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Court of Appeals
Division II
State of Washington
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No. 51202-5-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CITY OF VANCOUVER,

Respondent,

v.

MELISSA NICOLE KAUFMAN,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court committed reversible error by allowing evidence of Ms. Kaufman’s refusal of the PBT.

- a. A PBT is a search of one’s person has previously been held to be inadmissible for any purpose by our Washington Supreme Court. Did the trial court commit reversible error by allowing evidence of Ms. Kaufman’s refusal of a search of her breath?

2. The trial court committed reversible error by allowing Ofc. Tyler to comment on Ms. Kaufman’s alleged consciousness of guilt.

- a. Impermissible opinion testimony regarding a defendant’s guilt may violate a defendant’s constitutional right to a jury trial. Did the trial court commit reversible error by allowing Ofc. Tyler to make prohibited comments about her guilt?

B. STATEMENT OF THE CASE

Ms. Kaufman was charged with one count of Driving While Under the Influence (“DUI”) from an incident alleged to have occurred on March 11, 2016. CP 1.¹ During motions *in limine*, the City asked the court to allow the City to elicit evidence that Ms. Kaufman refused to submit to a Preliminary Breath Test (“PBT”) and consider it evidence of

¹ The entire District Court record, labelled “RECORD ON TRANSFER/DISTRICT”, was transferred to the Superior Court as part of the RALJ record. This, in turn, was transferred to the Court of Appeals as stated in the Designation of Clerk’s Papers. For the sake of clarity and simplicity, the Clerk’s Papers herein have been referenced the same in this briefing as in the RALJ appeal, i.e. only utilizing the “RECORD ON TRANSFER/DISTRICT”.

consciousness of guilt. CP 4-5; RP 4-5.² The defense objected, but was overruled by the court. RP 5.

At trial, Ofc. Tyler testified that he observed Ms. Kaufman's vehicle pass his vehicle in an adjacent lane in a 20 miles per hour school zone. RP 86. He estimated Ms. Kaufman was going approximately 25 to 28 miles per hour. RP 86-87. He "hit [his] overhead lights" for a few seconds, and her car slowed down. RP 86. He observed the vehicle move into a turn lane, but did not signal until she started to turn. RP 87. Ofc. Tyler stopped the other vehicle and dispatch indicated that the driver, Ms. Kaufman, had a misdemeanor warrant for her arrest. RP 87-88. Ofc. Tyler arrested Ms. Kaufman for the warrant and he then smelled an odor of intoxicants on her breath when he was placing her in handcuffs. RP 88. He observed that Ms. Kaufman's eyes were a little bloodshot and a little droopy. RP 89. Ms. Kaufman was then transported to the Clark County Jail. RP 90.

Ofc. Tyler decided to conduct a DUI investigation at the jail because Ms. Kaufman's car was stopped on a sharp incline and the

² The trial proceedings were transcribed for the original RALJ appeal, marked as "VERBATIM REPORT OF PROCEEDINGS", and have been transferred to the Court of Appeals as stated in the Designation of Clerk's Papers. For the sake of clarity and simplicity, the Report of Proceedings herein have been referenced the same in this briefing as in the RALJ appeal.

weather was chilly. RP 89. He asked Ms. Kaufman whether she would like to perform voluntary field sobriety tests (“FST”) and she declined. RP 90. He also asked her whether she would like to submit to a voluntary preliminary breath test “to establish probable cause for DUI” and she declined. RP 90. The PBT would detect alcohol in a person’s system. RP 91.

Ofc. Tyler then read Ms. Kaufman her *Miranda*³ warnings and asked Ms. Kaufman thirty questions from the DUI packet. RP 91, 94. Her face was observed as being flushed, her speech was observed as being fair, she was observed to have mood swings, and the officer’s opinion of her level of intoxication was slight. RP 95-96. On cross-examination, Ofc. Tyler clarified that Ms. Kaufman began crying when she was taken into custody. RP 109-110. Ofc. Tyler read Ms. Kaufman the implied consent warnings for breath and offered her a breath test, which she declined. RP 97-98. Ofc. Tyler believed at that time that he had probable cause to arrest Ms. Kaufman for DUI. RP 123-24.

Ofc. Tyler testified that if someone refuses to perform field sobriety tests, the PBT, or the breath test, that usually shows that they are under the influence because they don’t want to fail the tests. RP 127. The

³ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966).

defense objected to this line of testimony and was overruled. RP 126-127.

Specifically:

[Prosecutor:] . . . Is it evidence if someone's under the influence of alcohol if they refuse to do the field sobriety tests?

[Defense counsel:] Objection.

[Court:] Overruled.

[Prosecutor:] So if you ask someone to do the field sobriety tests and they refuse to do that does that indicate that-, something to you?

[Tyler:] Yes it usually shows me that they are under the influence because they don't want the tests to fail.

[Prosecutor:] Same thing you offered the defendant a PBT to see if there was alcohol in her system, she refused that, what does that indicate [sic] to you?

