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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

JAMES BEAUGARD MICHAEL-
SANDNESS,

Plaintiff and Appellant,

v.

GEORGE VALVERDE, as Director, etc.,

Defendant and Respondent.

A133281

(Alameda County
Super. Ct. No. RG11579542)

I. INTRODUCTION

Vehicle Code section 23136¹ prohibits any person under 21 years of age from driving with a blood-alcohol concentration (BAC) of 0.01 percent or greater, as measured by a preliminary alcohol screening (PAS) test or other chemical test. (§ 23136, subd. (a).) Section 13353.2 provides that the Department of Motor Vehicles (DMV) must suspend the driver's license of a person who violates that prohibition. (§ 13353.2, subd. (a)(2).) After two PAS tests administered during a traffic stop showed plaintiff and appellant James Beaugard Michael-Sandness (Sandness) (who was then 18 years old) had a BAC of 0.04 percent, the officer who detained Sandness suspended his driver's license. After an administrative hearing, the DMV upheld the suspension. Sandness filed a petition for a writ of mandate against defendant and respondent George Valverde, Director of the DMV. The trial court denied the petition. On appeal, Sandness argues that (1) the PAS test results should not have been admitted into evidence, and (2) even if

¹ All statutory references are to the Vehicle Code unless otherwise stated.

the results were properly admitted, there was insufficient evidence to support the finding that his BAC was 0.01 percent or greater. We reject these arguments, and affirm the judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Suspension of Sandness's License

On October 23, 2010, shortly before 4:00 a.m., Contra Costa County Sheriff's Deputy Eric Nygard, serving as a police officer for the city of Danville, spotted a red Nissan traveling at a high rate of speed (estimated by Officer Nygard to be approximately 60 miles per hour) in a zone with a posted limit of 45 miles per hour. Officer Nygard followed the Nissan in his patrol car and conducted a "bumper pace," during which the Nissan traveled at 58 miles per hour. The Nissan then made an abrupt, unsafe lane change in front of Officer Nygard's car, forcing Officer Nygard to brake aggressively to avoid a collision.

Officer Nygard stopped the Nissan, which was driven by Sandness, for driving at an unsafe speed and making an unsafe turn. Officer Nygard noticed that Sandness's eyes were red and watery, and Sandness's breath smelled of alcohol. The officer asked Sandness if he had been drinking alcoholic beverages, and Sandness confirmed that he had. Sandness was 18 years old on October 23, 2010.

Sandness provided two breath samples on Officer Nygard's PAS device. The device showed a result of 0.04 percent BAC for each sample.

Officer Nygard administered the PAS test after observing Sandness for two to three minutes. According to Officer Nygard's report, he stopped Sandness at 3:53 a.m., and administered the PAS tests at 3:55 a.m. and 3:56 a.m. At some point after Officer Nygard initiated the stop and before he administered the PAS tests, Sandness attempted to stuff several pieces of gum into his mouth.

Based on the PAS test results, Officer Nygard suspended Sandness's driver's license, issuing an "administrative per se" suspension order.

Officer Nygard observed marijuana and hashish oil in plain view in Sandness's car. During a search of the car, Officer Nygard also found tablets of ecstasy and Adderall, an electronic scale, a box of plastic sandwich bags, and a bottle of Bacardi 151.

B. The DMV Administrative Hearing

At the DMV administrative hearing, Sandness's counsel stipulated that, at the time of his arrest on October 23, 2010, Sandness was under age 21. Officer Nygard testified about his detention of Sandness and his administration of the PAS tests. Officer Julie Parish (also employed by the Contra Costa County Sheriff's Office and assigned to the Danville Police Department) testified that she regularly tested the department's PAS devices, and that the PAS device used by Officer Nygard to test Sandness was in proper working order on October 23, 2010.

The hearing officer admitted four exhibits: (1) Officer Nygard's sworn report about the incident (which includes the two PAS test results of 0.04 percent) and the accompanying order of suspension, on DMV form DS 367M; (2) Officer Nygard's detailed report on a Sheriff's Office form, including his narrative about the incident; (3) a printout of Sandness's driving record; and (4) a log of the results of the accuracy checks for the PAS device used for Sandness's tests. Sandness's counsel did not object to the admission of these exhibits. Sandness did not testify and presented no evidence.

