

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Benjamin H. Culbertson, Circuit Court Judge
Appellate Case No. 2012-211546

THE STATE,

Appellant,

vs.

MICHAEL J. HILTON,

Respondent.

SUPPLEMENTAL RECORD ON APPEAL

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Defendant's Memorandum in Support of Motion to Exclude Evidence, Pages 4 & 5.1

conduct periodic linearity checks on DataMaster 881279, particularly in light of the machine's consistent and repeated failures – including three failures in the thirty minute period immediately preceding Mr. Hilton's test – further undermines the reliability and evidentiary value of any test result generated.

The standard for admitting scientific evidence in South Carolina is “the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom.” State v. Jones, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979). In State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), the Court reaffirmed the Jones standard:

In considering the admissibility of scientific evidence under the Jones standard, the Court looks at several factors, including: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) **the quality control procedures used to ensure reliability**; and (4) **the consistency of the method** with recognized scientific laws and procedures.

State v. Council, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999) (emphasis added).

Here the Defendant does not challenge the admissibility of all DataMaster tests. He challenges only the test performed on him the morning after his arrest. The only consistency inherent in DataMaster 881279 is the machine's consistent failure. Moreover, the quality control procedures not only failed to ensure the test's reliability, but confirmed the test was unreliable. Pursuant to Council, *supra*, the results should not be admitted.

Section 56-5-2950 bars introduction of the breath test into evidence

In addition to those reasons set forth above, the results of Michael Hilton's breath test should be excluded from trial because the arresting officer failed to conduct the test within two hours of Mr. Hilton's arrest.

On April 10, 2008, the General Assembly amended S.C. Code Ann. §56-5-2950. The amendment became effective on February 9, 2009. In relevant part, the amendment provided:

AN ACT . . . TO AMEND SECTION 56-5-2950, RELATING TO A DRIVER'S IMPLIED CONSENT TO TESTING FOR ALCOHOL OR DRUGS, SO AS TO MAKE TECHNICAL CHANGES, TO PROVIDE WHEN BREATH SAMPLES MUST BE COLLECTED UNDER THIS PROVISION, TO DELETE THE PROVISION THAT PROVIDES THAT AN OFFICER MAY NOT REQUIRE ADDITIONAL TESTS OF A PERSON UNDER CERTAIN CIRCUMSTANCES, TO DELETE THE TERM "DEPARTMENT OF PUBLIC SAFETY" AND REPLACE IT WITH THE TERM "SOUTH CAROLINA CRIMINAL JUSTICE ACADEMY", **TO REVISE THE PROVISIONS THAT PROVIDE THE PROCEDURES FOR ADMINISTERING BREATH TESTS OR OBTAINING SAMPLES**, TO REVISE THE INFORMATION THAT A PERSON CHARGED WITH VIOLATING THIS PROVISION MUST BE GIVEN, TO PROVIDE THE CIRCUMSTANCES IN WHICH A PERSON MUST PAY FOR THE COST OF TESTS PERFORMED UNDER THIS SECTION AND PROVIDE FOR THE DISBURSEMENT OF THESE MONIES, TO DELETE THE PROVISION THAT PROVIDES THAT A CERTAIN LEVEL OF ALCOHOL CONCENTRATION IS A VIOLATION OF SECTION 56-5-2933, **AND TO REVISE THE CIRCUMSTANCES IN WHICH CERTAIN EVIDENCE MAY BE EXCLUDED IN A PROCEEDING THAT OCCURS UNDER THIS SECTION;**

Act No. 201, 2008 S.C. Acts ___ (emphasis added). Pursuant to the above, S.C. Code § 56-5-2950(A) was amended to provide:

A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs or the combination of alcohol and drugs if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs. . . . **A breath sample taken for testing must be collected within two hours of the arrest.**

S.C. Code Ann. § 56-5-2950(A) (Supp. 2010) (emphasis added).²

² Prior to the 2008 amendment, the implied consent statute contained no temporal requirement for breath testing in general. However, the section provided that "[i]f the alcohol concentration was at that time eight one-hundredths of one percent or more and the original testing of the person's breath or collection of other bodily fluids was performed within two hours of the time of arrest, the person has violated Section 56-5-2933." S.C. Code Ann. §56-5-2950(b)(4) (Supp. 2006).

CERTIFICATE OF COUNSEL

Counsel for Appellant certifies that this Supplemental Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeals complies to the best of my ability with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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