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APPELLANT'S NAME: Allen Spock Hartman
OFFENSE: DWI
COURT OF APPEALS: San Antonio 1996
CITATION: 917 S.W.2d 115
RESULT: Conviction Affirmed
COUNTY: Bexar
CRIM. APPEALS NO. 0484-96
DATE OF OPINION: April 23, 1997
JUDGE: Meyers, J.
DISPOSITION: Court of Appeals Reversed

G/S 271 WITNESSES / STATE'S EXPERT / LEVEL OF INTOXICATION: During its case in chief, the State put on a DWI expert [McDougall] who testified that even though the Appellant's blood level at the time of his intoxilyzer test was .138, at the time of his stop his blood level was between .150 and .160, and "that he was able to testify regarding the Appellant's BAC range at the time of the stop because of . . . his observations of over 2,000 students going through a complete drinking cycle at classes he taught at San Antonio College over the last seventeen years." McDougall also explained that the Intoxilyzer test "already accounts for the subject's body weight . . ." In short, McDougall repeatedly testified that, although he could not testify to a precise BAC level at the time of the stop, he could testify to a BAC range. Appellant challenged that testimony on the grounds that it was scientifically unreliable, citing the standard in Kelly v. State, 824 S.W.2d 568 (Tex.Cr.App. 1992) and Daubert v. Merrell Dow, Inc., ___ U.S. ___, 113 S.Ct. 2786, 2798, 125 L.Ed.2d 469, (1993). The Court of Appeals affirmed the conviction, holding that Kelley and Daubert pertained to "novel" scientific theories, and that AAwhen the proffered evidence is not novel, the admissibility of the evidence should be examined in line with the more general criteria of Rule 702@ (see the Greenwood / Schulman report, (see G&S, Vol. 4, No. 5; February 22, 1996).

HOLDING: Kelly did not limit the two-pronged standard to "novel" scientific evidence, no more than did Daubert. ("The Supreme Court noted that under the Rules, the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. We likewise see no value in having a different standard of admissibility for novel scientific evidence"). Thus, the Court of Appeals erred in applying a standard different than that set forth in Kelly, and the case is remanded for reconsideration by the Court of Appeals.

NOTE: Judge Keller filed a concurring and dissenting opinion, agreeing with the majority that Kelly "announces the proper test for all scientific evidence . . ." but would remand the case to the

Court of Appeals so it could consider the reliability of the techniques used by McDougall in formulating his opinion.

COMMENT: ([Roy Greenwood](#)) This case pertains to the so-called “relation back” test, in which the BAC at the time of the test relates back to a particular BAC at the time of arrest. While I believe in the efficacy of the relation back test, it only works when one knows whether the defendant is on the up or down swing. The problem in this case is that the “expert” wanted didn’t know when the Appellant stopped drinking or what he had eaten and when he had eaten it. Sounds like he was saying “trust me, I know how this works, I just can’t explain it to idiots like you.” A good decision.