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CASE NO. _____

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IN THE SUPREME COURT OF CALIFORNIA

Deputy

ASHLEY JOURDAN COFFEY,
Pla. with ~~Appellant and Petitioner,~~

vs.

GEORGE VALVERDE, DIRECTOR, CALIFORNIA DMV
Defendant & Respondent.

PETITION FOR REVIEW

After a Decision by the Court of Appeal Fourth Appellate District, District Three

Case No. G047562

On Appeal from the Superior Court of California, County of Orange,

The Honorable Robert J. Moss, Judge.

Case No. 30-2012-00549559

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To the Honorable Chief Justice and Associate Justices of the Supreme Court, Petitioner seeks review of the August 15, 2013 published decision of the Fourth District Court of Appeal, Division Three (Acting Presiding Justice William W. Bedsworth, Associate Justice Raymond J. Ikola, and Associate Justice Eileen C. Moore), which denied a petition for rehearing on September 9, 2013.

ISSUES PRESENTED

- (1) Whether the Court of Appeal committed error by creating a new standard of review rather than applying its “independent judgment” to a question of law?
- (2) Can circumstantial evidence tending to prove alcohol *impairment* and a chemical test of 0.08 percent blood alcohol content (BAC) fifty-six minutes after driving establish, by a preponderance standard, that a driver had a BAC of 0.08 percent at the time of driving, where the three-hour presumption in Vehicle Code section 23152, subdivision (b), had been rebutted by substantial evidence?¹

INTRODUCTION

The published decision of the Court of Appeal at issue created a new standard of review related to rebuttable presumptions. Specifically, previous law established that once a presumption is rebutted, it has no further effect, and the fact finder must decide the facts without regard to the presumption. The published decision in this case essentially holds that

¹ “[I]t is a rebuttable presumption that the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of the performance of a chemical test within three hours after the driving.” Veh. Code § 23152(b).

once the presumption is rebutted, the fact finder must merely decide if the evidence is “consistent” with the previously presumed fact.

Additionally, the Court of Appeals failed to apply the correct standard of review by looking for substantial evidence to support the trial court’s answer to a legal question. The proper review should have determined:

- 1) Whether the trial court’s finding of facts were supported by substantial evidence; AND
- 2) Whether those facts, reviewed de novo, amounted to a preponderance, or weight of the evidence.

The Court of Appeal only looked for evidence “consistent” with the factual findings and failed to apply the de novo standard.

This case focuses on the BAC of a driver legally required to suspend her driver’s license. Fifty-six minutes after Appellant/Petitioner, Ashley Jourdan Coffey (Petitioner), was arrested for driving under the influence of alcohol (DUI) she completed evidentiary chemical breath test with a BAC result of 0.08 percent. Three minutes later, another showed 0.09 percent. Approximately 24 minutes later, Petitioner completed an evidentiary blood test with results of 0.095 percent and 0.096 percent.

At Petitioner’s DMV Administrative Per Se (APS) hearing, additional evidence included circumstantial evidence of impairment – erratic driving, and field sobriety tests (FSTs). Petitioner called an expert, whom testified that based on all the chemical test evidence, Petitioner’s BAC was below 0.08 percent at the time of driving. The DMV upheld the suspension, and Petitioner sought an administrative writ of mandate in the Superior Court.

The trial court denied the petition for writ of mandate stating, even assuming the three-hour presumption had been rebutted, “there was sufficient evidence based on the alcohol tests and other circumstantial

evidence to... support the DMV hearing officer's decision under the weight of the evidence."

The Court of Appeal held the three-hour presumption was rebutted by the testimony of Petitioner's expert witness that Petitioner's BAC was rising and was 0.07 percent or less at the time of driving. However, the Court of Appeal then affirmed the trial court's denial of Petitioner's writ of mandate by concluding there was circumstantial evidence to support the trial court's conclusion.

While there was circumstantial evidence that reasonably inferred Petitioner was possibly impaired, there was no evidence correlating the circumstantial evidence to any level of BAC. Even if it is reasonable to infer that a person's BAC was 0.08 percent 56 minutes before a test showing 0.08 percent, it is thereafter a question of law, requiring de novo review, to determine if that allowable inference amounts to a preponderance.

WHY REVIEW SHOULD BE GRANTED

This case potentially affects thousands of California drivers every year. In 2012 there were 164,274 APS actions initiated for persons allegedly driving with a BAC of 0.08 percent or more. (Calif. Dep't of Motor Veh., *California Administrative Per Se Facts* 3 (April 18, 2013), at http://apps.dmv.ca.gov/about/profile/rd/2012_aps.pdf.) DMV imposed suspensions in 148,687 of those actions.² *Id.* Presumably, the DMV relied on the three-hour presumption codified in subdivision (b), of Vehicle Code section 23152, in a majority of those of those cases because the DMV is

² The average number of annual 0.08 percent or more BAC APS actions taken between 2001 and 2011 is 160,433, with a low of 146,291 in 2001 and a high of 182,152 in 2008. (Calif. Dep't of Motor Veh., *Annual Report of the California DUI Management Information System* 57 (January 2013), at http://apps.dmv.ca.gov/about/profile/rd/r_d_report/Section_5/S5-243.pdf.)

statutorily prohibited from imposing an APS suspension unless a person's BAC is 0.08 percent or more.

Each time the DMV proposes to take action based upon the three-hour presumption, the potential of a rising blood-alcohol defense presents itself. The rising blood-alcohol defense is well recognized in criminal cases and APS hearings alike. People v. Beltran, 157 Cal. App. 4th 235 (2007); Helmandollar v. Department of Motor Vehicles, 7 Cal. App. 4th 52, 55 (1992); see Taylor, Cal. Drunk Driving Defense (3d ed. 2001) Forensic Chemist: Blood-Alcohol, § 11.1.1, pp. 610–611.

The Court of Appeals decision at issue has effectively changed the legal test in each of these cases, from what the weight of the evidence proves, to a determination of whether the circumstantial evidence is consistent with a 0.08 percent inference, essentially abrogating the defense.

In addition, the Court should grant review to resolve conflicts between the courts of appeal. In the present matter, the Court of Appeal has held erratic driving, “failed” FSTs, “objective indications of intoxication,” and a valid chemical test of 0.08 percent 56 minutes after driving can establish a BAC of 0.08 percent at the time of driving sufficient to warrant the taking of a license.

