IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JAMIE MARTHA BRINK, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals Nos. A-13450 & A-13451 Trial Court Nos. 4BE-18-01054 CR & 4BE-17-00875 CR MEMORANDUM OPINION No. 6988 — January 12, 2022

Appeal from the District Court, Fourth Judicial District, Bethel, William Montgomery, Judge.

Appearances: Bradly A. Carlson, The Law Office of Bradly A. Carlson LLC, under contract with the Public Defender Agency, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Michal Stryszak, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

Before: Wollenberg, Harbison, and Terrell, Judges.

Judge TERRELL.

Jamie Martha Brink was arrested for driving under the influence of alcohol after driving her car and colliding with another vehicle. When the police contacted Brink, she smelled of alcohol and had bloodshot, glassy eyes. The police administered field sobriety tests, including the horizontal gaze nystagmus (HGN) test, and Brink

showed signs of impairment. A DataMaster test administered after her arrest showed that her blood alcohol content was .190 percent.

Following a jury trial, Brink was convicted of driving under the influence of alcohol.[1] Based on this conviction, the court revoked her probation in a separate case.

Brink now appeals both her conviction and the revocation of her probation. She claims that her conviction and revocation must be reversed because the trial court erred in admitting the DataMaster evidence without a proper foundation, and in admitting testimony regarding the HGN test without holding a *Daubert-Coon* hearing.[2] Having reviewed the record, we reject these claims and affirm the judgments of the district court.

Under AS 28.35.033(d), when the analysis of a person's breath is "performed according to methods approved by the Department of Public Safety," the results are presumptively valid. As a result, if the State can show that the regulations for performing a breath test have been followed, then a sufficient foundation has been established and the breath test is admissible. But even if the State does not strictly comply with the regulations, it can still show that it has substantially complied with the regulations in order to establish a sufficient foundation to admit the breath test.[3]

Brink first argues that the trial court erred in finding that the police had substantially complied with 13 Alaska Administrative Code (AAC) 63.040(a)(1), the regulation requiring police to conduct a fifteen-minute observation period before

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[1] AS 28.35.030(a).

[2] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589-95 (1993) (setting the federal standard for admissibility of evidence that is based on scientific principles or techniques); *State v. Coon*, 974 P.2d 386, 392-98 (Alaska 1999) (adopting *Daubert* as a matter of Alaska law), *abrogated on other grounds by State v. Sharpe*, 435 P.3d 887, 899-900 (Alaska 2019).

[3] *See, e.g.*, *Oveson v. Anchorage*, 574 P.2d 801, 804-05 (Alaska 1978); *Ahsogaek v. State*, 652 P.2d 505, 506 (Alaska App. 1982).

administering the DataMaster test. Brink contends that this regulation requires the officer to inspect her mouth prior to the observation period and that, because the officer did not do this, he did not realize that she had gum in her mouth during the test.

But 13 AAC 63.040(a)(1) does not require officers to open and visually inspect the arrestee's mouth.[4] Rather, it requires that officers observe an arrestee for fifteen minutes immediately before testing to ensure that the arrestee does not regurgitate or place anything in their mouth during that period.

In the present case, the court conducted an evidentiary hearing and found that, although the officer did not inspect Brink's mouth prior to the observation period, the officer did observe Brink for fifteen minutes and ensured that she did not regurgitate or place anything in her mouth during that time. We therefore conclude that the evidence supports the trial court's ruling that the police conducted the fifteen-minute observation period in substantial compliance with the statutory and regulatory requirements.[5]

Brink next contends that the trial court erred in allowing the State to introduce the DataMaster test result because the State failed to show that the DataMaster machine used in her case was on the list of approved and certified breath test instruments maintained by the scientific director of the breath and blood alcohol testing program.

The Alaska Administrative Code places several obligations on the scientific director of the breath and blood alcohol testing program with respect to breath testing instruments. The scientific director must approve the types of instruments that are used

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[4] *See, e.g.*, *Savage v. State*, 2010 WL 3719108, at *1-2 (Alaska App. Sept. 22, 2010) (unpublished) (noting that the regulation did not impose a duty to inspect the subject's mouth before administering a breath test).

[5] We also note that the State's expert testified that the presence of gum in Brink's mouth would not have significantly affected the result of the DataMaster test, and that the DataMaster machine was designed to alert the operator with an "invalid" status message when mouth alcohol was present in the breath sample.

to determine the alcohol content of a breath sample.[6] Once the State acquires a new breath testing instrument, the scientific director must verify its calibration.[7] After the initial verification of calibration, the calibration for each breath testing instrument used by the State must be verified at sixty-day intervals.[8] Last, the scientific director is required to maintain a running list of the individual breath testing instruments that "have been certified under 13 AAC 63.100 as operating within acceptable limits established by the scientific director."[9]

However, compliance with all four of these requirements — in particular, production of the list of the individual breath testing instruments that have been certified for use — has never been deemed necessary to satisfy the foundational requirements for admissibility of a breath test result at trial.[10] Rather, the Alaska Supreme Court has recognized that "[w]ith the increasing acceptance and reliability of the breathalyzer has come a relaxation of any notion of rigid proof of foundational facts."[11] And as we have

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[6] 13 AAC 63.020.

