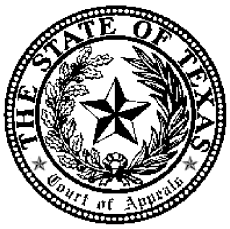
Affirmed and Opinion filed October 4, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-00553-CR

BRIAN RICHARD HENNIP, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law Number 9
Harris County, Texas
Trial Court Cause No. 99-34660

O P I N I O N

Appellant, Hennip, appeals the denial of his motion to suppress the results of a breath alcohol content test. He argues that the test results are unreliable because they are inconsistent with a technical supervisor's estimates of a subject's breath alcohol content levels based on hypothetical questions incorporating numerous assumptions regarding the timing and amounts of drinks and food. Because we find that the technical supervisor's answers went to the weight of the evidence rather than its admissibility, we affirm.

Appellant, Brian Richard Hennip, was charged by information with misdemeanor driving while intoxicated. After the trial court denied his motion to suppress, Hennip pled

nolo contendere under a plea bargain with the State. The trial court then assessed Hennip's punishment at 180 days in the Harris County Jail, suspended for 1 year of community supervision, and a $400.00 fine. Hennip obtained the trial court's permission to appeal the adverse ruling on his motion to suppress and timely filed a written notice of appeal.

In this appeal, Hennip makes the somewhat novel argument that the blood alcohol content ("BAC") results of an intoxilyzer breath test should have been suppressed because there was an inconsistency between the test results and the intoxilyzer technician's responses to hypothetical questions that included stipulated facts. Appellant alleges that the inconsistency renders the test results unreliable. We disagree.

FACTS

On August 12, 1999, Corporal Greg Lowrey[1] of the Harris County Constable's Office stopped a vehicle driven by Hennip at the intersection of Cypresswood and Jones in Harris County some time between 2:00 a.m. and 2:37 a.m. Although Hennip contends that the stop may have occurred at approximately 2:00 a.m. "based on a statement by Lowrey regarding the time of the stop," Corporal Lowrey would later testify that the stop was recorded by the dispatcher as occurring at 2:37. Lowrey stopped Hennip for failing to signal a turn and failing to keep his car in one lane. Lowrey testified that, upon approaching Hennip, he noticed a strong odor of alcoholic beverage on Hennip's breath and observed that his speech was slurred and his eyes were glossy. Before asking Hennip to step out of his car, Lowrey asked him to recite the alphabet; Hennip attempted three times, but failed. Additionally, Hennip failed several field sobriety tests, including tests requiring him to stand on one leg and to walk and turn. Subsequently, Hennip was given an intoxilyzer breath test; the intoxilyzer registered a .101 BAC level at 3:10 a.m. and a .102 BAC level at 3:13 a.m.

The trial court held a hearing on Hennip's motion to suppress the results of the breath

[1] The spelling of the Corporal's last name appears as "Lowrey" in the Reporter's Record and as "Lourey" in the State's brief.

test, at which Hennip argued that the intoxilyzer technician, Becky Cuculic, could not extrapolate his BAC level back to the time of his arrest. Hennip's counsel posed a hypothetical question to Cuculic, in which she was asked to assume the consumption of 8 or 9 ounces of crawfish etouffee at 10:30 p.m., a 20-ounce draft beer at 11:15 p.m., a 12-ounce beer at 12:15 a.m., a shot of Jack Daniels containing approximately 1½ ounces of alcohol, consumed in its entirety, at 1:00 a.m., a double shot of Jack Daniels containing approximately 3 ounces of alcohol, also consumed in its entirety, at 1:45 a.m., and a small order of onion rings at approximately 2:10 a.m.[2] Cuculic was further asked to assume that the subject was stopped for a traffic offense at 2:00 a.m., was arrested at approximately 2:40 a.m., and at 3:10 a.m. the intoxilyzer registered a .101. Finally, Cuculic was told to assume that the subject was approximately 6 feet 2 inches tall, weighs 195 pounds and is a 25-year-old man. Given these assumptions, Cuculic was asked what Hennip's BAC would have been at 2:00 a.m.

Cuculic testified that, under the given hypothetical, the subject's BAC would be at .11 to .12 at the time of the test, assuming the subject was "peaking," which she explained was a point after a person stops consuming alcohol and reaches a peak alcohol concentration. Cuculic further explained that if the subject was in the "absorption phase," she could not assign a numerical value.

When Hennip's counsel asked Cuculic to estimate what a BAC would be at 2:00 a.m. and to assume no test was administered, Cuculic estimated that the BAC would be approximately .05. Asked to reconcile the difference between her earlier extrapolation and the hypothetical, Cuculic responded that she did not think the .10 test results at 3:10 a.m. agreed with the assumptions as to the amounts the subject had to drink, and that she "would go with the number of drinks being mistaken." When asked whether the machine could also

[2] In response to Cuculic's question about whether the subject ate the onion rings before or after the stop, Hennip's counsel revised his hypothetical to include the assumption that the onion rings were eaten before the stop, while driving.

be mistaken, she stated that "[t]he instrument doesn't manufacture results."

