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6 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

7 **STATE OF NEW MEXICO,**

8 Plaintiff-Appellee,

9 v.

**No. 26,583**

10 **FRANK JULIAN,**

11 Defendant-Appellant.

12 **APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY**

13 **Sandra A. Price, District Judge**

14 Gary K. King, Attorney General

15 Santa Fe, NM

16 Jacqueline R. Medina, Assistant Attorney General

17 Albuquerque, NM

18 for Appellee

19 John Bigelow, Chief Public Defender

20 J.K. Theodosia Johnson, Assistant Appellate Defender

21 Santa Fe, NM

22 for Appellant

23 **MEMORANDUM OPINION**

24 **SUTIN, Judge.**

1 Defendant was convicted of driving while intoxicated (DWI). *See* NMSA 1978  
2 § 66-8-102 (2005) (amended 2007 and 2008). When this case was first before this  
3 Court, Defendant raised two issues in relation to the admission of the results of his  
4 breath-alcohol test (BAT). First, Defendant argued that the officer did not comply  
5 with the twenty-minute deprivation period before he administered the BAT because  
6 he did not observe Defendant the entire time; could not tell whether Defendant  
7 belched, burped, or regurgitated; and that the officer neither asked him if he had  
8 something in his mouth nor inspected his mouth before taking the breath samples.  
9 Second, Defendant argued that the State failed to prove the foundation necessary to  
10 admit the breathalyzer's calibration log into evidence. Because we reversed and  
11 remanded for a new trial on our conclusion that the State had not properly ascertained  
12 that Defendant did not have anything to eat, drink, or smoke for at least twenty  
13 minutes before the BAT, we did not address Defendant's calibration-log argument.  
14 Our Supreme Court granted certiorari, reversed our decision as to Defendant's twenty-  
15 minute deprivation period and remanded this case for our consideration on whether  
16 the breathalyzer's calibration log was properly admitted into evidence.<sup>1</sup> *State v.*

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16 <sup>1</sup> We, of course, do not address Defendant's argument relating to the  
17 deprivation period. The Supreme Court addressed this issue. *See State v. Julian*, No.  
18 31,104, slip op. at 12-14 (N.M. Sup. Ct. June 24, 2009).

1 *Julian*, No. 31,104, slip op. at 2, 15 (N.M. Sup. Ct. June 24, 2009). We affirm the  
2 district court's admission of the calibration log.

1 **BACKGROUND**

2 In the early morning of September 20, 2005, Defendant was pulled over for  
3 erratic driving and, after showing signs of intoxication, he was arrested for DWI.  
4 Deputy Duncan administered a BAT to Defendant. The deputy was certified to use  
5 a breathalyzer. At trial during direct examination, the State asked Deputy Duncan if  
6 on the night in question he checked to make sure that the breathalyzer was certified.  
7 Deputy Duncan responded that as far as he knew it was certified. The deputy  
8 identified three documents that he recognized and that were notarized, namely, an  
9 instrument key operator certificate, a direct alcohol instrument certification  
10 (breathalyzer certification), and a copy of the breathalyzer’s log book showing  
11 calibration-related information (calibration log). He recognized his printed name in  
12 the calibration log. The State offered these three documents in evidence as Exhibit  
13 1.

14 Defendant objected on foundation grounds because there had not been any  
15 testimony offered as to calibration of the breathalyzer or as to what regulations must  
16 be followed to demonstrate validity of the BAT results. The State responded that the  
17 key operator certificate and the breathalyzer certification bore official signatures and  
18 would come in as official documents with an official seal. Defendant’s counsel  
19 renewed his objection arguing that upon proper objection, the State “has the burden

1 of demonstrating the qualifications, particularly, the scientific laboratory division  
2 regulations have been met prior to the admission of the [BAT] results.”

3         Referencing the documents, the court noted that the machine had been  
4 calibrated and asked defense counsel, “[d]oesn’t that meet the requirement of showing  
5 that the machine is functioning and in proper order[?]” Defense counsel countered  
6 that there had been “no testimony as to what measures were taken to demonstrate that  
7 it was calibrated—what kind of checks were run.” The court asked the prosecutor to  
8 lay more foundation on how the machine was operating to determine whether the  
9 State’s exhibit would be admitted. Deputy Duncan testified that he “remember[ed]  
10 making [his] log entry and observing [the] log” although he did not know how  
11 frequently the machine was tested, because he was not a key operator. The prosecutor  
12 asked the deputy whether the calibration log indicated that the machine had been  
13 tested, and he responded that it did.

