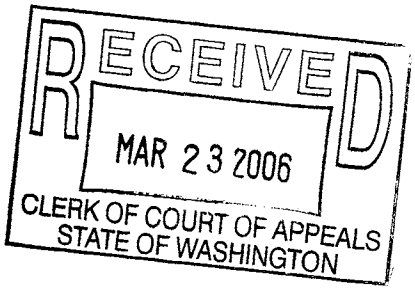
Court of Appeals
Division Two
Of the State of Washington

State of Washington
Respondent

v

Stephen M. Tucker
Appellant



Case No. 33335-0-II

Statement of Additional Grounds
for Review

Additional Grounds of Review

Assignment of Error: No. I

The appellant, Stephen Tucker challenges the sufficiency of the evidence in regard to his conviction as to the two counts of vehicular homicide

1. Trooper Carson testified that Deputy Osgood advised him that he did not smell any odor of intoxicants on the defendant at the scene of the accident Supplemental Hearing page 12
2. Trooper Carson testified that Deputy Osgood advised him that the defendant stated he did not take any medications on the day of the accident because he was planning on driving; this statement was at the scene of the accident before the defendant had any medications administered to him. S.H. p. 12
3. Trooper Carson testified that he did not smell any odor of intoxicants on the defendant at the accident scene Report of Proceedings page 32

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4. Mr. Pemberton testified that the defendant had no alcohol in the blood sample submitted as evidence that was drawn in the hospital emergency room on August 7, 2003 R.P. p. 240
5. Trooper McMullen testified that he did not know what time the accident occurred on August 6, 2003 R.P. p. 139 He also testified that it was irrelevant to him as a drug recognition expert what time the accident occurred even though it was his testimony that the defendant was under the influence of drugs at the time of the accident occurred which he used as probable cause to arrest the defendant R.P. p. 143-144
6. Trooper McMullen testified that when he evaluated the defendant at 1:50 a.m on August 7, 2003 there were no clues present that he was under the influence of any drug R.P. p. 141
7. The prosecution never established at what levels the drugs found in the defendant's blood sample

7. established a level of impairment nor did they rebut Dr. Halpern's expert testimony that none of the drug levels found in the defendant's blood sample would impair the defendants ability to drive a motor vehicle at the time of the accident R.P.P. 260-269

8. Ms. Pemberton testified to the levels of the drugs found in the defendant's blood sample R.P.P. 225-230

A. Tramadol was found at the level of .13 milliliters per liter. The metabolites of Tramadol were also found which are the by-products of the drug after it is used-up by the body and is in the process of being excreted by the kidneys R.P.P. 261 Dr. Halpern testified that Tramadol does not effect the ability to drive a motor vehicle, and that there are no studies of Tramadol and during R.P.P. 261 The prosecution never offered any evidence of a study that Tramadol effected the ability of the defendant to drive.

B. Amitryptyline was found at less than a quantitative value of .05

B. the quantization was down below because its (machine analyzer) is not capable to measure such a minute amount

C. Sertraline (Zoloft) was found and the literature states that it doesn't have any effect on the central nervous system and does not impair the ability to drive

D. Quetiapene (Seroquel) was found at such a level that it was so low that it could not be quantitated out, It was reported at less than 0.25 ml per liter

E. The metabolite of Soma (Carisprodal) was found and the level was not reported. It would not have any effect on the defendants ability to drive since it is just a by-product after the drug was used up by the body R.P. p 260

F. THC which is the active ingredient in marijuana was found at a level of 3 nanograms per liter. Ms. Pemberton testified about a study that said when marijuana is mixed with alcohol it effects the ability to drive a motor vehicle.

-7. She also testified that no alcohol was found in the defendants blood sample, therefore this study is irrelevant to this particular case. She then testified that the defendant had ingested or smoked marijuana within 3 hours of the blood draw R.P. p 240 Officer McMullen testified that the blood was drawn at 2:05 a.m on August 7, 2003 So the latest the defendant could have consumed marijuana is 11:00 p.m on August 6, 2003 R.P. 125 The only reference to the time of the accident is the testimony of John Burton who told the court the accident occurred around 9:00 - 9:30 p.m. on August 6, 2003 R.P. p 12 Therefore for this to be true the defendant had to consume marijuana an hour and a half after the accident while he was being extracted from his vehicle or enroute to the hospital. Which of course is not feasable. The defendant could not have been under the influence of marijuana at the time of the accident. Dr. Matheny testified that he wrote a letter to Allen

7. the defendant to consume marijuana for medical reasons. R.P.p. 290 Dr. Halpern testified that the leading marijuana researcher in the U.S. is a man named Leo Hollister who worked for the V.A. at Stanford Veterans Hospital. He published an article in the Journal of Pharmacological Review in March of 1986. The article stated that any amount of THC greater than 10 nanograms per liter in plasma (blood) is presumptive evidence of impairment. Therefore he testified that the defendant was not impaired or under the influence of marijuana at the time of the accident. R.P. 267-269 He testified that no one could tell by the THC blood levels when the defendant had smoked marijuana and that it could have been the day before the accident R.P.p. 269 He further stated that he has been studying the effects of marijuana since 1962-1963 R.P.p. 267

Assignment of Error No. II

The second assignment of error ~~occurs~~ concerns the testimony of Trooper John McMullen and Mr. Pemberton's admissability as experts and the admissability of their testimony at trial

