Filed 10/24/13 In re B.R. CA2/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re B.R., a Person Coming Under the Juvenile Court Law.	B242028 (Los Angeles County Super. Ct. No. KJ34828)
THE PEOPLE, Plaintiff and Respondent, v. B.R., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Phyllis Shibata, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Mary Bernstein, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Linda C. Johnson, Supervising Deputy Attorney General, and Theresa A. Patterson, Deputy Attorney General, for Plaintiff and Respondent.

Minor B.R. appeals from the order of wardship entered after the juvenile court

found that he drove a vehicle while he was under the influence of alcohol (Veh. Code, § 23152, subd. (a); undesignated statutory references are to the Vehicle Code), drove a vehicle while having a 0.08 percent or higher blood-alcohol level (§ 23152, subd. (b)), was a minor driving a vehicle while having a 0.01 percent or higher blood-alcohol concentration (§ 23136, subd. (a)), and was a minor driving a vehicle while having a 0.05 percent or higher blood-alcohol level (§ 23140, subd. (a)). Minor contends that the evidence was insufficient to support his conviction of driving with a 0.08 percent or higher blood-alcohol level. We affirm.

BACKGROUND

California Highway Patrol (CHP) Officer Gary Talaugon was dispatched to a single car collision on the southbound 605 Freeway in Long Beach at 9:45 p.m. on August 26, 2011. Talaugon arrived at the scene at about 9:55 p.m. Minor was in the driver's seat of a car that had crashed into the center divider, with his seat belt fastened and the keys in the ignition. A single passenger was also in the car. The car was disabled and could not move. Minor was emitting an odor of alcohol, and his eyes were red and watery. Upon questioning, minor said he was not injured, he had not bumped his head during the collision, he did not know how the collision had occurred, he did not know where he was when the collision occurred, he had been drinking on the beach in Santa Monica and was attempting to drive home to El Monte, he had consumed six beers between 7:00 p.m. and 8:00 p.m., and he had not consumed any alcohol after 8:00 p.m. Minor spoke slowly and deliberately, sometimes slurring his words. Officers found no alcohol in the car.

Talaugon drove minor to a nearby street to have minor perform five field sobriety tests. Minor's performance on each test was consistent with being under the influence of alcohol. Minor performed preliminary alcohol screening (PAS) breath tests at 10:24 and 10:27 p.m., with each test indicating a blood-alcohol content of 0.07. Based upon his training and experience and the totality of the circumstances, Talaugon believed that minor was more intoxicated that these results would indicate.

Talaugon transported minor to the CHP office in Santa Fe Springs, where minor twice performed a breath test using a Datamaster CDM machine. The first test, taken at 11:27 p.m., indicated that minor's blood-alcohol content was 0.11 percent. The second test, taken at 11:29 p.m., indicated that minor's blood-alcohol content was 0.12 percent. Such tests are considered accurate if the two results do not differ by more than 0.02.

For a six-year period, including the month of August in 2011, CHP Sergeant Ryan Monahan was the PAS device coordinator for the Santa Fe Springs CHP office. He was in charge of maintaining and calibrating all PAS devices. On August 19 and August 31, 2011, Monahan tested the accuracy of the PAS device used by Talaugon to test minor, and on each occasion the device functioned properly and produced accurate results. But Monahan testified that there had been numerous problems with the accuracy of the PAS devices in 2010 and 2011 when they were stored in CHP patrol cars. There were "quite a few" of the devices that were malfunctioning in the field, but produced accurate results when tested in a controlled environment. Monahan explained that they were "essentially getting cooked in the cars" and giving inaccurate results in the field, as shown by comparison with more accurate subsequent blood or breath test results. Monahan was present in one such instance. The owner's manual for the PAS devices states that they should be kept in a controlled environment when not out in the field, to keep them from being exposed to heat for long periods of time. The device has a self-check, but Monahan had seen it work only "for one period of time." The PAS devices were so unreliable that CHP officers stopped using them. The CHP sent a number of the PAS devices back for repair, although the particular device used on minor was not sent back. Ultimately the agency changed its policy about storing them in patrol cars, and the problems with inaccurate results ceased.

