COA NO. 33859-2-III

NO. 94369-9
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSE LUIS SOSA,

Appellant.

PETITION FOR REVIEW

RESPONDENT'S BRIEF

Respectfully submitted:

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the conviction and sentence of the Appellant.

III. ISSUES

1. Is there manifest error permitting the review of unpreserved error where the Defendant cannot demonstrate a conflict of Washington laws or a statutory basis for his claim, where the law specifically prohibits suppression on the Defendant's claim, where the Defendant does not demonstrate prejudice, and where persons who consent to breath tests are not similarly situated to those from whom blood is drawn by warrant?
2. Was counsel ineffective for failing to object to the testimony regarding the Defendant's *non-responsiveness* to the officer's request for the portable breath test (PBT), and for the reason that any PBT result (although there was none) was not shown to pass the *Frye* standard?

IV. STATEMENT OF THE CASE

At approximately 6:30 in the morning on March 9, 2014, the Defendant Jose Luis Sosa swerved over the yellow line on Highway 12 causing a two car collision with serious injury to the other car and driver, Mark Gomes. RP 116, 144, 149, 194, 231-32, 236. It was the Defendant's birthday, and during the three day weekend he had been celebrating with friends from Walla Walla to Seattle to the Tri-Cities and back to Walla Walla. CP 1-2; RP 427-30. Mr. Gomes, his wife, and 15 year old daughter were heading the opposite direction, on their way to a girls' volleyball tournament. RP 229-31.

The collision left Mr. Gomes' car upside down and crushed. RP 194, 200, 203-04, 233, 242, 258. The car had to be pried apart to extract Mr. Gomes. RP 242. His ribs were cracked; he could not breathe; his left arm and leg felt broken; he hung upside down from his seat belt, blinded by broken glass and the blood running from the cut under his chin. RP 235-43. At the hospital, it was determined he had a facial laceration, multiple rib fractures, a spleen laceration, a torn medial meniscus, and a torn rotator cup with chipped bone. RP 144, 243. Subsequent complications were life threatening. RP 249-55, 270-79.

The Defendant's car had bumper damage and deployed airbags.

RP 193-94. The Defendant called 911 and reported that he had fallen asleep and hit another car head on. CP 92; RP 110-14. When the operator asked if he were injured, the Defendant replied, "unfortunately, I'm not." CP 92-93; RP 111-14. He exited his black Monte Carlo and observed the other car flipped over on the side of the road, noting it was "a pretty bad accident" and that he felt bad for the people that he hit. RP 112-14.

Mr. Gomes' daughter crawled over him, escaping to call 911. RP 235-36. His wife held his C-spine and kept his head tilted so he did not choke on his own blood as the fuel leaked from his tank and the engine continued to run. RP 235, 237, 240-41. Although a young veteran with mechanical training, the Defendant did not assist; he remained in his car, struggling with the airbag. RP 111, 420, 424.

Responding officers observed that the Defendant smelled of alcohol; his eyes were watery and bloodshot; his speech was slurred; he was swaying back and forth, having a hard time standing; and he seemed to be having a hard time staying awake. CP 2; RP 118-19, 130, 169-70, 214-15. He admitted that he had been drinking beer. RP 120. In the hospital, he told Dep. Edwards that he did not mean to hurt anyone, it was "just a bad choice." RP 122.

Trooper Jensen testified that he offered to administer a portable

breath test (PBT), which would only have provided a preliminary indication without taking the place of an official breath test or blood toxicology results. RP 173. The Defendant did not respond to the question. RP 173. Defense counsel did not object to the admission of this non-response/refusal at trial. RP 173. The Defendant was unresponsive to any of the drug recognition expert requests for testing (horizontal gaze nystagmus, PBT, or physical field sobriety tests). CP 2; RP 171-74.

Two vials of blood were collected from the Defendant that day. CP 66-67, 70; RP 174. Three hours after the collision, the Defendant's blood ethanol level was .12, well above the legal limit. RP 333, 532. At the time of the collision at about six in the morning, his blood alcohol would have been .155 -.225 i.e., 2-3 x the limit. RP 343-46. He was arrested that day and charged with vehicular assault the next day. CP 1-2, 11-12.

The prosecution was delayed by defense's failure to provide discovery. CP 22-23, 26-30, 41-59. In August of 2015, just before the issuance of *State v. Martines*, 184 Wn.2d 83, 355 P.3d 1111 (2015), the defense filed a motion to suppress the blood test, claiming the warrant permitted seizure, but not testing, of the blood. CP 62-67. The matter was cured with a new warrant permitting testing of the preserved sample 17

months after collection. CP 71, 76-85.

The jury convicted the Defendant of vehicular assault. CP 117, 127; RP 526-30.

