ATTORNEY FOR APPELLANT

Marc Lopez
The Marc Lopez Law Firm
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General for Indiana

Justin F. Roebel
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Bryan Priest,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

January 25, 2022

Court of Appeals Case No. 21A-MI-551

Appeal from the Hendricks Superior Court

The Honorable Stephenie Lemay-Luken, Judge

Trial Court Cause No. 32D05-2012-MI-327

Bailey, Judge.

Case Summary

[1] Bryan Priest ("Priest") was charged with operating a commercial motor vehicle with an alcohol concentration equivalent ("ACE") of 0.04 but less than 0.08, a Class C infraction.[1] Pursuant to Indiana Appellate Rule 14(B), Priest brings this discretionary interlocutory appeal of the trial court's order denying his motion to suppress evidence of his ACE. The only issue he raises on appeal is whether the trial court's decision to admit the evidence was erroneous. We hold that it was, and we reverse.

Facts and Procedural History

[2] On August 18, 2019, an Indiana State Police officer issued a traffic citation charging Priest with operating a commercial motor vehicle with an ACE of .042. The traffic citation stated, "B.A.C.[blood alcohol concentration] 0.042." App.[2] at 42. On August 19, the State initiated its prosecution of Priest by filing the traffic citation in the Plainfield Town Court.[3] On October 16, 2020, Priest filed a motion to suppress the evidence of his ACE, and the State filed a brief in opposition to that motion. On November 24, 2020, the Town Court issued an

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[1] Ind. Code § 9-24-6.1-6.

[2] All references to the appendix are to the amended appendix unless otherwise specified.

[3] Priest has filed a motion with this Court requesting that we take judicial notice of the charge filed in the Plainfield Town Court, and we grant that motion by separate order. We further note that the record of the Town Court proceedings is available to this Court via the Odyssey computerized case management system.

"Infraction Judgment" finding Priest "guilty as charged" and ordering the payment of a fine and court costs totaling $162.00. *Id*. at 55.

[3] On December 8, 2020, Priest filed a request for a trial de novo in the Hendricks County trial court, and the Hendricks County Superior Court set a date for the trial de novo. The State filed a "Brief in Support of Breath Test Admissibility," but did not attach or otherwise file any breath test results other than the "B.A.C. 0.042" notation contained on the traffic citation itself. *Id*. at 10. Priest moved to exclude "the Breath Ticket," and requested that the trial de novo date be converted to an "attorneys only hearing on a motion to exclude." *Id*. at 33. The State did not object to the latter request, and the court granted it.

[4] On February 10, 2021, the trial court conducted the "Attorneys Only Hearing on a Motion to Exclude" evidence of Priest's ACE. *Id*. at 34. At the hearing, Priest's counsel argued evidence of his ACE should be excluded on hearsay grounds. No evidence was offered or admitted at the hearing. In an order dated February 11, the trial court "overrule[d]" Priest's hearsay objection and denied his motion to exclude the "breath test ticket." *Id*. at 35.

[5] Priest sought an order certifying the February 11 order for interlocutory appeal, and the trial court granted that request. We accepted jurisdiction of the interlocutory appeal per Indiana Appellate Rule 14(B)(2) on April 22, 2021.

[6] Additional facts will be provided as necessary.

Discussion and Decision

[7] Priest's interlocutory appeal challenges the denial of his motion to suppress evidence. We review the denial of such a motion using a standard similar to that used in reviewing the sufficiency of the evidence. *Triblet v. State*, 169 N.E.3d 430, 433 (Ind. Ct. App. 2021), *trans. denied*. That is,

> [w]e determine whether substantial evidence of probative value exists to support the denial of the motion. We do not reweigh the evidence, and we consider conflicting evidence that is most favorable to the trial court's ruling. However, the review of a denial of a motion to suppress is different from other sufficiency matters in that we must also consider uncontested evidence that is favorable to the defendant.

Id. (quotations and citations omitted).

[8] Priest alleged in his motion to suppress evidence that the "breath-test results" were inadmissible hearsay. App. at 53-54. Evidence including hearsay is generally inadmissible, "subject to a handful of specific and limited exceptions." *McMillen v. Stat*e, 169 N.E.3d 437, 441 (Ind. Ct. App. 2021) (citing Ind. Evidence Rules 802-804). Our Supreme Court stated in *Mullins v. State* that "[b]reath-test results as shown by a printout are hearsay" and therefore inadmissible unless they fall within one of the statutory or judicial exceptions to the hearsay rule. 646 N.E.2d 40, 48 (Ind. 1995). When the defense objects to the admission of breath-test results on the ground of hearsay, the burden shifts to the State "to fit the breath-test results into a judicially or statutorily created exception to the general prohibition against the admission of hearsay." *Id*. at

48. The *Mullins* Court held that the "BAC Datamaster" printout of an "evidence ticket" that was at issue in that case, while hearsay, was nevertheless admissible because it fell within a statutory exception to the hearsay rule. *Id*. at 42.

