

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

ALEJANDRO ORTEGO GUTIERREZ,

Petitioner,

v.

SUPERIOR COURT OF ALAMEDA
COUNTY,

Respondent;

GEORGE VALVERDE, DIRECTOR OF
THE DEPARTMENT OF MOTOR
VEHICLES,

Real Party in Interest.

A133249

(Alameda County
Super. Ct. No. RG11-573490)

A “well-recognized” defense in cases involving drunk driving is that of “rising blood-alcohol.” (*People v. Beltran* (2007) 157 Cal.App.4th 235, 246.) Respondent Alejandro Ortega Gutierrez provided uncontradicted expert testimony supporting this defense in an administrative per se hearing, testimony based in part on a preliminary alcohol screening (PAS) reading of 0.082 blood-alcohol content (BAC), followed 37 minutes later by a 0.090 BAC reading from a blood test. The hearing officer rejected the expert opinion as “too speculative to support the contention” and “based on scientific opinion not fact,” and suspended Gutierrez’s driving privilege.

Gutierrez filed a petition for writ of mandate in the superior court, which was granted, the court relying in part on the accuracy of the result of the PAS test. The Department of Motor Vehicles (DMV) appeals, asserting that the superior court erred in considering the PAS result. We affirm.

BACKGROUND

The Administrative Per Se Procedure

Gutierrez was arrested for drunk driving, which led to an administrative per se hearing. We had occasion to discuss the history and background of the administrative per se procedure in *Brown v. Valverde* (2010) 183 Cal.App.4th 1531, 1536-1538, which discussion described how the procedure works:

“When a driver is arrested for driving under the influence and is determined to have a prohibited blood-alcohol content (BAC), the arresting officer or the DMV serves the driver with a ‘notice of [an] order of suspension or revocation’ of his or her driver’s license, advising that the suspension will become effective 30 days from the date of service. (Veh. Code, §§ 13353.2, subs. (b) & (c), 13353.3, subd. (a).) The notice explains the driver’s right to an administrative hearing before the effective date of the suspension if the driver requests a hearing within 10 days of receipt of the notice. (*Id.*, §§ 13353.2, subd. (c), 13558, subd. (b).)

“After the driver is served with the notice, the DMV automatically reviews the merits of the suspension to determine whether the peace officer had reasonable cause to believe that the driver had been driving a motor vehicle under the influence of alcohol, the driver was placed under arrest, and the driver had a BAC of 0.08 percent or more at the time he or she was driving. (Veh. Code, §§ 13558, subd. (c)(2), 13557, subd. (b)(2).) This determination must be made prior to the effective date of the suspension, although the DMV may dispense with the automatic review if the driver requests a hearing. (*Id.*, § 13557, subs. (c), (e).)

“The administrative per se hearing is presided over by either the director of the DMV, a hearing board, or in the usual case . . . a hearing officer. (Veh. Code, § 14104.2, subd. (a) [“Any hearing shall be conducted by the director or by a hearing officer or

hearing board appointed by him or her from officers or employees of the [DMV].”]; [citations].) Hearing officers are typically DMV employees who need not have any legal training whatever. . . .

“The sole task of the hearing officer is to determine whether the arresting officer had reasonable cause to believe the person was driving, the driver was arrested, and the person was driving with a BAC of 0.08 percent or higher. If the hearing officer determines that the evidence establishes these three facts by a preponderance of the evidence, the license will be suspended. [Citations.]”

“The procedure is civil in nature and is independent from the criminal prosecution that might ultimately result in the imposition of penalties through the criminal justice system. [Fns. omitted.]”

The Administrative Per Se Hearing

The administrative per se hearing here convened on January 25, 2011, presided over by Hearing Officer Stone. Gutierrez was represented by counsel. The hearing began with the hearing officer marking for identification several exhibits: the officer’s statement (DS 367) and administrative per se order of suspension/revocation temporary driver license endorsement; the Central Valley toxicology blood analysis report; the Albany Police Department crime report, the driving under the influence investigation report containing the results of the PAS test administered to Gutierrez; and Gutierrez’s driving record printout from January 24, 2011. Of significance here, the driving under the influence investigation report contained the results of a PAS test administered to Gutierrez showing a reading of 0.082 BAC.

