IN THE COURT OF APPEALS OF THE STATE OF ALASKA

REX VICTOR WESTON, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11444 Trial Court No. 3AN-12-2064 CR MEMORANDUM OPINION No. 6228 — August 19, 2015

Appeal from the Superior Court, Third Judicial District, Anchorage, Stephanie E. Joannides, Judge.

Appearances: Jane B. Martinez, under contract with the Public Defender Agency, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Christina Sherman, Assistant District Attorney, Anchorage, and Michael C. Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, and Allard and Kossler, Judges.

Judge MANNHEIMER.

Rex Victor Weston was convicted of felony driving under the influence and driving with a revoked license.[1] On appeal, Weston attacks his DUI conviction on two bases: he argues that the evidence presented at his trial was legally insufficient to prove

[1] AS 28.35.030(n) and AS 28.15.291(a)(1), respectively.

that he was impaired by alcohol, and he also argues that the evidence failed to establish that his blood alcohol level was .08 percent or higher, if one takes account of the margin of error of the DataMaster machine (the machine that was used to test Weston's breath).

Weston's first argument — that the evidence was insufficient to establish that he was impaired — is premised on viewing the evidence in the light most favorable to himself. But when a criminal conviction is challenged on the basis that it is not supported by sufficient evidence, an appellate court is required to view the evidence, and all reasonable inferences to be drawn from the evidence, in the light most favorable to the verdict.[2] Viewed in that way, the evidence presented at Weston's trial was sufficient to convince fair-minded jurors beyond a reasonable doubt that Weston was impaired.

Weston's second argument — that the State failed to establish that his blood alcohol content was .08 percent or greater, if the DataMaster's margin of error is taken into account — is precluded as a matter of law. The pertinent statute, AS 28.90.020, declares that a breath testing instrument's margin of error should not be taken into account when assessing a particular defendant's blood alcohol level if (1) that instrument has been approved by the Department of Public Safety and (2) the particular instrument that was used to test the defendant's breath was properly calibrated. We upheld the constitutionality of this provision in *Bushnell v. State*, 5 P.3d 889, 891-93 (Alaska App. 2000).

Weston does not claim that the DataMaster was not approved for use in Alaska, nor does he claim that his particular machine was not properly calibrated. Accordingly, the DataMaster's margin of error was irrelevant to the question of Weston's blood alcohol content.

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[2] *Moore v. State*, 298 P.3d 209, 217 (Alaska App. 2013).

Weston's final argument is that the superior court was clearly mistaken when it concluded that he was a "worst offender" for sentencing purposes. [3]

The superior court based its "worst offender" finding primarily on Weston's criminal history. Between 1997 and the time of his sentencing in this case, Weston had been convicted of burglary, second-degree sexual assault, two instances of disorderly conduct, three other instances of driving under the influence (including one felony-level conviction), and three parole violations. According to the pre-sentence report, Weston's criminal history stretches back even farther, to 1981, and it includes eight felony convictions (including Weston's present conviction for felony DUI).

The sentencing judge concluded that Weston was dangerous when he drank. She noted that Weston had been on supervised release in the past, but that he had been unwilling or unable to stop using drugs and alcohol. She therefore found that he was a worst offender, and she sentenced him to serve 5 years in prison — the maximum sentence for felony driving under the influence. [4] (She imposed an additional 30 days for driving with a revoked license.)

The record supports the sentencing judge's characterization, and we therefore uphold Weston's sentence.

For all these reasons, the superior court's judgement is AFFIRMED.

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[3] *See*, *e.g.*, *State v. Wortham*, 537 P.2d 1117, 1120 (Alaska 1975); *Napayonak v. State*, 793 P.2d 1059, 1062 (Alaska App. 1990).

[4] AS 12.55.125(e).