Sandness's counsel argued that the PAS test results were not reliable because Officer Nygard had not complied with title 17 of the California Code of Regulations (Title 17). As discussed further below, Title 17 includes regulations relating to the analysis of blood, breath, or urine samples to determine the alcohol content of the samples. (Title 17, §§ 1215-1222.2.) Section 1219.3 of Title 17 states: "A breath sample shall be expired breath which is essentially alveolar in composition. . . . The breath sample shall be collected only after the subject has been under continuous observation for at least fifteen minutes prior to collection of the breath sample, during which time the subject must not have ingested alcoholic beverages or other fluids, regurgitated, vomited, eaten, or smoked." Sandness's counsel contended that, because Officer Nygard did not observe Sandness for 15 minutes before administering the PAS

test, and because Sandness attempted to put gum into his mouth, the tests did not comply with Title 17, and the results therefore were unreliable.

On May 26, 2011, the DMV hearing officer issued a written decision upholding the suspension of Sandness's license. The hearing officer concluded that the evidence showed Sandness was under age 21 and was driving with "a blood-alcohol level of at least .01%." The hearing officer rejected Sandness's argument about Title 17 compliance, concluding that (1) the Title 17 regulations do not apply to the administration of a PAS test for the purpose of determining the presence of alcohol, and (2) the DMV had laid a sufficient foundation for introduction of the test results. The hearing officer stated: "[T]he preliminary alcohol screening is not subject to the 15 minute observation[.] As the Court of Appeal explained in [*People v. Bury* (1996) 41 Cal.App.4th 1194, 1202 (*Bury*)], Title 17 regulations apply to PAS tests that determine the *concentration* of alcohol [in] the blood but not those that determine only its *presence*. . . . Further the department laid [an] [*Adams*²] [f]oundation with the testimony of Officer Parish." The hearing officer also expressly found that Officer Nygard's testimony was credible.

C. The Trial Court's Ruling

Sandness filed a petition for a writ of mandate in the trial court. He contended that, because Officer Nygard did not follow the Title 17 regulations, the PAS test results were unreliable and inadmissible or, if admitted, were entitled to no evidentiary weight.

The trial court denied the petition. The court rejected Sandness's challenge to the admissibility of the PAS test results, holding that the Title 17 regulations do not apply to PAS tests administered to determine only the presence of alcohol, and that "[o]nly the presence of alcohol in the blood (0.01 BAC or above)" is required to suspend the license of a driver under age 21.

The trial court also concluded that the weight of the evidence supported the suspension of Sandness's license. The court held that, although noncompliance with

² *People v. Adams* (1976) 59 Cal.App.3d 559 (*Adams*).

Title 17 can be relevant to the trier of fact's assessment of the weight of the evidence, it was "unlikely the PAS test, being used solely to determine the presence of alcohol in [Sandness's] system at the time of the incident (consistent with the intent of the statute), was rendered unreliable due to the short observation period and any gum chewing of [Sandness]. The 0.04 reading, coupled with Officer Nygard's observation of [Sandness's] unsafe driving, his red watery eyes and the odor of alcoholic beverages in his vehicle and on his person, were sufficient to support the hearing officer's decision to uphold [Sandness's] license suspension. The weight of the evidence also is that [Sandness] had been driving with a measurable amount of alcohol in his blood and that the suspension is mandated." The trial court entered a judgment denying the writ petition.

Sandness appealed.

III. DISCUSSION

A. Standard of Review

When a person petitions for a writ of mandate after the suspension of his or her driver's license, the trial court must determine, based on the exercise of its independent judgment, whether the weight of the evidence supports the administrative decision. (*Lake v. Reed* (1997) 16 Cal.4th 448, 456-457 (*Lake*); *Roze v. Department of Motor Vehicles* (2006) 141 Cal.App.4th 1176, 1183-1184 (*Roze*)). "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. [Citation.]" (*Roze, supra*, 141 Cal.App.4th at p. 1184.)

On appeal, we review the record to determine whether the trial court's findings are supported by substantial evidence. (*Lake, supra*, 16 Cal.4th at p. 457; *Molenda v. Department of Motor Vehicles* (2009) 172 Cal.App.4th 974, 986 (*Molenda*); *Roze, supra*, 141 Cal.App.4th at p. 1184.) " "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.]” ’ [Citations.]” (*Lake, supra*, 16 Cal.4th at p. 457; accord, *Roze, supra*, 141 Cal.App.4th at p. 1184.)

