

NO. 45446-7-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

CLIFFORD STONE, JR.

Appellant.

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

Before the Honorable Nelson Hunt, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. The trial court erred by denying the appellant's motion to suppress and by admitting evidence pertaining to his right to exercise his constitutional rights.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. A criminal defendant may not be penalized for exercising the right to refuse consent to a search by having that refusal used as evidence of guilt at trial. The trial court admitted testimony regarding the appellant's statement that it would take fifteen people to draw his blood if law enforcement obtained a search warrant for a blood draw, and where the prosecutor argued that the testimony was evidence of guilt.

Did the use of this testimony at trial violate the appellant's constitutional right to refuse consent to a search under the Fourth Amendment and Article I, Section 7 of Washington's constitution? Assignment of Error 1.

C. STATEMENT OF THE CASE

At approximately 9:40 p.m. on June 29, 2013, Washington State Patrol Officer Nathan Hovinghoff observed a car speeding on State Route 508 in

Lewis County, Washington. 2RP at 59.¹ After stopping the car, Trooper Hovinghoff contacted the driver, Clifford Stone, and noticed the odor of intoxicants coming from the interior of the car. 2RP at 48, 55. Trooper Hovinghoff stated that Mr. Stone was unsteady getting out of the car, appeared to be off balance, and had difficulty removing items from his wallet. 2RP at 55, 56.

Trooper Hovinghoff requested that Mr. Stone perform voluntary field sobriety tests, namely, the horizontal gaze nystagmus looking for involuntary jerking of the eye, the one-leg stand, and the turn and walk test, in order to gauge Mr. Stone's ability to listen, follow directions, multitask, and perform simple tasks involving balance. 2RP at 57. Mr. Stone did not perform the tests. 2RP at 58. Mr. Stone wanted Trooper Hovinghoff to photograph tools in his car's trunk, but then changed his mind several times regarding consent to open the trunk. 2RP at 61-64.

Trooper Hovinghoff placed Mr. Stone under arrest and transported him to the Lewis County Jail. 2RP at 58. Trooper Hovinghoff described Mr. Stone as being restless and agitated while being taken to the jail. 2RP at 65, 66.

¹The record of proceedings consists of four volumes:
RP—July 3, 2013, August 15, 2013, August 22, 2013; 1RP—August 19, 2013, jury trial;

At the jail, Trooper Hovinghoff read him the implied consent warnings, and requested he submit to a breath test for alcohol. 2RP at 70. Mr. Stone was advised he had the right to refuse, but if he refused, his license would be suspended and his refusal could be used against him in a criminal trial. 2RP 70-72. After Trooper Hovinghoff paused in the middle of reading the advisement, he continued reading and Mr. Stone stated that he did not understand the warnings and decided not to take a Breathalyzer test. 2RP at 74. Trooper Hovinghoff told Mr. Stone that he would apply for a search warrant for a blood draw. 2RP at 75. When asked by the deputy prosecutor during direct examination about Mr. Stone's reaction to the statement, Trooper Hovinghoff testified "he said it would take 15 people to get blood from him." 2RP at 75. He also testified that at that time Mr. Stone became more aggressive and despite being handcuffed, tried to rise out of his chair, and that he needed to be controlled by three members of the jail staff. 2RP at 75, 76. Due to Mr. Stone's state of agitation and aggression at the jail, Trooper Hovinghoff, after consulting with superiors, decided not to apply for a search warrant for a blood draw. 2RP at 76-77.

After obtaining a warrant to search Mr. Stone's car, which had been

2RP—August 20, 2013, jury trial; and RP—August 26, 2013, sentencing.

impounded, law enforcement obtained a bottle labeled Burnett Vodka, partially filled with a liquid that smelled like an intoxicant. 2RP at 79.

Mr. Stone testified that he was at a family reunion in Yakima on June 29 and was driving back to his home in Onalaska when he was stopped by Trooper Hovinghoff that evening. 2RP at 129, 130. He did not consume alcohol at the reunion. 2RP at 131. When driving back, he stopped in Packwood and gave a ride to a woman who asked for a ride. While he was driving, she asked if he had anything to drink. 2RP at 134. She mixed vodka he had in the car with orange juice he purchased, and he had one drink from the drink she prepared, and she consumed the rest. 2RP at 134, 135. He took the woman to her destination in Morton and then proceeded to Onalaska. 2RP at 135.