Gutierrez’s counsel objected to the admission of the documents as hearsay, which objection was overruled.

Those documents showed the following background facts: at 11:31 p.m. on October 7, 2010, Officer Aaron Potter of the Albany Police Department was observing traffic while parked in a parking lot. He observed a Chevrolet truck pass in the southbound direction, traveling seven to ten miles per hour over the posted speed limit, with a light dangling from the rear bumper, in violation of Vehicle Code section 24012.

Officer Potter began to follow the truck. It accelerated from a stop signal while closely tailgating the vehicle ahead, and then activated its left-turn signal and quickly turned into a parking lot. Officer Potter activated his emergency lights to conduct an enforcement stop.

Officer Potter identified Gutierrez as the driver, accompanied by two passengers, Jose Carrillo and Juan Lopez. Officer Potter detected objective symptoms of intoxication, including watery, bloodshot eyes, and a moderate odor of alcohol emanating from Gutierrez's breath and from the truck. He asked Gutierrez how much he had had to drink that evening; Gutierrez denied drinking anything.

Gutierrez agreed to submit to a PAS test, and ultimately blew a sample that registered 0.082 BAC. This was at 12:03 a.m. Officer Potter noted that Gutierrez's breath sample was "weak," as opposed to "moderate" or "strong," the other descriptions on the report. Officer Potter attempted to obtain a second PAS sample but, according to him, Gutierrez frustrated this by barely blowing into the device, preventing it from registering.¹ Officer Potter placed Gutierrez under arrest for driving under the influence. It was 12:08 a.m.

Officer Boehm (one of the officers who had arrived to assist) took Gutierrez to North County jail, where a blood draw was conducted at 12:40 a.m. Officer Boehm collected the blood sample and booked it into evidence, to be sent to the laboratory for

¹ This is how Officer Potter described it in his arrest report: "Following the HGN test I asked GUTIERREZ to submit to a PAS test. GUTIERREZ agreed. I explained to GUTIERREZ how to submit to the PAS test however on his first three attempts GUTIERREZ refused to provide and [*sic*] adequate breath sample for the device to register. GUTIERREZ attempted to barely blow into the machine and attempted to let air escape from around the mouth piece. GUTIERREZ finally provided and [*sic*] adequate sample which registered .082. Upon my attempt to obtain a second sample GUTIERREZ again continued to barely blow into the machine causing it to register "NOGO" (inadequate sample). I subsequently abandoned my attempt to obtain a second sample."

The DMV would describe this as Gutierrez attempting to "game" the system, as an attempt to "undermine the test by barely blowing into the device and letting air escape from around the mouth piece."

analysis. On October 15, 2010 the blood sample was tested at Central Valley Toxicology, and showed 0.09 BAC.

As noted, Gutierrez was represented at the hearing by counsel who, by way of defense, first marked for identification the following exhibits: the Central Valley toxicology chain of possession form; a blood analysis report from Drug Detection Laboratory, Inc.; a letter from the National Highway Safety Traffic Administration indicating that the Alco-Sensor IV is on the National Highway Traffic Safety Administration's (NHTSA) confirming products list for evidential breath test devices; the curriculum vitae of Edwin A. Smith; and ten photographs.

Gutierrez's offer of evidence was taken under submission by the hearing officer, though the record is unclear whether the items were in fact admitted. Regardless, the hearing officer did say at the conclusion of the hearing that she would "review the documents" submitted.

Following the identification of the documents, Gutierrez put on forensic toxicologist Edwin Smith, who was recognized by the hearing officer as an expert.² Smith testified that he had reviewed all the investigation reports and blood analyses reports. He also testified that his laboratory had retested the blood sample taken from Gutierrez and that the results of the retest showed a 0.08 BAC.

