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COURT OF APPEALS
DIVISION II

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No. 37979-1-II

STATE OF WASHINGTON

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JAMES BROWN, JR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Richard Strophy, Judge
Cause No. 08-1-00621-6

BRIEF OF RESPONDENT

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P. M. / 1-21-2009

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether evidence of vertical gaze nystagmus is inadmissible as novel scientific evidence, and if so, whether Brown's counsel was ineffective for failing to object to it.

2. Whether Brown was entitled to a bifurcated trial in which the jury would hear evidence of his prior DUI convictions and habitual traffic offender status only after finding him guilty of DUI and driving while license revoked, and if so, whether his counsel was ineffective for failing to request a bifurcated trial.

3. Whether Brown was prejudiced because his attorney failed to stipulate that the DUI was a felony in order to prevent the jury from hearing that he had four prior DUIs within ten years and was an habitual offender, and if so, whether his counsel was ineffective for failing to offer such a stipulation.

4. Whether Brown presented to the trial court sufficient indications of incompetency such that the court was required to inquire into his competence to stand trial.

B. STATEMENT OF THE CASE.

While Brown's statement of the substantive and procedural facts contains a significant amount of argument, the State accepts the statement of the facts.

C. ARGUMENT.

1. Evidence of vertical gaze nystagmus is not inadmissible as novel scientific evidence, and therefore Brown's counsel was not ineffective for failing to object to it.

Brown argues that while the horizontal gaze nystagmus (HGN) test has been accepted by Washington courts, the vertical gaze nystagmus (VGN) test has not, and, therefore, it was error to

admit evidence of the VGN test in Brown's trial. Because his counsel did not object to the testimony, he frames his argument as ineffective assistance of counsel to get around RAP 2.5(a); a court does not review on appeal an alleged error not raised at trial unless it is a "manifest error affecting a constitutional right." State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). Ineffective representation would affect his Sixth Amendment right to counsel.

Contrary to Brown's assertion, Washington has recognized the scientific validity of the VGN test. State v. Baity, 140 Wn.2d 1, 991 P.2d 1151 (2000), is a case in which the Supreme Court decided that the drug recognition protocol used by drug recognition experts (DRE), met the requirements of the Frye standard. (Frye v. United States, 293 F. 1013, 34 A.L.R. 145 (1923)) The protocol is a twelve-step exercise that is used to determine if a given subject has used certain categories of drugs. One of the steps in that determination is the use of gaze nystagmus. The Baity court reviewed cases from a number of other jurisdictions, and came to the bottom line conclusion that the DRE protocol contained elements that were subject to a Frye analysis, including horizontal gaze nystagmus, and that the protocol was accepted in the relevant scientific communities. Brown argues that this holding as it pertains

to VGN is limited to the drug recognition protocol, and is reliable only when all twelve steps are used. When the Baity court said that, however, it was addressing the situation where a DRE gives an opinion that a person was affected by a particular category of drugs, not that he was generally affected by alcohol or some unspecified drug.

In Baity, the court discussed at length whether the HGN test was scientific and subject to the Frye test. It concluded:

[W]e agree the underlying scientific basis for HGN testing—an intoxicated person will exhibit nystagmus—is “undisputed, even by those cases and authorities holding the test inadmissible without scientific proof in each case.”

Baity, *supra*, at 12 (citing to State v. Superior Court, 149 Ariz. 269, 718 P.2d 171, 177, 60 A.L.R.4th 1103 (1986)) The court further cited with approval language from Williams v. State, 710 So. 2d 24 (Fla. Dist. Ct. App.), *review denied* 725 So. 2d 1111 (Fla. 1998):

On further analysis, the court held the DRE protocol subsets, including HGN, VGN, and LOC [lack of convergence], were “scientific” within the meaning of Frye, but that Frye did not apply because the “use of the HGN test to establish the presence of alcohol ha[d] already gained general acceptance in the scientific community.”

Baity, *supra*, at 16. The Baity opinion further quotes from State v. Klawitter, 518 N.W.2d 577 (Minn. 1994):

Only the tests for horizontal and vertical nystagmus and for convergence are out of the ordinary, but they can hardly be characterized as emerging scientific techniques. Nystagmus and convergence have long been known and the tests contemplated by the protocol have been in common medical use without change for many years.