[9] Here, the State admits that none of the statutory exceptions to the hearsay rule apply.[4] However, the State argues that no such exception is required because the challenged evidence is non-testimonial, non-hearsay. In support, the State points to *Cranston v. State* in which a panel of this Court held that a mechanically generated or computerized breath-test result is hearsay only if it incorporates "a certain degree of human input and/or interpretation." 936 N.E.2d 342, 344 (Ind. Ct. App. 2010). *Cranston* involved a "Datamaster printed ticket" showing the results of a breath analysis that was very similar in form to the "evidence ticket" at issue in *Mullins*. However, the *Cranston* Court held that the "Datamaster evidence ticket" was non-testimonial, non-hearsay because, "while [it] require[ed] administrative input from the test operator and a breath sample from the test subject, [it] calculates and prints a subject's blood alcohol concentration through a mechanical process involving no material human intervention." *Id*.

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[4] The Indiana legislature has enacted statutory hearsay exceptions providing that evidence of blood alcohol content shown by chemical breath-test results are admissible in charges involving operating a motor vehicle while intoxicated, I.C. § 9-30-6-15, and operating a motorboat while intoxicated, I.C. § 35-46-9-15. No such statutory exception exists for operating a commercial motor vehicle with an elevated blood alcohol level, I.C. § 9-24-6.1-6, which was the charge in this case.

[10] On appeal, Priest contends that *Cranston* is not good law because it conflicts with the specific holding of our Supreme Court in *Mullins* that the Datamaster evidence ticket is hearsay. The State, on the other hand, asserts that *Mullins* is no longer good law because the Evidence Rules regarding hearsay have been amended since the date of that decision.

[11] However, we need not resolve the alleged conflict between *Mullins* and *Cranston* because the case before us does not involve the same evidence that was at issue in those cases. Both of those cases related to evidence in the form of a printout from a "B.A.C. Datamaster" breath test, which *Mullins* found admissible under a statutory exception to hearsay, 646 N.E.2d at 42, and *Cranston* found admissible as non-hearsay, 936 N.E.2d at 342. But here, although the trial court and parties' counsel seemed to assume a breath-test result was in the record, the record actually contains no evidence of any breath test at all. The only evidence in the record related to Priest's ACE or B.A.C. is the traffic citation itself, and that document does not state who was tested, what test was used, who did the testing, and what the test results were, all of which were in evidence in both *Mullins* and *Cranston*. *Id*. Rather, the traffic ticket issued to Priest—which was completed and signed by an Indiana State Police Officer who did not appear at the suppression hearing or otherwise testify—stated only: "B.A.C. 0.042." App. at 42. That statement, alone, is clearly hearsay; it is an out-of-court statement offered to prove the truth of the matter asserted. *See* Evid. R. 801.

[12] At the start of the February 10, 2021, hearing on the motion to suppress, the trial judge stated, "This is a hearing only on argument as to whether the breath test ticket is admissible, or breath test, I don't even know if there's a ticket; so I don't know what type of breath test it is." Tr. at 4. Yet, the State presented no evidence that would prove what type of breath test was at issue. While the prosecutor referred in his argument at the February 10 hearing to "the Intoxilyzer ticket," the "BAC Datamaster," a "certification," and the "Intoxilyzer ECIR2 instrument," Tr. at 5, no such evidence was offered or admitted into evidence,[5] and the prosecutor's statements themselves are, obviously, not evidence.

[13] Thus, the trial court's denial of Priest's motion to suppress the evidence of his ACE was not supported by substantial evidence of probative value; rather, the only evidence the State presented—the bald statement in the traffic citation that Priest's "B.A.C." was "0.042"—was inadmissible hearsay. App. at 42.

[14] Reversed.

Mathias, J., and Altice, J., concur.

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[5] The State did not object to Priest's motion to convert the trial de novo into an "Attorneys Only" (i.e., non-evidentiary) hearing. App. at 34. Therefore, it waived the issue of any potential objection thereto. *See, e.g.*, *Monroe Guar. Ins. Co. v. Magwerks Corp.*, 829 N.E.2d 968, 974 (Ind. 2005) ("Failure to object waives the issue for review.").