Smith's testimony then turned to the "rising blood-alcohol" defense, and began with a hypothetical question: he was asked to assume that a 5 feet 8 inches, 175-pound man³ drank five to six beers of 4.4 percent alcohol, with the last two beers within 30 minutes of driving, stopped at 11:31 p.m., with a 0.082 PAS result at 12:03 a.m., and 0.09 percent BAC chemical blood test based on a sample drawn at 12:40 a.m. Smith answered that, assuming that the PAS result was accurate, the man was still absorbing

² Smith had a bachelor's degree in forensic science and a master's degree in forensic toxicology. He had 19 years experience as a forensic toxicologist/criminologist and had testified more than 185 times in California and federal courts.

³ Gutierrez was 5 feet 8 inches tall and weighed between 175 and 178 pounds.

alcohol. And relying on these assumptions, Smith opined that Gutierrez's BAC at the time of driving was less than 0.08 percent.

Before embellishing on his opinion, Smith testified to the reliability of the Alco-Sensor IV, the device used to perform the PAS test on Gutierrez. It was not only a very reliable device, he said, it was an "evidentiary quality device," and was on the conforming products list of the NHTSA for evidential breath test devices.

Smith then returned to the subject of the blood alcohol level, and his opinion that Gutierrez's blood alcohol at the time he was driving was "rising." Smith based his opinion on the fact that the PAS result indicated that Gutierrez's blood-alcohol concentration at 12:03 a.m.—some 30 minutes after Gutierrez was stopped—was lower than the later blood test at 12:40 a.m., which indicated that Gutierrez's blood-alcohol concentration was 0.09. Thus, he reiterated, Gutierrez's blood-alcohol level was rising, and it was very likely that Gutierrez's blood alcohol level was below 0.08 at the time of his driving.

Smith's expert testimony consumed the remainder of time available on January 25, and the hearing was continued to March 4. It resumed that day, and the only witness was Gutierrez. As pertinent here, he testified that on the evening in question he drank five to six beers over a two-hour period, the last one some 30 minutes before he was stopped. Gutierrez and his companions then went to a Nation's restaurant in El Cerrito, where he ate a chicken sandwich and had a soda.

Following Gutierrez's testimony, his counsel gave her closing argument, and the hearing concluded with the hearing officer stating she would "review the documents as well as the testimony presented [and would] render a decision . . . within the next 30 days."

On April 1, 2011, the hearing officer issued her Administrative Per Se—.08 BAC Notification of Findings and Decision. Among the findings of fact were that there were objective symptoms of intoxication; that Officer Potter also considered "the following as contributing factors in forming the belief of intoxication;" and that the "evidentiary basis for the findings of intoxication on the objective basis is the DS-367 Officer's Sworn

Statement.” It was the “DS-367 Officer’s Sworn Statement”—an exhibit introduced by the hearing officer on behalf of the DMV—that showed the PAS test result of 0.082.

The hearing officer went on to reject Smith’s expert testimony as “based on scientific opinion and not fact” and, after further discussion, concluded that “the opinion cannot rise to the dignity of substantial evidence.” The findings concluded with the hearing officer’s “Decision”: “suspension of [Gutierrez’s] driving privilege is re-imposed as specified in these documents.”

The Petition for Administrative Mandate

Gutierrez filed a petition for writ of administrative mandate, seeking to set aside the suspension. The petition fundamentally argued that the testimony of expert witness Smith rebutted the presumption of driving under the influence afforded by the timely chemical testing of the blood. The petition also argued that the evidence of the blood test lacked foundation.

The DMV’s opposition argued that the hearing officer properly rejected the speculative testimony of expert witness Smith, as it was derived from the unreliable PAS test result and the questionable drinking pattern. The DMV further argued that the blood test results were properly admitted into evidence.

The petition came on for hearing on August 3, 2011, before the Honorable Frank Roesch, an experienced law and motion judge. And as is apparent from the colloquy in the lengthy argument that ensued, Judge Roesch was thoroughly familiar with the record, down to the most minute detail. At the conclusion of the hearing Judge Roesch stated his conclusion. It was as follows:

“Okay. I have reviewed the evidence presented in the underlying hearing, and using my independent judgment the petition is going to be granted. The basis of my opinion is that the [PAS]test taken approximately 32 minutes after the stop of a .082 was a valid test. My opinion is also based on the fact that there was a blood test taken 37 minutes after that that indicated a blood alcohol level of .09. And assuming that is a .090, which is the minimum that it could be—at least, as I understand what I’m being told this morning, that would mean that the person’s blood alcohol raised 8,000 percent over

that period of time, that 37 minutes. I find it inescapable, to tell you the truth, that if those two readings are correct there's just no doubt in my mind that below—half an hour before the [PAS]test it had to be below .08.

