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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 108

PATRICIA FRATANGELO,

Appellant.

20 Eagle Street
Albany, New York 12207
May 6, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 108.

2 Counselor, do you want any rebuttal time?

3 MR. BAKER: Two minutes, if I may, Judge?

4 CHIEF JUDGE LIPPMAN: Sure.

5 Counsel, what does the Mertz case stand
6 for?

7 MR. BAKER: The Mertz case stands for the
8 proposition that the number values assigned to blood
9 alcohol content in DWI prosecutions, neither create a
10 strict liability offense under Section 1192(2), nor
11 do they create irrebuttable presumptions under the
12 probative value Section 1195, of the Vehicle and
13 Traffic Law.

14 CHIEF JUDGE LIPPMAN: And how does that
15 square with your arguments here?

16 MR. BAKER: Your Honor, the proof at trial
17 in this matter was that there was a breath test
18 result obtained of a .09. The evidence at trial also
19 established that the blood alcohol level at the time
20 of operation of the vehicle - - -

21 CHIEF JUDGE LIPPMAN: Well, you had an
22 expert witness who said that.

23 MR. BAKER: Yes, Your Honor.

24 CHIEF JUDGE LIPPMAN: But that doesn't mean
25 it's established, right?

1 MR. BAKER: It's evidence in the case, Your
2 Honor.

3 JUDGE SMITH: It's evidence from which a
4 jury could have found it.

5 MR. BAKER: Correct.

6 JUDGE SMITH: But - - - but does - - -
7 doesn't your - - - didn't you ask for a charge
8 essentially that the ev - - - that the expert's
9 evidence was sufficient under the statute to
10 establish a prima facie case under - - - of a - - -
11 of nonintoxication?

12 MR. BAKER: No, Your Honor. I - - - I
13 asked for the pattern jury charge for common law DWI,
14 which includes the instruction to the jury that if
15 there is evidence that the blood alcohol content was
16 less than .08, that's prima facie evidence that the
17 driver was not intoxicated.

18 JUDGE GRAFFEO: But that's - - - but then
19 you're saying that the jury had to accept your
20 expert's - - -

21 MR. BAKER: No.

22 JUDGE GRAFFEO: - - - explanation of what
23 the BAC was at the time of the operation of the
24 vehicle.

25 MR. BAKER: Not at all.

1 has to be advised - - - has to receive instructions
2 about the meaning of - - -

3 CHIEF JUDGE LIPPMAN: Isn't the better - -
4 - isn't the better charge that the jury has to listen
5 to your arguments about it, but not that they have to
6 accept it?

7 MR. BAKER: I - - - I - - -

8 JUDGE ABDUS-SALAAM: Or put another way,
9 doesn't the charge that you requested only apply to
10 the chemical test?

11 MR. BAKER: No, Your Honor, it doesn't, and
12 I think this court's decision in People v. Blair in
13 2002, establishes that. People v. Blair was perhaps
14 the mirror image of this case. In People v. Blair
15 the sole charge was a common law charge under
16 1192(3). In that case, the defendant was - - - was
17 arrested. He blew into a machine. The test result
18 was a .08 at a time when the legal limit was .10.

19 The prosecutor charged him with common law
20 driving while intoxicated, and this court addressed
21 the issue that that charge, the common law charge,
22 could not be dismissed. The prosecution should be
23 allowed by extrinsic evidence, such as the evidence
24 of an expert witness, Mr. - - - you know, Dr. Brown
25 in this case - - - to rebut the presumption created

1 by Section 1195 - - -

2 JUDGE SMITH: But no one - - - but no one's
3 tell - - - no one's saying Dr. Brown's testimony is
4 inadmissible. But you - - - but you - - - your
5 argument here, as far as I can tell, depends on our
6 finding that Dr. Brown's testimony was evidence
7 within the meaning of the statute. And it looks to
8 me like this statute is talking about chemical
9 evidence, chemical test evidence.

