

NOTICE

*Memorandum decisions of this court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law.*

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JACK LEE BENNETT JR.,	)	
	)	
Appellant,	)	Court of Appeals No. A-11429
	)	Trial Court No. 3PA-09-2247 CR
v.	)	
	)	<u>MEMORANDUM OPINION</u>
STATE OF ALASKA,	)	
	)	
Appellee.	)	No. 6102 — October 15, 2014
_____	)	

Appeal from the Superior Court, Third Judicial District, Palmer,  
Eric Smith, Judge.

Appearances: Elizabeth D. Friedman, Palmer, for the Appellant.  
Kenneth M. Rosenstein, Assistant Attorney General, Office of  
Special Prosecutions and Appeals, Anchorage, and Michael C.  
Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Hanley,  
District Court Judge.\*

Judge ALLARD.

Jack Lee Bennett Jr. was convicted of felony driving under the influence  
under two alternative theories: based on evidence that his blood alcohol level was above

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\* Sitting by assignment made pursuant to article IV, section 16 of the Alaska  
Constitution and Administrative Rule 24(d).

the legal limit of .08 percent, and based on evidence that he was under the influence at the time he drove. Bennett appeals, arguing that the superior court should have instructed the jury that it had to unanimously agree on one or both of these theories to convict him. Bennett also argues that the superior court should have granted him a new trial based on newly discovered evidence he claims was relevant to the accuracy of his breath test. For the reasons explained below, we reject these claims and affirm Bennett's conviction.

*Factual background and prior proceedings*

At about 2:00 a.m. on September 3, 2009, Bennett was stopped at the Palmer fairgrounds for speeding. When Palmer Police Detective Kelly Turney contacted Bennett, he observed that Bennett smelled of alcohol and had bloodshot, watery eyes. Bennett admitted he had been drinking; he also performed poorly on field sobriety tests. When Turney asked Bennett to submit to a preliminary breath test, Bennett admitted that the test would show that his blood alcohol level was above the legal limit. A later Datamaster test revealed that Bennett's blood alcohol level was .082 percent, slightly above the legal limit of .08 percent.

The State charged Bennett with felony driving under the influence under both subsections of AS 28.35.030 — subsection (a)(1), the “under the influence” theory, and subsection (a)(2), the “blood alcohol level” theory. At Bennett's trial, the jury convicted Bennett based on a general verdict form that did not distinguish between these two theories of prosecution.

Following this verdict, Bennett filed a motion for a new trial, arguing, for the first time, that his right to due process had been violated because the court did not instruct the jury that it had to unanimously agree on one or both of the two theories of

DUI. The judge denied the motion, finding that the challenged jury instruction was not plain error.<sup>1</sup>

After he was sentenced, Bennett filed a second motion for a new trial, this time alleging that he had obtained newly discovered evidence — a state crime lab memo in which the lab admitted that a mathematical error had affected the preparation of some of the “alco bottles” used to validate the accuracy of breath tests in Alaska. (“Alco bottles” contain samples of air mixed with premeasured amounts of alcohol; these control samples are tested before and after a breath test to ensure that the machine is functioning properly at the time of the test.) After Bennett failed to produce any evidence that the crime lab error affected his particular breath test result, the judge denied the motion.

Bennett now appeals the denial of his motions for a new trial.

*Jury unanimity is not required on the theory of DUI*

On appeal, Bennett renews his argument that the trial court committed plain error by not requiring the jury to reach unanimity as to the theory of DUI.

This Court has already held, in *Molina v. State* and *Gundersen v. Anchorage*, that the two definitions of DUI codified in AS 28.35.030(a)(1) and (2) are simply “variant ways of proving the same thing” and that juries do not need to be unanimous as to the theory that supports their guilty verdict.<sup>2</sup>

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<sup>1</sup> Alaska Rule of Criminal Procedure 30(a) (“No party may assign as error any portion of the [jury] charge or omission therefrom unless the party objects thereto before the jury retires to consider its verdict ... .”); *Tugatuk v. State*, 626 P.2d 95, 102 (Alaska 1981) 5.3(b)(iii) (upholding trial court’s denial of a motion for new trial because the unobjected-to jury instruction was not plain error).

