FILED BY CLERK
FEB -1 2007
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee,	)	2 CA-CR 2006-0158 DEPARTMENT A
v.	)	MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court
MARTIN ANDREW VILLA, Appellant.	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20042228

Honorable Kenneth Lee, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Kathryn A. Damstra — Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Alex Heveri — Tucson
Attorneys for Appellant

H O W A R D, Presiding Judge.

¶1 A jury found appellant Martin Andrew Villa guilty of aggravated driving under the influence of an intoxicant (DUI) and aggravated driving with an alcohol concentration of .08 or more, both while his driver's license was revoked. The trial court found Villa had two previous DUI convictions and sentenced him to prison for concurrent, presumptive, ten-

year terms. On appeal, Villa challenges the trial court's ruling that the results of his breath tests were admissible in evidence.

¶2 The admissibility of breath test results is governed by A.R.S. § 28-1323, which provides the foundational requirements for admission. Subsection (B) of § 28-1323 provides that "[c]ompliance with subsection A of this section is the only requirement for the admission in evidence of a breath test result." Germane to the present inquiry is the requirement of § 28-1323(A)(5), which provides:

> The device used to conduct the test was in proper operating condition. Records of periodic maintenance that show that the device was in proper operating condition are admissible in any proceeding as prima facie evidence that the device was in proper operating condition at the time of the test. Calibration checks with a standard alcohol concentration solution bracketing each person's duplicate breath test are one type of records of periodic maintenance that satisfies the requirements of this section. The records are public records.

Villa contends the state failed to satisfy § 28-1323(A)(5) and the court should have precluded his breath test results because the clock on the Intoxilyzer used to test Villa's breath "was not working properly" when his breath was tested on June 8, 2004.

¶3 A Tucson Police Department criminalist testified at trial that standard quality assurance checks and calibration checks had been performed on the Intoxilyzer at issue on May 13 and June 9, 2004, and on both occasions the machine was working properly. The criminalist testified that, on both dates, the clock on that Intoxilyzer "was moved ahead four minutes," but that the clock's inaccurate timekeeping had no effect on the machine's ability to accurately test the alcohol concentration in breath samples. As the criminalist explained,

"[T]he clock battery is on a separate circuit board, and it has nothing to do with how the alcohol concentration is calculated by the instrument." Even if the clock were disabled entirely, she testified, the alcohol concentration test would still be valid; in that case, the machine operators would simply use a different "timing device" and manually document the time of each test on the "test record cards."

¶4 The crux of Villa's argument is that, because the clock on the Intoxilyzer was apparently four minutes slow when it was tested on May 13 and again on June 9, 2004, before and after Villa's breath tests on June 8, "the state failed to meet its burden of proving that the duplicate tests of Villa's breath were administered five to ten minutes apart"—a requirement contained not in § 28-1323(A)(3) itself but in applicable Arizona Department of Health Services (ADHS) regulations.[1]

¶5 The Tucson police officer who administered the breath tests testified that, after watching Villa for a forty-minute deprivation period, he performed three tests. Because the first test produced a deficient sample, the officer collected two more samples. His testimony established that he had collected all three samples within a total elapsed time of ten minutes, each sample within five to ten minutes of the next, and that the test results from the two latter, valid samples showed alcohol concentrations within .02 of each other, as § 28-1323(A)(3) requires.

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[1]Arizona Administrative Code R9-14-404(C) provides in part: "Duplicate quantitative breath tests shall be administered at intervals of not less than five minutes nor more than 10 minutes. The results of both tests shall be within .020 alcohol concentration of each other."

¶6 In combination, the testimony of the criminalist and the officer who administered the tests sufficiently established the foundational requirements of § 28-1323(A), justifying the test results' admission in evidence. And the minor deviations in time corrected during the monthly quality assurance tests do not establish that the ADHS regulations' requirement was not met. Admissibility determinations are the province of the trial court, and we cannot say the court abused its discretion in ruling the foundation sufficient and the evidence admissible here. *See State v. Sanchez*, 191 Ariz. 418, 421, 956 P.2d 1240, 1243 (App. 1997).

¶7 Villa's further contention—that the trial court erred in instructing the jury it could presume Villa had been under the influence of an intoxicant if his alcohol concentration within two hours of driving was .08 or more—depended upon his companion claim that the breath test results were improperly admitted. Our rejection of that argument also leads us to reject Villa's second contention, as the court's instruction did nothing more than accurately inform the jury of the applicable law as set forth in A.R.S. § 28-1381(G)(3).

¶8 We affirm the judgment of convictions and sentences imposed.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

GARYE L. VÁSQUEZ, Judge