“Now, it gets complicated, because the retest of the blood shows a .08. There was considerable doubt in my mind as to what happened to the blood between the time of the first test and the second test. And I thought that the hearing officer—the analysis is correct that those are different. There is no explanation for it. There is no long discussion about the chain of custody and the condition that the blood was in—whether it was opened or left opened or any of those things, casting some doubt on its validity. And that really is the only explanation I could have for having two blood samples and have different numbers, just that something happened in between.

“The other option is that the blood test simply wasn't done correctly or used somebody else's blood or—I'm not sure the reasons for that are legion, but I am accepting as true that the .09 blood test—I do believe it's admissible, and that's the number I'm going to go with. And I'm going to discount the .08 blood test, because I don't think it's a valid reflection of what the blood had in it at the time that it was drawn. I just don't see how the fellow's blood alcohol could have been over .08 a half hour before that [PAS] test.

“That's the reason that I'm going to grant the petition and issue the writ for the DMV to vacate its decision.”

On August 15, the court entered its judgment and order granting the petition for writ of mandate, and commanding the DMV to set aside its decision suspending Gutierrez's driving privilege. The DMV filed a timely notice of appeal.

DISCUSSION

Standard of Review

The rules that pertain are well settled, as confirmed in the leading case of *Lake v. Reed* (1997) 16 Cal.4th 448. First, as to the rules governing Judge Roesch, “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.” ’ ’ ” (*Id.* at p. 456.) But even with that independent judgment, “the trial court still ‘must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence.’ ” (*Manriquez v. Gourley* (2003) 105 Cal.App.4th 1227, 1233, quoting *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817.)

As to the rules governing us, *Lake v. Reed, supra*, 16 Cal.4th 448 further confirms that “[o]n appeal, we ‘need only review the record to determine whether the trial court’s findings are supported by substantial evidence.’ [Citations.] ‘ “We must resolve all evidentiary conflicts and draw all legitimate and reasonable inferences in favor of the trial court’s decision. [Citations.] Where the evidence supports more than one inference, we may not substitute our deductions for the trial court’s. [Citation.] We may overturn the trial court’s factual findings only if the evidence before the trial court is insufficient as a matter of law to sustain those findings. [Citation.]” ’ [Citation.]” (*Id.* at p. 457; accord, *Roze v. Department of Motor Vehicles* (2006) 141 Cal.App.4th 1176, 1184 (*Roze*).

We conclude that Judge Roesch’s decision is supported by substantial evidence.

Substantial Evidence Supports Judge Roesch’s Decision

The DMV’s argument has two fundamental parts. The first is that there was a rebuttable presumption that Gutierrez’s BAC was 0.08 or more at the time of driving based on the blood test taken at the police station at 12:40 a.m. The second is that Judge Roesch “erred as a matter of law in concluding that Gutierrez rebutted the presumption,” because he failed to present foundational evidence that the PAS test results were reliable indicators of his BAC, and thus “[t]he trial court’s determination that Gutierrez’s BAC was rising and below .08% BAC at time of driving is not supported by substantial evidence.” We agree with the first part of the DMV’s argument. We disagree with the second.

Vehicle Code section 23152, subdivision (b) provides in pertinent part that “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 a 0.08 percent or more, by weight, or alcohol in his or her blood at the time of the performance of a chemical test within three hours after the driving.” This so-called “three hour presumption” applies in administrative per se hearings. (*Burge v. Department of Motor Vehicles* (1992) 5 Cal.App.4th 384, 391.)