[7] 13 AAC 63.100(a).

[8] 13 AAC 63.100(c).

[9] 13 AAC 63.020.

[10] *See, e.g.*, *Herter v. State*, 715 P.2d 274, 275-76 (Alaska App. 1986) (holding that the breath test result was admissible under the substantial compliance doctrine when the instrument was certified prior to use in testing Herter but was not re-certified within sixty days of that certification, as required by 13 AAC 63.100(c)); *Westby v. State*, 2006 WL 2709534, at *3 (Alaska App. Sept. 20, 2006) (unpublished) (holding that the State was not required to demonstrate compliance with 13 AAC 63.100(a), regarding initial certification and calibration of newly acquired breath testing instruments, in order to establish foundational admissibility of breath test result).

[11] *Wester v. State*, 528 P.2d 1179, 1183 (Alaska 1974).

stated, "Under Alaska law, the Datamaster result is presumptively admissible if the calibration of the Datamaster machine has been verified every sixty days."[12]

Here, the State introduced the verification of calibration reports for the DataMaster used to test Brink, which also contained an attestation from the scientific director of the breath and blood alcohol testing program that this instrument was "certified for evidentiary use in the State of Alaska." The trial court accordingly did not err in allowing the State to introduce the breath test result despite the absence of the full list of certified breath testing instruments.

Next, Brink contends that the trial court erred by allowing the State to introduce evidence of the HGN test without establishing that the test was valid under *Daubert-Coon*, which replaced the *Frye* standard for determining the admissibility of scientific evidence.[13]

Brink acknowledges that in *Ballard v. State*, we held that the HGN test is admissible for the limited purpose of showing that an arrestee has consumed alcohol and is potentially impaired, but not for claiming any specific degree of impairment or particular blood alcohol level.[14] But she notes that in *Ballard* we applied the *Frye* standard. She accordingly contends that, before evidence of the HGN test could be admitted at her trial, the court was required to evaluate the evidence under the *Daubert-Coon* standard. We disagree.

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[12] *McCarthy v. State*, 285 P.3d 285, 289-90 & n.10 (Alaska App. 2012) (citing AS 28.35.033(d) and 13 AAC 63.100).

[13] *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923); *State v. Coon*, 974 P.2d 386, 392-98 (Alaska 1999), *abrogated on other grounds by State v. Sharpe*, 435 P.3d 887, 899-900 (Alaska 2019).

[14] *Ballard v. State*, 955 P.2d 931, 940 (Alaska App. 1998).

In *Coon*, the Alaska Supreme Court expressly allowed trial courts to take judicial notice of the admissibility of scientific evidence when an area of expertise is well known and has been fully considered by the trial court.[15] The supreme court declared that "it also seems unlikely that methodologies that were admitted under *Frye* and that remain generally accepted in the appropriate community will be excluded, absent affirmative evidence of unreliability."[16] And in *Lewis v. State*, we held that when the scientific validity of a particular type of evidence has already been resolved in prior litigation, a *Daubert-Coon* hearing is not required "unless the opponent of the evidence provides a good reason to re-examine the earlier court decision."[17]

Here, the trial court took judicial notice that the HGN evidence the State offered was admissible under the *Frye* test. And it allowed the State to introduce the evidence only after finding that Brink had not presented any evidence that the HGN test was unreliable. Under these circumstances, the trial court did not err in allowing the State to introduce the HGN evidence.[18]

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[15] *Coon*, 974 P.2d at 398.

[16] *Id.*

[17] *Lewis v. State*, 356 P.3d 795, 800-01 (Alaska App. 2015). However, once the opponent of the evidence offers good reason to doubt the continuing validity of the prior court decision, then the burden is on the proponent of the evidence to establish its scientific validity under *Daubert* and *Coon*. *Id.* at 801.

[18] *See Hugo v. Anchorage*, 2021 WL 4302919, at *1 (Alaska App. Sept. 22, 2021) (unpublished summary disposition) (relying on *Ballard* to uphold admission of HGN evidence offered for the limited purpose of showing alcohol consumption, and rejecting the claim that the trial court should have held a *Daubert-Coon* hearing where Hugo never disputed that the HGN test was scientifically valid for this limited purpose).

Conclusion

For the reasons stated above, we AFFIRM the district court's judgment of conviction and its revocation of Brink's probation.