We review the trial court’s rulings as to the admissibility of evidence under the deferential abuse of discretion standard. (*Molenda, supra*, 172 Cal.App.4th at p. 986; see *People v. Williams* (2002) 28 Cal.4th 408, 417-418 (*Williams*) [admissibility of PAS test results].) “ ‘[T]he appropriate test of abuse of discretion is whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered.’ [Citation.] Appellate courts will disturb discretionary trial court rulings only upon a showing of a clear case of abuse and a miscarriage of justice. [Citation.]” (*Molenda, supra*, 172 Cal.App.4th at p. 986.)

We review questions of law, including questions of statutory interpretation, de novo. (*Molenda, supra*, 172 Cal.App.4th at pp. 986-987; *Roze, supra*, 141 Cal.App.4th at p. 1184.)

B. The Relevant Statutes

Section 23136 provides in part: “(a) Notwithstanding Sections 23152 and 23153, it is unlawful for a person under the age of 21 years who has a blood-alcohol concentration of 0.01 percent or greater, as measured by a preliminary alcohol screening test or other chemical test, to drive a vehicle. . . . [¶] (b) A person shall be found to be in violation of subdivision (a) if the person was, at the time of driving, under the age of 21 years, and the trier of fact finds that the person had consumed an alcoholic beverage and was driving a vehicle with a blood-alcohol concentration of 0.01 percent or greater, as measured by a preliminary alcohol screening test or other chemical test.” Under section 23136, subdivision (c)(1), “[a]ny person under the age of 21 years who drives a motor vehicle is deemed to have given his or her consent to a preliminary alcohol screening test or other chemical test for the purpose of determining the presence of alcohol in the person, if lawfully detained for a violation of subdivision (a).” The Supreme Court and other courts have referred to section 23136 as the “zero tolerance” law. (See *In re Jennings* (2004) 34 Cal.4th 254, 262; *In re Jennifer S.* (2009) 179 Cal.App.4th 64, 72

(*Jennifer S.*); *Bury, supra*, 41 Cal.App.4th at p. 1207; *Coniglio v. Department of Motor Vehicles* (1995) 39 Cal.App.4th 666, 673 (*Coniglio*).

Other statutory provisions implement the prohibition on persons under age 21 driving with a BAC of 0.01 percent or greater. Section 13388 provides that, “[i]f a peace officer lawfully detains a person under 21 years of age who is driving a motor vehicle, and the officer has reasonable cause to believe that the person is in violation of Section 23136, the officer shall request that the person take a preliminary alcohol screening test to determine the presence of alcohol in the person, if a preliminary alcohol screening test device is immediately available. If a preliminary alcohol screening test device is not immediately available, the officer may request the person to submit to chemical testing of his or her blood, breath, or urine, conducted pursuant to Section 23612 [the implied consent law].” (§ 13388, subd. (a).) If the PAS test or other chemical test reveals a BAC of 0.01 percent or greater, the officer is to serve the person with a notice of suspension of his or her driving privilege. (§ 13388, subd. (b)(1).) Section 13388, subdivision (c), states: “For the purposes of this section, a preliminary alcohol screening test device is an instrument designed and used to measure the presence of alcohol in a person based on a breath sample.”

An administrative procedure, referred to as the “administrative per se” law, governs license suspensions. (See *Lake, supra*, 16 Cal.4th at pp. 454-457.) Section 13353.2, subdivision (a), provides that the DMV shall immediately suspend a person’s driver’s license in specified circumstances, one of which is if “[t]he person was under 21 years of age and had a blood-alcohol concentration of 0.01 percent or greater, as measured by a preliminary alcohol screening test, or other chemical test.” (§ 13353.2, subd. (a)(2); see §§ 13353.2, subd. (d), 13380, subds. (a), (b), 13557, subd. (a).) A person whose license is suspended may request an administrative hearing (§ 13558, subd. (a); see § 13353.2, subd. (d)), and thereafter may seek judicial review. (§ 13559, subd. (a).)

C. Applicability of the Title 17 Regulations to PAS Tests

“Title 17 contains various regulations relating to the analysis of blood, breath, or urine samples to determine the alcohol content of the samples. (Tit. 17, §§ 1215-1222.2.) With regard to breath samples, the Title 17 regulations address the collection and handling of the samples (Tit. 17, §§ 1219, 1219.3) and set forth standards governing the instruments and accessories that may be used to obtain and test the samples. (Tit. 17, §§ 1221.1, subd. (a), 1221.2, subd. (a), 1221.3.) The regulations also set forth procedures for administering breath tests, for determining the accuracy of the testing devices, for training persons who operate the devices, for record keeping related to the accuracy testing, and for expressing analytical results. (Tit. 17, §§ 1221.4, 1221.5.)” (*Molenda, supra*, 172 Cal.App.4th at p. 1000.) As we discuss further in part III.D below, compliance with the Title 17 regulations is a sufficient basis for admission of breath test results, but noncompliance does not require exclusion of the results if other evidence establishes an adequate foundation for their admission. (See *Molenda, supra*, 172 Cal.App.4th at p. 1000.)