14         Using the log to refresh his memory, Deputy Duncan testified that the machine  
15 had been calibrated on September 19, 2005, and again on September 26, 2005, and  
16 passed calibration. Based on the calibration log, Deputy Duncan testified that the  
17 breathalyzer was properly calibrated when he administered the BAT to Defendant.  
18 The court asked Deputy Duncan if he saw any abnormalities in the functioning of the  
19 machine, and he responded that he did not. The court further asked if the machine

1 would indicate on a print out if there were any problems. Deputy Duncan indicated  
2 that he did not see anything that would have lead him to believe the breathalyzer was  
3 not working properly. Being satisfied with the foundation laid by the State as to  
4 calibration, the district court admitted State's Exhibit 1 into evidence.

5         The State then sought the admission of a "read-out" from the breathalyzer, also  
6 known as a BAT card, that contained Defendant's BAT results. Defendant continued  
7 to object as to lack of proper foundation. However, the district court admitted the  
8 BAT card into evidence, and Deputy Duncan testified that the results shown on  
9 Defendant's BAT card were .16 and .16. The court found Defendant guilty of DWI.  
10 Defendant appeals.

## 11 **DISCUSSION**

12         There does not appear to have been a dispute at trial regarding admission and  
13 the court's consideration of the key operator certificate and the breathalyzer  
14 certification. On appeal, Defendant states that he does not dispute that the key  
15 operator certificate and the breathalyzer certification were properly admitted as self-  
16 authenticating. In his brief in chief, which was filed before our Supreme Court's  
17 decision in *State v. Martinez*, 2007-NMSC-025, 141 N.M. 713, 160 P.3d 894,  
18 Defendant argues that the calibration log was not authenticated or self-authenticating  
19 and also lacked foundation to be admitted in evidence under any hearsay exception.

1 In *Martinez*, our Supreme Court clarified that with respect to foundation evidence for  
2 admission of a BAT card, such as a breathalyzer certification, Rule 11-104(A) NMRA  
3 governed and that “the State is not required to have admitted into evidence and  
4 prove[d] beyond a reasonable doubt that the testing machine was certified, calibrated  
5 and functioning properly at the time the test was taken.” *Martinez*, 2007-NMSC-025,  
6 ¶¶ 14-15.

7       Thus, “[w]hether a BAT card may be admitted into evidence is a matter decided  
8 solely by the trial court and is not contingent upon its relevancy being established by  
9 other facts submitted to the jury.” *Id.* ¶ 17. Furthermore, “the trial court may consider  
10 hearsay.” *Id.* ¶ 21. Addressing *Martinez* in his reply brief, Defendant nevertheless  
11 argues that the State chose to seek and obtain admission of the calibration log into  
12 evidence, and that *Martinez* does not control the present case because, in *Martinez*,  
13 “the State did not attempt to admit the calibration log into evidence—it sought to  
14 admit the B.A.T. card.” Having chosen to seek admission into evidence of the  
15 calibration log, Defendant argues, the State was required to lay a proper foundation  
16 but failed to do so because the evidence constituted hearsay and its admission was  
17 governed by the hearsay rule of evidence. Therefore, Defendant concludes, the  
18 calibration log was erroneously admitted because it was not admitted under any  
19 hearsay exception.

1            “We review an alleged error in the admission of evidence for an abuse of  
2 discretion.” *Martinez*, 2007-NMSC-025, ¶ 7. In the present case, *Martinez* controls  
3 and the district court did not abuse its discretion even though the calibration log was  
4 admitted in evidence along with the BAT card. The State must admit the BAT card  
5 showing the BAT results in order to prove that a defendant was driving while  
6 intoxicated above the legal alcohol limit. *See Martinez*, 2007-NMSC-025, ¶ 13.  
7 Compliance with accuracy-ensuring regulations of the Scientific Laboratory Division  
8 of the Department of Health is a condition precedent to admission of BAT results. *See*  
9 *Martinez*, 2007-NMSC-025, ¶¶ 11-12; *State v. Gardner*, 1998-NMCA-160, ¶ 11, 126  
10 N.M. 125, 967 P.2d 465. Because certification is an accuracy-ensuring regulation,  
11 “the State must make a threshold showing that the machine has been certified” and  
12 that the certification was current at the time the test was taken before the BAT results  
13 can be admitted. *Martinez*, 2007-NMSC-025, ¶¶ 11-12. Certification is contingent  
14 in part on weekly calibration checks. *Id.* ¶¶ 11, 14.