Here, as noted, the records introduced by the hearing officer established that a blood test taken at 12:40 a.m.—well within the three-hour period—revealed a 0.09 BAC. This supported the presumption that Gutierrez had a BAC of 0.08 or more at the time he was driving. (*Jackson v. Department of Motor Vehicles* (1994) 22 Cal.App.4th 730, 741; *Komizu v. Gourley* (2002) 103 Cal.App.4th 1001, 1005-1006; see also *Burge, supra*, 5 Cal.App.4th at pp. 388-389 [written report of a blood-alcohol test, prepared on behalf of law enforcement agencies by a licensed laboratory, ordinarily meets the criteria for public employee business records].) With that, the burden shifted to Gutierrez to rebut the presumption established by the blood test.

As described above, Gutierrez’s effort in this regard was the expert testimony of Smith who, as also described above, testified that Gutierrez’s BAC was less than 0.08 at the time he was driving, an opinion based in part on the 0.082 PAS test result, followed 37 minutes later by the 0.09 blood test result.

The heart of the DMV’s position is that the PAS was inaccurate, and could not be relied on, not by expert witness Smith, and not by Judge Roesch. This, the DMV argues, despite that the 0.082 PAS test result was introduced without objection from the DMV—indeed, introduced by the DMV itself. Such evidence, we conclude, provides substantial evidence supporting Judge Roesch’s judgment under well-settled law.

The rule is well described in *Witkin* where, citing numerous cases and authorities, the author puts it this way: “Material and relevant evidence that is technically incompetent and inadmissible under the exclusionary rules, if offered and received without a proper objection or motion to strike, will be considered in support of the

judgment. This principle is recognized in the Evidence Code’s definition of ‘evidence’ (see [Evid. Code, §] 140, Law Rev. Com. Comment), and it has been applied to a wide range of evidentiary topics, including hearsay, secondary evidence violating the former best evidence rule, inadmissible opinions, lack of foundation, incompetent, privileged or unqualified witnesses, illegally obtained evidence and even violation of the parol evidence rule.” (3 Witkin, Cal. Evidence (5th ed. 2012) Presentation at Trial § 405, p. 561.) Two sections later Witkin gives illustrations of evidence coming within the rule, including “*Demonstrative, Experimental, and Scientific.*” (*Id.* at § 407, p. 563.)

In short, the 0.082 BAC evidence was in the record. And it could be considered, even if it were incompetent—which, not incidentally, the DMV does not demonstrate. And contrary to the DMV’s position, the PAS test was not in the record by “estoppel.”

The DMV’s brief has an argument heading that reads, “The trial court erred as a matter of law by concluding that the DMV was estopped from contesting the validity of the PAS test result.” The argument immediately below that heading begins as follows: “The trial court asserted that the DMV could not contest the reliability of the PAS test result in this instance because the result had supported the officer’s probable cause to arrest Gutierrez for driving under the influence. [Citation.] However, there is no authority to support the trial court’s conclusion that the DMV is estopped from challenging the validity of the PAS test result.”

We find nothing in the transcript, or anyplace else in the record, where Judge Roesch said—or even indicated—that he was relying on any estoppel. What in fact occurred in connection with the PAS test result followed an interchange between Judge Roesch and DMV counsel Senne as to what was the record evidence concerning Gutierrez’s drinking pattern on the night he was arrested.⁴ At that point the following colloquy ensued:

⁴ Such evidence is germane to the rising blood-alcohol defense, as is what Gutierrez had to eat, and when.

“MR. SENNE: But even if that is the case, there is ample reason to distrust this analysis, because it is absolutely dependent on the complete and absolute accuracy of the [PAS] test. And that is, we submit, not a reasonable assumption for several reasons.

“First of all, the officer’s report fully describes a pattern of gaming the [PAS] test when it was being taken.

“THE COURT: I don’t mean to be critical. But if you want to talk about gaming, the California Attorney General’s Office was here about two weeks ago in a petition of this very kind. And the one fact that distinguished whether the blood alcohol was greater than .08 on two blood tests—a test and a retest that were significantly different, was that there had been a [PAS] test at the scene of the arrest and that the [PAS] test showed a blood alcohol greater than .08; and . . . that is reliable and so reliable it should be the determining factor as to whether the blood-test inconsistencies were correct or not correct. And in that case I will tell you that I ruled that the pass-test was a valid, legitimate test. I ruled that it was admissible, notwithstanding it wasn’t on the 367, because of its reliability and because of its presence in the police officer’s hearsay report.