10 MR. BAKER: The statute speaks to evidence.

11 JUDGE SMITH: Ev - - - yeah - - - yeah.
12 "Evidence of blood alcohol conduct as determined by
13 such tests".

14 MR. BAKER: That interpretation, Your
15 Honor, reelevates those numbers to irrebuttable
16 presumptions.

17 JUDGE SMITH: No, I didn't give an
18 interpretation. I just read the words off the page.

19 MR. BAKER: You did read the numbers off
20 the - - - or the words off the page, Your Honor. But
21 - - - but the court had that language - - - similar
22 language in Mertz and that language - - - similar
23 language in Blair. And this court has said that when
24 faced with a number, the defendant can present
25 evidence and argue that - - -

1 CHIEF JUDGE LIPPMAN: Yeah, but no one's
2 saying that you can't present evidence. No one - - -
3 you know, that the jury - - - I think you're taking
4 it one step further. Aren't you?

5 MR. BAKER: The - - -

6 CHIEF JUDGE LIPPMAN: And you're reading
7 the statute to say that - - - that even when it's not
8 chemical, if anyone says - - - anyone, meaning an
9 expert - - - if there's evidence presented, that
10 takes on a prima facie veneer to it. That is what
11 you're saying?

12 MR. BAKER: Pri - - - prima facie evidence
13 is evidence that can always - - - always be rebutted
14 and can always be argued.

15 CHIEF JUDGE LIPPMAN: Yeah, but you're
16 saying they should start from the proposition that -
17 - - that they didn't - - - they - - - they had below
18 the level.

19 MR. BAKER: This - - -

20 CHIEF JUDGE LIPPMAN: From just your
21 expert's testimony.

22 JUDGE READ: That there has to be that
23 instruction given.

24 MR. BAKER: The instruction has to be
25 given. I - - - the key is in the cases - - -

1 JUDGE READ: That is your position then?

2 MR. BAKER: People v. Ochs, and the other
3 cases cited in that portion of my brief, People v.
4 Zona. When there is evidence, you know, viewing all
5 of the evidence in the case, evidence viewed most
6 favorably to the defendant that supports a recognized
7 defense. And if I'm allowed to introduce the proof,
8 if I'm allowed to argue it, I submit that's a
9 recognized defense.

10 JUDGE SMITH: Well, let's - - - I mean,
11 what - - - I didn't find - - - you keep saying it was
12 CJI charge. It there anywhere in the record - - - a
13 verbatim record, of exactly what charge you asked
14 for?

15 MR. BAKER: I'm not sure if I read - - -

16 JUDGE SMITH: Okay, but I - - -

17 MR. BAKER: No, I can't say that I read the
18 CJI - - - CJI charge - - -

19 JUDGE SMITH: Okay, but - - - okay, well -
20 - - okay, when you read the CJI charge, verbatim, it
21 doesn't quite fit, so you must have made some - - -
22 but you - - - you obvious - - - you asked for a
23 charge saying evidence of a - - - that her BAC was
24 less than .08 is prima facie evidence that she was
25 not intoxicated. That's the substance of it?

1 MR. BAKER: Correct.

2 JUDGE SMITH: So - - - you did not ask for
3 a charge that said, if you find that her - - - that
4 her BAC was less than .08, you may - - - you may
5 acquit or you may find her not intoxicated. That's a
6 little different, isn't it? Isn't that a more
7 defensible charge?

8 MR. BAKER: I - - - I don't think it's
9 significantly different, Your Honor. And there's a
10 long line of cases that say, when there's a pattern
11 jury instruction, a pattern charge, the court amends
12 that charge or - - - or - - -

13 JUDGE SMITH: Yeah, but - - -

14 MR. BAKER: - - - tweaks it at its own
15 peril.

16 JUDGE SMITH: But you're - - - but you're
17 looking - - - you're look - - - your charge had the
18 word prima facie - - - or maybe it didn't have the
19 words "prima facie" in it or did it? I guess it did.

20 MR. BAKER: The CJI charge doesn't - - -

21 JUDGE SMITH: Yeah, okay. I mean, you're -
22 - - and you're saying you're entitled to those words.
23 And I don't see how you can get out of 1195, the - -
24 - the inference that - - - that something that's not
25 a chemical test can be prima facie evidence.