In *Coniglio*, the Court of Appeal (the Sixth District) held that the Title 17 regulations do not apply to PAS tests. (*Coniglio, supra*, 39 Cal.App.4th at pp. 671, 673, 679, 683.) The *Coniglio* court concluded that, under section 23136, a PAS test determines the presence of alcohol, rather than the particular blood-alcohol concentration. (*Coniglio, supra*, 39 Cal.App.4th at pp. 674-677.) The court also noted that, under the Title 17 regulations themselves, the threshold of 0.01 percent BAC is the minimum level that establishes the presence of alcohol in the blood; lower readings may be reported as negative. (See *Coniglio, supra*, 39 Cal.App.4th at p. 676, citing Title 17, §§ 1220.4, subds. (b) & (c), 1221.5.)³ The *Coniglio* court concluded that, in contrast to the statute’s

³ See also *Jennifer S., supra*, 179 Cal.App.4th at page 72 (section 23136 “is designed to penalize the presence of alcohol in the blood”; by setting prohibited blood alcohol level at “the lowest detectable amount, [section 23136] penalizes the consumption of alcohol, contemporaneous with the driving of an automobile”); *Bobus v. Department of Motor Vehicles* (2004) 125 Cal.App.4th 680, 685 (“the goal of section

focus on the presence of alcohol, Title 17 applies only to tests that determine the concentration of alcohol in the blood. (*Coniglio, supra*, 39 Cal.App.4th at pp. 677-681.)

In *Bury*, a criminal prosecution for driving under the influence (DUI) (§ 23152, subd. (a)), the court noted that a PAS device may determine *either* the presence *or* the concentration of alcohol in a person’s blood. (*Bury, supra*, 41 Cal.App.4th at pp. 1198, 1201.) After noting *Coniglio*’s holding that the Title 17 regulations do not apply to a PAS device used to determine the presence of alcohol in the blood (see *Bury, supra*, 41 Cal.App.4th at pp. 1201-1202), the *Bury* court stated that the Title 17 regulations apply to PAS devices used to measure the concentration of alcohol in the blood. (*Bury, supra*, 41 Cal.App.4th at p. 1202; see *id.* at 1198.) The *Bury* court disagreed with *Coniglio*’s suggestion that Title 17 does not apply to *any* PAS device. (*Bury, supra*, 41 Cal.App.4th at p. 1202, fn. 7.)

In *Williams*, also a criminal DUI prosecution, our Supreme Court approved *Bury*’s limitation of *Coniglio*: “As the Court of Appeal explained in *Bury*, title 17 regulations apply to PAS tests that determine the *concentration* of alcohol in the blood but not those that determine only its *presence*. (*Bury, supra*, 41 Cal.App.4th at p. 1202.) The *Bury* court properly rejected as dicta the finding in [*Coniglio, supra*, 39 Cal.App.4th at pp. 677-681] that title 17 never applies to PAS tests.” (*Williams, supra*, 28 Cal.4th at p. 414, fn. 2; accord, *Molenda, supra*, 172 Cal.App.4th at p. 1002 [Title 17 regulations apply to PAS tests that determine the concentration of alcohol in the blood, but not those that determine only its presence]; *Roze, supra*, 141 Cal.App.4th at pp. 1186-1187 [same].)

On appeal, Sandness contends that Title 17 applies to the PAS tests administered to Sandness. He argues that the relevant statutes use the term “concentration,” and require proof that a person has a BAC of 0.01 percent or greater (as measured by a PAS

23136 was to enhance public safety, and indirectly, to discourage minors from consuming any alcohol before driving”).

test or other chemical test), rather than just the presence of alcohol.⁴ (§§ 13353.2, subd. (a)(2), 13388, subd. (b), 23136, subd. (b).) Moreover, the PAS device used here showed “the numerical concentration of alcohol” in the blood. (See *Bury, supra*, 41 Cal.App.4th at p. 1202.) In response, Valverde contends that the Legislature, in enacting the zero tolerance law, intended to prohibit drivers under age 21 from driving with any measurable amount of alcohol in their blood, and did not intend the Title 17 regulations to apply in this context.