“So when you tell me that a [PAS] test is not a reliable test, I have to tell you that you have argued the opposite side of that question, and I do not appreciate that. Now either your office is going to take the position that the [PAS] test is a valid test or you’re going to take the position in every case that it’s not a valid test. You just can’t have it both ways, honestly.

“MR. SENNE: Well, with respect, your Honor, I have not said that a [PAS] test is, intrinsically, an unreliable test. And I cannot speak to what happened in that case two weeks ago. I know nothing about it. [¶] . . . [¶]

“I’m not saying—and please don’t understand us to be saying that [PAS] tests, per se, are unreliable. What I am saying is that in this case there is substantial evidence this petitioner—when he was taking the [PAS] test he was gaming the process, because he was repeatedly giving insufficient blows. I know you’ve read the record.

“THE COURT: Indeed, he did, but you also got a good reading.

“MR. SENNE: We got one good reading. But there are three appellate cases in California that have said that for the [PAS] test result to be reliable and accurate they must capture the air from deep within the lungs; and that if there are half-hearted attempts at fulfilling the test that weakens the reliability of that [PAS] test. Those are the *Manriquez*, *Roze*, and the *Coniglio* cases that we’ve cited in our brief.

“So for those reasons we think that the assumption of their expert that the [PAS] reading in this case was absolutely reliable to calculate an alleged rising blood alcohol level—

“THE COURT: The only reason this man was arrested was because he had a [PAS] test of .082. The rest of the arrest might justify tickets for the wrong kind of lights on his truck or something else—or for following a car too closely. But there’s nothing else there that really persuades me that an officer would be justified in having arrested this person for drunk driving other than that [PAS] test.

“MR. SENNE: Well, there was the [PAS] test. There was the—

“THE COURT: —the field sobriety tests that—

“MR. SENNE: —that he did poorly of.

“THE COURT: Well, I don’t think he did as poorly as you do, maybe. I looked at those and I thought—well, I’ve seen an awful lot worse.

“MR. SENNE: Sure. But there were also objective signs of the complications.

“THE COURT: Sure. Well, there’s objective signs of alcohol intake beyond a doubt. But whether he was over .08 or driving under the influence—I don’t think that the police officer would have made that decision without the [PAS] test; although, he obviously was not enamored with this particular person that he stopped.

“Other than that I think you have to live with the [PAS] test as it is, because without that you may not really even have probable cause. . . . [¶] . . . [¶]

“I just don’t see how—if it really is the straw that tips it over to the side that it should be an arrest, then I think you have to live with it as reliable. You can’t argue it’s not reliable. If it’s not reliable then the guy shouldn’t have been arrested.”

Pointing to certain comments by the hearing officer about the testimony of Gutierrez and expert witness Smith, the DMV asserts that issues of credibility “are within the province of the Hearing Officer.” True enough. Also true, however, is that credibility determinations are also the province of Judge Roesch, as confirmed in *Roze, supra*, 141 Cal.App.4th 1176, a case so heavily relied on by the DMV that it is cited as “passim.” *Roze* says this: “In reviewing the administrative record, the court acts as a trier of fact; it has the power and responsibility to weigh the evidence and make its own determination about the credibility of the witnesses. (*Barber v. Long Beach Civil Service Com.* (1996) 45 Cal.App.4th 652, 658-659.) While the court must afford a strong presumption of correctness concerning the administrative findings, ultimately it is free to reweigh the evidence and substitute its own findings. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 816-819; *State Farm Mutual Automobile Ins. Co. v. Quackenbush* (1999) 77 Cal.App.4th 65, 71.)” (*Roze, supra*, at p. 1184.) Indeed, as was said in *Guymon v. Board of Accountancy* (1976) 55 Cal.App.3d 1010, 1016, Judge Roesch had the *responsibility* to make such determination: “[D]ecisions of our Supreme Court and most courts of appeal hold that the trial court has the power and responsibility to weigh the evidence at the administrative hearing and to make its own determination of the credibility of witnesses. . . . In the case at bench, the trial court discharged the responsibility and exercised the power which the law thrusts upon it.”