1 JUDGE READ: But I guess that's what you're
2 ask - - -

3 MR. BAKER: The ev - - -

4 JUDGE READ: - - - that's what you're
5 asking us to do.

6 MR. BAKER: Yes. The evidence in the case
7 includes all of the evidence: the officer's
8 observations, the machine result at a time one hour
9 and twenty minutes after the operation of the
10 vehicle, and testimony of the expert witness who
11 takes other evidence in the case and - - - and
12 answers a hypothetical based on the evidence in the
13 case.

14 JUDGE ABDUS-SALAAM: But if we disagree
15 with your interpretation or reading of this charge,
16 then you lose?

17 MR. BAKER: Pardon me?

18 JUDGE ABDUS-SALAAM: If we disagree with
19 your interpretation of this charge that it doesn't
20 apply only to chemical tests, and we say it does,
21 then you lose?

22 MR. BAKER: Yes, I think I do.

23 CHIEF JUDGE LIPPMAN: Okay, you'll have
24 your rebuttal. Let's go with your adversary.

25 MR. PORSCHE: Good afternoon, may it please

1 the court, Barry Porsch representing the People of
2 the State of New York.

3 JUDGE GRAFFEO: What do you think the
4 purpose of 1195(2) is?

5 MR. PORSCH: The - - -

6 JUDGE GRAFFEO: What's the primary purpose
7 of that statute?

8 MR. PORSCH: The primary purpose of that
9 statute in my opinion, is if somebody is arrested for
10 common law intoxication, they take him back to the
11 police station, take a breath test, and, say, they
12 blow up a .07, say, that's two hours later, the
13 People are entitled to continue prosecuting that
14 defendant for common law intoxication, bringing in an
15 expert witness to show that, based on the facts, that
16 his BAC - - - he or she's BAC - - - was - - - the
17 person was intoxicated at the time of the stop.

18 JUDGE GRAFFEO: So the purpose is to deal
19 with what to charge someone with?

20 MR. PORSCH: Well, to continue the charge.
21 If somebody's charged with a common law DWI, and the
22 breath test shows that it's less, it might have been
23 - - - the person still might have been intoxicated at
24 the time of the stop.

25 JUDGE GRAFFEO: Okay.

1 JUDGE SMITH: What - - - what was the - - -
2 I mean, the jury here came back with questions. They
3 were obviously confused about what these numbers
4 meant and what weight they should give them to them.
5 Shouldn't they have been given some guidance to say,
6 look, if it's below .08, you got a statute that says
7 you can find that's not intoxication?

8 MR. PORSCH: Well, the defense didn't ask
9 for a lesser included charge in the DWI in this case.

10 JUDGE PIGOTT: No, but he asked for this -
11 - - this paragraph. I'm wondering, because it says,
12 "Under the law, evidence that there was less than
13 .08."

14 MR. PORSCH: Yes.

15 JUDGE PIGOTT: What evidence would that be?

16 MR. PORSCH: Based - - - that - - - that
17 criminal jury instruction is based on the V&T Section
18 1195.

19 JUDGE PIGOTT: Right. What ev - - - what
20 evidence would that be? It seems to me that the
21 judge, and you're arguing, you can't challenge .08.
22 That's a chemical test. It says .08; you're done.
23 You can't introduce evidence that there's less than
24 .08. Right?

25 MR. PORSCH: Well, they can. They did

1 through their opinion testimony.

2 JUDGE PIGOTT: All right. If that's true,
3 then why wouldn't this charge "under our law,
4 evidence that there was less than .08," - - - can be
5 considered?

6 MR. PORSCH: That charge is derived from
7 Section 1195 of the V&T law, and which deals with
8 deals with chemical test results - - - chemical test
9 evidence.

10 JUDGE PIGOTT: But I just asked you, I
11 said, what evidence is there that there was less than
12 .08? You got a chemical test that says .08. Yours
13 says a little bit more. You put that in evidence.
14 He puts in an expert that says, yeah, but there's a
15 wiggle room in this stuff, or you put in somebody
16 that says, you know, these - - - these - - - these
17 gaseous things, you know, they're not absolutely
18 accurate. They're accurate within, you know, one or
19 two, so a .09 might really be a .06.

