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First, Petitioner contends that there was a violation of § 577.041.3 because Officer JS allegedly did not provide Petitioner with a reasonable opportunity to consult with an attorney upon her request as required by statute.

Second, Petitioner contends that there was a violation of 19 CSR 25-30.051.4 and 19 CSR 25-30.031.3 because Respondent allegedly did not produce sufficient evidence that the simulator was checked against a valid NIST traceable reference thermometer.

Third, Petitioner contends there was a violation of 19 CSR 25-30.060(6)(7) and 19 CSR 25-30.011(2)(H) because Petitioner wiped a cloth intended to clean oil and gas from a mechanic's hands across her face just prior to the breath test therefore rendering the chemical analysis of the Petitioner's breath invalid.

Petitioner also objected to Exhibit B, the maintenance report, offered by Respondent as allegedly violating 19 CSR 25-30.051.4, 19 CSR 25-30.031.3.

Further, Petitioner objected to Exhibit C submitted by Respondent C which was a certificate of the NIST thermometer, alleging improper certification under 19 CSR 25-30.051.

Finally, Petitioner offered Petitioner's Exhibit 1 and Exhibit 2. Respondent objected to Exhibit 1. Exhibit 1 is a simulator calibration report for simulator serial no. DR3412 dated July 17, 2017 and Exhibit 2, the surveillance video from the [REDACTED] jail to which no objection was made.

The court reserved rulings on the Petitioner's objections to be taken with the proposed findings of fact and conclusions of law.

RESPONDENT'S BURDEN OF PROOF

Respondent, the Director of Revenue has the burden of proving by a preponderance of the evidence that (1) Petitioner was arrested upon probable cause to believe she was driving a motor

vehicle while intoxicated, and (2) she was driving with a BAC of .08% or higher. See § 302.505, RSMo; *Stewart v. Director of Revenue*, 702 S.W.2d 472, 475 (Mo. banc 1986), *O'Rourke v. Dir. of Revenue*, 409 S.W. 3d 443, 447 (Mo. App. 2013). The Director's burden has two components, the burden of production and the burden of persuasion. The burden of production means the duty to introducemissible evidence, while the burden of persuasion means the duty to convince the fact finder to view the facts favorably to the director.

FINDINGS OF FACT

1. Probable Cause for the Arrest

At trial, the parties stipulated that there was probable cause for the arrest.

2. Twenty Minute Rule

Section 577.041.1 provides in part:

If a person when requested to submit to any test allowed pursuant to section 577.020 requests to speak to an attorney, the person shall be granted twenty minutes in which to attempt to contact an attorney.

The twenty-minute waiting period begins running immediately after the officer has informed the driver of the implied consent law, regardless of whether the driver requested an attorney before or after the information was provided. *Norris v. Director of Revenue*, 304 S.W. 3d 724 (Mo. Banc. 2010).

The twenty-minute requirement is met either at the conclusion of the twenty minute period, if the person attempts to contact an attorney unsuccessfully or if the driver abandons the attempt. *White v. Director of Revenue*, 255 S.W. 3d 571, 578 (Mo. App. S.D. 2008). Abandonment is established when "the driver ceases attempting to contact a lawyer and indicates that she intends



to make no additional attempts to contact an attorney within the twenty minute period". *McMaster v. Lohman*, 941 S.W. 2d 813, 817 (Mo. App. W.D. 1997).

In this case, it is undisputed that Petitioner did not personally attempt to contact an attorney at any time even though she clearly was in possession of a cell phone during the relevant time frame. It is undisputed that Petitioner called her husband.

According to the booking video, Exhibit 2, on August 11, 2016 at 12:36:58 a.m. Officer JS gave Petitioner a cell phone. Petitioner then made a call at approximately 12:37:19 a.m. and spoke with someone, presumably her husband, until 12:40:48 a.m.. Thereafter Petitioner makes a comment to Officer JS who then, at 12:40:57 a.m., advised her she has twenty minutes to contact an attorney. She makes another phone call at 12:41 :20 and states to the person on the line that they have twenty minutes to contact an attorney. While she is on the phone, Officer JS clarifies to her that *she* has 20 minutes to contact an attorney, which Petitioner repeats to the person on the phone. This phone call ends at 12:41: 48 a.m .. During the period of time between 12:47:28 and 12:49:16 a.m. Officer JS asks Petitioner some questions including whether she has been injured. Petitioner indicates her elbow. Officer JS then obtains a wipe or rag from a jar with a red cap sitting on the desk and gives it to Petitioner at 12:49:16 a.m. Petitioner wipes her hands and puts the rag or wipe down next to her at 12:50:39 a.m. Petitioner grabs what appears to be a tissue at 12:50:52 a.m and then blows her nose. From 12:50:52 to 12:53:10, Officer JS asks Petitioner a series of 3 or 4 questions. Thereafter there is no speaking between them until 12:54:54 when Officer JS tells Petitioner she is down to a few minutes. Petitioner then makes another call, presumably to her husband, at 12:55 :09 a.m. and that call ends at 12:58:53 a.m .. It is unclear from the video if Petitioner makes any comments to Officer JS after the phone call. At 12:59:07 a.m., Officer JS states to Petitioner that



“you have a couple more minutes, do you want to waive that time.” Officer JS then states to Petitioner at 12:59:29 a.m. “ok then do you want to do it.” He then describes the breath test to her and at 1:03:24 a.m. he instructs her to stand up and proceeds to do the breath test.