Many prior cases give rise to a different conclusion. For example: People v. Bejasa, 205 Cal. App. 4th 26, 43 (2012) [Observations of an officer such as loss of balance or slurred speech “reflects only an officer's observation of the physical manifestation of the subject's intoxication (i.e., a lack of muscular coordination).”]; Brenner v. Dep't of Motor Vehicles, 189 Cal. App. 365, 373 (2010) [“While the impressions of the officer may have a bearing on plaintiff's level of impairment, they have no bearing on the precise level of his BAC.”]; People v. Beltran, 157 Cal. App. 4th 235, 246, fn 10 (2007) [“While there was other evidence that defendant was

under the influence at the time of driving, our review of the record reveals no expert testimony tying defendant's objective symptoms of intoxication (weaving, speeding, odor of alcohol, and performance on field sobriety tests) to any particular BAC.”]; Baker v. Gourley, 98 Cal. App. 4th 1263, 1264-66 (2002) [“But before the DMV can summarily suspend a license without court proceedings it must have the definite evidence of a valid chemical test showing blood alcohol while driving of at least .08 percent. As the DMV itself is well aware, some symptoms of intoxication can occur below the .08 percent blood-alcohol threshold.” Slurred speech, bloodshot eyes, unsteady gait without a valid chemical test cannot establish specific BAC.]; Yordamlis v. Zolin, 11 Cal. App. 4th 655, 660 (1992) [Erratic driving, odor of alcohol, bloodshot/watery eyes, slurred speech, unsteady gait and a valid chemical test of 0.17 percent taken at an unknown time after driving insufficient to establish BAC was 0.08 percent or more at driving.]; Santos v. Department of Motor Vehicles, 5 Cal. App. 4th 537, 542, 549-50 (1992) [Erratic driving, bloodshot/watery eyes, unsteady gait, slurred speech, odor of alcohol, and a valid chemical test of 0.13 percent taken at an unknown time are “no basis for an inference that respondent’s blood-alcohol level was 0.08 or more percent at the time of driving.”]

FACTUAL AND PROCEDURAL HISTORY

A. The Facts

On November 13, 2011, at approximately 0132 hours, Petitioner was observed swerving while driving driving in the area of southbound State Route 55 near Baker Street. (AR 16.)³ When Petitioner was initially contacted the officer smelled the “strong odor of an alcoholic beverage”

³ “AR” references are to the Administrative Record.

and noticed her “eyes were red.” (AR 16.) Petitioner was then administered a series of FSTs. (AR 17.)

At approximately 0200 hours, based upon the observed driving and performance on the FSTs, the arresting officer “formed the opinion that [Petitioner] was under the influence of an alcoholic beverage and was unable to safely operate a motor vehicle upon a highway. [Petitioner] was placed under arrest for 23152 (a) V.C..” (AR 18.) At 0228 hours, 56 minutes after she was driving, Petitioner completed an evidentiary breath test with a BAC result of 0.08 percent; at 0231 hours, she completed an evidentiary breath test with a BAC result of 0.09 percent. (AR 13.) At 0255 hours, Petitioner completed an evidentiary blood test with a BAC result of 0.095 percent and 0.096 percent. (AR 21-22.)

On February 14, 2012 Petitioner’s APS hearing took place. (AR 3, 35.) DMV’s evidence consisted of Petitioner’s arrest report (AR 14-19), Petitioner’s breath test results (AR 13), Petitioner’s blood test results (AR 21-22), and the Age 21 and Older Officer’s Statement (DS367) (AR 7-9). After DMV’s presentation of its evidence, Petitioner’s expert witness testified. (AR 36.) The DMV hearing officer stipulated to expert’s qualifications. (AR 38.)

The expert explained absorptive, plateau, and elimination rates of alcohol consumption. (AR 46.) The expert noted that Petitioner completed two breath tests, each increasing over the one before it, of 0.08 to 0.09; and then, approximately 20 to 30 minutes later, completed a blood test with results of 0.095 and 0.096. (AR 47.) The expert stated the chemical test results were “totally consistent with alcohol rising, or recent consumption of alcohol.” (AR 48) The expert stated Petitioner’s BAC had to be rising because, “Well, it wouldn’t go down and then go back up again.” (AR 51.) He stated the only scenario in which Petitioner’s BAC was not rising at the

time she was stopped was if “her and the officer after the stop enjoyed some alcoholic beverages together” (AR 49). In regards to Petitioner’s rising blood alcohol, the expert agreed with the statement that, “[Alcohol] takes time to get into your system. And it has time to take effect and the affects your brain.” (AR 44.) He went on to explain that, “You get probably a maximum effect within an hour and a half, two hours after you start drinking.” (AR 45.)

The expert then opined when the totality of the circumstances of the officers’ observations of Petitioner (“no unsteady gait, no slurred speech”), her FST results, and breath and blood test results were all taken into account, it indicated Petitioner was below 0.08 percent at the time of driving: “She – the way it looks, it’s less than .08 at the time of driving.” (AR 48-49.)

The expert was asked, “[Appellant] was cooperative. Was a moderate odor of alcohol. Speech was normal. No issues. And then you have an 08/09. And you take a look at the field sobriety tests, not that bad. I mean there’s impairment, but it’s nothing outrageous. Is this consistent with what you perceive and have seen as a scientist with someone’s alcohol rising?” (AR 47.) He replied, “Yes, it - - it - - as the time goes by your performance on those tests gets a little poorer... You’ll be an 08 before you’re an 09” and Petitioner was 0.08 three minutes before being 0.09. (AR 47.)

The expert acknowledged that Appellant’s breath two rose from breath one, blood one rose from breath two, and blood two was higher than blood one. (AR 48.) The expert then opined that if breath one, breath two, blood one, and then blood two were plotted on a graph it “would be totally consistent with the alcohol rising, or recent consumption of alcohol.” (AR 48.) DMV did not present any evidence after the expert testimony.

B. Procedural History

On February 14, 2012 Petitioner had a DMV APS hearing. (AR 35.) Also on February 14, 2012, DMV issued its APS Notification of Findings and Decision concluding Petitioner had driven a vehicle with a BAC of 0.08 percent or more; and, ordered the suspension of her driver's license for four months. (AR 3-5.) In the Notification, the hearing officer stated the testimony of Petitioner's expert witness was speculative and insufficient to rebut the presumption her BAC was 0.08 percent or more. (AR 4.)