Mr. Stone testified that he did not take the field sobriety tests because he was agitated by the officer's demand that he get out of the car, because he had difficulty with his back from previous injuries, and because he was tired from the reunion and from driving for over three hours. 2RP at 141, 144. He stated that he had difficulty getting out of his car because it sits close to the ground and he has long legs. 2RP at 139.

The Lewis County Prosecutor's Office charged Mr. Stone with one

count of felony driving under the influence of intoxicating liquor (DUI). Clerks Papers (CP) 1-3.

Jury trial in the matter started August 19, 2013, the Honorable Nelson Hunt presiding. Over the objection of defense counsel, the court ruled that testimony from Trooper Hovinghoff that Mr. Stone said that it would take fifteen people to obtain a blood sample from him if law enforcement obtained a search warrant for a blood draw was admissible. 1RP at 17. Mr. Stone stipulated he had previously been convicted of vehicular assault while under the influence of an intoxicating liquor or drug. 2RP at 124. The jury was instructed that it could only consider the stipulation for a limited purpose and that the stipulation related only to a particular element of the offense pertaining to a prior conviction for vehicular assault and that the stipulation was not to be considered for any other purpose. Instruction 9; CP 56-69.

Neither exceptions nor objections to the jury instructions were taken by either counsel. 2RP at 178.

The jury returned a verdict of guilty to felony DUI. CP 70.

The court sentenced Mr. Stone to a standard range sentence of 60 months. CP 75-85. Timely notice of appeal was filed. CP 86. This appeal follows.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN ADMITTING TROOPER HOVINGHOFF'S COMMENT PERTAINING TO THE APPELLANT'S RIGHT TO EXERCISE HIS CONSTITUTIONAL RIGHTS WHEN HE STATED THAT IT WOULD TAKE FIFTEEN PEOPLE TO DRAW HIS BLOOD IF THE TROOPER OBTAINED A SEARCH WARRANT FOR A BLOOD DRAW

Mr. Stone was charged with felony DUI based on a previous conviction of vehicular assault under RCW 46.61.522. A felony DUI requires proof that (1) the person is guilty of driving while under the influence of an intoxicating liquor; and either (a) the person has four or more prior offenses within ten years; or (b) the person has ever been previously convicted of (i) vehicular homicide while under the influence of an intoxicating liquor or any drug RCW 46.61.520(1)(a)(ii), or (ii) vehicular assault while under the influence or (iii) an out of state offense comparable to the offenses in (b)(i) or (ii). RCW 46.61.502(6).

The Fifth Amendment to the United States Constitution guarantees that a criminal defendant shall not be compelled to be a witness against himself. U.S. Const. Amend V. Nor may the State comment on a defendant's exercise of that right. *Griffin v. California*, 380 U.S. 609, 613-15, 14 L.Ed.2d 106, 85 S.Ct. 1229 (1965). The Washington Constitution guarantees the

same protections. Wash. Const., art. I, § 9; *State v. Earls*, 116 Wn.2d 364, 374-74, 805 P.2d 211 (1991) (federal and state protections coextensive). "The right against self-incrimination is liberally construed. It is intended to prohibit the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind, or speak his guilt." *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996) (citations omitted). Thus, it is constitutional error for the State to elicit testimony or make closing argument as to the defendant's silence to infer guilt. *Easter*, 130 Wn.2d at 236.

Further, it is well settled that comments on the defendant's post-arrest silence violate due process, because the *Miranda* warnings constitute an assurance that the defendant's silence will carry no penalty. *Easter*, 130 Wn.2d at 23.

Here, Trooper Hovinghoff commented on Mr. Stone's exercise of his constitutional rights. Over a defense motion *in limine*, the court permitted Trooper Hovinghoff's testimony regarding Mr. Stone's reaction to the Trooper's statement that he would obtain a warrant for a blood draw. 1RP at 17. Trooper Hovinghoff testified at trial that he read Mr. Stone his rights and implied consent warnings. 2RP at 72-74. He stated that after pausing in the middle of the recitation of the rights, Mr. Stone said that he did not

understand the implied consent warnings. 2RP at 74, 75. Trooper Hovinghoff further testified that when Mr. Stone refused to take a BAC test, he said that he would get a warrant for a blood test, and that Mr. Stone said that it would take fifteen people to get blood from him. 2RP at 75.