V. ARGUMENT

A. THE DEFENDANT DOES NOT DEMONSTRATE MANIFEST ERROR, PREJUDICE, OR VIOLATION OF AN EXISTING RIGHT.

For the first time on appeal, the Defendant challenged the blood alcohol evidence, claiming he should have been advised of his right to independent testing of the blood sample. Appellant's Opening Brief (AOB) at 9, citing RAP 2.5(a)(3) (manifest error affecting a constitutional right); Petition for Review at 3. The Defendant's legal premise, the existence of a right to advice, is not the law.[1]

Under RCW 46.20.308(2), officers shall inform DUI suspects of their right to have additional tests administered by any qualified person of

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[1] The State maintains that the Defendant's factual premise, that the officer failed to advise, is also not the record. *But see* Pub. Op. at 3. "[W]hen a defendant wishes to suppress certain evidence, he must, within a reasonable time before the case is called for trial, move for such suppression, and thus give the trial court an opportunity to rule on the disputed question of fact." *State v. Baxter*, 68 Wn.2d 416, 422, 413 P.2d 638, 642 (1966). Absent an objection, the record only establishes that no attorney ever inquired into this subject of any witness, and no witness spontaneously volunteered this information. AOB at 17 (citing CP 66-72, 76-82; RP 107-31, 164-228, 262-63, 396-409). It is impossible to infer the Defendant's necessary factual premise from this record.

their choosing *prior to administering a* ***breath*** *test*. This section was not violated. In this case, no breath test was administered.

Under RCW 46.61.506(6), a person ***may*** have a qualified person of their choosing administer blood tests in addition to those administered at the direction of law enforcement. However, the statute does not require any advisement. AOB at 23 (Defendant conceding that the statute does not require an officer seeking a blood draw to advise the suspect of his right to independent testing). The section also provides that the failure to obtain an additional test "shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer." It is clear in the legislative language that the blood test cannot be excluded on this basis.

While citing RAP 13.4(b) (1) and (2), the Defendant does not actually show a conflict of Washington laws.

> The cases relied on by Mr. Sosa in support of his right-to-advice argument interpret prior versions of the Revised Code of Washington. The statutes in effect at the time of Mr. Sosa's offense no longer required advice about independent testing in the context of a blood draw. Nor is there any independent constitutional right to such advice.

Published Opinion at 1-2. In 2013, the statute was amended to remove a right to advisement. Pub. Op. at 5. Earlier cases, which interpreted a

different statute, do not demonstrate a conflict of case law.

> Had Mr. Sosa's offense taken place prior to the 2013 amendment, he undoubtedly would have been entitled to advice about independent blood testing. But this is no longer so.

Pub. Op. at 6.

The Defendant does not claim that the State "thwarted" his attempts to obtain an independent test. Therefore, the discussion of these cases (Petition at 10) not only involves earlier, different statutes, but also entirely different facts. They do not provide a basis for review.

The Defendant acknowledges that the statute has been amended to remove any requirement that a DUI suspect be advised of a right to obtain additional independent testing of a breath tests, as compared to a blood test. Petition at 6-7. The removal of language is a clear indication that the legislature did not intend a more expansive provision. *Bird-Johnson Corp. v. Dana Corp.*, 119 Wn.2d 423, 427-28, 833 P.2d 375 (1992). The Defendant acknowledges that this Court has discussed this right as deriving from the statute. Petition at 7, (citing *State v. Morales*, 173Wn.2d 560, 568, 269 P.3d 263 (2012)).

Rather, the Defendant is asking this Court to find a constitutional right where the Legislature determined there should be no right. Petition at 7-9, (citing Tennessee and Montana cases).

The court of appeals determined that there was no constitutional right. "Mr. Sosa cannot show he is similarly situated to individuals whose breath is tested for alcohol concentration, as required for an equal protection challenge." Pub. Op. at 7. The court noted that breath and blood tests are both legally and factually different. Pub. Op. at 8.

The Defendant provides no support for his suggestion that the choice of blood versus breath test is up to an officer's arbitrary caprice. Petition at 14-15. The choice of test will depend on the suspect's choice (whether to refuse a breath test) and condition (an unconscious person cannot cooperate with a breath test), the evidence (suspicion that intoxicant is something other than alcohol), and a magistrate's finding of probable cause.

Blood tests are more invasive and costly than breath tests. Accordingly, they are rare, occurring under particular circumstances. Breath tests are always by consent; blood draws are generally, although not always, by warrant.

In one circumstance, the person who takes a blood test will have been offered a breath test and been advised of the right for independent testing. This person either (1) refuses to blow, (2) requests a blood draw, or (3) tests negative suggesting intoxication by something other than alcohol. If a person does not consent to a blood draw, the test is only taken after a warrant issues upon a magistrate's finding of probable cause. In this case, *the person would already have been advised of the right to independent testing.* There would be no need to advise the person of their rights a second time when blood is taken.