On February 29, 2012 Petitioner filed a petition for peremptory writ of mandate in the Orange County Superior Court, the Honorable Judge Robert J. Moss. (CT 9-12.)⁴ On October 19, 2012 the trial court issued an order denying Petitioner's petition stating in part, "The DMV hearing officer was entitled to reject the uncontradicted testimony of petitioner's expert witness, and the hearing officer set forth reasons for doing so in this case." (CT 58.) During oral arguments, in regards to the rebutting of the three-hour presumption, Petitioner's counsel attempted to clarify the trial court's ruling to determine if the court had exercised its independent judgment on the testimony of the expert witness or if the court was simply accepting the DMV hearing officer's rejection of the expert opinion. (RT 1-3.)⁵

The trial court stated, "The hearing officer does not have to accept an expert's opinion... I understand what your expert said, the hearing officer wasn't buying it." (RT 2.) In addition, the trial court concluded that even if Petitioner's expert had rebutted the presumption that her BAC was 0.08 percent or more, "there was sufficient evidence based in the blood-alcohol tests and the other circumstantial evidence based on the assessment,

⁴ "CT" references are to the Clerk's Transcript.

⁵ "RT" references are to the Reporter's Transcript page number.

observations and tests by the arresting officers at the scene to support the DMV hearing officer's decision under the weight of the evidence." (AR 58.)

On October 24, 2012 Petitioner filed her Notice of Appeal. (CT 66.) On November 9, 2012 Petitioner filed a Petition for Writ of Supersedeas or Other Appropriate Stay Order, in the Court of Appeal, requesting an immediate stay of the suspension of her driver's license. On November 13, 2012 the court issued an order staying the suspension of Petitioner's license pending further order of the court.

Approximately seven months after Petitioner filed her notice of appeal, the trial court dismissed her petitioner for writ of mandate with prejudice. (Op. 5.)⁶

C. The Court of Appeal Opinion

On April 15, 2013 the Court of Appeal issued its published opinion affirming the trial court's denial of the writ of mandate. (Op. 2.) The court began its "Discussion" by holding the trial court "was without jurisdiction to dismiss the petition and its act is void." (Op. 6.) The court then stated that although trial court was to exercise its independent judgment, "The administrative findings come before the superior court with a 'strong presumption of correctness,' and the burden rests on the petitioner to establish administrative error." (Op. 7-8.)

The court reversed the holding of the trial court in regards to the three-hour presumption, finding that the presumption had been rebutted. (Op. 7.) The court stated, (Op. 10):

⁶ "Op." references are to the page number of the filed opinion and attached to this petition. The opinion has been subsequently published at Coffey v. Shiomoto, 218 Cal. App. 4th 1288 (2013).

Applying the foregoing here, [Petitioner's] expert testified based on breath and blood test results that [Petitioner's] BAC was in a state of rising and thus her BAC at the time of driving was below 0.08 percent. This substantial evidence rebutted the three-hour presumption and required the DMV to adduce evidence to prove [Petitioner's] BAC was at least 0.08 percent at the time of driving "without regard to the presumption." (Evid. Code, § 604.)

The court then went on to state, "The issue boils down to whether nonchemical test circumstantial evidence can prove that [Petitioner's] BAC at the time of driving was consistent with her BAC at the time of her chemical tests. Based on *Burg*, supra, 35 Cal.3d at page 266, footnote 10, we hold it can." (Op. 11.) The court found, "The evidence of [Petitioner's] erratic driving, failed field sobriety tests (FST's), and objective indications of intoxication are substantial evidence that [Petitioner] had a BAC equal to or greater than 0.08 percent at the time of driving." (Op. 2.)

The court concluded its opinion with the following statement, which reads as a caution for misuse of the precedent it was setting, (Op. 15):

In reaching the conclusion that the circumstantial evidence here was sufficiently substantial to support the trial court's ruling, we hasten to add that nothing about our opinion compels a fact finder to accept any particular combination of signs of intoxication as proving a particular BAC at the time of driving. Trial courts must independently weigh the evidence and reach their own conclusions. Our holding is limited to the proposition that such evidence constitutes substantial evidence sufficient to sustain such a finding in the presence of a valid BAC test taken a reasonable time after driving.

On August 30, 2013 Petitioner filed a Petition for Rehearing in the Court of Appeal. On September 9, 2013 the Court of Appeal denied the petition.

ARGUMENT

I. THE GENERAL LEGAL FRAMEWORK AT ISSUE.

Vehicle Code section 13353.2, subdivision (a)(1), mandates that the DMV suspend the driver's license when, "The person was driving a motor vehicle when the person had 0.08 percent or more, by weight, of alcohol in his or her blood." There is no provision for the DMV to administratively suspend the driver's license of a person who is under the influence, but whose BAC is below 0.08 percent.

Subdivision (b), of Vehicle Code section 23152 provides a rebuttable presumption that if a person chemical test with a result of 0.08 percent or more within three-hours of driving, that the person's BAC was 0.08 percent or more at the time of driving.

The DMV must make a determination of the facts requiring suspension on the basis of the peace officer's sworn report. Veh. Code § 13353.2(d). It must then determine by a preponderance of the evidence whether the peace officer had reasonable cause to believe the driver violated section 23152; the driver was placed under arrest; and the driver had a BAC of 0.08 percent or more. Veh. Code § 13557(b)(3). This determination is final unless the driver timely requests a hearing. Veh. Code § 13557(b)(2).

Upon the driver's timely request, the DMV must hold an administrative hearing (APS hearing) at which the evidence is not limited to that presented at the prior administrative review. Veh. Code § 13558. "The only issues at the hearing on an order of suspension pursuant to Section 13353.2 shall be... whether the arresting officer had reasonable cause to believe the person was driving, the driver was arrested, and the person was driving with .08 percent BAC or higher." Lake v. Reed, 16 Cal. 4th 448, 456 (1997). At the APS hearing, the DMV bears the burden of proof to establish the validity of the suspension:

Section 13558] says nothing about the driver starting the hearing with such a burden. Quite the contrary, one of the stated legislative purposes of the enactment was to protect against erroneous deprivation of one's driving privilege is by providing an opportunity for a "full hearing". (Stats. 1989, Ch. 1460, Section 1). Moreover, the Supreme Court has established in somewhat analogous DMV proceedings that, although mere reports presented without proof of reliability sufficed to support an initial summary finding of license suspension, once "the Petitioner requests a hearing, the ... report is itself insufficient to establish a prima facie showing of the facts supporting the suspension of a driver's license." (quoting, Daniels vs. Department of Motor Vehicles, 33 Cal. 3rd 532, 541 (1983).)

