

SUPREME COURT OF NEBRASKA

State v. McIntyre

290 Neb. 1021 (2015) · No. No. S-14-595 · Decided May 29, 2015

SUMMARY

The Nebraska Supreme Court held that evidence of a chemical breath test producing a deficient sample is admissible in a driving under the influence prosecution if the State establishes the required foundational elements. The court also held that the defendant waived his challenge to charging alternative enhancement theories by failing to move to quash the information, and it affirmed the conviction and sentence.

CASE DETAILS

COURT	Supreme Court of Nebraska
WRITING FOR THE COURT	Connolly, J.; Heavican, C.J.; Wright, J.; Stephan, J.; McCormack, J.; Miller-Lerman, J.; Cassel, J.
JURISDICTION	Nebraska
DECIDED	May 29, 2015
DOCKET	No. S-14-595
DISPOSITION	affirmed
PROCEDURAL POSTURE	McIntyre appealed his convictions and sentence from the Lancaster County District Court. He challenged the admissibility of a deficient breath-test result, the State's use of alternative enhancement theories in one information, the excessiveness of his sentence, and the sufficiency of the evidence.
STANDARD OF REVIEW	Statutory and regulatory interpretation are reviewed independently as questions of law. A sentence within statutory limits is reviewed for abuse of discretion. Sufficiency of the evidence is reviewed by asking whether, viewing the evidence most favorably to the prosecution, any rational trier of fact could have found the essential elements beyond a reasonable doubt; the appellate court does not resolve credibility conflicts or reweigh evidence.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Joshua J. McIntyre v. State of Nebraska

TOPICS

evidence criminal procedure statutory interpretation sentencing appellate procedure

PRACTICE AREAS

criminal law criminal procedure DUI/DWI evidence administrative law appellate procedure

QUESTIONS PRESENTED

1. Whether a chemical breath-test result from a deficient sample is admissible when the State establishes the required foundational elements.
2. Whether the State was required to elect between alleging a breath-alcohol concentration of at least .15 and alleging refusal to submit to chemical testing.
3. Whether the district court imposed an excessive sentence.
4. Whether sufficient evidence supported McIntyre's DUI conviction and the .15 breath-alcohol enhancement.

HOLDINGS

1. Nebraska's DUI statutes and Department of Health and Human Services regulations do not bar evidence of a chemical breath-test result obtained from a deficient sample when the State lays sufficient foundation. The result may be admitted as evidence of the motorist's minimum breath-alcohol content.
2. McIntyre waived any objection that the amended information alleged inconsistent alternative theories because he did not timely move to quash the information. The court also concluded that the alternative theories concerned different methods of proving a single offense rather than separate offenses, and McIntyre failed to demonstrate prejudice.
3. The district court did not abuse its discretion by sentencing McIntyre to 365 days' imprisonment.
4. The evidence was sufficient to support the DUI conviction and the .15 breath-alcohol enhancement.

KEY QUOTATIONS

"In conclusion, the driving under the influence statutes and the regulations promulgated by the Department of Health and Human Services do not bar evidence of the result of a chemical breath test with a deficient sample if the State lays sufficient foundation." (1033)

"A rational trier of fact could have found the essential elements of McIntyre's crime beyond a reasonable doubt." (1038)

FACTUAL BACKGROUND

After drinking at a bar, Joshua McIntyre drove on Interstate 180 and was stopped after weaving and varying his speed. The officer observed multiple signs of impairment, and McIntyre admitted at trial that he was under the influence. During a DataMaster breath test, McIntyre did not provide a full breath sample; the device reported "DEFICIENT SAMPLE, INCOMPLETE TEST" but also recorded a breath-alcohol value of .218 as the highest

value obtained. The State presented evidence that the device was functioning properly and that the result represented a scientifically probative minimum breath-alcohol concentration.

PROCEDURAL HISTORY

The State charged McIntyre with driving under the influence and alleged enhancement based on a breath-alcohol concentration of at least .15 or refusal to submit to chemical testing, along with two prior DUI convictions. The district court admitted the deficient-sample breath-test result, declined to require the State to elect between the alternative theories, and entered judgment after a jury conviction and enhancement hearing. The court sentenced McIntyre to 365 days' imprisonment and revoked his operator's license for 15 years. The Nebraska Supreme Court affirmed.

DISPOSITION

affirmed

CASES CITED

- Liddell-Toney v. Department of Health & Human Servs., 281 Neb. 532, 797 N.W.2d 28 (2011)
- State v. Kuhl, 276 Neb. 497, 755 N.W.2d 389 (2008)
- State v. Baue, 258 Neb. 968, 607 N.W.2d 191 (2000)
- U.S. v. Brannon, 146 F.3d 1194 (9th Cir. 1998)
- State v. Mazzuca, 132 Idaho 868, 979 P.2d 1226 (Idaho App. 1999)
- State v. DeMarasse, 85 N.Y.2d 842, 647 N.E.2d 1353 (1995)
- State v. Conrad, 187 W. Va. 658, 421 S.E.2d 41 (1992)
- State v. Wilkinson, 181 W. Va. 126, 381 S.E.2d 241 (1989)
- Williams v. District of Columbia, 558 A.2d 344 (D.C. 1989)
- State v. Robbins, 253 Neb. 146, 570 N.W.2d 185 (1997)
- State v. Thacker, 286 Neb. 16, 834 N.W.2d 597 (2013)
- Utelcom, Inc. v. Egr, 264 Neb. 1004, 653 N.W.2d 846 (2002)
- State v. Novak, 181 Neb. 90, 147 N.W.2d 156 (1966)
- Hoffman v. State, 164 Neb. 679, 83 N.W.2d 357 (1957)
- State v. Johnson, 290 Neb. 369, 859 N.W.2d 877 (2015)
- State v. Brouillette, 265 Neb. 214, 655 N.W.2d 876 (2003)
- State v. Nissen, 252 Neb. 51, 560 N.W.2d 157 (1997)
- Sudyka v. State, 123 Neb. 431, 243 N.W. 276 (1932)
- State v. Collins, 281 Neb. 927, 799 N.W.2d 693 (2011)
- State v. Liston, 271 Neb. 468, 712 N.W.2d 264 (2006)
- State v. Conklin, 249 Neb. 727, 545 N.W.2d 101 (1996)
- Sheppard v. State, 104 Neb. 709, 178 N.W. 616 (1920)

- *Pointer v. United States*, 151 U.S. 396, 14 S. Ct. 410, 38 L. Ed. 208 (1894)
- *State v. Knutson*, 288 Neb. 823, 852 N.W.2d 307 (2014)
- *State v. Carngbe*, 288 Neb. 347, 847 N.W.2d 302 (2014)
- *State v. Ortega*, 290 Neb. 172, 859 N.W.2d 305 (2015)
- *State v. Hale*, 290 Neb. 70, 858 N.W.2d 543 (2015)

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