



# TIBA TEXAS INDEPENDENT BAR ASSOCIATION

Post Office Box 783  
Austin, Texas 78767  
Tel. 512-850-6544



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⚖ Vol. 12, No. 7, February 23, 2004

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Case Name: [Dawn Kuretsch Stewart v. The State of Texas](#)

- OFFENSE: Driving While Intoxicated
- COUNTY: Bexar
- COURT OF APPEALS: San Antonio 2003
- C/A CITATION: 103 S.W.3d 483
- C/A RESULT: Conviction Reversed
- CCA. CASE No. PD-0324-03
- DATE OF OPINION: February 18, 2004
- DISPOSITION: Court of Appeals Reversed VOTE: 5-3-1
- OPINION: Keasler, J.
- TRIAL COURT: CCL 4; Hon. Sarah Garrahan-Moulder
- LAWYERS: Mark Stevens, Stephanie Stevens, Adriaan Jansse, Maria Ross (Defense); Kerrisa J. Chelkowski (State)

⚖ 301.04 [Witnesses / Experts / Admissibility or Scope \(DWI Extrapolation Testimony\)](#): The trial judge admitted the results Appellant's breath alcohol test (Intoxilyzer), which was taken 80 minutes after the stop, but refused to permit the State's expert to give retrograde extrapolation testimony, because he did not have enough information to determine what Appellant's alcohol concentration would have been at the time she was driving and did not know whether Appellant's body was absorbing or eliminating alcohol at the time of the test. The Court of Appeals reversed the conviction, holding that the belated Intoxilyzer test failed to present evidence that was relevant to alcohol concentration at the time of driving, and without extrapolation, presented evidence jury that confused the jury's deliberations (see ⚖, [Vol. 11, No. 2](#); 01/20/2003).

**Holding:** Appellant's breath test results tended to make it more probable that she was intoxicated at the time she drove under either definition of intoxication because they provided evidence that she had consumed alcohol. And, there is no evidence that she consumed alcohol after driving. The breath test results—along with [the arresting officer's] testimony and the videotape of Appellant -- were probative evidence of her intoxication. The breath test results might not have been conclusive proof that Stewart was intoxicated at the time that she drove, but that is of no consequence. We conclude that the Court of Appeals erred in finding that the results of Stewart's breath tests were irrelevant without retrograde extrapolation evidence.

**Concurring / Dissenting Opinions:** Judge Womack delivered a concurring opinion in which Judge Johnson joined. Her argued that the opinion "does not resolve the problem that faces trial courts: whether to admit breath-test results without extrapolation evidence." Judge Price delivered a dissenting opinion

in which he argued that, although relevant, "without retrograde extrapolation evidence, the results were substantially more prejudicial than probative under [Rule 403] analysis.

**Comment:** ([David A. Schulman](#)) From a scientific standpoint, I would take this a step further than either Judge Womack or Judge Price and argue that, without some evidence that demonstrates the relationship between results of the Intoxilyzer test and the question of whether Appellant was intoxicated at the time she was operating the motor vehicle, the Intoxilyzer evidence isn't relevant to anything. Without saying so, this opinion seems to incorporate a "common knowledge" aspect into the mix, and/or ties the question of relevance to admission of other evidence. What precedence do we take from this? What if the Intoxilyzer was administered 5 hours later? What if the BT had been .09 when the Intoxilyzer was administered 80 minutes later? Nevertheless, my objections to the relevance holding notwithstanding, I would agree with Judge Womack that this holding is correct only "because of the peculiar procedural posture of this appeal . . .," and that the most important question, whether retrograde extrapolation evidence is necessary to demonstrate the relevance of Intoxilyzer test results, remains unanswered.