Coombs v. Pierce, 1 Cal. App. 4th 568, 580-81 (1991). The DMV's determination is then subject to judicial review. Veh. Code § 13559.

"In ruling on an application for a writ of mandate following an order of suspension or revocation, a trial court is required to determine, based on its independent judgment, " 'whether the weight of the evidence supported the administrative decision.' " Lake, 16 Cal. 4th at 456; Berlinghieri v. Dep't of Motor Vehicles, 33 Cal. 3d. 392, 395 (1983) [In reviewing the suspension or revocation of a driver's license "the trial court must not only examine the administrative record for errors of law, but also must exercise its independent judgment upon the evidence."

II. THE WEIGHT OF THE EVIDENCE DOES NOT SUPPORT A FINDING THAT THE PETITIONER'S BAC WAS 0.08 PERCENT OR MORE.

A. The Evidence of Petitioner's BAC at the time of Driving.

When evidence contradictory to a presumption is presented the "presumption disappears." Craig v. Brown & Root, 84 Cal. App. 4th 416, 421 (2000). Once the presumption is rebutted it cannot be given further effect and, "the matter must be determined on the evidence presented." In

re Heather B., 9 Cal. App. 4th 535, 561 (1992). Thus, once the three-hour presumption was rebutted, the chemical test evidence was reduced to merely direct evidence that, 56 minutes after driving, Petitioner's BAC was 0.08 percent. It is also circumstantial evidence of some level of concentration at the time of driving. People v. Warlick, 162 Cal. App. 4th Supp. 1, 7 (2008).

There was additional evidence of Petitioner's BAC at the time of driving. There was the evidence that Petitioner's BAC was **below** 0.08 percent at the time of driving: Expert testimony that her BAC was rising; expert testimony that her BAC was below 0.08 percent at the time of driving; the expert's testimony that alcohol takes time to effect the brain and maximum effect is within an hour and a half to two hours; the expert's opinion that the arresting officer's observations of Petitioner, her FST results, and chemical tests all indicated she was below 0.08 percent; and the expert opinion that Petitioner's BAC could not have gone down and then back up again. The Court of Appeal's found the expert testimony to be substantial evidence that Petitioner's BAC was rising.

There was circumstantial evidence that Petitioner was impaired: There was evidence that Petitioner was swerving while driving; that she had bloodshot/watery eyes; that she had the odor of an alcoholic beverage; that she did not have an unsteady gait or slurred speech; that the arresting officer believed she had performed poorly on the FSTs; and, that the officer arrested her because he believed she was under the influence of an alcoholic beverage. However, this circumstantial evidence was not shown to be indicative of a particular blood-alcohol concentration.

There *was not* any evidence that bloodshot/watery eyes begins to occur at any particular BAC; there was not evidence that the odor of an alcoholic beverage begins to occur at any particular BAC; there was not evidence that

Petitioner's "poor performance" on the FSTs would only occur at any particular BAC or higher; and, there was not any evidence that swerving while driving would occur only at any particular BAC or higher.

B. The Court of Appeal Created a Test Contrary to Established Law.

The Court of Appeal stated: "This substantial evidence rebutted the 3-hour presumption and required the DMV to adduce evidence to prove [Petitioner's] BAC was at least 0.08 percent at the time of driving 'without regard to the presumption.'" The court then stated, "The issue boils down to whether non-chemical test circumstantial evidence can prove that [Petitioner's] BAC at the time of driving was consistent with her BAC at the time of her chemical tests."

Stating the issue that way creates a test which is contrary to established law. Such a test inherently changes the current legal standard of proof from a preponderance, or weight of the evidence test, to a mere consistency test under certain circumstances. Specifically, such a holding requires a finding, in every case, that the driver's BAC was 0.08 percent or more at the time of driving where there is a valid chemical test of 0.08 percent or more, unless the non-chemical circumstantial evidence proves the two BAC's are *inconsistent* with each other. It would have been more harmonious with the applicable legal standard to state the issue similarly to, "The issue boils down to whether non-chemical test circumstantial evidence can prove, by the weight of the evidence, that [Petitioner's] BAC at the time of driving was equal to, or higher than, the BAC results, which exceeded the 0.08 percent limit, at the time of her chemical tests." As currently stated, the court's holding places an illogical and impossible burden on the driver in any APS hearing. Specifically, it places a burden on a driver (even after rebutting the 3-hour presumption) to show that the

circumstantial evidence proves the BAC at time of the chemical testing is inconsistent with a presumed BAC of 0.08 percent at the time of driving.

Moreover, accurately stating the true legal test highlights the flaws in the court's analysis. The court relied on an unreasonable inference that the driver's BAC at the time of driving is the *same* as the BAC at the time of the chemical test. Using that unreasonable inference, it then looked to the record for evidence which was "consistent" with that unreasonable inference. The inference is unreasonable because the court failed to appreciate that, without the three-hour presumption, it is unreasonable to infer an *identical* BAC at the time of driving to a chemical test taken later in time. California case law holds, as a well known fact, and as a matter of law, that BAC changes rapidly over time. Therefore, to start the analysis with an inference that the driver's BAC was equal at the time of driving to the BAC at the time of testing, is unreasonable.

Likewise, it is unreasonable to infer, in this case, that her BAC was *higher* at the time of driving than at the time of chemical testing. The court relied footnote 10 in Burg v. Municipal Court, 35 Cal. 3d 257, 266 (1983), to reach its conclusion that non-chemical test circumstantial evidence could prove Petitioner's BAC. (Op. 11.) The Burg footnote cited to Fuenning v. Super Ct. In & For Cty. Of Maricopa, 680 P.2d 121 (Ariz. 1983), for the proposition that circumstantial evidence could be adduced to establish a specific BAC. The court's reliance on Burg and Fuenning was misplaced. See sections II. D and E, *post.*)

The Fuenning court essentially held that where a driver was observed to have an inability to stand without help, nausea, and dizziness, all closer in time to driving than the chemical test taken "hours" later, that it was reasonable *under those circumstances* to infer the chemical test would produce a result lower than what the driver's BAC was at time of driving.