Juan Apadaca, a senior criminalist employed by the Los Angeles County Sheriff's Department, testified as a forensic alcohol expert for the prosecution. The sheriff's department tests and maintains the CHP's Datamaster machines. The machines are tested every seven days. The machine used on minor was tested and produced accurate results

on August 22 and again on August 29, 2011. Apadaca opined that the machine was working properly at the time of minor's tests.

Apadaca opined that, assuming minor had a blood-alcohol level of 0.11 at 11:27 p.m., he drank six beers between 7:00 p.m. and 8:00 p.m., and did not drink alcohol after 8:00 p.m., minor's blood-alcohol content would have been between 0.11 and 0.14 at 9:40 p.m. Apadaca explained that after a person consumes alcohol, his or her blood-alcohol level rises for a time, peaks, then begins to decline. If a person evenly spaces his or her drinks over a longer period of time, the peak alcohol level will be reached anytime between the last drink and 30 minutes later. But if a person drinks a large amount of alcohol in a short period of time, as minor reported doing, the peak will be reached anywhere from 15 to 90 minutes after the last drink.

Dewayne Beckner, who had formerly worked as a forensic chemist for the Los Angeles County Sheriff's Department for 25 years, testified as an expert for the defense. He is familiar with PAS devices and testified that storing them in the trunk of a vehicle in hot or cold temperatures would not affect their accuracy, although other things, such as radio frequency interference, can cause them to malfunction. In addition, such devices have "internal checks." Beckner opined that, based on minor's PAS test results of 0.07 and the 0.11 results of the Datamaster test approximately 63 minutes later, minor's blood-alcohol level was rising during this time period. Assuming minor had a blood-alcohol content of 0.07 at 10:24 p.m. (based on the PAS result), and a blood-alcohol content of 0.11 at 11:27 p.m. (based on the Datamaster result), his blood-alcohol content would have been 0.04 or 0.05 at 9:40 p.m. According to Beckner, a person reaches his or her peak blood-alcohol level anywhere between 18 and 138 minutes after the last drink.

The juvenile court sustained a Welfare and Institutions Code section 602 petition alleging that minor drove a vehicle while he was under the influence of alcohol or drugs (§ 23152, subd. (a)), drove a vehicle while having a 0.08 percent or higher blood-alcohol level (§ 23152, subd. (b)), was a minor driving a vehicle while having a 0.01 percent or higher blood-alcohol concentration (§ 23136, subd. (a)), and was a minor driving a

vehicle while having a 0.05 percent or higher blood-alcohol level (§ 23140, subd. (a)). The court declared minor to be a ward of the court and ordered him placed home on probation. The court also revoked a prior deferred entry of judgment order that had been made in December of 2010 after minor admitted possessing marijuana for sale. As far as the appellate record reveals, the court took no further action regarding the prior petition.

DISCUSSION

Minor contends that the evidence was insufficient to support the juvenile court's finding he drove with a 0.08 percent or higher blood-alcohol level. (§ 23152, subd. (b).) He argues, as he did in the juvenile court, that his blood-alcohol level was still rising at the time of the PAS and Datamaster tests, and was thus less than 0.08 percent at the time he was driving. He argues that the juvenile court's finding rests on "two highly questionable facts: [minor] had his last drink no later than 8 p.m. and the PAS device did not function properly."

To resolve this issue, we review the whole record in the light most favorable to the juvenile court's order to decide whether substantial evidence supports the court's finding, so that a reasonable fact finder could find the allegation true beyond a reasonable doubt. (*In re Matthew A.* (2008) 165 Cal.App.4th 537, 540.) We also presume in support of the juvenile court's finding the existence of every fact the trier could reasonably deduce from the evidence and make all reasonable inferences that support the finding. (*In re Babak S.* (1993) 18 Cal.App.4th 1077, 1089.)

Section 23152, subdivision (b) provides, in pertinent part, as follows: "It is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle. [¶] . . . [¶] In any prosecution under this subdivision, it is a rebuttable presumption that the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of the performance of a chemical test within three hours after the driving."