Baity, *supra*, at 16.

Nystagmus is defined in Quinney v. Texas, 99 S.W.3d 853, 857 (Tex. 2003), as “an involuntary rapid oscillation of the eyes in a horizontal, vertical, or rotary direction”, citing to another case which cited to the *Merck Manual of Diagnosis and Therapy* 1429 (R. Berlow ed., 1992).

If, as Baity holds, the steps of the DRE protocol, which includes VGN, meet the Frye standard for use in detecting drug use and identifying the class of drug consumed, there is no logical reason why VGN fails to meet the Frye standard in determining if a person is under the influence of alcohol or some unspecified drug. “Consumption of alcohol exaggerates nystagmus to the degree it can be recognized by the naked eye.” Quinney, *supra*, at 857. At Brown’s trial, the toxicologist who testified about the effects of alcohol on the human body characterized VGN as a subcategory within the HGN test, the value of VGN being that if it is present it

indicates a greater level of alcohol or drugs in the system than HGN alone. [RP 242-43]¹

Brown argues that there could be no tactical reason for counsel failing to object to the VGN evidence, and that because Brown asserted that he was not intoxicated, the evidence of a higher level of impairment ran counter to the defense strategy. [Appellant's Brief, pg. 10] The State agrees that counsel's failure to object to something that was not objectionable was not exactly a tactical decision. Counsel quite properly recognized that an objection would not likely be sustained. It is not clear why the VGN, as opposed to the HGN, testimony ran counter to defense strategy. Where his defense was that he was not intoxicated, it seems to make no difference whether the testimony was that he was "impaired" as detected by HGN, or "really impaired" as detected by VGN.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an

¹ Unless otherwise noted, references to the Report of Proceedings are to the trial transcript of June 5 & 6, 2008.

objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when but for the deficient performance, the outcome would have been different. In the Matter of the Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). Moreover, counsel's failure to offer a frivolous objection will not support a finding of ineffective assistance. State v. Briggins, 11 Wn. App. 687, 692, 524 P.2d 694, *review denied*, 84 Wn. 2d 1012 (1974).

A defendant must overcome the presumption of effective representation and demonstrate (1) that his lawyer's performance

was so deficient that he was deprived of “counsel” for Sixth Amendment purposes, and (2) that there is a reasonable probability that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Brown has not overcome the presumption of effective representation. Nor has he shown that he was prejudiced by counsel’s failure to object to the VGN evidence. Even had he objected and the evidence been excluded, the jury would still have heard the HGN evidence that he was impaired. Assuming that this was an evidentiary error, it is not of constitutional magnitude and would be reversible only if, within reasonable probability, the outcome of the trial was materially affected. State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993) (citing to State v. Tharp, 96 Wash.2d 591, 599, 637 P.2d 961 (1981)). Considering the totality of the evidence, there is virtually no chance that the VGN made a difference in the outcome of the trial.

2. Brown was not entitled to a bifurcated trial and therefore his counsel’s failure to ask for it was not ineffective assistance of counsel.

Brown was charged with two crimes. [CP 2] The first, felony driving under the influence of intoxicating liquor, is defined in RCW 46.61.502(1)(b) and (6)(a), which reads in pertinent part:

(1) A person is guilty of driving while under the influence of intoxicating liquor or any drug if the person drives a vehicle within this state;

(b) While the person is under the influence of or affected by intoxicating liquor or any drug; . . .

(6) It is a class C felony punishable under chapter 9.94A RCW, or chapter 13.40 RCW if the person is a juvenile, if: (a) The person has four or more prior offenses within ten years as defined in RCW 46.61.5055; . . .

The second offense is first degree driving while license revoked, which is set forth in RCW 46.20.342(1)(a), which reads in pertinent part:

(1) It is unlawful for any person to drive a motor vehicle in this state while that person is in a suspended or revoked status or when his or her privilege to drive is suspended or revoked in this or any other state. Any person who has a valid Washington driver's license is not guilty of a violation of this section.