Here, the observations did not include such drastic signs of impairment as an inability to stand, nausea and dizziness. The observations in the case at bar may be sufficient to support an inference that the driver was impaired, but to go so far as to say it supports an inference that the driver was higher at the time of driving than the time of the tests, beginning just less than an hour after driving, goes too far. There is no nexus between those facts and that inference. There is no explanation in the record as to why it is more probable or likely that the driver's BAC was falling from the time of those observations and the time of the chemical test. Moreover, there was only one chemical test of 0.11 percent in Fuenning hours after driving, which is quite different than the facts here where there were many tests over a span of 27 minutes.

Finally, the court gave too much weight to the non-chemical test evidence in this case. While it may be common knowledge that the effects of alcohol cause "symptoms of intoxication," it is *not* common knowledge which symptoms appear at any given level, which symptoms appear at levels below 0.08 percent, or which symptoms appear at levels above 0.08 percent. While relevant to impairment, they are not relevant to a specific alcohol level without some indicia of evidence in the record demonstrating a correlation to a specific alcohol level.

C. Petitioner's BAC could not have been 0.08 Percent or more at the time of Driving Because there was Substantial Evidence her BAC was Rising.

The court held that Petitioner's expert "testified based on breath and blood test results that [Petitioner's] BAC was in a state of rising and thus her BAC at the time of driving was below 0.08 percent. This substantial evidence..." "[R]ising alcohol basically means that a person's blood alcohol concentration is increasing over time. And the defense part comes

in, in that perhaps if a test was done at some time or period after the driving occurred, typically a longer period of time, like let's say two hours, that possibly at the time of driving, the person's actual BAC was below [0].08.” Beltran, 157 Cal. App. 4th at 246. It “is strong forensic evidence” when there is evidence of one chemical test rising from a prior test coupled with expert testimony that a person’s BAC was below 0.08 percent at the time of driving.

The court’s holding directly supports that Petitioner’s BAC was below 0.08 percent at the time of driving. Petitioner’s first breath test was 0.08. Her BAC was rising. Therefore, her BAC must have been below 0.08 prior to the test or else it could not have rose to 0.08. Anything below 0.08 percent, even 0.079, does not empower the DMV to suspend a license.

D. The Court of Appeal’s Reliance on *Burg* was Misplaced.

It is fundamental doctrine that a decision is not authority for what is dicta within the opinion but only for the points actually involved and actually decided. Norris v. Moody, 84 Cal. 143, 149 (1890); Hart v. Burnett, 15 Cal. 530, 598 (1860). The statement of a principle not necessary to the decision will not be regarded either as a part of the decision or as a precedent that is required by the rule of stare decisis to be followed. Brown v. Brown, 83 Cal.App. 74, 81 (1927); Hills v. Superior Court, 207 Cal. 666, 670 (1929); Laguna L. & W. Co. v. Greenwood, 92 Cal.App. 570, 574 (1928); Harris v. Industrial Acc. Com., 204 Cal. 432, 438 (1928). Thus, the Court of Appeal should not have rendered an opinion “based” on a footnote in Burg where it was dicta inconsistent with other authorities.

“While the impressions of the officer may have a bearing on plaintiff’s level of impairment, they have no bearing on the precise level of his BAC.” Brenner, 189 Cal. App. At 373 (See also, Bejasa, 205 Cal. App. 4th at 43

[Observations of an officer such as loss of balance or slurred speech “reflects only an officer's observation of the physical manifestation of the subject's intoxication (i.e., a lack of muscular coordination).”]; Beltran, 157 Cal. App. 4th at 246, fn 10 [“While there was other evidence that defendant was under the influence at the time of driving, our review of the record reveals no expert testimony tying defendant's objective symptoms of intoxication (weaving, speeding, odor of alcohol, and performance on field sobriety tests) to any particular BAC.”].)

Brenner, Bejasa, and Beltan are on point with the present matter and support that the observations of Petitioner’s arresting officer *do not* amount to any evidence of a specific BAC, let alone substantial circumstantial evidence of Petitioner’s BAC. Thus, it is not reasonable to conclude there is “substantial evidence” to support the trial court’s finding that the preponderance of the evidence was that Petitioner’s BAC was 0.08 percent at the time of driving based on a Burg footnote. The only evidence of Petitioner’s specific BAC at the time of driving was the circumstantial evidence that her BAC was 0.08 percent 56 minutes after driving. However, under two separate theories, Petitioner’s expert firmly established that Petitioner’s BAC would have been below 0.08 percent at the time of driving. At best, this competing evidence could only be a tie; a tie is not a preponderance; therefore, there was not substantial evidence to support the trial court’s decision.

E. The Court’s Reliance on *Fuening* Fails to Appreciate the Critical Factual Differences to the Present Matter.

In Baker v. Gourley, 98 Cal. App. 4th 1263, 1270 (2002) the court warned of the danger of lost meaning when one court paraphrases another. Here, the Court of Appeal noted that Burg cited to Fuening for the proposition that, “Of course, both parties may also adduce other

circumstantial evidence tending to establish that the defendant did or did not have a 0.10 percent blood-alcohol level while driving.”

The court, at page 12, then went on to quote from Fuenning, 680 P.2d at 130:

Evidence that at that time the person charged smelled strongly of alcohol, was unable to stand without help, suffered from nausea, dizziness or any other ‘symptoms’ of intoxication would justify an inference that a test administered some time after arrest probably produced lower readings than that which would have been produced had the test been administered at the moment of arrest.

However the court “paraphrased” by omitting the immediately preceding sentence from Fuenning, “Defendant attacked the results, presenting evidence regarding margin of error, time lapse and other factors. Such evidence might raise considerable doubt whether the test result of .11% indicated .10% or greater BAC at the time defendant was arrested”; as well as the sentence immediately following, Id.:

The converse is also true. Evidence that at the time of arrest defendant was in perfect control, displayed none of the symptoms of intoxication and had not driven in an erratic manner, is relevant to show that a reading of .11% from a test given some time later does not prove beyond a reasonable doubt that the defendant was driving with a .10% or greater BAC at the time of his arrest.

Similar to the instant matter, in Fuenning, there was expert testimony that, Id. at 124-25:

The speed at which the body absorbs alcohol is affected by the presence or absence of food in the stomach. When the stomach is empty of food, alcohol is absorbed much more quickly. **The test can only measure the amount of alcohol in the blood at the time of the test, not at the time of the event.** If a person has had several drinks during dinner, is arrested while driving soon afterward, and given an

intoxilyzer test an hour or two later, the test is likely to show a considerably greater BAC than that which existed at the time of arrest. [Emphasis added.]