[Tyler:] That she didn't want to take the tests because the result would show that she's under the influence.

[Prosecutor:] And last thing is you offered the defendant a chance to give a breath sample on the BAC Datamaster and she forego giving a sample knowing her license would be suspended?

[Tyler:] Yes.

[Prosecutor:] Is that further evidence to you that she was under the influence on that date?

[Tyler:] It's usually an indication yes.

RP 126-27.

The jury subsequently found Ms. Kaufman guilty of DUI with a special finding that Ms. Kaufman refused to submit to a breath test. CP 95-96.

This appeal follows.

C. ARGUMENT

1. **The court committed reversible error by allowing evidence of refusal of the PBT.**

Chapter 448-15 of the Washington Administrative Code details the administration of the PBT. WAC 448-15-020 sets out the use of the test results, as follows:

(1) Valid results from the PBT instruments described in WAC 448-15-010 are approved for use to determine that a subject has consumed alcohol and establish probable cause to place a person under arrest for alcohol related offenses or probable cause to support issuance of a search warrant for blood to test for alcohol.

(2) This preliminary breath test is voluntary, and participation in it does not constitute compliance with the implied consent statute (RCW 46.20.308).

(3) For purposes of this section, valid results are considered those obtained by an operator following the approved testing protocol described in WAC 448-15-030 while using an approved PBT instrument which has been certified according to the rules described in WAC 448-15-040.

(4) Valid results will show the test subject's breath alcohol concentration. These results may not be used on their own for determining, beyond a reasonable doubt, that a person's breath alcohol concentration exceeds a

proscribed level such as anticipated under the ‘per se’ statutes for intoxication.

Notably, PBTs are distinct from the evidentiary breath test and are not subject to the provisions of the Implied Consent Warning under RCW 46.20.308. WAC 448-15-020(2). Furthermore, “in the absence of a *Frye* hearing on the PBT, or specific approval of the device and its administration by the state toxicologist, the result garnered from the PBT is inadmissible for any purpose...” *State v. Smith*, 130 Wn.2d 215, 222, 922 P.2d 811 (1996).

Generally speaking, any breath test is a search under the Fourth Amendment of the U.S. Constitution and Article I § 7 of the Washington State Constitution. *State v. Garcia–Salgado*, 170 Wn.2d 176, 184, 240 P.3d 153 (2010). The United States Supreme Court has recognized that a compelled intrusion into the body for blood to be analyzed for alcohol content is a search and similarly, the Court found Breathalyzer tests to implicate similar concerns about bodily integrity and constitute searches as well. *Garcia–Salgado*, 170 Wn.2d at 184 (citing *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989)). However, evidentiary breath tests conducted subsequent to an arrest for DUI falls under a search incident to arrest exception. *State v. Baird*, 187 Wn.2d 210, 222, 386 P.3d 239 (2016) (citing *Birchfield v.*

North Dakota, 579 U.S. ___, 136 S.Ct. 2160, 2174, 195 L.Ed.2d 560 (2016)). Because the search falls under an exception to the warrant requirement, there is no constitutional right to refuse the evidentiary breath test. *Baird*, 187 Wn.2d at 222. Consequently, if the driver has no constitutional right to refuse, admitting evidence of that refusal is not a comment on the driver's exercise of a constitutional right because no constitutional right exists. *Id.*

In contrast to the evidentiary breath test, the PBT is done prior to an arrest for DUI and therefore there is no search incident to arrest exception and the driver does indeed have the constitutional and the statutory right to refuse the PBT. A PBT is specifically not an evidentiary test as defined by WAC 448-15-020. Prosecutors may not comment on a refusal to waive a constitutional right. *State v. Mechem*, 186 Wn.2d 128, 136, 380 P.3d 414 (2016) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 228, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) (consent to waive a constitutional right may not be coerced, either explicitly or implicitly); *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978) (evidence of defendant's refusal to consent to warrantless search violates Fourth Amendment and article I, section 7)); *see also State v. Gauthier*, 174 Wn. App. 257, 267, 298 P.3d 126 (2013) (exercising a constitutional right such as a Fourth Amendment right is not admissible as evidence of guilt).

In the instant case, the City has relied heavily on *Meacham* in arguing that the PBT is merely another field sobriety test. This is an incorrect analysis, as *Meacham* dealt with physical field sobriety testing, including the horizontal gaze nystagmus test, walk and turn test, and one leg stand test. *Meacham*, 186 Wn.2d at 130. The Court explained what FSTs were as follows:

An FST is an officer's observations of a suspect driver's physical actions. The standard FST includes three components. First, in the horizontal gaze nystagmus test, the suspect driver must follow a moving object with the eyes while the officer looks for involuntary eye movements. Second, in the walk-and-turn test, the suspect driver must take several heel-to-toe steps in a line. The third test requires the suspect driver to stand on one leg while counting out loud. These tests are specifically designed to provide statistically valid and reliable indications of a driver's blood alcohol content and "are usable only for a sobriety determination." *Heinemann v. Whitman County*, 105 Wn.2d 796, 808, 718 P.2d 789 (1986); *see also State v. Quaal*, 182 Wn.2d 191, 198, 340 P.3d 213 (2014) (horizontal gaze nystagmus test "merely shows physical signs consistent with ingestion of intoxicants"); U.S. Dep't of Transp., Nat'l Highway Traffic Safety Admin., *Development of a Standardized Field Sobriety Test (SFST) Training Management System 1-12* (Nov. 2001) (DOT-HS-809-400).