20 So they want the jury to consider the fact
21 that the machine's not perfect, or someone with a
22 chemical analysis who can say, I can base this and
23 tell you it's something different, so .08 is not
24 right. You say they can't intro - - - that's not
25 evidence that can be introduced to - - - to show that

1 there's less than .08. Right?

2 MR. PORSCH: Well, I believe he's allowed
3 to introduce that into evidence, but he's not
4 entitled to a charge of - - - the charge he requested
5 they - - -

6 JUDGE PIGOTT: Well, then, why put in the
7 evidence? I mean, if you're trying to show that .08
8 is not right, that - - - that the - - that the
9 machine is wrong or that when the machine was used,
10 it's not accurately describing what she was doing
11 when she was driving. Why wouldn't that evidence be
12 important to a jury who's got to decide whether or
13 not if it's .08, she's guilty?

14 MR. PORSCH: It would be important - -

15 JUDGE PIGOTT: Okay.

16 MR. PORSCH: - - - and they were allowed to
17 introduce that evidence in this case, and there is a
18 jury instruction for - - -

19 JUDGE PIGOTT: For that.

20 MR. PORSCH: - - - their expert witness,
21 and it was given in this case, and it was - - -

22 JUDGE SMITH: Is - - - could the - - -
23 could the judge have told them anything? I mean,
24 let's suppose the jury was convinced by the expert
25 that at the time she was driving, her - - - her count

1 was .03. How's the jury supposed to know what that
2 means? I mean, shouldn't the jury know that .03 is a
3 lot less than the threshold that our legislature has
4 set for intoxication?

5 MR. PORSCH: Yes, and they were - - - they
6 were advised what the - - - the level is. But with
7 regard to his - - - his expert, he did receive an
8 instruction with regard to opinion testimony
9 regarding defendant's sobriety. They were told that
10 they could consider that expert opinion on - - - on
11 the defendant's intoxication was right.

12 JUDGE SMITH: Yeah, but what they didn't
13 know and what they were obviously struggling with was
14 what numbers mean intoxication and what don't. And
15 there is a statute that gives us a pretty good rough
16 guide as to what the legislature thought. Where - -
17 - how was that explained to the jury?

18 MR. PORSCH: Well, I don't think the
19 defendant's entitled to have that explained based on
20 what he requested.

21 JUDGE SMITH: Is that fair? Well, based on
22 what he requested, you're saying.

23 MR. PORSCH: Yes.

24 JUDGE SMITH: You think he's not entitled
25 to any explanation at all?

1 MR. PORSCH: Well, not what he requested.

2 JUDGE SMITH: Well, suppose he had asked
3 for a charge that said if you find that the - - -
4 that the BAC was below .08, you may - - - and you
5 don't have to, but you may infer from that that she
6 was not intoxicated. Is that a correct charge?

7 MR. PORSCH: That may be. He didn't
8 request that. He requested the actual instruction
9 out of the CJI, and that's - - - he requested that
10 said prima facie case. He hadn't - - - if you were
11 to grant that, the jury - - - there'd be more weight
12 to opinion evidence than there would be to a
13 scientific instrument.

14 JUDGE PIGOTT: Nothing wrong with that,
15 necessarily.

16 MR. PORSCH: I believe there would be,
17 because - - -

18 JUDGE PIGOTT: When - - - when do you see
19 this charge being given?

20 MR. PORSCH: I see this charge being given
21 if - - - if we're prosecuting somebody for common law
22 DWI - - -

23 JUDGE PIGOTT: No, you got the .08. So - -
24 - so you got to put in evidence, I assume, that
25 someone is driving with more than, you know, the - -

1 - the legal limit. So you say, here's a .08, right?
2 Can - - - can a defendant get a charge, saying I
3 challenge that .08? You know, I put in evidence I
4 wasn't drunk. So - - - so maybe they should say then
5 - - - maybe that's .08's wrong.

6 MR. PORSCHE: They're allowed to do that.

7 JUDGE PIGOTT: And that they would get this
8 charge?

9 MR. PORSCHE: No. The only time this charge
10 can be given is if there's a breath test result less
11 than point - - -

12 CHIEF JUDGE LIPPMAN: That's the only time
13 it's prima - - - prima facie evidence, is the - - -
14 is the chemical test?