As we discuss in parts III.D and III.E below, even if Title 17 applies to the tests administered to Sandness, Title 17 provides no basis for reversal of the judgment. Accordingly, we need not resolve the parties’ dispute as to whether Title 17 applies.⁵

D. Admissibility of the PAS Test Results

Sandness’s sole challenge to the admissibility of the PAS test results is that they were unreliable and inadmissible because Officer Nygard did not follow the 15-minute observation period specified in section 1219.3 of Title 17. But Title 17 compliance is not a prerequisite to the admissibility of PAS breath test results. Instead, such results are admissible “upon a showing of *either* compliance with the regulations set forth in Title 17 *or* the foundational elements described in [*Adams, supra*, 59 Cal.App.3d at p. 561],

⁴ Sandness cites an unpublished Court of Appeal decision that he contends supports his position on this and other issues. Such citations generally are prohibited. (Cal. Rules of Court, rule 8.1115(a).) Sandness cites an exception that applies “[w]hen the opinion is relevant to a criminal or disciplinary action because it states reasons for a decision affecting the same defendant or respondent in another such action.” (Cal. Rules of Court, rule 8.1115(b)(2).) Sandness notes that the Director of the DMV was an appellate respondent in both the unpublished case and in this case. But the Supreme Court has held that the rule’s “reference to the same ‘respondent’ means the respondent in the ‘disciplinary action or proceeding,’ not a respondent on appeal.” (*People v. Russo* (2001) 25 Cal.4th 1124, 1133-1134, fn. 1.) The exception thus applies only when the unpublished decision is related to the same criminal or disciplinary action. (*Ibid.*) We therefore do not consider the unpublished decision.

⁵ We thus deny the parties’ requests that we take judicial notice of legislative history documents that they claim support their respective positions on this issue. (We previously took these requests under submission to be decided with the merits of the appeal.)

which include: (1) properly functioning equipment, (2) a properly administered test, and (3) a qualified operator. (*Williams, supra*, 28 Cal.4th at pp. 414, 417.) Title 17 compliance and the foundational requirements from *Adams* are distinct and independent means to support the admission of blood-alcohol test results. (*Williams*, at p. 416.)” (*Molenda, supra*, 172 Cal.App.4th at p. 1000.) For example, in *Williams*, the Supreme Court concluded that, although the evidence of the PAS testing performed in that case did not meet the Title 17 foundational requirements, the test results were reliable and admissible under the *Adams* foundational requirements. (*Williams, supra*, 28 Cal.4th at pp. 414, 417-418.)

We conclude that the trial court did not abuse its discretion in determining that the PAS test results were admissible under *Adams*. As to the first *Adams* element, Officer Parish’s testimony established the PAS device used by Officer Nygard was properly functioning. Officer Parish testified that, as the officer responsible for testing and calibrating the Danville Police Department’s PAS devices, she tests the devices at least every 10 days, or every 150 uses, whichever comes first. She tests each device against a “true value” canister with a known alcohol concentration, and compares the results of the test to the true value. Based on these regular accuracy checks, the PAS device used by Officer Nygard to test Sandness (an Alco-Sensor IV, serial number 42327) was in proper working order on October 23, 2010. Officer Parish had never needed to recalibrate that device. Officer Parish received four hours of training by forensic alcohol analysts at the county crime laboratory, as well as refresher training from the previous calibration officer upon taking over the position. Her training included the Alco-Sensor IV, the device used for Sandness’s tests. The department’s accuracy check log was also admitted into evidence without objection.

As to the requirement of a qualified operator, Officer Nygard testified that he had administered PAS tests on hundreds of occasions. Although he was not responsible for calibrating the device, it is his practice to “blow into it to make sure it zeroes[.]” He received training on PAS devices at the police academy, and took a subsequent training

course that included several different PAS devices. Officer Nygard also received field training on how to administer PAS tests using the Alco-Sensor IV device.

Finally, as to the second *Adams* element (properly administered test), Officer Nygard testified that Sandness provided two breath samples on the PAS device. Officer Nygard explained that, when taking the test, a person takes a deep breath and breathes through a straw. As noted, the officer zeroes the device before using it. This testimony, in conjunction with Officer Nygard's testimony as to the training he received, support the inference that he administered the test properly and in accordance with his training. This testimony thus establishes the second *Adams* element. (See *Roze, supra*, 141 Cal.App.4th at p. 1190 [officer's testimony that he complied with operational instructions on PAS device consistent with his training "shows the test was properly administered for purposes of establishing its admissibility into evidence"].)

