

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

BRANDON MICHAEL RAMSEY

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1461 MDA 2013

Appeal from the Order of July 17, 2013
In the Court of Common Pleas of Franklin County
Criminal Division at No(s): CP-28-CR-0001540-2011

BEFORE: LAZARUS, J., WECHT, J., and MUSMANN, J.

MEMORANDUM BY LAZARUS, J.:

FILED JULY 24, 2014

Brandon Michael Ramsey appeals from the order entered in the Court of Common Pleas of Franklin County on July 17, 2013, denying his motion of acquittal of one charge of Driving Under the Influence (DUI).¹ After review, we affirm.

On May 7, 2011, at approximately 12:30 a.m., state troopers observed Ramsey's vehicle drive across a white fog line several times, and then swerve toward a utility pole. The troopers activated their lights and pulled over Ramsey's vehicle. When the troopers approached Ramsey, who was behind the wheel, they smelled alcohol on his breath, saw that his eyes were

¹ 75 Pa.C.S. § 3802(c). Ramsey was originally charged with two counts of DUI, one under section 3802(a)(1) and one under section 3802(c). Ramsey was convicted under section 3802(a)(1), but the jury could not reach a verdict on the charge under section 3802(c).

bloodshot and glassy, and noticed that his speech was slurred. Ramsey failed a field sobriety test. The troopers took him into custody, transporting him to the Chambersburg Hospital for a blood test.

At the hospital, a medical technologist drew a sample of Ramsey's blood. Jody Kelly, the lead medical technologist that night, then analyzed the blood sample for its alcohol content. Kelly performed the test with a Beckman Coulter LXI analyzer machine. The machine tests for the alcohol content of blood serum, a component of whole blood, rather than whole blood itself. Because section 3802 expresses the legal threshold limits of intoxication as percentages of whole blood, the machine uses a conversion factor to convert the result obtained from the serum into a percentage of whole blood. The analyzer yielded a result of .264 percent blood alcohol from the serum, and a low equivalent value of .195 percent of whole blood, well above the legal limit. Kelly testified to these results at trial. At the conclusion of the Commonwealth's case in chief, Ramsey moved for judgment of acquittal, which the trial court denied. The jury convicted Ramsey of DUI. The instant appeal followed.

The sole issue raised on appeal is whether the trial court erred when it denied Ramsey's motion for acquittal based on the Commonwealth's failure to meet its burden to prove that a generally accepted conversion factor was used in testing Ramsey's blood.

We employ the same standard when reviewing the denial of a motion for acquittal as a challenge to the sufficiency of the evidence.

Commonwealth v. Hutchinson, 947 A.2d 800, 805 (Pa. Super. 2008).

We ask, “whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, [was there] sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt[?]”

Id. (quoting **Commonwealth v. Andrulewicz**, 911 A.2d 162, 165 (Pa. Super. 2006)). We will defer to the fact finder’s determinations unless “the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances.” **Id.**

This Court recently articulated the legal requirements and scientific basis for the use of conversion factors in **Commonwealth v. Brugger**, 88 A.3d 1026 (Pa. Super. 2014):

In **Commonwealth v. Renninger**, 682 A.2d 356 (Pa. Super. 1996), we made it clear that supernatant blood alcohol test results are invalid “unless converting evidence is provided to establish the alcohol content of whole blood.” We explained that where blood alcohol testing is performed on only a portion of whole blood, such as plasma, serum, or a supernatant sample, it requires conversion to establish the correlative whole blood test results. **Id.** Recently, in **Commonwealth v. Hutchins**, 42 A.3d 302 (Pa. Super. 2012), we expounded on the necessity of whole blood test results as follows:

The general rule for alcohol[-]related DUI is that only tests performed on whole blood will sustain a conviction under 75 Pa.C.S. § 3802. Thus, evidence of blood serum, plasma or supernatant testing, without conversion, will not suffice. The reasoning for this rule rests on the distinction between whole blood and blood serum:

The distinction between whole blood and blood serum is significant. Serum is acquired after a whole blood sample is centrifuged, which separates the blood

cells and fibrin, the blood's clotting agent, from the plasma—the clear liquid i[n] the blood serum. When blood serum is tested the results will show a [BAC] which can range from between 10 to 20 percent higher than a test performed on whole blood. The reason for this is because the denser components of whole blood, the fibrin and corpuscles, have been separated and removed from the whole blood, leaving the less dense serum upon which the alcohol level test is performed. The value of the [BAC] in the serum is then determined. Because the serum is less dense than whole blood, the weight per volume of the alcohol in the serum will be greater than the weight per volume in the whole blood. Thus, an appropriate conversion factor is required to calculate the corresponding alcohol content in the original whole blood sample.