15 MR. PORSCHE: Yes.

16 CHIEF JUDGE LIPPMAN: That's - - - that's
17 the nub of your argument?

18 MR. PORSCHE: Yes, Your Honor.

19 JUDGE PIGOTT: Well, that's what - - -
20 that's what your opponent, I think, is arguing that -
21 - - that what you're then saying is this is strict
22 liability, that you cannot - - - if - - - if evidence
23 goes in at .08, you're convicted; you're done.
24 There's nothing more to do.

25 MR. PORSCHE: No, it's not strict liability.

1 The jury gets to - - - the rest of the jury charge is
2 read to them. They have to decide whether the
3 defendant was intoxicated. This was common law
4 intoxication. The elements that the jury was given
5 at the very end of this instruction didn't have any
6 BAC results or standard.

7 CHIEF JUDGE LIPPMAN: Okay, thanks,
8 counsel.

9 MR. BAKER: Very briefly, Your Honor.

10 I'm going to reiterate and paraphrase
11 People v. Ochs. If there's an error in the jury
12 instructions which tends to blur the issues on an
13 important issue, or prevents proper consideration by
14 the jury, that error can't be disregarded.

15 JUDGE PIGOTT: Is this a common law case?

16 MR. BAKER: Yes, it - - -

17 JUDGE PIGOTT: All right.

18 MR. BAKER: - - - well, this conviction is
19 a common law conviction. The case itself included
20 both a per se allegation of, you know, driving with -
21 - - that the defendant was acquitted of by this jury
22 - - -

23 JUDGE PIGOTT: One of them.

24 MR. BAKER: - - - indicating that they
25 didn't believe that the blood - - - the machine

1 result was accurate.

2 JUDGE GRAFFEO: Doesn't that mean they gave
3 some weight to your expert's testimony?

4 MR. BAKER: Some, but they didn't - - -

5 JUDGE GRAFFEO: But they may still - - -
6 but they may still have felt based on other testimony
7 or evidence in the case that he was still
8 intoxicated.

9 MR. BAKER: They - - - they may have.

10 JUDGE GRAFFEO: Just may not have been .08.

11 JUDGE READ: And there was other evidence,
12 right?

13 MR. BAKER: And there was other evidence -
14 - -

15 JUDGE READ: The officer - - -

16 MR. BAKER: - - - that it - - - that it was
17 less.

18 JUDGE READ: Yeah.

19 MR. BAKER: That's - - - that's the - - -

20 JUDGE GRAFFEO: Because they were four sobr
21 - - - four field sobriety tests administered, right?

22 MR. BAKER: I forget how many were
23 administered. Many of them - - -

24 JUDGE RIVERA: Well, she failed four.

25 MR. BAKER: - - - she passed. She failed

1 four?

2 JUDGE RIVERA: She failed four.

3 JUDGE PIGOTT: Passed three.

4 JUDGE ABDUS-SALAAM: Four of something.

5 MR. BAKER: Failed four. Of the four that
6 the officer said she failed, he couldn't remember or
7 testify or put words on how she failed. All he knows
8 is that she failed. That was the extent of his
9 testimony. There was no - - - no testimony beyond
10 the mere conclusion.

11 JUDGE ABDUS-SALAAM: But they also heard
12 your client's testimony about how much she had to
13 drink and over what period of time?

14 MR. BAKER: Yes.

15 JUDGE ABDUS-SALAAM: So they considered
16 that, apparently too.

17 MR. BAKER: Apparently, they did, but - - -
18 but again, the problem is with a recognized defense,
19 an instruction is not given. Clearly by the jury's
20 questions, the - - - the failure to give the
21 instructions prevented the jury from giving full
22 consideration to the proper weight to be given to the
23 number - - - either the number given by the machine
24 or the number given by Dr. Brown, or whatever number
25 in between those two parameters the jury thought was

1 the appropriate number.

2 CHIEF JUDGE LIPPMAN: Okay, counsel.

3 Thanks, counsel.

4 MR. BAKER: Thank you.

5 CHIEF JUDGE LIPPMAN: Thank you both,
6 appreciate it.

7 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Patricia Fratangelo, No. 108 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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