids. A61. State introduced Trooper Setting's Body Worn Camera video. A61. At one point Trooper Setting administered the vertical gaze nystagmus test, the modified Romberg balance test, and the finger

to nose test (A83); however, at another point he claimed to have also administered the Vertical Gaze Nystagmus test. A87. When asked what might cause nystagmus other than drugs and alcohol, Trooper setting testified that there were other causes, but he couldn't "even think of any." A85. He observed zero of six clues when conducting the nystagmus test. A87. He testified that during the interaction Stevens was "slouched over. Almost not coherent... [and not] responding to verbal." A88. He also testified that Stevens had informed him about a knee injury, and that if the injury was affecting Stevens, then the tests should not have been performed; however, Trooper Settings could not recall if he asked Stevens if the injury was affecting him. A113—15.

After completing the tests, Trooper Setting obtained a warrant to take a sample of Stevens' blood and contacted a phlebotomist to do so. A92. Trooper Settings placed the blood in an evidence refrigerator. A95.

Trooper setting authenticated an official notification of withdrawal of Stevens' Driver's license. A126.

Sean Braydman

Sean Braydman is an Analytical Chemist at the Delaware Division of Forensic Science (DDFS). A129—30. He testified that a chain of custody report was prepared for the blood sample in this case and authenticated it. A132—134. He also testified to the procedures used by the lab to ensure a complete chain of custody and that there

is no tampering and stated that those procedures were followed. A136—37. Mr. Braydman was not involved in the testing in this case. A139.

Grant Fehnel

Grant Fehnel is an Analytical Chemist at DDFS. A140. He performed the preliminary enzyme-linked immunosorbent assay (ELISA) screen on the blood sample. A142. He testified that DDFS does not conduct a preliminary test to ensure machine used for ELISA testing is properly calibrated, but they do use “quality Control samples” during the testing to ensure the same and did so when testing the sample in this case. A142—43; A147. Mr. Fehnel explained that the machine produces raw data documentation which is the basis for determining whether it is functioning properly. A148—51. He testified that this data is not something normally provided in discovery, and that he did not have it with him. A151.²

Laura Choquette-Miller

Laura Choquette-Miller is an Analytical Chemist at DDFS. A159. Ms. Choquette-Miller conducted unidentified testing on the sample in this case. A160.

² At this point, Stevens objected to the ELISA results based on an absence calibration logs or other documentation indicating the machine was certified as working properly. A151—52. This same objection was later applied to the LC-MS/MS results. A167; A180; A194; A293—99.

Matthew Fox

Matthew Fox is an Analytical Chemist in the Toxicology Unity at DDFS. A163—65. Mr. Fox was assigned to conduct a Fentanyl confirmation test on the sample. A165. He did so using a liquid chromatograph tandem mass spectrometer (“LC-MS/MS”).³ A165. He testified that before using the LC-MS/MS he engaged in a “variety quality of assurance and quality control measures.” A166. He described the procedures for ensuring accurate and complete chain of custody. A166. He testified that the LC-MS/MS has a “daily calibration requirement,” that it is calibrated prior to running any samples, and that he did so. A173—74. He testified that there is documentation produced for such calibration tests, but that he did not have it with him in court. A174—75. admissibility

Mr. Fox testified that the test confirmed the presence of Fentanyl. A166—67.

Shronda Ellis

Shronda Ellis is an Analytical Chemist at DDFS. A177. Ms. Ellis was tasked with conducting confirmatory testing for the presence of Benzodiazepine in the sample, using an LC-MS/MS. A179. She testified that the control samples used to

³ In the liquid chromatography phase, the sample is separated into its molecularly discrete components in accordance with their relative masses, and then mass spectrometry provides information about those components which identifies their unique chemical makeup. A179; *Milligan v. State*, 116 A.3d 1232 at n.3 (Del. 2015); 54 AM. JUR. PROOF OF FACTS 3d 381 (Originally published in 1999).

ensure calibration are used contemporaneously with the testing. A179—80. She testified that the machine is not calibrated every day, but they do engage in other procedures to ensure accuracy. A184. She confirmed that as a result of those procedures, the LC-MS/MS prints out documentation which shows if it is functioning properly or not. A185. She indicated that she had the documentation with her in court (A185); but, at no point was it introduced into evidence. Ms. Ellis did not, however, have the printout measuring the controls used contemporaneously with Stevens' blood sample. A185—86.

Ms. Ellis testified that the test confirmed the presence of Benzodiazepine. A181.

Jessica Smith

Jessica Smith is Chief Forensic Toxicologist and a Laboratory Manager at DDFS. A187—88. As the Chief Forensic Toxicologist, Ms. Smith is “responsible for certification of the final toxicology reports, and the interpretation of the results.” A191. Ms. Smith confirmed that there is daily maintenance, including “running calibrators” conducted on the LC-MS/MS. A201. She testified that the labs “acceptance criteria” was followed and that she had “the case file with all the raw data” in her bag at court (A202—03); but, at no point was that documentation introduced into evidence.