DMV attorney Senne acknowledged at the hearing that he was not saying that PAS tests are per se unreliable. And as noted, there was testimony from expert witness Smith about the reliability of the equipment used for the PAS test here, which, as Judge Roesch observed, produced a “good reading.” Judge Roesch’s factual finding that Gutierrez’s blood-alcohol level was below 0.08 at the time he was stopped was supported by substantial evidence.

We conclude with two other observations, wondering if the DMV really means some of the things it says in its brief. First, the DMV has an argument heading that states “As a matter of law the PAS test result cannot qualify as an accurate BAC measurement

under either Title 17 or the *Adams* test.”⁵ We assume the DMV means the PAS here, not all PAS tests.

Second, and along the same lines, the DMV’s brief reads in part as follows: “Gutierrez’s reliance on the PAS result is inadequate to show his actual BAC at the time of detention because PAS tests are not deemed *per se* reliable measures of a person’s BAC. Rather, the Legislature has noted that a PAS test is presumptively only an investigative tool used by officers as part of field-sobriety testing to detect the *presence* of alcohol and to determine whether probable cause exists to arrest. . . . [¶] The limited role, *and presumed inaccuracy*, of a PAS test result is confirmed by the manner in which the law treats PAS testing.”

As noted above, Judge Roesch confronted DMV counsel with the fact that the DMV had apparently taken a position 180 degrees contrary in a recent proceeding, the implication being that the DMV takes positions that may avail it one time and a contrary position at another. We cannot help but wonder if that is what the DMV’s arguments here manifest, given the principles set forth in other cases, including, for example, *Manriquez v. Gourley*, *supra*, 105 Cal.App.4th at pp. 1232-1233. There, in another case so heavily relied on by the DMV that is also cited *passim*, commenting about the administrative *per se* procedure and the standard of appellate review, the Court of Appeal said this:

“In this hearing, the DMV bears the burden of proving by a preponderance of the evidence certain facts, including that the driver was operating a vehicle with a blood-alcohol level of 0.08 percent or higher. [Citations.] The DMV may satisfy its burden via the presumption of Evidence Code section 664. [Citation.] ‘Procedurally, it is a fairly simple matter for the DMV to introduce the necessary foundational evidence. Evidence Code section 664 creates a rebuttable presumption that blood-alcohol test results recorded on official forms were obtained by following the regulations and

⁵ Cal. Code Regs., tit. 17, § 1221.4, subd. (a)(1); *People v. Adams* (1976) 59 Cal.App.3d 559.

guidelines of title 17. [Citations.] . . . The recorded test results are presumptively valid and the DMV is not required to present additional foundational evidence. [Citation.]’ [Citation.] With this presumption, the officer’s sworn statement that the breath-testing device recorded a certain blood-alcohol level is sufficient to establish the foundation, even without testimony at the hearing establishing the reliability of the test.

(*Davenport v. Department of Motor Vehicles* (1992) 6 Cal.App.4th 133, 140-141; *Snelgrove v. Department of Motor Vehicles* (1987) 194 Cal.App.3d 1364, 1366.)” That, to us, hardly supports the “presumed inaccuracy” of the PAS test.

We conclude with the observation that we could not agree more with the DMV’s description of the hazards presented by the drunken driver: “As has been long recognized by California’s courts and Legislature, drunk driving is an extremely dangerous offense. (See *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 261-262 [‘The drunk driver cuts a wide swath of death, pain, grief, and untold physical and emotional injury across the roads of California and the nation.’]; *Taylor v. Superior Court* (1979) 24 Cal.3d 890, 897-898 [‘Drunken drivers are extremely dangerous people.’]; *People v. Duroncelay* (1957) 48 Cal.2d 766, 772.)”

That said, we also agree with the Court of Appeal in *Helmandollar v. Department of Motor Vehicles* (1992) 7 Cal.App.4th 52, 57: “While we recognize the severity of the numerous, dangerous, and deadly risks associated with drinking and driving, we may do no more than apply the law as written.” That law requires us to affirm Judge Roesch’s conclusion if it is supported by substantial evidence. It is, and we affirm it.

DISPOSITION

The judgment is affirmed.

Richman, J.

We concur:

Kline, P.J.

Haerle, J.