

Case Summary

James Cushinberry appeals his conviction for operating a vehicle while intoxicated as a Class A misdemeanor.¹ We affirm.

Issue

Cushinberry raises one issue, which we restate as whether the trial court abused its discretion by admitting the BAC DataMaster Evidence Ticket (“Evidence Ticket”) into evidence.

Facts

In November 2008, the State charged Cushinberry with resisting law enforcement as a Class D felony, operating a vehicle while intoxicated as a Class A misdemeanor, operating a vehicle with a BAC of at least 0.08 but less than 0.15 as a Class C misdemeanor, battery as a Class A misdemeanor, criminal recklessness as a Class A misdemeanor, resisting law enforcement as a Class A misdemeanor, and two infractions. At the jury trial, during the direct examination of Officer Jerry Piland, Cushinberry objected to the admission of the Evidence Ticket, which showed that Cushinberry had a BAC of 0.08. Cushinberry argued, in part, that the Evidence Ticket was inadmissible hearsay and that it was an investigative report, which does not fall within the hearsay exception of Indiana Evidence Rule 803(8). The trial court overruled Cushinberry’s objection, finding that the Evidence Ticket was not an investigative report. Officer

¹ Cushinberry makes no argument regarding his other convictions.

Piland then testified that Cushinberry's test results showed a BAC of 0.08 grams of alcohol per 210 liters of breath. The jury found Cushinberry guilty as charged.

At the sentencing hearing, the trial court merged the operating a vehicle while intoxicated as a Class C misdemeanor conviction with the operating a vehicle while intoxicated as a Class A misdemeanor conviction. The trial court then sentenced Cushinberry on the remaining charges to an aggregate sentence of three years in the Department of Correction with one and one-half years suspended to probation.

Analysis

Cushinberry argues that the trial court abused its discretion by admitting the Evidence Ticket at the jury trial. "The admission of chemical breath test results is left to the sound discretion of the trial court and will be reviewed for an abuse of discretion." Nivens v. State, 832 N.E.2d 1134, 1136 (Ind. Ct. App. 2005). An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or it misinterprets the law. Carpenter v. State, 786 N.E.2d 696, 703 (Ind. 2003).

On appeal, Cushinberry argues that the Evidence Ticket was inadmissible because it was hearsay and did not qualify under the public records exception of Indiana Evidence Rule 803(8) because it was an investigative report.² However, we need not address

² Indiana Evidence Rule 803 provides that the "following are not excluded by the hearsay rule, even though the declarant is available as a witness:"

(8) Public Records and Reports. Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations in any form, of a public office or agency, setting forth its regularly conducted and regularly recorded

Cushinberry’s argument regarding Rule 803(8) because our supreme court has held that “Indiana Code § 9-30-6-15 unequivocally provides for the admissibility of breath-test results, their hearsay character notwithstanding.”³ Mullins v. State, 646 N.E.2d 40, 44 n.5 (Ind. 1995).

“Breath-test results as shown by a printout are hearsay—an out-of-court statement offered to prove the truth of the matter asserted by the statement.” Id. at 48. Hearsay is generally inadmissible absent a judicially or statutorily created exception to the general prohibition. Id. Indiana Code Section 9-30-6-15(a) is one such statutorily created exception to the general hearsay rule, and it provides:

At any proceeding concerning an offense under IC 9-30-5 or a violation under IC 9-30-15, evidence of the alcohol concentration that was in the blood of the person charged with the offense:

- 1) at the time of the alleged violation; or
- 2) within the time allowed for testing under section 2 of this chapter;

as shown by an analysis of the person’s breath, blood, urine, or other bodily substance is admissible.

activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule: (a) investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case; (b) investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party; (c) factual findings offered by the government in criminal cases; and (d) factual findings resulting from special investigation of a particular complaint, case, or incident, except when offered by an accused in a criminal case.

³ Cushinberry makes no argument that the admission of the Evidence Ticket violated his Sixth Amendment rights.

In Mullins, our supreme court held: “Section 9-30-6-15(a) creates, in fact, just such an exception, making breath-test results admissible in prosecutions under § 9-30-5 [and now § 9-30-15].” 646 N.E.2d at 48; see also Napier v. State, 820 N.E.2d 144, 148 (Ind. Ct. App. 2005), modified in part on reh’g, trans. denied, cert. denied. Given Indiana Code Section 9-30-6-15(a) and our supreme court’s decision in Mullins, we conclude that the trial court did not abuse its discretion by admitting the Evidence Ticket.⁴

Conclusion

The Evidence Ticket was admissible under Indiana Code Section 9-30-6-15(a) and Mullins. We affirm Cushinberry’s conviction for driving while intoxicated as a class A misdemeanor.

Affirmed.

NAJAM, J., and KIRSCH, J., concur.

⁴ Additionally, “the results of chemical breath tests are not admissible if the test operator, test equipment, chemicals used in the test, or techniques used in the test have not been approved in accordance with the rules adopted by the Department of Toxicology.” Napier, 820 N.E.2d at 150; see also Ind. Code § 9-30-6-5(d). Relying upon Napier, Cushinberry argues that “the record does not clearly demonstrate that [sic] foundational elements noted in Napier v. State were adequately established to admit [the Evidence Ticket].” Appellant’s Br. p. 9. However, Cushinberry did not object at trial to the admission of the Evidence Ticket on this basis. Consequently, this argument is waived. White v. State, 772 N.E.2d 408, 411 (Ind. 2002) (“A party may not object on one ground at trial and raise a different ground on appeal.”). Moreover, Cushinberry makes no cogent argument regarding the test operator, test equipment, chemicals used in the test, or the techniques used in the test. The argument is, thus, waived on this basis also. Jensen v. State, 905 N.E.2d 384, 395 (Ind. 2009) (waiving a claim due to lack of cogent argument or citation to authority).