The statutory BAC at issue was 0.10 percent. Id. at 130. Fuenning's BAC was 0.11 percent. Id. at 124. The Fuenning court noted that "Reaching the chemical level of .10% requires consumption of a number of drinks (as much as a pint of whiskey, one to two six packs of beer, or a quart of wine) in a period of two or three hours." Id.

In addition, the evidence was not that the arresting officer merely detected "the smell of alcohol and gave field sobriety tests," Id. at 124, but also included a videotape showing Fuenning's behavior at the time of booking and testimony from the arresting officer that Fuenning was "Drunk,' 'intoxicated,' and 'under the influence.'" Id. at 130. But significantly noteworthy, the court specifically stated that "the probative value of terms like "drunk," "intoxicated," and "under the influence" in a "per se case would be slight" and cautioned trial courts from admitting this type of evidence in determining per se cases. Id. at 131.

Most importantly, Fuenning never concluded that the observations of the arresting officer were sufficient evidence to establish that Fuenning was driving with a BAC of 0.10 percent. In fact, it was not even the issue before the court. The issues before the court were the "Constitutionality of the statute," Id. at 125; "Admissibility of evidence of defendant's conduct and behavior," which the court specifically stated, "We need not decide," Id. at 130; and, "Foundation for admission of test results," Id. at 131. Thus, because it was not decided, Fuenning does not stand for the proposition that the meager observations noted by Petitioner's arresting officer are "substantial evidence" that Appellant's BAC was 0.08 percent or more at the time of driving.

F. When there are two Reasonable Evidentiary Inferences that are Reasonable, the Inference Favoring the Petitioner must be Given.

Because the appropriate test is a “weight of the evidence” or preponderance test, how *much* weight should be given to the circumstantial evidence where the ultimate question is a specific BAC level? Giving it the most generous amount of weight, it should only be viewed as proving it is reasonably possible that the driver had a BAC of 0.08 percent at the time of driving. But just because it is reasonable, does not make it more likely than not – does not make it rise to a preponderance. When the evidence gives rise to another reasonable conclusion, that Petitioner’s BAC was *below* 0.08 percent, the Court must find in Petitioner’s favor if they are equally likely, or if the conclusion that she was below 0.08 percent is more likely. This is the ultimate question which the Court of Appeals decision failed to correctly address. Once it found the trial court could reasonably infer Petitioner’s BAC was 0.08 percent, there was no *de novo* review to determine if the evidence tipped the scales in that direction or not.

It is the DMV’s burden to establish by the weight of the evidence that Petitioner was driving with a BAC of 0.08 percent or more. If the evidence is of equal weight, the courts must favor Petitioner:

[W]here proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other., before he is entitled to recover.

Showalter v. Western P. R. Co., 16 Cal. 2d 460, 476 (1940) (See also, Pennsylvania R. Co. v. Chamberlain, 288 U.S. 333, 340 (1933) [“When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A

verdict in favor of the party bound to maintain one of those propositions against the other is necessarily wrong."].)

Evidence that provides a reasonable inference of a BAC of 0.08 percent is insufficient to prove by the weight of the evidence that Petitioner's BAC was 0.08 percent at the time of driving. The evidence must prove it was more likely than not that she was 0.08 percent at the time of driving. The Court of Appeal did not weigh the evidence properly because it came to its ultimate conclusion, that it must uphold the trial court's ruling, merely upon a showing of substantial evidence that a reasonable inference may be drawn from the chemical test and circumstantial evidence of impairment. The proper standard would have included weighing the evidence, which in turn would have revealed **no likelihood** of 0.08 percent at the time of driving had been proven.

CONCLUSION

The Court should grant review because the opinion of the Court of Appeal establishes a new standard of review contrary to established law. The published case has a real potential to affect tens of thousands of Californians on a yearly basis.

Respectfully submitted,

Dated: September 23, 2013



CHAD R. MADDOX
Attorney for Petitioner
ASHLEY JOURDAN COFFEY

CERTIFICATE OF WORD COUNT

(California Rules of Court, Rule 8.204(c)(1).)

The text of the memorandum consists of 6,676 (six-thousand, six-hundred seventy-six) words as counted by the Microsoft Word version 2007 processing program used to generate the brief.

Dated: September 23, 2013



CHAD R. MADDOX

PROOF OF SERVICE

Appellate Court Case No.: G047562

Trial Court Case No.: 30-2012-00549559

Ashley Jourdan Coffey v. George Valverde, Director, California DMV.

I hereby declare that I am a citizen of the United States, am over 18 years of age, and am not a party in the above-entitled action. I am employed in the County of Orange and my business address is 5120 E. La Palma, #207, Anaheim Hills, CA 92807.

On September 23, 2013, I served the attached document described as a Petition for Review on the party in the above named case. I did this by enclosing true copies of the document in sealed envelopes with postage fully prepaid thereon, I then placed the envelopes in a U.S. Postal Service mailbox in Anaheim Hills, California, addressed as follows:

Office of the Attorney General
Kevin K. Hosn
300 S. Spring St. - #1702
Los Angeles, CA 90013

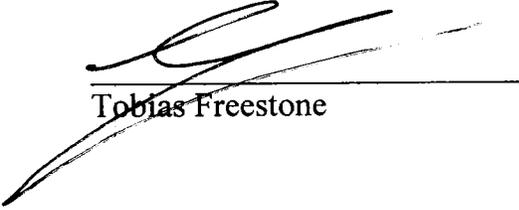
Judge Robert J. Moss, Orange County Superior Court, Department 23
700 Civic Center West
Santa Ana, CA 92701

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Court of Appeal, Fourth Appellate District
Division Three
601 W. Santa Ana Blvd.
Santa Ana, CA 92701

I, Tobias Freestone, declare under penalty of perjury that the foregoing is true and correct.

Executed on September 23, 2013, at Anaheim Hills, California.



Tobias Freestone



COPY

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

COURT OF APPEAL-4TH DIST DIV 3
FILED

AUG 15 2013

ASHLEY JOURDAN COFFEY,

Plaintiff and Appellant,

v.

JEAN SHIOMOTO, as Chief Deputy
Director, etc.,

Defendant and Respondent.