Kevin Stevens

At the time of trial, Kevin Stevens was sixty years old, and had been an auto-mechanic for over 40 years. A216—17. On December 18, 2022, soon after he and his girlfriend separated, Stevens went to Acme to get his dog some food. A217—18. The prices were too high for him, so he left and went to Rite-aid.⁴ A218. Stevens testified that his car did not strike another car, and that if he had, he would have realized. A219. Stevens was in a hurry, so when he got to the Rite-aid he parked sideways so he could quickly be in and out. A220. Stevens denied knocking a display over and falling on the floor.

Stevens testified that he had broken his kneecap earlier in the year. A224. His knee was operated on, and he did physical therapy. A225—26. He informed Trooper Setting that it was hurting because of the cold temperature. A224—25. Stevens was prescribed painkillers for the injury during the time in question; and “some kind of mental health” medication because of being “down in the dumps” after his injury. A227—28. He testified that he did not take any drugs other than those prescribed. A232—33.

In 2020 Stevens was convicted of fleeing police in Pennsylvania. A234.

⁴ Although Stevens referred to the store as a “Walgreens,” “Rite-aid” is used herein to avoid confusion as there is no dispute that the Walgreens referred to by Stevens, and the Rite-aid referred to by other witnesses, are one in the same.

I. THE TRIAL JUDGE CONTRAVENED A CLEAR MANDATE FROM THIS COURT AND ERRED AS A MATTER OF LAW BY APPLYING THE WRONG FOUNDATIONAL ADMISSIBILITY STANDARD TO LIQUID CHROMATOGRAPH TANDEM MASS SPECTROMETER BLOOD INTOXICANT TESTING RESULTS.

Question Presented

Whether this Court’s decision in *McConnell v. State* establishes the introduction of certifications of an intoxicant testing machine’s calibration as a prerequisite to introducing the results of that machine’s testing? A167; A180; A194; A293—99.

Standard and Scope of Review

A trial judge's legal conclusions, are reviewed *de novo* for errors in formulating or applying legal precepts.⁵

Argument

- a. ***State Chemist certified proof of calibration is a foundational requirement for introducing results of a blood-intoxicant testing device.***

The importance of properly calibrating a blood-alcohol testing device used for DUI prosecutions cannot be overstated.⁶ By 1994, when this Court decided

⁵ *Burrell v. Delaware*, 2024 WL 4929021, at *6 (Del. Dec. 2, 2024).

⁶ Joseph Citron, *Differences Between a Hospital Blood Testing and a Crime Lab Blood Testing*, UNDERSTANDING DUI SCIENTIFIC EVIDENCE, 2013 WL 6140727, at *5 (2013 Aspatore) (“Precision of the results from any laboratory depends on the proper calibration of the instrument used to perform the analysis...Precision in the calibration process is the most essential part of the crime laboratory procedure.”)

McConnell v. State, a particular procedure for establishing proper calibration was already “well-established in Delaware.”⁷ In particular, “the prerequisite to introducing the result ... is to present the certifications of the State Chemist that the intoxilyzer machine was operating accurately before and after testing the breath of the defendant on trial.”⁸ Throughout the next thirty years until the present time, this Court⁹ and Delaware trial courts¹⁰ have continued to cite favorably to *McConnell*’s bright line rule. Finally, although *McConnell* applied the requirement to intoxilyzer results, the trial court suggested, and the prosecutor did not dispute that it is equally applicable to LC-MS/MS results. A153.

McConnell’s brightline rule makes perfect sense: given the statutorily presumptive reliability of “evidence establishing the presence and concentration of

⁷ *McConnell v. State*, 639 A.2d 74 (Del. 1994).

⁸ *Id.*

⁹ *Hofmann v. State*, 299 A.3d 1282 at n.18 (Del. 2023) *McCoy v. State*, 89 A.3d 477 at n. 8 (Del. 2014); *Talley v. State*, 841 A.2d 308 n. 11 (Del. 2003); *Anderson v. State*, 675 A.2d 943, 944–45 (Del.1996).

¹⁰ *Cedeno v. State*, 2023 WL 6323598, at *3 (Del. Super. Ct. Sept. 27, 2023) (“it is the Chemist’s Certification that establishes the reliability of the testing”); *Cahill v. State*, 2009 WL 3334902, at *2 (Del. Super. Ct. Aug. 31, 2009) (“in order to admit the results of an intoxilyzer test into evidence, the State must first introduce the certifications of the State Chemist...”); *State v. Grivas*, 1997 WL 127005, at *5 (Del. Super. Ct. Feb. 3, 1997) (holding “proof of the satisfactory performance of [calibration] tests ... is an element of the proper foundation for ... Intoxilyzer results” and testimony about those calibration logs is an inadequate substitute and violative of the best evidence rule); *State v. Hopper*, 2010 WL 11508217, at *5 (Del. Com. Oct. 1, 2010) (“in order to admit the results of an intoxilyzer test into evidence, the State must ...first introduce the certifications of the State Chemist ...”).

alcohol or drugs ... from tests of samples of the person’s blood,”¹¹ and the relaxed chain of custody requirements for admitting such results,¹² the truth-seeking function of a trial court, and D.R.E. 403, demand a foundational requirement designed to demonstrate the machine was “operating accurately.” Such a requirement is especially important for LC-MS/MS results given that technology’s “exquisite[] sensitiv[ity]”¹³ and “daily calibration requirement.” A173—74

b. The trial court erroneously declined to apply McConnell’s bright-line rule, which was left unsatisfied by the State’s failure to introduce calibration logs, or state chemist certification thereof.