Substantial evidence supported the juvenile court's finding that minor drove with a blood-alcohol content of 0.08 or greater. Minor crashed his car before 9:45 p.m., when the CHP dispatcher sent Talaugon to the scene of the accident. Minor told Talaugon that he had consumed six beers between 7:00 and 8:00 p.m. and had not consumed any alcohol after 8:00 p.m. Neither minor nor his passenger testified, and no other evidence contradicted or cast doubt upon the accuracy of minor's time statements. Significantly, no alcohol was found in minor's car. According to Apadaca's expert testimony, minor would have reached his peak blood-alcohol level 15 to 90 minutes later, that is, no later than 9:30 p.m. His blood-alcohol level would have been declining after 9:30 p.m., at the latest, and thus declining from the time Talaugon spoke to him through the time of the breath tests. Based upon minor's statements about his drinking and the Datamaster tests result of 0.11 at 11:27 p.m., Apadaca opined that minor's blood-alcohol content would have been between 0.11 and 0.14 at 9:40 p.m. Although the PAS results and Beckner's expert testimony would have supported a conclusion that minor's blood-alcohol level was actually still increasing when he took the two tests and would have been less than 0.08 percent at 9:40 p.m., the juvenile court was not required to so conclude, and we view the record in the light most favorable to the judgment, not to the defense. The juvenile court could reasonably discount the lower PAS test results on the basis of Monahan's testimony regarding the difficulties the CHP was experiencing during 2011 with the PAS devices being "cooked" in the patrol cars and yielding inaccurate results in the field while nevertheless performing correctly when Monahan tested them in a controlled environment. Notably, minor was tested on the machine on August 26, 2011, during summer, and it was entirely plausible that it was subjected to significant heat during the day, causing it to produce inaccurate results.

Minor further relies on *People v. Beltran* (2007) 157 Cal.App.4th 235 (*Beltran*), a case addressing the propriety of instructing a jury with CALJIC No. 12.61.1, which stated, "'If the evidence establishes beyond a reasonable doubt that (1) a sample of defendant's blood, breath or urine was obtained within three hours after he operated a

vehicle and (2) that a chemical analysis of the sample establishes that there was 0.08 percent or more, by weight, of alcohol in the defendant's blood at the time of the performance of the chemical test, then you may, but are not required to, infer that the defendant drove a vehicle with 0.08 percent by weight, of alcohol in the blood at the time of the alleged offense.'" (*Id.* at pp. 238–239.) There, the parties stipulated that the PAS device yielded accurate results of 0.08 percent. An intoxilyzer test 24 minutes after the first PAS test showed a 0.10 percent blood-alcohol level, and the experts for both parties agreed that Beltran's blood-alcohol was *rising* when tested. The prosecution expert estimated that Beltran's blood-alcohol level would have been 0.06 to 0.09 percent at the time of his traffic stop, while the defense expert estimated that Beltran's blood-alcohol level was 0.06 when he was stopped. (*Ibid.*) The appellate court concluded that because the test results and the expert testimony established that Beltran's blood-alcohol level was rising from the time of the traffic stop until the tests, "the sole evidence upon which the jury could have concluded that appellant had a BAC of 0.08 percent or greater when he was driving was the inference of that fact from a blood-alcohol test administered within three hours of driving that revealed a BAC of 0.08 percent or greater at the time of the test. Under *Ulster* [*County Court v. Allen* (1979) 442 U.S. 140 [99 S.Ct. 2213]], because the permissive inference was the sole evidence used to convict, the connection between the proved fact and the inferred fact had to be established beyond a reasonable doubt, in order to pass constitutional muster." (*Id.* at p. 245.) The court concluded that, under the circumstances, that connection was not established beyond a reasonable doubt, and instructing the jury on the statutory inference constituted prejudicial constitutional error.

Here, unlike *Beltran*, the parties disputed both the accuracy of the PAS results and whether minor's blood-alcohol level was rising or falling from the time of the accident (when he stopped driving) to the times he performed the breath tests. Accordingly, *Beltran* in no way detracts from the sufficiency of evidence in minor's case.

DISPOSITION

The order under review is affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

JOHNSON, J.