Deputy Clerk

G047562

(Super. Ct. No. 30-2012-00549559)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert J. Moss, Judge. Affirmed.

Law Offices of Chad R. Maddox and Chad R. Maddox for Petitioner.

Kamala D. Harris, Attorney General, Alicia M.B. Fowler, Kenneth C. Jones, and Kevin K. Hosn, Deputy Attorneys General, for Defendant and Respondent.

* * *

used his vehicle's public address system to advise Coffey to pull over to the right. Coffey eventually slowed down and pulled over. Upon making contact, the officer immediately noticed a strong odor of alcohol emitting from Coffey's vehicle. Coffey denied having consumed alcohol.

A second officer arrived to perform FST's. He immediately smelled the odor of alcohol emitting from Coffey's person and observed Coffey's red, watery eyes. In performing the horizontal gaze nystagmus test, Coffey displayed a lack of smooth pursuit in both eyes. In performing the walk and turn test, Coffey missed the heel-to-toe on five of the nine steps, turned clockwise instead of counter-clockwise, and used both feet to turn instead of one. And in performing the Romberg test, Coffey swayed slightly in all directions, her eyes trembled, and she estimated 30 seconds at 37 seconds.¹ The officer concluded Coffey failed the FST's and placed her under arrest at 2:00 a.m.

At 2:28 a.m., Coffey performed a breathalyzer test with a result of 0.08 percent BAC. At 2:31 a.m., she took another breathalyzer test with a result of 0.09 percent. At 2:55 a.m., she took blood tests with results of 0.095 percent and 0.096 percent.

After the arrest, the DMV issued an APS suspension order and held an evidentiary hearing where Coffey was represented by counsel. The exhibits admitted into evidence were the arresting officer's sworn statement (DMV form DS-367), the officer's arrest report, and a supplemental arrest report. These exhibits detailed the circumstances recited above.

¹

In the Romberg test, a suspect is "asked to stand at attention, close his eyes, tilt his head back, and estimate the passage of 30 seconds. While [the suspect] perform[s] the test, [the officer] observe[s] [the suspect's] balance and his ability to accurately measure the passage of 30 seconds." (*People v. Bejasa* (2012) 205 Cal.App.4th 26, 33.)

Coffey petitioned for a writ of mandate to set aside the suspension order. Coffey contended that her expert testimony had rebutted the 3-hour presumption of Vehicle Code section 23152, subdivision (b), by presenting expert evidence that Coffey's BAC was below 0.08 percent at the time she was driving.² She further contended the DMV had offered no evidence to establish Coffey's BAC at the time of driving and that the DMV officer was not free to arbitrarily reject uncontradicted expert testimony.

The court denied the petition by way of minute order, stating, "The DMV hearing officer was entitled to reject the uncontradicted testimony of petitioner's expert witness, and the hearing officer set forth reasons for doing so in this case. [Citation.] Even assuming that petitioner Coffey rebutted the presumption under [section 23152, subdivision (b)], there was sufficient evidence based on the blood-alcohol tests and the other circumstantial evidence based on the assessment, observations and tests by the arresting officers at the scene to support the DMV hearing officer's decision under the weight of the evidence." Coffey timely appealed. Coffey also petitioned us for a writ of supersedeas staying the suspension of her license. We issued a temporary stay of Coffey's license suspension.

Approximately seven months later we received notice that the trial court had dismissed the petition with prejudice. The circumstances surrounding the dismissal were that Coffey's attorney had not appeared at a status conference held after the notice of appeal had been filed. The record is unclear, but the purpose of the status conference may have been to discuss the format of a formal judgment. The court then issued an order to show cause re: dismissal, and Coffey's attorney again did not appear, so the court dismissed the petition with prejudice. We issued an order requesting the parties to

²

All statutory references are to the Vehicle Code unless otherwise stated. Section 23152, subdivision (b), states, "it is a rebuttable presumption that the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of the performance of a chemical test within three hours after the driving."

driving. We agree she rebutted the presumption, but we find substantial evidence supports the trial court's finding that Coffey's BAC was at least 0.08 percent at the time of driving.

"A person who operates a motor vehicle while intoxicated is subject to criminal prosecution and penalties. Prior to the criminal trial, however, the [DMV] must suspend the individual's driver's license as an administrative matter if it determines the person was driving a motor vehicle with a blood-alcohol concentration . . . of .08 percent or higher." (*Lake v. Reed* (1997) 16 Cal.4th 448, 451 (*Lake*)). "After either the arresting officer or the DMV serves a person with a 'notice of an order of suspension or revocation of the person's [driver's license],' the DMV automatically reviews the merits of the suspension or revocation." (*Id.* at p. 455.) "In those cases where the individual requests an administrative hearing, whether he or she was driving with a prohibited BAC is often proved by the introduction into evidence of the arresting police officer's sworn report describing the circumstances of the arrest, together with the results of a breath test administered by the officer." (*Id.* at p. 451.)

To sustain the suspension order, the DMV must determine "by the preponderance of the evidence" (1) that a peace officer had "reasonable cause to believe" the driver was driving under the influence of alcohol or drugs; (2) the driver was arrested (or, under circumstances inapplicable here, lawfully detained); (3) and, as applicable here, the driver was operating a motor vehicle when the driver "had 0.08 percent or more, by weight, of alcohol in her blood." (§ 13557, subd. (b)(3)(A)(B)(C)(i).)

"In ruling on a petition for writ of mandate following an order of suspension or revocation, a trial court is required to determine, based on its independent judgment, whether the weight of the evidence supported the administrative decision. [Citation.] . . . [Citation.] Under the independent judgment test, the court determines whether the administrative hearing officer abused his or her discretion because the findings are not supported by the weight of the evidence. [Citation.] The administrative

prove beyond a reasonable doubt that at the time he was driving his blood alcohol exceeded 0.10 percent.” (*Burg v. Municipal Court* (1983) 35 Cal.3d 257, 265 (*Burg*).

“The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption.” (Evid. Code, § 604.) In other words, when met with “contradictory evidence,” the presumption “disappears.” (*Craig v. Brown & Root, Inc.* (2000) 84 Cal.App.4th 416, 421.)