<sup>2</sup> *Molina v. State*, 186 P.3d 28, 29-30 (Alaska App. 2008); *Gundersen v. Anchorage*, 762 P.2d 104, 114-15 n.7 (Alaska App. 1988).

Under the doctrine of *stare decisis*, it is Bennett’s burden to show either that the decisions in *Molina* and *Gundersen* were “originally erroneous” — *i.e.*, never legally justifiable — or that these decisions are “no longer sound because of changed conditions.”<sup>3</sup> In his briefs to this Court, Bennett does not mention *Molina* or *Gundersen*. Instead, he presents this issue as if there were no controlling judicial precedent. This is not a sufficient showing for us to revisit, let alone overturn, our prior precedent on this issue.

*The trial court did not err in denying the motion for a new trial based on the alco bottle information*

After Bennett was sentenced, he learned that technicians at the state crime lab had been using an erroneous mathematical formula when they prepared some of the alco bottles used in Datamaster testing throughout the state. Based on this new evidence, Bennett moved for a new trial. He argued that he should be granted a new trial so he could request discovery from the State concerning the error and (based on this discovery) investigate whether his breath test result was affected by the error. He also argued that, had he known of the crime lab’s error, he would have used the information to cross-examine the witness from the crime lab who testified at his trial.

To obtain a new trial based on newly discovered evidence, a defendant must show not only that the evidence was newly discovered, but also that the new evidence would likely produce a different verdict if a new trial were held.<sup>4</sup>

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<sup>3</sup> See *Erickson v. State*, 950 P.2d 580, 587 (Alaska App. 1997) (quoting *State v. Dunlop*, 721 P.2d 604, 610 (Alaska 1986)).

<sup>4</sup> *Cathey v. State*, 60 P.3d 192, 199 (Alaska App. 2002).

Before ruling on Bennett's motion, the superior court gave Bennett the opportunity to seek discovery from the crime lab. The court also gave Bennett the chance to supplement his discovery requests after he had time to analyze the new information about the alco bottles. In addition, the court deferred the litigation of Bennett's motion so Bennett could follow the extensive litigation that was then occurring (in approximately seventy consolidated cases) as a result of this crime lab error.

After the consolidated litigation concluded, the superior court gave Bennett additional opportunities to file briefing on his motion for a new trial. Bennett again failed to support his motion with any information as to how the crime lab's error might have affected the breath test result in his case. The superior court therefore denied Bennett's motion.

In *Ashenfelter v. State*,<sup>5</sup> this Court rejected a similar claim that the defendant was entitled to a new trial based on evidence of the crime lab's error. In *Ashenfelter*, we affirmed the trial court's decision to deny the motion for a new trial because there was no evidence that the crime lab error affected Ashenfelter's breath test result and any additional impeachment value from the admission of evidence was highly unlikely to have altered the outcome of Ashenfelter's trial.<sup>6</sup>

We likewise find no reversible error in Bennett's case. The superior court gave Bennett ample opportunity to develop evidence to show that the crime lab's error affected his breath test result and Bennett failed to produce any such evidence.

Bennett argues that he should nonetheless be given a new trial so that he has the opportunity to cross-examine witnesses on the general topic of the crime lab's

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<sup>5</sup> 2013 WL 563182 (Alaska App. Feb. 13, 2013) (unpublished).

<sup>6</sup> *Id.* at \*2-3.

error. The State replies that this is “merely impeaching” evidence that precludes the granting of a new trial. As we have previously explained, the fact that the only use for new evidence is to impeach the credibility of a witness does not, in and of itself, bar a new trial if “the newly discovered evidence impeaches the government’s case in new and significant ways[.]”<sup>7</sup> Here, however, no new trial is warranted because Bennett did not show that any potential impeachment value of the evidence was likely to influence the jury’s verdict. We therefore affirm the superior court’s denial of Bennett’s motions for a new trial.

*Conclusion*

The judgment of the superior court is AFFIRMED.

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<sup>7</sup> *Mooney v. State*, 167 P.3d 81, 83 (Alaska App. 2007).