In light of the foregoing, the court hereby finds that the twenty minute rule was not violated and that Petitioner abandoned the efforts to contact an attorney prior to the expiration of the twenty minute period. As detailed above, the booking video reveals that Petitioner conversed with her husband by cell phone three separate times. It is clear from the video, and it is not disputed, that she was informed about the twenty minute rule and she was specifically told that the rule only applied to *her* attempts to contact an attorney. Finally, the video reveals that it was only after the three phone calls and the notice of the twenty minute rule that she thereafter indicated here willingness to waive the remaining few minutes of the twenty minute time limit.

The Court rejects the Petitioner’s argument that the fact that Officer JS asked her questions from the alcohol influence report interfered with her attempts to obtain an attorney, since her husband was the one who was presumably attempting to make such contact with an attorney and she was able to call her husband both before and after the Officer asked her some questions. Further, Petitioner retained her cell phone through-out the entire time period leading up to the breath test and nothing in the video or the Officer’s testimony leads to the conclusion that the Petitioner was coerced to waive the full twenty minutes.¹

3. Validity and Admissibility of the BAC under CSR 25-30.051.4 and 19 CSR 25-30.031.

To establish a *prima facie* foundation for admission of breathalyzer test results, Director must demonstrate the test was performed: (1) by following the approved

¹ Petitioner did not testify at the hearing.



techniques and methods of DHSS {Department of Health and Senior Services}; (2) by an operator holding a valid permit; 3) on equipment and devices approved by DHSS. *Sledd v Director of Revenue*, 503 S.W. 3d 347, 349 (Mo. App. S.D. 2016) citing *Courtney v. Dir. Of Revenue*, 477 S.W. 3d 659, 667 (Mo. App. W.D. 2015).

“The rule defining the standard simulator solutions . . . to be used in verifying and calibrating breath analyzers as well as the annual checks required on simulators used in conjunction with the standard simulator solution is:

‘Any breath alcohol simulator used in the verification or calibration of evidential breath analyzers with the standard simulator solutions referred to in . . . this rule shall be certified against a National Institute of Standards and Technology (NIST) traceable reference thermometer or thermocouple between January 1, 2013 and December 31, 2013 and annually thereafter.’” *Sledd, supra, citing* 19 CSR 25-30.051(4).

Further under 19 CSR 25-30.031(3) a Type II permittee shall perform maintenance checks on breath analyzers under his/her supervision at intervals not to exceed thirty-five (35) days.

The maintenance report and supporting documents in Exhibit B reflect that the device had been timely inspected and in good working order. The maintenance report on the breath machine reflects an inspection performed on August 6, 2016, five days before Petitioner’s breath test. The maintenance report was fully completed and signed by a Type II permit holder for the instrument, Officer Schnurr. Exhibit C, the Simulator Calibration Report reflects that the simulator used to test Petition’s breath was calibrated in reference to the NIST Traceable Thermometer SN 09048 which was tested on 10/13/2015 and that such certification expires 10/13/16.



Although Petitioner argues that Exhibit B was insufficient because the Department of Health and Senior Services changed their forms and that Exhibit B is an older version of the form, the Court overrules the objection to Exhibit B and finds that Exhibit B coupled with the testimony of Officer JS and Exhibit C satisfy the requirements of 19 CSR 25-30.051 (4). The court sustains the Respondent's objection to Exhibit 1 as it is irrelevant as to the admissibility of the Exhibit B, because Petitioner's Exhibit 1 is a much later calibration check on the subject simulator. Evidence of subsequent maintenance checks are not required to establish the foundation for admissibility of the breath test. *See e.g. Kern v. Director of Revenue*, 936 S.W. 2d 860, 862 (Mo. App. E. D. 1997). Subsequent maintenance checks go to the weight of the evidence not admissibility. Here the subsequent maintenance check, Petitioner's Exhibit 1, doesn't demonstrate any malfunction with the equipment and therefore has no impact on the validity of the test results or the weight this court gives to the evidence.

Accordingly, this Court finds that the evidence presented at trial established that the proper procedures were followed in conducting the analysis of the Petitioner's breath sample. The court therefore finds there is foundation for the admission of the breath test results and finds that the Respondent has established by a preponderance of the evidence that the Petitioner was driving with a blood alcohol content of .170, an amount in excess of the legal limit.

4. Whether the Fifteen minute observations period was violated or whether the breath tests were invalid due to potential ingestion of foreign substance.