On cross-examination, the State posed the same facts as given in the hypothetical (taking into account the test results), except that the subject was stopped at 2:37 a.m. In Cuculic's opinion, the subject would have had between a .106 and a .116 BAC level at the time of the stop. On redirect, Hennip's counsel asked Cuculic what the subject's BAC level would be at 2:37 a.m. based on the same assumptions, but disregarding the test results, and Cuculic responded that the BAC would be approximately .04.

When Hennip's counsel requested to call Hennip to the stand for the limited purpose of testifying to the number and timing of drinks, the prosecutor stated as follows:

> If I could respond. We have already stipulated into evidence that the videotape – on tape he does admit to two beers and two shots. Now, you know, if he wants to testify how big they were or whatever, I will stipulate to that, that that's the sizes which is fine with me. I agree with the Court that I don't seek how this can help us a whole lot. The hypotheticals are pretty much what the defendant is probably going to testify to.

At the conclusion of the hearing, the court denied the motion to suppress.

ANALYSIS

Hennip contends that, given the State's stipulation to the hypothetical questions posed to Cuculic and the inconsistency between her opinion of the BAC levels under the given hypothetical questions and the actual intoxilyzer test results, sufficient doubt was raised about the reliability of the particular intoxilyzer results to require exclusion of the intoxilyzer evidence. Although Hennip repeatedly characterizes his appeal as a challenge to the reliability of the intoxilyzer test results, he does not raise a *Daubert* challenge to the scientific validity of the test; indeed, at the hearing on the motion to suppress, Hennip stipulated that he was not challenging the machine, thereby preempting the State's line of

questioning regarding the reliability of the intoxilyzer device. Nor does Hennip seek to exclude the technician's testimony. Rather, Hennip challenges the relevance of the evidence and asserts that suppression was warranted in this particular case because of the prosecution's stipulation to certain facts in the hypothetical questions.[3]

In reviewing a decision on a motion to suppress, the appellate court must review the evidence in the light most favorable to the trial court's ruling. *Reyes v. State*, 899 S.W.2d 319, 322 (Tex. App.—Houston [14th Dist.] 1995, pet. ref'd); *State v. Hamlin*, 871 S.W.2d 790, 792 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd). At a suppression hearing, the trial judge is the sole judge of the witnesses' credibility, and the court's findings will not be disturbed absent a clear abuse of discretion. *Meek v. State*, 790 S.W.2d 618, 620 (Tex. Crim. App. 1990); *Reyes*, 899 S.W.2d at 322. Thus, we affirm the trial court's findings if they are supported by the record. *Turner v. State*, 901 S.W.2d 767, 769 (Tex. App.—Houston [14th Dist.] 1995, pet. ref'd).

As an initial matter, we cannot agree with Hennip that the State in fact agreed to all of the facts assumed in the hypothetical. The record reflects that, at best, the State stipulated only that Hennip would testify that he had two beers and two shots, as stated in the hypothetical. There was no stipulation as to the time of consumption, the size of the drinks, or the times and amounts of food consumed prior to the stop.

Further, and most notably, Hennip elicited inconsistent results only when he asked Cuculic to disregard the actual breath test results. Hennip offered no evidence indicating that the intoxilyzer results were made in error, except for his hypothetical based on his

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[3] Specifically, Hennip argues that the test results in this case are not relevant under Texas Rules of Evidence 401-403, the rules addressing relevance, because of the inconsistences noted, and therefore do not satisfy Texas Rule of Evidence 104(b), which provides that "[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." We cannot say, however, that evidence bearing on the accuracy of breath alcohol test results, and therefore the weight to be accorded them, is not relevant to the offense of driving while intoxicated. Further, Rule 104(a) makes clear that, in making a preliminary determination of admissibility, the court "is not bound by the rules of evidence except those with respect to privileges" and therefore is not constrained by the rules addressing relevance.

version as to the time and amounts he had to drink and eat that night. As Hennip himself stresses, the inconsistent testimony he relies upon is based on the intoxilyzer technician's answers to hypothetical questions. These hypothetical questions contained numerous assumptions and the technician's answers to them were not opinions on Hennip's actual breath alcohol at the time of the stop. Such evidence goes to the weight to be accorded to the intoxilyzer test results, rather than to admissibility. *See Slagle v. State*, 570 S.W.2d 916, 919 (Tex. Crim. App. 1978) (holding that evidence of the variables that may affect breath test results "[go] to the weight to be accorded to the breathalyzer results").

Here, Cuculic testified that, given (1) Hennip's breath test results of .101 at 3:10 a.m. and a .102 at 3:13 a.m., and (2) the time between his last drink and the time of his stop, Hennip's BAC level would have been above a .10 at the time of his stop. Because it was within the trial court's discretion to determine whether the intoxilyzer test results were preliminarily admissible, and the court's ruling is supported by the record, we conclude that the trial court did not err in admitting the evidence.

The trial court's ruling is, therefore, affirmed.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed October 4, 2001.
Panel consists of Chief Justice Brister and Justices Fowler and Seymore.
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