(a) A person found to be an habitual offender under chapter 46.65 RCW, who violates this section while an order of revocation issued under chapter 46.65 RCW prohibiting such operation is in effect, is guilty of driving while license suspended or revoked in the first degree, a gross misdemeanor. . . .

In the case of the DUI offense, the existence of four or more DUI convictions within the prior ten years elevates a DUI, which is

usually a gross misdemeanor, to a felony. Revocation as an habitual traffic offender is the element that makes driving while license revoked first degree, as opposed to a lesser degree.

At Brown's trial, a certified copy of his driving record was admitted into evidence to prove the element that he was revoked as an habitual offender. [RP 165] Also read to the jury was a stipulation that he had previously been convicted of DUI four times within ten years. [RP 167] He now argues that his attorney should have sought a bifurcated trial in which the jury would hear the evidence that he was driving with a suspended license and under the influence, and once guilty verdicts were entered, then hear evidence of his prior DUIs and habitual offender status in order to find that the DUI was a felony and that the driving while revoked was in the first degree. He argues that the court would likely have granted such a motion.

Brown is mistaken that he was entitled to a bifurcated trial. The Washington Supreme Court, in its recent decision in State v. Roswell, (No. 80547-4, filed Dec. 4, 2008, 2008 LEXIS 1063), ruled otherwise.

Washington has enacted certain criminal statutes that raise the level of a crime from a misdemeanor to a felony based upon the defendant's prior criminal convictions. These prior convictions are elements of

the charged crime that the State must prove beyond a reasonable doubt.

Id., at 1.

The State must prove each element of a crime beyond a reasonable doubt. “An element is an essential component of the underlying offense.” Id., at 7. A defendant charged with felony DUI cannot be convicted of that crime unless the State proves that he or she had at least four DUI convictions within the ten years preceding the current DUI, and thus those prior convictions are an element of the offense. Those convictions are not, as Brown essentially argues, an aggravator which increases the punishment that can be imposed for a DUI. Felony DUI is a separate crime in itself. In Roswell, the defendant was convicted of, among other offenses, three counts of felony communication with a minor. The crime was a felony because Roswell had a prior sex offense conviction. He, like Brown, argued that his trial should have been bifurcated and the jury not informed of his prior conviction until it convicted him of communication with a minor. Both this division of the Court of Appeals and the Supreme Court affirmed his convictions.

[W]e certainly [do] not suggest that defendants have a right to waive their right to a trial by jury on certain elements so as to prevent the jury from hearing prejudicial evidence. Courts have long held that when a prior conviction is an element of the crime charged,

it is not error to allow the jury to hear evidence on that issue. . . .If a prior conviction is an element of the crime charged, evidence of its existence will never be irrelevant. One can always argue that evidence that tends to prove any element of a crime will have some prejudicial impact on the defendant.

Roswell, at 16-17.

First degree driving while revoked cannot be proved without proving to the jury that the defendant is revoked because he or she is an habitual traffic offender. Brown argues that it is analogous to inadmissible evidence, but that is not the case. The State was required to prove that element in order to prove the crime. He also argues that prior convictions are inherently prejudicial and likely to be used as propensity evidence. He cites to State v. Hardy, 133 Wn.2d 701, 946 P.2d 1175 (1997), to support this argument, but in the Hardy case the prior conviction was a drug offense used to impeach the defendant. That is an entirely different use of prior convictions than proving them as an element of the charged crime.

Brown frames his argument as if the prior DUIs and his habitual offender status were aggravators rather than elements of the offense. They are not, and therefore his premise is incorrect. Because he was not entitled to a bifurcated trial, his attorney was not ineffective for failing to request one.

The Roswell court, citing to Spencer v. Texas, 385 U.S. 554, 561, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967), found that any prejudice created by evidence of prior convictions can be alleviated with a limiting instruction. Roswell, *supra*, at 17. The trial court here gave such a limiting instruction, Instruction No. 7.

You may only consider evidence of the defendant's prior convictions as proof that he has previously been convicted of 4 prior offenses within 10 years

You cannot consider the Defendant's prior convictions when determining whether or not he was operating a motor vehicle under the influence of intoxicants on the date alleged.