The DMV objects to this line of reasoning as “lessen[ing] the significance of” the 3-hour presumption, but it is unclear precisely how the DMV would characterize the presumption. The DMV cites the legislative history of the presumption, as set forth in *Bell v. Department of Motor Vehicles* (1992) 11 Cal.App.4th 304, 311, as follows, “The stated need for the presumption arose from the absence in ‘[e]xisting law’ of any ‘provision for the delay involved between the time a person is arrested for a DUI and when the chemical test for BAC is actually administered,’ of any ‘means to determine a person’s BAC at the time the person is actually *driving* the car,’ or of any ‘mention of time parameters for the administering of chemical tests and for their admission as admissible [*sic*] evidence into a court of law.’ [Citation.] Thus, in enacting the presumption, the Legislature intended (1) to ‘diminish the arguments that ha[d] arisen when extrapolating the [BAC] at the time of the test back to the time of the driving’ [citation], (2) ‘to close a potential loophole in the current law, whereby a person . . . could claim that he or she had consumed . . . alcohol which had not yet been absorbed into the bloodstream while the person was operating the vehicle, but which later raised the blood alcohol level’ [citation], and (3) ‘to recognize that alcohol concentrations dissipate over time, so that a person whose blood alcohol levels exceed the permissible concentrations

Substantial Evidence Supports the Trial Court's Finding

Substantial evidence supports the trial court's finding that the DMV met that burden. The trial court stated, "Even assuming that petitioner Coffey rebutted the presumption under [section 23152, subdivision (b)], there was sufficient evidence based on the blood-alcohol tests and the other circumstantial evidence based on the assessment, observations and tests by the arresting officers at the scene to support the DMV hearing officer's decision under the weight of the evidence."

The issue boils down to whether non-chemical test circumstantial evidence can prove that Coffey's BAC at the time of driving was consistent with her BAC at the time of her chemical tests. Based on *Burg, supra*, 35 Cal.3d at page 266, footnote 10, we hold it can.

Burg addressed the constitutionality of section 23152, subdivision (b). In discussing the manner of proving up an offense under section 23152, subdivision (b), the court specifically noted that circumstantial evidence is admissible to prove that the result of a test taken after driving reflected the driver's BAC at the time of driving: "Section 23152, subdivision (b), prohibits driving a vehicle with a blood-alcohol level of 0.10 percent or higher; it does not prohibit driving a vehicle when a subsequent test shows a level of 0.10 percent or more. Circumstantial evidence will generally be necessary to establish the requisite blood-alcohol level called for by the statute. A test for the proportion of alcohol in the blood will, obviously, be the usual type of circumstantial evidence, but of course the test is not conclusive: the defendant remains free to challenge the accuracy of the test result, the manner in which it was administered, and by whom. [Citations.] *Of course, both parties may also adduce other circumstantial evidence tending to establish that the defendant did or did not have a 0.10 percent blood-alcohol level while driving.*" (*Burg, supra*, 35 Cal.3d at p. 266, fn. 10, italics added.)

For this proposition *Burg* cited *Fuenning v. Super. Ct. In & For Cty. of Maricopa* (Ariz. 1983) 680 P.2d 121, which addressed various constitutional challenges

testing procedures on file with the State Department of Health Services.” (*Baker, supra*, 98 Cal.App.4th at p. 1265.) This rebutted any presumption that the test results were accurate, and the DMV failed to present any evidence to establish their accuracy. As here, Baker exhibited objective signs of intoxication such as “an unsteady gait, bloodshot eyes, slurred speech, [and] a smell of alcohol.” (*Ibid.*) “The case thus quickly devolves to this question: Can a given amount of blood-alcohol level be established *without a valid chemical test* by evidence of behavior or indicia typically *associated* with intoxication, such as, like here, slurred speech, bloodshot eyes, or an unsteady gait?” “No.” (*Id.* at pp. 1265-1266.)

In reaching that conclusion, however, the *Baker* court distinguished our situation where there *is* a valid BAC test. *Baker* distinguished prior opinions by noting they were focused “on the question of whether a blood-alcohol test administered sometime after arrest could properly show a given blood-alcohol level while driving. (*Of course* non-chemical test evidence is available on that point, because it is a reasonable inference that a driver who is acting drunk at the time of arrest has a *higher* blood alcohol *at that time* than at the time of the actual administration of the chemical test.)” (*Baker, supra*, 98 Cal.App.4th at p. 1272.) The *Baker* court then appended a footnote that provides another relevant point to our case: “A corollary to this commonsense point is that non-chemical test circumstantial evidence can shed light on whether the margin of error *in* a chemical test makes any difference.” (*Id.* at p. 1269, fn. 2.) Thus *Baker* does not help Coffey at all.

In *People v. Beltran, supra*, 157 Cal.App.4th 235, based on BAC tests indicating rising blood alcohol, both the defense *and* prosecution expert opined the defendant’s BAC at the time of driving could have been as low as 0.068 percent. The prosecution expert opined defendant’s BAC could have been as high as 0.09 percent. (*Id.* at p. 239.) The issue in *Beltran* was whether, in a criminal trial, given the evidence at hand, it was error to instruct the jury on the 3-hour presumption. Based on a

pp. 372-373.) In addition to being in a different procedural posture, we note that in *Brenner* there was no valid, undisputed BAC test at 0.08 percent or above, and thus the court's rejection of the circumstantial evidence is consistent with the holding in *Baker*.

In reaching the conclusion that the circumstantial evidence here was sufficiently substantial to support the trial court's ruling, we hasten to add that nothing about our opinion compels a fact finder to accept any particular combination of signs of intoxication as proving a particular BAC at the time of driving. Trial courts must independently weigh the evidence and reach their own conclusions. Our holding is limited to the proposition that such evidence constitutes substantial evidence sufficient to sustain such a finding in the presence of a valid BAC test taken a reasonable time after driving.

DISPOSITION

The judgment is affirmed. Coffey's petition for a writ of supersedeas is dismissed as moot. The DMV shall recover its costs on appeal.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.



COURT OF APPEAL - STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

ASHLEY JOURDAN COFFEY,
Plaintiff and Appellant,

v.

JEAN SHIOMOTO, as Chief Deputy Director, etc.
Defendant and Respondent.

COURT OF APPEAL-4TH DIST DIV 3
FILED

SEP 09 2013

Deputy Clerk _____

G047562
Orange County No. 30-2012-00549559

THE COURT:

The petition for rehearing is DENIED.

IKOLA, J.

IKOLA, J.

WE CONCUR:

BEDSWORTH, J.

BEDSWORTH, ACTING P.J.

MOORE, J.

MOORE, J.

cc: See attached list

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