

gas chromatography instrument used to test the defendant's blood alcohol content, thus the test results were deemed inadmissible and the evidence thereby legally insufficient to sustain the conviction.

In doing so, the trial court reversed the ruling it had made at trial allowing testimony that the gas chromatography machine was reliable and accurate and receiving into evidence the blood alcohol test results.

The issue, then, is whether the Court abused its discretion in precluding the blood alcohol analysis results. It did not.

It is the rule that "Trial courts are accorded wide discretion in making evidentiary rulings, and, absent an abuse of discretion, those ruling should not be disturbed on appeal" and that "A court's discretion in evidentiary rulings is circumscribed by the rules of evidence" (*People v Carroll*, 95 NY2d 375, 385 [2000]).

Unlike *breath* analysis instruments (*see* 10 NYCRR 59.4), devices that measure blood alcohol levels by using a blood sample are not considered reliable and their results are not admissible unless the People establish "the requisite foundation for the admission of the (blood test) results" (*People v Sierra*, 85 AD3d 1659, 1661[4th Dept 2011]; *lv denied* 17 NY3d 905[2011], *habeas denied Sierra v Bradt*, 2013 WL 5701805, *7 [WD NY 2013]). The foundation can be laid by testimony that the device in question is a "scientifically reliable means for identifying alcohol in the blood and is generally accepted in the scientific community as accurate and reliable" (*Sierra v Bradt, id; see also People v Baker*, 51 AD3d 1047, 1048-49 [3d Dept 2008]; *People v Campbell*, 73 NY2d 481, 485 [1989]).

Here, the foundational testimony was provided by David Nemeth, PhD., a certified "forensic toxicologist," equipped with a bachelor of science and chemistry from the Pennsylvania

State University and a doctorate in chemistry from the University of Pittsburgh, as well as post-doctorate work at the University of Rochester. His work at the Monroe County Medical Examiner's office involves the testing of blood and tissue samples for the presence of alcohol, which he has done "hundreds of times."

Asked whether the "headspace gas chromatography" analysis or technique used to test the blood sample given by the defendant is "... recognized by the scientific community," he replied, "Yes." Although Dr. Nemeth displayed a high degree of knowledge as to the operation of the machine and was qualified to render an opinion that the machine was generally accepted as being reliable (*People v Abel*, 166 AD2d 841, 842 [3d Dept 1990]; *People v Sierra*, *id*), it was well within the Court's discretion to preclude, post-verdict, the evidence of the machine's results, as the People's question regarding the accuracy of the *technique* involved fell short of the foundation necessary to validate the accuracy of the instrument used to test this defendant's blood (*see Baker* at 1049).

The defendant also contends, and the lower court in the exercise of its discretion, agreed, that a proper foundation was not laid for the introduction into evidence of the samples used to calibrate the instrument. Prior to testing the defendant's blood samples, Dr. Nemeth ran 29 separate calibrations of the machine, using quality control samples Dr. Nemeth had personally concocted from a stock solution supplied by a private company. He testified that after running the quality control and calibration tests, he was able to form the opinion that the instrument used to conduct the test was in "good working order" and "giving acceptable results."

However, the People failed to elicit any testimony regarding how he diluted the stock samples in order to create the reference samples used to calibrate the device. He was never asked how it was done, or that it was done in a manner or using a procedure that was deemed reliable

and acceptable by the scientific community. In other words, he was never asked how he knew that the final resulting samples were what he said they were, or that in his opinion to a degree of scientific certainty the samples were accurate. The People's argument that the solutions were accurate was a tautology – they were accurate because the machine results corresponded to what he believed they ought to be, without “connecting the dots” to the satisfaction of the court as to how he got from the stock solution to the quality control samples.

Thus, the Court acted within its discretion in precluding the test results based in part upon the failure of the People to elicit testimony specifically directed to the determination of the accuracy of the samples used to calibrate the machine. While it would not have been an error to receive the results (*see Sierra v Bradt*, 2013 WL 5701805, 7 [WD NY 2013] [“the technician confirmed that the gas chromatograph was working properly by running several quality control tests”]), to reject it was not an abuse of discretion, and the People have pointed to no rule of evidence that mandated its receipt. The lower court apparently imposed on the People the burden of a high degree of exactness to demonstrate the reliability of the machine used to test the defendant's blood, a burden the People could not meet.

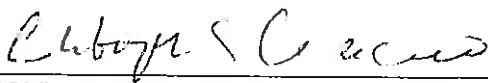
The People's contention that there is no “need, in cases of blood tests, for the People to establish that the chemicals used in conducting the test were mixed the proper proportions” is rejected, as having no support in the case law and as contrary to the principles set forth in *Frye v United States*, 293 F 1013, 1013 ([DC Cir 1923]; *see also People v Bohrer*, 37 Misc 3d 370, 372 [Just Ct 2012]), as well as logic and common sense. Certainly the requirement can't possibly be a burden; in this case, it would have required no more than a few lines of testimony from Doctor Nemeth.

Since the lower Court acted within its discretion in finding that the device test results were inadmissible, the remaining evidence, absent now the test results, was legally insufficient to sustain the conviction for a violation of VTL § 1192[2].

Accordingly, the lower court's Decision and Order are affirmed.

This constitutes the DECISION and ORDER of the Court.

Dated: June 5, 2017
Rochester, New York



HON. CHRISTOPHER S. CIACCIO
Monroe County Court Judge