Ultimately law enforcement did not seek a warrant for a blood draw. The testimony that it would take fifteen people to draw blood refers to a refusal to cooperate with the police investigation by exercising the right not to provide evidence or otherwise answer questions or assist in the investigation. The trial court found that Trooper Hovinghoff's testimony regarding Mr. Stone's response to a warrant for a blood draw showed his state of mind and showed "his attitude at the time." 1RP at 17.

A direct comment on the defendant's exercise of rights is constitutional error. *State v. Romero*, 113 Wn. App. 779, 790, 54 P.3d 1255 (2002). When a comment from a State agent is indirect, it is still constitutional error if it was given for the purpose of attempting to prejudice the defense or resulted in the unintended effect of likely prejudice. *Id.* at 790-91. The reviewing court must apply the constitutional harmless error analysis. *Id.*

Once an accused is arrested for driving under the influence, a refusal

to take a BAC test is admissible in a criminal trial. RCW 46.20.308(2)(b). While the prosecutor's initial question called for admissible evidence, Trooper Hovinghoff's testimony that Mr. Stone made it clear by his comment that his action that he would refuse to provide a blood sample and would not cooperate if law enforcement obtained a warrant for a blood draw commented on his right to remain silent.

The State emphasized Mr. Stone's reaction; in fact, it was its theme of the case. The prosecutor argued that Mr. Stone:

[r]efused to do FSTs, refused to BACS and started freaking when Sergeant Hovinghoff told him he was going to get a warrant for his blood. Again, Sergeant Hovinghoff testified on the stand that it's been his experience that people who are drunk just refuse everything, they don't want to provide any evidence, they want to limit it as much as possible. His experience that he testified to on the stand is that is classic behavior of an intoxicated persons.

2RP at 195. The prosecution continued to argue the theme throughout closing, 2RP at 212, 217.

A reviewing court will find "a constitutional error harmless only if convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error" and "where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." *Easter*, 130 Wn.2d at 242. Constitutional error is presumed prejudicial, and the State bears the

burden of proving it was harmless. RCW 46.61.502(6).

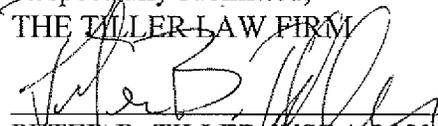
A comment on the defendant's invocation of his right to remain silent implies the defendant's guilt. In many cases it is impossible to conclude that a refusal to cooperate is more consistent with guilt than with innocence, and the danger exists that such refusal will be misinterpreted by the jury. *State v. Gauthier*, ___ Wn. App. ___, 298 P.3d 126, 130-31 (2013) (citing *United States v. Prescott*, 581 F.2d 1343 (9th Cir.1978)).

The error here is like that found in *Gauthier*. In *Gauthier*, the defendant's constitutional right to privacy was violated when the prosecutor was allowed to use his invocation of the right to refuse consent to a warrantless DNA search as substantive evidence of his guilt. 298 P.3d at 130-32. The reliance on Mr. Stone's clear indication that he would not submit to a blood draw was erroneously introduced as substantive evidence of his guilt. The trial court's evidentiary ruling violated Mr. Stone's constitutional right to remain silent. The State cannot show the constitutional violation was harmless to Mr. Stone's DUI conviction. See also *Gauthier*, 298 P.3d at 133-34 (error not harmless where prosecutor repeatedly relied on refusal to undermine credibility and as substantive evidence of guilt). Consequently, the conviction should be reversed.

F. CONCLUSION

Based on the foregoing facts and authorities, Mr. Stone respectfully requests this Court to reverse his conviction.

DATED: February 28, 2014.

Respectfully submitted,
~~THE TILLER LAW FIRM~~

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CERTIFICATE OF SERVICE

The undersigned certifies that on February 28, 2014, the Appellant's Brief was sent via JIS Link, to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, and was sent by first class mail, postage pre-paid to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington/ Signed at Centralia, Washington, on February 28, 2014.



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