Sandness contends that, because Officer Nygard did not comply with Title 17 by observing Sandness for 15 minutes before administering the PAS test, the officer did not "properly administer" the test for purposes of admitting the test results under *Adams*. We disagree. Assuming the Title 17 regulations apply, they are "an expressed standard for competency of the test results; in effect, they are a simplified method of admitting the results into evidence." (*Adams, supra*, 59 Cal.App.3d at p. 567.) But, as previously noted, they are not the only standard. (*Williams, supra*, 28 Cal.4th at p. 416.) Both the *Adams* court and the Supreme Court in *Williams* emphasized that Title 17 compliance and proof of the *Adams* foundational elements are distinct and independent means to support the admission of breath test results. (*Williams, supra*, 28 Cal.4th at p. 416; *Adams, supra*, 59 Cal.App.3d at p. 567.) The *Williams* court explained that, under *Adams*, "admissibility depends on the reliability and consequent relevance of the evidence, not the precise manner in which it was collected. Compliance with regulations is sufficient to support admission, but not necessary. *Noncompliance goes only to the weight of the evidence, not its admissibility.*" (*Williams, supra*, 28 Cal.4th at p. 414, italics added.) Accordingly, noncompliance with Title 17 may be relevant in assessing the *weight* to be assigned to PAS test results, but it does not establish that a PAS test was

not properly administered for purposes of *admissibility* under *Adams*. (See *Roze, supra*, 141 Cal.App.4th at pp. 1179, 1186-1187, 1190.)

Sandness nonetheless argues that, under *Williams*, Title 17 noncompliance remains “highly relevant” to reliability and admissibility under the *Adams* standard. But, in the portion of *Williams* on which Sandness relies, the Supreme Court held that, *despite* evidence of noncompliance with the Title 17 regulations, the trial court properly exercised its discretion in finding the test results reliable and admissible.⁶ (*Williams, supra*, 28 Cal.4th at pp. 417-418.) For example, the court stated that, although the testing device was not tested with the frequency demanded by the regulations, it always performed within the acceptable range. (*Ibid.*) In addition, where the officer observed the defendant for 13 minutes and took only one test (and the defendant apparently had not drunk, smoked or vomited within 15 minutes prior to the test), the trial court could conclude that the results were sufficiently reliable to be relevant. (*Id.* at p. 418 & fn. 7.)

Here, Officer Nygard observed Sandness for two to three minutes and conducted two PAS tests (and, as discussed further in part III.E below, it is not clear whether Sandness actually chewed the gum he attempted to stuff into his mouth). In light of the above evidence establishing the *Adams* foundational elements, the trial court could properly conclude that the test results were sufficiently reliable to be relevant and admissible on the question of whether Sandness had a BAC of 0.01 percent or greater. Sandness has not shown an abuse of discretion.

⁶ In a DUI prosecution under section 23152, subdivision (a) (such as the one in *Williams*), evidence that a driver had “0.08 percent or more, by weight, of alcohol” in his or her blood gives rise to a presumption that the person was under the influence of alcohol. (§ 23610, subs. (a) & (a)(3); see *Williams, supra*, 28 Cal.4th at pp. 417-418 [PAS test results significantly exceeded this “level of presumptive intoxication” and thus “tended to establish defendant’s intoxication”]; accord, *Bury, supra*, 41 Cal.App.4th at pp. 1200, 1206.) Defendant is incorrect in suggesting that, in *Williams*, the results were admissible only to show the defendant had “some unspecified amount of alcohol” in his blood.

E. Sufficiency of the Evidence

Sandness contends that, even if the PAS test results showing a BAC of 0.04 percent were admissible, the trial court erred in determining the weight to be assigned to the results, and the evidence was insufficient to support the finding of a BAC of 0.01 percent or greater. We review a trial court's factual determination as to the weight of PAS test evidence under the substantial evidence standard. (*Roze, supra*, 141 Cal.App.4th at pp. 1179, 1184, 1187.) We resolve all evidentiary conflicts and draw all legitimate and reasonable inferences in favor of the trial court's decision. (*Id.* at p. 1184.)