15            Under Rule 11-104(A), the district court needs to be satisfied that the  
16 foundational requirement to admit the evidence has been met by a preponderance of  
17 the evidence only, and “the rules of evidence, except those concerning privileges, do  
18 not apply” in the court’s determination. *Martinez*, 2007-NMSC-025, ¶ 19. There  
19 exists a “distinction between the piece of evidence the State is ultimately attempting

1 to have admitted and the evidence the State must initially present to have that evidence  
2 admitted.” *Id.* ¶ 13. “On one side of the line is the evidence that is to be  
3 admitted—the test result—on the other is evidence used to determine whether the test  
4 result is admitted in the first place—the foundational requirements.” *Id.* A  
5 breathalyzer’s certification, our Supreme Court noted, is but a foundational  
6 requirement tending to prove one of the elements of DWI, not an element to be proved  
7 to the factfinder. *Id.* ¶ 23.

8       In *Martinez*, in order to admit the BAT card into evidence, the officer testified  
9 that the breathalyzer was certified and that its certification was current at the time of  
10 the test. *Id.* ¶ 3. This was for the purpose of laying a foundation for admission of the  
11 BAT card. The defendant objected because the officer had no first-hand knowledge  
12 of the machine’s certification. *Id.* As a preface to its discussion, the Court stated that  
13 before the BAT card could be admitted in evidence, the State had to make threshold  
14 showings that (1) “the machine has been certified,” and (2) “SLD certification was  
15 current at the time the test was taken.” *Id.* ¶ 12. The Court noted that the officer’s  
16 knowledge that the machine was certified and that its certification was current at the  
17 time of the test was gained by viewing an SLD certification sticker on the machine.  
18 *Id.* ¶¶ 3, 13. The Court held that under Rule 11-104(A) the officer did not have to  
19 have personal knowledge that the certification was current for the testimony to be

1 admissible as foundation for admission of the BAT card into evidence. *Martinez*,  
2 2007-NMSC-025, ¶¶ 13-24. The foundation requirement was met with the testimony  
3 as to what the officer saw in the document. *Id.* ¶ 22.

4 In regard to calibration, the Court in *Martinez* pointed out that the district court  
5 relied on *State v. Smith*, 1999-NMCA-154, ¶ 11, 128 N.M. 467, 994 P.2d 47, as  
6 holding that “an officer [can] testify as to the contents of calibration logs without  
7 having first-hand knowledge of the actual calibrations.” *Martinez*, 2007-NMSC-025,  
8 ¶¶ 3, 21. The Court discussed the regulations governing certification that are accuracy-  
9 ensuring regulations, and in doing so, the Court set out not only that a machine must  
10 undergo calibration tests before and after initial certification, but also that certification  
11 is contingent on, among other things, a calibration check. *Id.* ¶ 11. The Court stated:

12 Since they are not elements [of the crime], the State is not required to  
13 have admitted into evidence and prove[d] beyond a reasonable doubt that  
14 the testing machine was certified, calibrated and functioning properly at  
15 the time the test was taken, or that the officer conducting the test was  
16 certified by SLD.

17 *Id.* ¶ 14. The Court then stated that “these are merely foundation requirements that  
18 the State must meet before the critical piece of evidence—the test result—is admitted  
19 into evidence. *Id.* From the foregoing, we feel bound to read *Martinez* to include the  
20 calibration log information as foundation material covered in Rule 11-104(A).

1 Defendant appears to acknowledge that, under *Martinez*, if treated as a  
2 foundation requirement, calibration of the breathalyzer would not require a separate  
3 foundation to overcome the hearsay rule. However, as we understand his position,  
4 Defendant asserts that the State was not using the calibration log as a foundational  
5 requirement for admission of the BAT card into evidence but, instead, the State  
6 obtained admission of the calibration log itself as independent evidence for the fact  
7 finder to consider on the issue of DWI. “The purpose of the State’s actions,”  
8 Defendant argues, “does not negate the requirements of the rules of evidence.” We  
9 are unpersuaded.