[CP 27]

The trial court here did exactly as it was required to do, and Brown's attorney was not only not deficient, he performed in a very competent manner.

3. It would have been error had the court allowed Brown to stipulate that the DUI was a felony. Stipulating to his habitual offender status would not have removed any prejudice. His counsel was not ineffective.

A defendant cannot remove from the jury's consideration a statutory element that must be proved in order for it to convict. In State v. Gladden, 116 Wn. App. 561, 66 P.3d 1095 (2003), the defendant was, like Roswell, convicted of felony communication with a minor. He offered to stipulate that the element of the prior

conviction could be deleted entirely so the jury would not hear that evidence. The trial court refused, and the Court of Appeals affirmed. Here Brown is arguing that he could stipulate that the DUI was a felony, but the felony status is not an element of the crime. The four prior convictions form an element, and he could not, by stipulation, make that element go away.

Brown argues that when prior convictions are an element of the current offense, the accused must be allowed to “sanitize” them in order to reduce the potential for unfair prejudice, [Appellant’s brief, pg. 14] citing to Old Chief v. United States, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997), and State v. Johnson, 90 Wn. App. 54, 950 P.2d 981 (1998), to support this argument. With regard to the felony DUI charge, this is exactly what happened at Brown’s trial. This stipulation was read into the record:

It is hereby stipulated and agreed to by the plaintiff, State of Washington, through Deputy Prosecuting Attorney James C. Powers, and stipulated and agreed to by the defendant, James Anthony Brown, Jr., through his attorney, Eric Pilon, that on the date of March 29, 2008, the defendant had previously been convicted of four prior driving under the influence offenses within ten years.

[RP 167] The holding in Old Chief, requiring the State to accept the defendant’s stipulation that the prior convictions existed, when the purpose of the evidence is solely to prove the element of a prior

conviction, was to avoid any prejudice to the defendant from the jury hearing the full record of the prior judgment. Gladden, at 565.

[T]he court in Old Chief did not hold that a jury must be completely shielded from any reference to the prior offense, only that when a defendant stipulates to a prior conviction the court must accept the stipulation and shield the jury from hearing evidence that led to the prior conviction.

Roswell, at 11-12.

In Brown's case, the stipulation proved the element of the four prior DUIs while preventing the State from producing the judgments and sentences from those convictions, or any evidence from those cases.

In proving that Brown was suspended in the first degree, the State offered Exhibit 2, a four-page document from the Department of Licensing (DOL) that included the notice from DOL to Brown that his driving privilege was revoked for seven years, beginning April 15, 2007, because he was an habitual traffic offender. [RP 166] Presumably Brown's attorney could have offered to stipulate that Brown was an habitual traffic offender and his license revoked, but since Exhibit 2 provided no more information than that, there would have been no tactical advantage to doing so. A second stipulation, in fact, might have conveyed the impression to the jury that he was really pleading guilty to first degree driving while revoked, a result a

competent attorney would seek to avoid. There is no prejudice to the defendant where a stipulation would have conveyed no less information than the jury received from the State's proof.

4. The court had no reason to inquire into Brown's competence and there was no due process violation.

While Brown does not argue that he is, or was, incompetent to stand trial, he argues that the court should have inquired into his competency before trial. He bases this in part on a motion he filed in the Superior Court approximately one month after his sentence. [CP 35-50]

"No incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." RCW 10.77.050. "Incompetency' means a person lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect." RCW 10.77.010(14). If there is reason to doubt a defendant's competency, the court shall follow a procedure set forth in RCW 10.77.060 for determining competency. "Whether a person is competent is a mixed question of law and fact". State v. Marshall, 144 Wn.2d 266, 281, 27 P.3d 192 (2001). A trial court's decision to require a competency evaluation is reviewed for abuse of

discretion. In re Fleming, 142 Wn.2d 853, 863, 16 P.3d 610 (2001);
State v. Ortiz, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985).

The due process clause of the Fourteenth Amendment prohibits conviction of a person who is not competent to stand trial.

The constitutional standard for competency to stand trial is whether the accused has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and to assist in his defense with "a rational as well as factual understanding of the proceedings against him."