Id. at 1028-29 (citing **Commonwealth v. Hutchins**, 42 A.3d 302, 309-10 (Pa. Super. 2012) (citations omitted)) (citations modified) (brackets in original).

In support of his claim, Ramsey cites **Commonwealth v. Karns**, 50 A.3d 158 (Pa. Super. 2012), in which this Court held that the Commonwealth presented insufficient evidence of the use of a conversion factor generally accepted in the scientific community. There, the Commonwealth's witness testified that she was not aware of how the machine that tested and converted the blood sample worked, never identified which conversion factors she used, and failed to establish that they were generally accepted in the scientific community. **Id.** at 164-65.

Here, Medical Technologist Kelly's testimony adequately described to the jury how the machine converted the BAC in Ramsey's blood serum into the BAC in his whole blood. On cross-examination by Shawn M. Dorward, Esquire, counsel for Ramsey, Kelly testified as follows:

DORWARD: Okay. And, they explain how they come up with the conversion factor?

KELLY: Yes, I believe so.

DORWARD: Or do they just basically tell you that plasma to whole blood is the conversion factor and serum to whole blood is the conversion factor?

KELLY: No. They described the study that was used to create the conversion factor.

DORWARD: Can you tell me about the study that was done?

KELLY: I can't give specific numbers, because I don't remember them, but they tested patients. It's a random study where you bring in—you collect specimens and you collect the whole blood, and serum and plasma and you process all of them, and then you—the conversion factors are created from the differences between those specimens.

DORWARD: Okay. But can you give me the mathematical equation that got Mr.—Dr. Garriott, as to the fact where he's using a low equivalent of 1.35 and a high equivalent of 1.10?

KELLY: I know that the conversion factor for the low is 1.35 and the high is 1.10.

N.T. Trial, 10/15/13, at 133-34. Kelly further opined on the purpose of conversion factors:

DORWARD: And, why is there a conversion factor used in this equation? Why do you do that?

KELLY: Because we test on serum and the conversion factor allows for what that level of the alcohol is in the whole blood of that specimen.

N.T. Trial, 10/15/13, at 148-49.

Although the trial court would not allow Kelly to testify directly as to whether the conversion factors used were generally accepted in the scientific community, the jury was exposed to sufficient evidence for it to have concluded that they, in fact, were. Indeed, Dr. Garriott's conversion factor has been previously accepted as such by this Court. **See Commonwealth v. Newsome**, 787 A.2d 1045, 1049 (Pa. Super. 2001).

In determining whether something is generally accepted in the scientific community, courts have primarily been concerned with whether the basis of the methods employed is sound, and that the result is not the product of some rogue scientist's fanciful efforts. **See Tucker v. Community Medical Center**, 833 A.2d 217, 224 (Pa. Super. 2003). Here, upon redirect examination by Assistant District Attorney Gerard N. Mangieri, Esquire, Kelly testified to the fact that the conversion factors used came directly from a peer-reviewed and published study by Dr. James Garriott:

MANGIERI: Mrs. Kelly, this text, is that called medical legal aspects of alcohol in bio-legal specimens, is that what that's call? [sic]

KELLY: I believe so, yes.

MANGIERI: And these studies that counsel was asking you about, were they published studies?

KELLY: Yes, this is a published text book.

MANGIERI: And when you say published, they have to be peer-reviewed, right?

KELLY: I believe that's how it works.

MANGIERI: And, when we say peer-reviewed, that's scientists in the community reviewing that work, is that right?

KELLY: Yes.

MANGIERI: Okay. And scientists in the community having reviewed that work, found it to be accepted?

KELLY: Yes.

MANGIERI: Okay. And, that the conversion factors were arrived at using generally accepted scientific methods, is that right?

KELLY: Yes.

MANGIERI: Okay. And, you know that because you learned about those scientific methods, right?

KELLY: Yes.

MANGIERI: And, not only in your education but in your training as well?

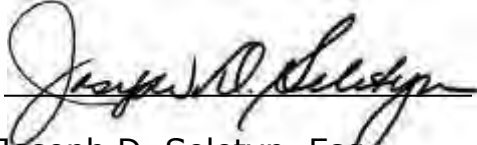
KELLY: Yes.

N.T. Trial, 10/15/13, at 134-35.

Because Kelly's testimony described how the conversion factors worked, identified the conversion factors that were actually used, and testified that they were the products of a peer-reviewed scientific study, we are satisfied that the Commonwealth adduced sufficient evidence to present the issue to the jury. Accordingly, the trial court did not err in denying Ramsey's motion for acquittal.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/24/2014