In another circumstance, similar to the facts of the instant case, the person will have been *incapable of consent* (to either a breath test or a blood draw) and of comprehending any advisement. The advisement would be pointless here. So a blood draw only occurs upon a magistrate's issuance of a warrant upon a finding of probable cause.

For a breath test, any additional testing must be promptly performed. For a blood test, additional testing may be performed at any time because the samples have been preserved. Thus a prompt advisement in regards to additional blood testing is unnecessary.

The Defendant argues that a test may be contaminated. But again contamination is significantly more likely of a breath test than a blood test.

There are significantly more protocols regarding blood borne pathogens, and needles are never re-used.

In this case, the Defendant passed out immediately before the accident and again afterwards. He became non-responsive when questioned by police. A warrant was obtained. The sample was preserved. The Defendant could have tested the sample at any time prior to trial. And there was a lengthy pretrial period.

A defendant seeking review of unpreserved must show manifest error, i.e. practical and identifiable consequences (actual prejudice) in the case. *State v. Schaler*, 169 Wn.2d 274, 282-83, 236 P.3d 858 (2010); *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). Because the sample was preserved and testing went on many months later after the appointment of counsel, the Defendant could have tested the sample at any time.[2] Pub. Op. at 7. He made no attempt to do so. Nothing suggests that different testing would have a different outcome or that his right to present a defense was impeded.

Even if the Defendant had made a timely objection and created a factual record to support this claim, there is no lawful basis to suppress the

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[2] The Defendant's claims this is conflict with *State v. Dunivin*, 65 Wn. App. 501, 505, 828 P.2d 1150 (1192). Petition at 10. This is incorrect as *Dunivin* interpreted a previous version of the statute, since amended to remove any requirement of an advisement.

State's evidence. Therefore, there can be no claim of deficient performance of defense counsel.

B. THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

The Defendant claims his counsel should have objected to the admission of his refusal to submit to a portable breath test (PBT) on the basis that no *Frye*[3] hearing had been held. Petition at 16.

The Defendant claims that the court of appeals relied upon *State v. Baird*, 187 Wn.2d 210, 226-28, 386 P.3d 239 (2016) for its ruling. Petition at 16. This is inaccurate. The court's discussion of *Baird* and admissibility of a suspect's refusal is not determinative of the issue. The court held, as the State argued, that "[b]ecause the State never obtained a PBT, there was no need to determine reliability." Pub. Op. at 9. As the Defendant notes, it is the test result that may be inadmissible. Petition at 18. A suspect's appearance and behavior (smelling of alcohol, having bloodshot eyes, swaying and having a hard time standing, having a hard time staying awake despite the dire circumstances, and being unresponsive) are admissible.

Not only did the State did not offer the results of a PBT, but the State also readily elicited evidence that a PBT would only have provided a

[3] *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923).

preliminary indication but not taken the place of an official breath test or blood toxicology results. RP 173. Because no results existed, there could be no utility in a *Frye* hearing. Counsel's performance could not be deficient for failing to object to results which were not offered or admitted. What was admitted was Mr. Sosa's lack of responsiveness. No *Frye* test is required for the jury to interpret this. Because the actual blood test results were admitted and are not objectionable, no prejudice can be shown.

The Defendant argues that his failure to respond could have been interpreted as consciousness of guilt. Petition at 18-19. However, the case he cites does not support his conclusion of ineffective assistance.

> Here, however, defendant never took the polygraph test and therefore no results were introduced into evidence. The mere fact a jury is apprised of a lie detector test is not necessarily prejudicial if no inference as to the result is raised or if an inference raised as to the result is not prejudicial.

State v. Descoteaux, 94 Wn.2d 31, 38, 614 P.2d 179, 183 (1980), *overruled on other grounds by State v. Danforth*, 97 Wn.2d 255, 643 P.2d 882 (1982). To demonstrate ineffective assistance, a defendant must prove prejudice. Here the Defendant's lack of response was provided in the context of his inability to push past an airbag, failure to render aid his

inability to stand, and his propensity to fall asleep. His blood alcohol was then obtained and demonstrated his significant intoxication. Defense counsel's failure to object was not prejudicial.

VI. CONCLUSION

Where no RAP 13.4(b) consideration exists, the State respectfully requests this Court deny the petition.

DATED: May 14, 2016.

Respectfully submitted:

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Kristina Nichols Kristina@ewalaw.com Laura Chuang laurachuang@gmail.com	A copy of this brief was sent via email by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED May 14, 2017, Pasco, WA **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**