10 The State presented along with the calibration log the instrument key operator  
11 certificate and the breathalyzer certification to lay a foundation for the ultimate  
12 purpose of admitting the BAT card into evidence. Because these documents served  
13 foundation purposes, the district court did not need to apply the rules of evidence in  
14 its determination to admit and consider them. *See Martinez*, 2007-NMSC-025, ¶¶ 14,  
15 15, 19, 21, 23. Defendant has not shown any harm or prejudice from the admission  
16 of the calibration log in evidence. Indeed, given *Martinez*, we do not see how the  
17 admission of the calibration log in evidence as foundation for admission of the BAT  
18 card could constitute prejudicial error in this court-tried case. We hold that the district  
19 court did not abuse its discretion by admitting the calibration log into evidence.

1 **CONCLUSION**

2 We affirm Defendant's conviction for DWI.

3 **IT IS SO ORDERED.**

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**JONATHAN B. SUTIN, Judge**

6 **I CONCUR:**

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**MICHAEL D. BUSTAMANTE, Judge**

9 **RODERICK T. KENNEDY, Judge (dissenting).**

1 **KENNEDY, J. (dissenting)**

2 I respectfully dissent. This case presents a police officer whose completely  
3 honest lack of knowledge about the documentary evidence supporting the foundation  
4 of the breath test does not slow down its wrongful admission. I see nothing to  
5 recognize in the record of this case to resemble a reliably developed foundation for the  
6 breath test. Of the three documents admitted to establish that Defendant was tested  
7 by a properly certified and regulated breath test device, two were unchallenged, none  
8 but the officer's own log entry was independently authenticated, and the issue of  
9 whether the test was performed on a currently certified machine is, in my view, not  
10 established to an appropriate legal standard. Jumping from the existence of  
11 documents to proving a foundation in the district court was a slack-jawed process I  
12 cannot in good conscience support.

13 I believe *Martinez* is of limited precedential value, and supports such sloppy  
14 practice that might in another case contribute to some substantial injustice, should a  
15 DWI defendant actually be innocent. That case should be distinguished on its horribly  
16 misunderstood facts. The Supreme Court had it easy in *Martinez*, saying that an  
17 *unchallenged* annual certificate of dubious provenance was evidence of current  
18 certification. *Martinez*, 2007-NMSC-025, ¶ 13. As defense counsel stated when  
19 asked about the nature of the mythic “SLD sticker” during oral argument in *Martinez*,

1 “I’ve actually never seen one on a machine myself.” Audio Tape: *State v. Martinez*  
2 and *State v. Lissol* oral argument, held by the New Mexico Supreme Court, Tape 1 at  
3 589 (Mar 12, 2007) (on file with author). Indeed, *Martinez* itself suggests it should  
4 be thus limited to allowing a foundation to be laid for a chemical test based on  
5 unchallenged testimony rather than supporting a judicial assessment based of  
6 evidentiary quality. *Martinez*, 2007-NMSC-025, ¶ 25. *Martinez* weakly stated that  
7 as a result, “[the Supreme Court] cannot say that admitting the BAT card in this case  
8 was clearly contrary to logic and the facts and circumstances of the case.” *Id.* ¶ 23  
9 (internal quotation marks and citation omitted). Unchallenged testimony is the  
10 hobgoblin of appellate work and, as a result no one in that case ever wondered  
11 whether the certificate “sticker” was for the whole year, or indicated “current”  
12 certification based on compliance with the regulations.

13         Assuming the certificate in this case is allowable, it is in and of itself  
14 insufficient to support the current certification of the machine. We recognized the  
15 contingent nature of an annual certification in *State v. Onsurez*, 2002-NMCA-082, ¶  
16 13, 132 N.M. 485, 51 P.3d 528. The Supreme Court specifically held that “the  
17 Legislature required compliance with the regulations [addressed in *Onsurez*  
18 concerning requirements of ongoing certification] in order to ensure accurate results,”  
19 and that “if an accuracy-ensuring regulation is not satisfied, the result of the test in

1 question may be deemed unreliable and excluded.” *State v. Dedman*,  
2 2004-NMSC-037, ¶ 13, 136 N.M. 561, 102 P.3d 628. From this, New Mexico’s  
3 courts properly concluded that *certification of an instrument to be in use is contingent*  
4 from moment to moment on whether the mandatory requirements of the other  
5 regulations that are designed to ensure an accurate test are complied with.