Issue No. I

1. Prior to the defendants seven minute contact with Trooper McMullen to determine if the defendant was under the influence of drugs at the time of the accident he testified that Trooper Carson told him this was a head-on collision and that the defendant had a very large amount of prescription drugs in the vehicle with him. R.P. p.39 Trooper Carson testified that the accident was not a head-on collision but more of a side-swipe type accident and he estimated the collision took place within one foot of the center line. S.H. p.13 R.P. p.50 Trooper McMullen's reaction to the list of medications that Trooper Carson told him were discovered "Oh my God, I couldn't believe he was continuing" S.H. p.37 He further testified that two of the

1. drugs popped out which were Tramadol and Carisprodol S.H.p.36 He testified he knew Tramadol was a narcotic analgesic and Carisprodol would be antagonistic toward one another and whichever one was the strongest would win out. He further stated the pulling effects on the pupils and since the pupils were not constricted that Carisprodol (the depressant) would have to be the strongest and win out. Because of this antagonistic effect the defendant was under the influence of poly-drug use S.H.44 Ms. Pemberton testified that there was not any Carisprodol in the defendants blood sample R.P.228 Dr. Halpern testified that Tramadol was a non-narcotic analgesic and is prescribed to avoid the side effects of Morphene or narcotics. R.P.260-261

2. Trooper McMullen testified when he arrived at the hospital he wanted to find out if the hospital or anybody had given the defendant any medication prior to the time that he talked with the defendant. S.H.p.49 He also testified that he did not know

2. if any medications were administered to the defendant prior to his arrival at the hospital S.H. 49-50
3. Trooper McMullen testified that he was trained to perform a thirteen step evaluation to determine whether a subject is under the influence of drugs. He further stated that this thirteen step process was never administered on the defendant which obviously violated standard practice R.P. p. 138
4. Trooper McMullen testified that he must know three different drugs and the categories they fit into, which are divided into seven different categories. He was unable to demonstrate this on the list of medications that were seized in the defendants vehicle prior to his arrest. This must be demonstrated for a person to be certified as a drug recognition expert. S.H. 50-56
5. Trooper McMullen testified that different drugs affect the blood pressure, heart rate, and body temperature of the defendant. This information is taken into account to ascertain

5. if the defendant is under the influence of drugs. These vital signs were never measured in violation of standard procedures

6. Issue No II

1. Ms. Pemberton testified that she took a three day course that involved the evaluation of drugs on human performance. The defendant challenges that this qualifies her to testify as an expert repeatedly about different drugs found in the blood analysis of the defendant and how they affected the defendant and his ability to operate a motor vehicle safely R.P. 217
2. Ms. Pemberton was asked by the prosecutor Ms. Vingo when certain drugs would be prescribed to the defendant. The defense objected which was overruled by judge Toscano. The defense challenges this ruling since she is not a licensed medical personnel qualified to write prescriptions R.P.P. 225
3. Ms. Pemberton testified that the defendant was under the influence of marijuana at the time of the accident since she was able

3. to assay THC in the defendants blood sample. She also stated that it (THC) could not be detected after three hours that the marijuana was consumed. The accident occurred between 9:00 - 9:30pm on August 6, 2003 and the blood was drawn at 2:05 a.m on August 7, 2003. R.P.p. 242 p. 12 p. 125 for her to be correct the defendant had to consume marijuana after the accident while the medical personnel were extracting him from the vehicle

Assignment of Error III

The appellant, Stephen Tucker, challenges that there was probable cause for his arrest

1. Trooper McMullen testified it was irrelevant to him what time the accident occurred yet he stated that the defendant was under the influence of drugs at the time of the accident and that was the probable cause he used to arrest the defendant R.P.p. 139
2. Trooper McMullen testified that when the defendant was evaluated for D.U.I in the emergency room there

2. were no clues present that the defendant was under the influence of any drugs R.P. p. 142
3. Trooper McMullen testified that he did not follow standard operations and to perform the proper thirteen step evaluation to determine if the defendant was under the influence of drugs at the time of the accident R.P. p. 138
4. Trooper McMullen testified that prior to the time he spoke with the defendant in the emergency room he did not know what drugs were administered before he arrived at the hospital S.H. 49-50
5. Trooper McMullen testified that due to the signs that was exhibited by the defendant it was very clear that there were other high amounts of drugs in his system besides what he knew was administered in the emergency room S.H. p. 59 Yet the defendants blood assay results indicated that there were very little drug levels present or not enough to quantatively measure R.P. 222-242

Assignment of Error No. IV

The fourth assignment of error is the appellants challenge to the seizure of the medication in his motor vehicle at the scene of the accident

1. Trooper Carson testified that he took pictures of all the relative evidence at the scene of the accident yet there was not a picture of the backpack that he said was discarded on the front seat of the defendants vehicle R.P. 27-30 There was not a picture of the beer can that he testified was between Michele Burton's legs at the accident scene R.P.p. 49 There also were no pictures of all the beer cans that were from the Burton's vehicle at the accident scene R.P.p. 49
2. Trooper Carson testified that in order to see the contents of the backpack he had to look inside what was basically a closed container containing lawfully prescribed medication S.H. p 23
3. Trooper Carson testified that at the time he was going through

3. the backpack of medications he was talking to Trooper McMullen on the phone S.H.p.24 He stated the reason he seized the backpack and prescription drugs was because he thought they were possibly involved in the defendant being affected by these medications in regard to the accident S.H.p.25

Stephen Tucker
3-20-06

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