19 CSR 25-30.060(7) requires that before any chemical test of the breath is given there must be a fifteen minute observation period to ensure that any alcohol or foreign substance in a test subject's mouth has time to dissipate before a breath sample is taken so that mouth alcohol or the foreign substance does not affect the accuracy of the test result. 19 CSR 25-30.011(2) (H) defines observation period as the "minimum fifteen (15) minute continuous period that ends when a breath sample has been provided" Although direct observation is not necessary, "the operator shall remain close enough to a subject to reasonably ensure, using the senses of sight, hearing, or smell that a test subject does not smoke, vomit or have any oral intake". Oral intake is defined as the act of placing a substance from outside the body into the mouth during the observation period. 19 CSR 25-30.011(2)(I). Substance is defined as any foreign matter, solid or liquid, not to include dentures, dental work, studs piercing or tongue jewelry. 19 CSR 25-30.011(2)(L). Officer JS testified that he satisfied the 15 minute observation requirement and that she did not ingest any foreign substances or vomit. Petitioner contends that the Respondent failed to produce sufficient evidence that no oral intake occurred during the fifteen minute observation period because Officer JS gave Petitioner a wet wipe/cloth containing an unidentified substance which Petitioner used to wipe her hands, her lips and face.

Petitioner's Exhibit 2, the surveillance video, does reveal that at 12:35:10 a.m. Officer JS performed a mouth check with a flashlight and that the breath test took commenced at approximately 12:03:43 a.m. The surveillance video also shows, as noted above, that at around 12:49:12 a.m. Officer JS removes a wipe/cloth from a jar and gives it to Petitioner who used it to wipe her hands. Officer JS testified that he did not know the substance that was contained on the wipe/cloth but that it was a pumice type matter that was used to clean mechanic's hands.



From the surveillance video, although it is not absolutely clear, it does not appear that Petitioner used the wipe on her mouth or face but she did hold it in her hands and wipe her hands with it for over thirty (30) seconds. The video also shows that after Petitioner put down the wipe or cloth she picked up what appears to be a tissue and wiped her face and eyes and blew her nose. On several occasions Petitioner wiped her face and eyes with either her fingers or a tissue and blew her nose prior to the breath test. The video further shows that for a period of about 14 seconds after Officer JS gave Petitioner the wet wipe/cloth, Officer JS walked away from Petitioner to the other side of the room, with his back to Petitioner.

The 14 second absence is a technical violation of the fifteen minute rule as it occurred between 12:49:41 and 12:49:55 a.m. and the breath test began being administered at 1:03:43 a.m., however, Petitioner did not object on this ground and neither party addressed this issue in the testimony at trial or in their proposed findings of fact and conclusions of law. Nevertheless, on the surveillance video, it does not appear that Petitioner put the wipe/cloth into her mouth during these 14 seconds. Therefore, the court finds that the 14 second absence does not affect reliability or credibility of the BAC results or require exclusion of the test results. *Cf. Collins v. Director of Revenue*, 399 S.W. 3d 95 (Mo. App. W.D. 2013).

Finally, although the court is troubled by the fact that Officer JS gave Respondent a wipe or cloth containing an unknown substance to use to wipe her hands, the undisputed testimony of Officer JS is that Petitioner did not put it in her mouth or put anything in her mouth and such testimony is corroborated by the video. The Petitioner's argument that Petitioner may have ingested the unknown substance from the wipe or cloth by touching her face and possibly her lips seems too tenuous. The video does not show her sticking her fingers, the cloth/ wipe or tissues in or on her mouth. Accordingly, the Court finds that the BAC results are admissible and that the



Respondent has met his burden to prove by a preponderance of the evidence that the Petitioner's blood alcohol content exceeded the legal limit.

CONCLUSIONS OF LAW

1. Probable Cause

The parties stipulated that there was probable cause for the arrest. Stipulated evidence is admitted and therefore uncontested evidence. *White v. Director of Revenue*, 321 S.W.3d 298, 307 (Mo. banc 2010).

2. BAC .08% or Higher

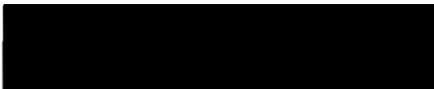
A. Respondent established a proper foundation for admission of its Exhibits and Exhibits A, B and C are therefore admitted into evidence over Petitioner's objection.

B. Respondent's objection to Petitioner's Exhibit 1 is sustained. Petitioner's Exhibit 1 is refused.

C. Respondent established by the preponderance of the evidence that it complied with the Twenty Minute Rule, the 15 minute observation period and the statutory and regulatory requirements for maintenance and certification of the BAC test equipment and therefore the court finds and concludes that Respondent established by the preponderance of the evidence that Petitioner was driving with a BAC of .08% or greater.

WHEREFORE Petitioner's request for trial de novo to set aside the Director of Revenue's Administrative Suspension/Revocation of Petitioner's Driver's License is DENIED.

SO ORDERED, this 26th day of December, 2017



Judge Ellen W. Dunne / 29