6 In this case, Deputy Duncan was asked to authenticate three documents which  
7 are significant to establish that a breath test is administered on a device that is capable  
8 of producing a valid result worthy of being used to turn the tide of a case from  
9 innocence to guilt beyond a reasonable doubt.<sup>2</sup> His testimony was simply that the  
10 documents he was shown said what they said, bore a notary seal, and that he had seen  
11 one of them before when he wrote on it. No testimony in the record directly  
12 associated the certification for the machine or the key operator certificate with the  
13 machine producing the breath card containing Defendant’s test result, upon which was  
14 also clearly printed the machine serial number. 7.33.2.12(B)(2) NMAC (breath tests  
15 only to be administered on machines certified by SLD); 7.33.2.11(F) NMAC (at least  
16 one key operator is assigned to a specific machine and lack of a key operator is  
17 grounds for suspension or revocation of certification of machine). Deputy Duncan did

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18 <sup>2</sup> None of those three documents was seen fit to be included by the court or  
19 counsel in the record sent to us.

1 not authenticate the documents; they must have been admitted because they were  
2 notarized. No matter, since defense counsel did not object.

3 Deputy Duncan was unflaggingly honest and forthright in his desire to  
4 distinguish what he knew from what others might attribute to him. His response to the  
5 question “[D]id you check to make sure the machine was certified? Or, do you have  
6 personal knowledge that it is certified?” was answered “As far as I know, it was  
7 certified.” Particularly with regard to the log showing any record of calibration, what  
8 the majority refer to as “refreshing his memory” that the machine had been calibrated  
9 on certain dates shows no memory to be refreshed when he clearly testified “I don’t  
10 know. I’m not a key operator[]” when asked “How frequently is [the] machine  
11 tested?”

12 Actually, the reality is worse. The notion that anything was “refreshed” is only  
13 the prosecutor’s question, “If you can refresh your memory from that log, when was  
14 it tested prior to you using the machine?” Deputy Duncan responded, “[t]hat’s what  
15 they wrote here. Unless I’m looking at it wrong.” After reading some dates from the  
16 document, Deputy Duncan was asked by the prosecutor, “And, did it . . . pass this  
17 calibration on the night in question?” Deputy Duncan then stated, “According to this,  
18 yes.” Deputy Duncan had clearly testified that he had no personal knowledge of the  
19 contents of the document and an unprepared prosecutor was grasping at very short

1 straws. Deputy Duncan clearly was testifying from the document, he had no memory  
2 to refresh, and it was the document's hearsay contents that constitute the record to  
3 which the majority point. Other than an ability to read, Deputy Duncan had nothing  
4 of evidentiary value to offer relative to the other entries in the log, or any of the other  
5 documents, which were blithely admitted by the district court, and his answers were  
6 clearly contingent on some other actors having correctly done their job and signed off  
7 on it. The machine log was incompetent evidence and considering it was an abuse of  
8 discretion for the lack of foundation for its contents.

9         From the breath card itself, one can deduce that this was Intoxilyzer, Serial No.  
10 66-004641. No evidence was offered to show that this machine was specifically the  
11 subject of either the machine certificate or the key operator certificate tendered to the  
12 court (and we do not have the documents themselves). Deputy Duncan was not a key  
13 operator and unable to testify to any requisite calibration checks in the past or future  
14 from the breath test he gave Defendant. He could testify to no other testing of the  
15 machine from his own knowledge. Rule 11-602 NMRA ("A witness may not testify  
16 to a matter unless evidence is introduced sufficient to support a finding that the  
17 witness has personal knowledge of the matter."). This would include whether the  
18 calibration tests were performed by a key operator as required by law. Hence, the log  
19 book entries in that regard were unsupported since Deputy Duncan had no recollection

1 to refresh on those subjects. The test result was unsupported by adequate foundation  
2 and should not have been admitted based on the faulty foundation offered by a lax  
3 prosecutor. The State did not carry its burden of providing the district court with  
4 adequate evidence, and the district court erred in jumping to unwarranted conclusions.  
5 I notice that the breath card shows a contemporaneous calibration check that exists  
6 unbriefed, unmentioned, and unnoticed right between two test results well north of the  
7 legal limit. I regard it as no more a part of this case than the foundation for the test,  
8 but cannot help but appreciate the irony of such stretching of an evidentiary  
9 foundation in our Court to cover the errors attendant to prosecuting what might, with  
10 preparation and effort, have been a simple case establishing Defendant's guilt  
11 straightaway, *State v. Marquez*, 2009-NMSC-055, ¶ 29, \_\_\_ N.M. \_\_\_, \_\_\_ P.3d  
12 \_\_\_ (Bosson, R., dissenting).

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**RODERICK T. KENNEDY, Judge**