In support of his argument on this point, Sandness relies primarily on *Roze*. In that case, the DMV suspended Roze's license for driving with a BAC in excess of 0.08 percent. (*Roze, supra*, 141 Cal.App.4th at pp. 1179-1181; see § 13353.2, subd. (a)(1).) An officer had administered a PAS test to Roze nine minutes after stopping his car and asking him to spit out gum he had been chewing. (*Roze, supra*, 141 Cal.App.4th at pp. 1179-1180.) The PAS test results were 0.104 and 0.108, which were "based upon two 'weak' breath samples." (*Ibid.*) The trial court, while admitting the PAS results into evidence, concluded they were unreliable and not entitled to significant weight. (*Id.* at pp. 1182-1183.) The trial court found that, in assessing the weight of the PAS results, the Title 17 requirements were relevant to the proper administration of the test; the court found the results had little weight because, among other things, the officer did not comply with the 15-minute observation period. (*Id.* at pp. 1182, 1187.) The court also concluded that the PAS testing device at issue (which was permitted "to have a range of between 0.09 to 0.11 using a 0.10 percent solution") was only intended as a field sobriety test to determine the presence of alcohol, not as a measuring method for discerning actual blood alcohol levels. (*Ibid.*) Based on its determination that the PAS test was unreliable for determining actual blood alcohol level as opposed to the presence of alcohol, and the "fundamental unfairness" of permitting the DMV to rely on a test that was not intended to establish actual concentration, the trial court found the evidence did not support the finding of a blood alcohol level greater than 0.08 percent. (*Id.* at pp. 1182-1183.)

The appellate court in *Roze* affirmed, finding that the trial court’s factual determination as to the weight of the PAS test results was supported by substantial evidence. (*Roze, supra*, 141 Cal.App.4th at pp. 1179, 1187-1190.) The *Roze* court held that, under *Williams*, it was appropriate for the trial court, in its role as the trier of fact assessing the weight of the evidence, to consider Title 17 compliance.⁷ (*Roze, supra*, 141 Cal.App.4th at pp. 1186-1187.) The *Roze* court then discussed the evidence in the record, emphasizing the deferential nature of the substantial evidence standard of review. The DMV argued that the trial court had erred in giving little or no weight to the PAS test evidence; the DMV contended the level of Roze’s blood alcohol was supported by “ ‘undisputed’ ” evidence, including the PAS test results and circumstantial evidence of Roze’s intoxication, including his bloodshot and watery eyes, the odor of alcohol, and Roze’s unsteadiness on his feet and poor performance on field sobriety tests. (*Id.* at p. 1187.) The appellate court stated that these arguments, by focusing exclusively on the evidence supporting the DMV hearing officer’s conclusion, misapplied the substantial evidence standard. (*Ibid.*) The appellate court’s task was, instead, “to search for evidence or draw inferences from the evidence supporting the trial court’s decision that the PAS test results in this case were not sufficiently reliable to support the hearing officer’s finding.” (*Ibid.*)

Applying this standard, the *Roze* court concluded there was evidence supporting the trial court’s decision. The officer who administered the PAS test explained that he did not observe Roze for 15 minutes because he only considered the test a field sobriety test. (*Roze, supra*, 141 Cal.App.4th at p. 1188.) The trial court thus could reasonably

⁷ The PAS test results in *Roze* were offered to prove Roze’s actual blood alcohol concentration, i.e., 0.08 percent or greater. (*Roze, supra*, 141 Cal.App.4th at pp. 1186-1187.) After noting the *Williams* court’s statement that the Title 17 regulations apply to PAS tests that determine the concentration of alcohol in the blood but not those that determine only its presence, the *Roze* court held that the trial court could “consider undisputed evidence that [the officer] did not comply with title 17 regulations applicable to the PAS tests here, which were offered to prove Roze’s actual blood-alcohol concentration.” (*Roze, supra*, 141 Cal.App.4th at p. 1187.)

conclude that the officer did not conduct the test “in such a way to be used as proof of Roze’s actual blood alcohol concentration, but that he intended only to learn whether there was alcohol present in Roze’s system.” (*Ibid.*) In addition, the record included evidence from which the trial court could conclude that noncompliance with Title 17 requirements under the circumstances of Roze’s testing could result in a false positive test. (*Roze, supra*, 141 Cal.App.4th at p. 1188.) An officer testified that, after he had taken three drinks of beer, he had obtained a false positive result from a PAS test conducted in violation of the 15-minute observation rule, and expressed the general opinion that it was important to wait the period to obtain accurate results. (*Ibid.*) Further, Roze had recently had gum in his mouth, and the odor of alcohol in the car could support an inference that Roze had recently been drinking. (*Ibid.*) Roze also had provided “ ‘weak’ ” breath samples, while Title 17 requires breath from deep within the lungs. (*Roze, supra*, 141 Cal.App.4th at p. 1188.) The appellate court held that, based on this evidence, the trial court could reasonably conclude that “the PAS test was not a sufficiently reliable reading of Roze’s actual blood-alcohol concentration based on the manner in which it was conducted and the absence of title 17 compliance.” (*Id.* at p. 1189.) Finally, the *Roze* court stated that the PAS test “is not the scientific equivalent of a post arrest blood, breath or urine test, and due to questions about its reliability, the Legislature does not treat it as the functional equivalent of the mandatory blood-alcohol level test under Vehicle Code section 23612, subdivision (a) [the implied consent law].” (*Ibid.*)