In this case, over objection, the State presented and relied on results of LC-MS/MS testing without calibration logs (A151—54) or State Chemist certification thereof.¹⁴ A293—99. While Smith did testify that the lab’s “acceptance criteria” was followed (A202—03), neither the State nor the trial court identified a single case in which the foundational requirements for either LC-MS/MS or intoxilyzer results were deemed satisfied by *testimony about* calibration or the certification process without the actual calibration logs or the certification. Nor has Counsel found such

¹¹ 21 Del. C. § 4177(g).

¹² 21 Del. C. § 4177(h).

¹³ See 54 AM. JUR. PROOF OF FACTS 3d 381 (Originally published in 1999).

¹⁴ The report certifies itself as having been “prepared by a person qualified under standards and analyzed under procedures approved by the DFS” but does not purport to certify that the “machine was operating accurately before and after testing.” Stevens’ challenge is unrelated to whether the report’s author was qualified to prepare the report or whether the procedures used to analyze the report were approved by DFS. A292.

a case. Rather, as one would expect given *McConnell*'s clear and well-established rule, Delaware decisional law addressing the sufficiency of proof of calibration is focused on the adequacy of a witness's qualifications to authenticate the required calibration records and certification.¹⁵ Because neither was presented, the foundational requirements to introduce the LC-MS/MS were not satisfied, Stevens' jury should not have been permitted to hear any of this evidence or argument.

The trial court declined to apply *McConnell*'s rule— certified calibration logs are a prerequisite to admitting results – based on its conclusion that *McConnell*'s rule only applies if the opposing party contends that the testing device was not properly calibrated. A154; Exhibits B and C. This conclusion was legal error reached by misreading the *McConnell* Court's reference to that defendant's failure to "contend[], that the calibration checks performed by the State Chemist with the 'standard solutions' were improper,"¹⁶ as an indication that certified calibration logs

¹⁵ See e.g. *Desai v. State*, 198 A.3d 725, 730 (Del. Super. Ct. 2018) (rejecting argument that witness familiar with calibration process, but unfamiliar with certification process, was unqualified to introduce calibration records); *State v. McCoy*, 2012 WL 1415698, at *2 (Del. Super. Ct. Feb. 21, 2012) (reversing Court of Common Pleas decision holding witness unqualified to introduce calibration records); *State v. Palomino*, 2009 WL 10674894, at *2 (Del. Com. Sept. 3, 2009) (finding state trooper qualified to introduce State Chemist's certification of calibration); *State v. Arnold*, 2003 WL 23112735, at *2 (Del. Com. July 2, 2003) ("Because I conclude that this witness did not come within the requirement of an otherwise qualified witness under the Rules of Evidence, Rule 803(6), the Court excluded the certification test. Because the certification documents were excluded, the results of the intoxilizer are excluded.")

¹⁶ *McConnell v. State*, 639 A.2d 74 (Del. 1994).

are not required unless there is a contention of improper calibration. Exhibit B. The *McConnell* Court did not suggest that the failure to “contend[], that the calibration checks ...were improper” had any bearing on the foundational requirement to produce certified calibration records; rather, it explicitly upheld that requirement as a “well established” rule, and identified the absence of improper calibration evidence as the basis for rejecting McConnell’s argument that *in addition to* certified calibration logs, the proponent of the results must produce “evidence that the ‘standard solutions’ used to calibrate the intoxilyzer machine by the State Chemist were checked to determine their validity.”

The evidence in Stevens’ trial presents the opposite scenario: the State did not present “the [necessary and sufficient] certifications of the State Chemist that the [] machine was operating accurately before and after testing the breath of the defendant on trial,”¹⁷ and instead chose to present inadequate and unnecessary¹⁸ testimony about calibration.

¹⁷ *Id.*

¹⁸ *State v. McCoy*, 2012 WL 1415698, at *3 (Del. Super. Ct. Feb. 21, 2012) (“In order for an intoxilyzer test to be admitted into evidence, the State must first establish that the intoxilyzer machine functioned properly ... A State chemist is the individual responsible for ensuring the proper functioning of the intoxilyzer machine, but there is no requirement that the chemist testify at trial. Instead, the State can admit the calibration logs under the business records exception to the hearsay rule.”); *State v. Grivas*, 1997 WL 127005, at *5 (Del. Super. Ct. Feb. 3, 1997) (holding D.R.E. 1002 generally prohibits testimony *about* intoxilyzer calibration documentation if underlying documentation not presented but testimony permitted when defendant is responsible for missing documentation.).

CONCLUSION

For the reasons and upon the authorities cited herein, Defendant's aforesaid conviction should be vacated.

Respectfully submitted,

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DATED: December 30, 2024