Fleming, supra, at 861-62 (citing to several federal decisions). "The two-part test for legal competency for a criminal defendant in Washington is as follows: (1) whether the defendant understands the nature of the charges; and (2) whether he is capable of assisting in his defense." Id., at 862. Once a court finds reason to doubt a defendant's competency, it must follow the statute to determine competency. "A reason to doubt' is not definitive, but vests a large measure of discretion in the trial judge." Seattle v. Gordon, 39 Wn. App. 437, 441, 693 P.2d 741 (1985).

The factors a trial judge may consider in determining whether or not to order a formal inquiry into the competence of an accused include the "defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel."

Id., at 863 (citing to State v. Dodd, 70 Wn.2d 513, 514, 424 P.2d 302 (1967)).

Brown argues that the court should have, *sua sponte*, raised the issue of his competency. He claims the record raises doubts as to his competency because he has only an eighth grade education, he told his attorney he has difficulty counting, he claimed to believe he was arrested on a misdemeanor warrant, and that approximately a month after sentencing he filed a motion indicating he misunderstood the prosecutor's sentencing recommendation and the court's statements at the sentencing hearing.

There is no authority for the proposition that lack of education equates to incompetency. Neither his eighth grade education nor any difficulty in counting renders him unable to understand the proceedings against him or to assist his attorney with his defense. Assuming he actually believed that he was arrested on a misdemeanor warrant, a belief he did not express at the time of his arrest, [RP338-39] that speaks more to his level of intoxication on the night of the offense than to his ability to understand the proceedings against him. He understood that he was being tried for DUI. Finally, his misunderstanding regarding the length of his incarceration was obviously not before the court before

trial. It is the sort of misunderstanding that is more indicative of a failure to listen than the mental disease or defect required by the statute for a finding of incompetence.

There was simply no reason for the court to doubt Brown's competence. A trial court has the opportunity to observe the defendant in the courtroom, and there is always much nonverbal information that does not get picked up in a paper and ink transcript. However, there was no irrational behavior, no psychiatric reports, no expressed confusion, no indications from his counsel that would have alerted the court to a competency issue. The court cannot exercise its discretion where there is nothing on which to exercise it.

At sentencing, Brown, who is not very articulate, nevertheless appeared to understand the proceedings, and during his allocution asserted that five years was too lengthy a sentence for his crime. He clearly understood that an appeal would follow. [06/26/2008 RP 10] At a post-sentencing hearing on July 2, 2008, which concerned the entry of the judgment and sentence and Brown's refusal to sign a notice of appeal, the court found him to be intransigent. [07/02/2008 RP 5] Intransigence is not incompetency.

Brown has failed to establish sufficient indications from the record that he was incompetent as opposed to poorly educated, obtuse, and obstinate. The court did not err by failing to raise the competency issue and order an evaluation.

D. CONCLUSION.

Brown is incorrect that evidence of vertical gaze nystagmus is inadmissible and that he was entitled to a bifurcated trial. An appropriate stipulation regarding his prior DUIs was given, and a stipulation regarding his status as a habitual traffic offender would have provided to the jury the same information that the State's evidence provided. He has not established that his counsel was ineffective nor that there was any reason for the court to inquire into his competency.

The State respectfully asks this court to affirm his convictions for felony DUI and driving while license revoked in the first degree.

Respectfully submitted this 21st day of January, 2009.



Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the State's Brief of Respondent 37979-1-II,
on all parties or their counsel of record on the date below as follows:

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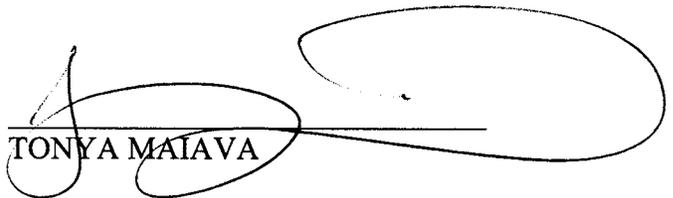
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I certify under penalty of perjury under laws of the State of
Washington that the foregoing is true and correct.

Dated this 21st day of January, 2009, at Olympia, Washington.


TONYA MAIAVA