Roze is both legally and factually distinguishable. To the extent the *Roze* court expressed general concerns about the reliability of PAS tests in proving a defendant’s actual blood alcohol concentration (e.g., the 0.08 percent threshold at issue in *Roze*), and stated that the Legislature does not view the PAS test as the equivalent of mandatory post arrest tests under the implied consent law, such concerns do not apply here. (See *Roze, supra*, 141 Cal.App.4th at pp. 1182-1183, 1189.) To the contrary, “the Legislature has found the PAS test to be a reliable method for enforcing the zero tolerance law.” (*Coniglio, supra*, 39 Cal.App.4th at p. 677; see also *Bury, supra*, 41 Cal.App.4th at

p. 1201.) The Legislature expressly designated the PAS test as a means of measuring and proving whether a driver under age 21 has a BAC of 0.01 percent or greater. (§§ 23136, subds. (a) & (b), 13388, subd. (a), 13353.2, subd. (a)(2).) Indeed, it is the primary means—section 13388 requires an officer to use a PAS test device if one is immediately available; only if no such device is immediately available should the officer request the person to submit to a chemical test pursuant to the implied consent law. (§ 13388, subd. (a).)

Moreover, the *Roze* court held only that the trial court’s factual determination as to the weight of the PAS test results was supported by substantial evidence. (*Roze, supra*, 141 Cal.App.4th at pp. 1179, 1187-1190.) Applying the same standard of review here, we conclude that substantial evidence supports the trial court’s factual determination that Sandness’s PAS test results were entitled to weight. The results of the two tests (0.04 percent) were consistent with other evidence that Sandness had consumed alcohol. This evidence included Officer Nygard’s observations of Sandness’s unsafe driving, red and watery eyes, and the odor of alcohol in Sandness’s car.⁸ Sandness also confirmed that he had been drinking alcoholic beverages. The officer later found a bottle of rum in the car.

The trial court was not obligated to conclude that Sandness’s attempt to put gum into his mouth undermined the reliability of the PAS test results. Officer Nygard stated in his report that he noticed Sandness “was frantically attempting to stuff several pieces of gum in his mouth.” At the administrative hearing, Sandness’s counsel, apparently referring to this passage, asked Officer Nygard: “Now, in your police report, when you stopped my client, Mr. Sandness, you said that you observed him stuffing several pieces

⁸ The *Roze* court concluded that the odor of alcohol in the car supported an inference that Roze had been drinking recently, possibly within the 15-minute observation period specified in Title 17. (*Roze, supra*, 141 Cal.App.4th at p. 1188.) But the trial court here was not required to draw the inference that Sandness had drunk that recently. (See *id.* at p. 1184 [appellate court must resolve all evidentiary conflicts and draw all reasonable inferences *in favor of* the trial court’s decision].) Instead, the trial court could conclude that the odor of alcohol and other objective evidence of alcohol consumption were consistent with, and thus supported the reliability of, the PAS test results.

of gum in his mouth, correct?” Officer Nygard replied: “Correct.” Contrary to Sandness’s suggestion, neither the passage in the police report referring to Sandness’s attempt to put gum into his mouth, nor the brief lines of testimony in which the officer confirmed this portion of his report, compel the inference that Sandness chewed the gum or that he was still chewing it when he took the PAS tests.

For the foregoing reasons, the trial court could reasonably conclude that, despite the short observation period before administering the PAS tests, the results of 0.04 percent were reliable and entitled to weight in determining that Sandness had a BAC of “0.01 percent or greater, as measured by a [PAS] test[.]” (§§ 23136, subs. (a) & (b), 13353.2, subd. (a)(2).)

IV. DISPOSITION

The judgment is affirmed. Valverde shall recover his costs on appeal.

Haerle, Acting P.J.

We concur:

Lambden, J.

Richman, J.