Meacham, 186 Wn.2d at 132. FSTs quite clearly do not include the PBT.

The *Meacham* Court ultimately held that FSTs are a seizure but not a search because information revealed by FSTs does not differ significantly from the information that is revealed from ordinary observation of a suspect

driver's demeanor and gait. *Mecham*, 186 Wn.2d at 146. The Court specifically distinguished FSTs from the testing of blood or urine, for example, as FSTs provide far less private medical information. *Id.* The Court held that FSTs merely require an officer to examine the eyes, the speech, and the ability of a suspect driver to execute a prescribed routine and they are not a physical search. *Mecham*, 186 Wn.2d at 128. This is clearly distinguishable from the physical search of examining a driver's breath through a PBT device.

If trial error is of constitutional magnitude, prejudice is presumed and the State bears the burden of proving it was harmless beyond a reasonable doubt. *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013); *State v. Levy*, 156 Wn.2d 709, 731, 132 P.3d 1076 (2006). A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). In *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), the Washington State Supreme Court adopted the "overwhelming untainted evidence" test because that test "allows the appellate court to avoid reversal on merely technical or academic grounds while insuring that a conviction will be reversed where there is any reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty

verdict.” Under this test, the appellate court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. *Id.*; *Watt*, 160 Wn.2d at 635.

Here, the trial court concluded that both of Ms. Kaufman’s breath test refusals occurred after her arrest. But the record supports that Ofc. Tyler did not determine that he had probable cause to arrest Ms. Kaufman for DUI until after he completed his DUI investigation at the jail. His investigation included asking Kaufman to consent to a breath test. He also did not read Ms. Kaufman her *Miranda* warnings until after she refused the PBT. *Baird* only permits the use of breath test results or refusals “subsequent to an arrest for DUI”, which did not occur here. *Baird*, 187 Wn.2d at 222.

Given the foregoing, the error by the trial court was of a constitutional magnitude and the City cannot meet its burden in proving this error was harmless beyond a reasonable doubt. The observations of intoxication by Ofc. Tyler were “slight”, there was no breath test administered indicating a certain alcohol concentration, if any, and there were no other objective indicators of intoxication of Ms. Kaufman. Ms. Kaufman pulled her vehicle over appropriately to the side of the road when signaled to do so and she also was able to maintain her lane of travel in a straight line. RP 105. Ofc. Taylor stated that when he first pulled her

over he did not have probable cause to believe Kaufman was under the influence. He added that even after he smelled alcohol on her, he did not have enough evidence to arrest her for DUI, so he decided to investigate further at the jail. It was only after this investigation that Ofc. Tyler then had to “make a judgment with very little information on the observations at the time” whether to arrest her for DUI. RP at 124. Accordingly, the City cannot show that this error was harmless beyond a reasonable doubt and the conviction must be reversed.

2. **The court committed reversible error in allowing Ofc. Tyler to comment on Ms. Kaufman’s alleged consciousness of guilt.**

“Impermissible opinion testimony regarding the defendant’s guilt may be reversible error because such evidence violates the defendant’s constitutional right to a jury trial, which includes the independent determination of the facts by the jury.” *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). Similarly, “[permitting a witness to testify as to the defendant’s guilt raises a constitutional issue because it invades the province of the jury and the defendant’s constitutional right to a trial by jury.” *State v. Olmedo*, 112 Wn. App. 525, 533, 49 P.3d 960 (2002), review denied, 148 Wn.2d 1019 (2003). The general rule is that no witness, lay or expert, may “testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.” *City of Seattle v.*

Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993) (citing *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967)). Invading the province of the jury is an error of constitutional magnitude and the standard of review is whether the court can conclude that the error was harmless beyond a reasonable doubt. *Levy*, 156 Wn.2d at 731.

To determine whether testimony is an improper opinion on guilt, the reviewing court considers: (1) the type of witness involved; (2) the specific nature of the testimony; (3) the nature of the charges; (4) the type of defense; and (5) the other evidence before the trier of fact. *Kirkman*, 159 Wn.2d at 929 (quoting *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (quoting *Heatley*, 70 Wn. App. at 579)).

In the instant case, Ofc. Tyler spelled out Ms. Kaufman's alleged consciousness of guilt for the jury. He indicated that if a person refuses field sobriety tests then they are intoxicated. If a person refuses to submit to a PBT then they are intoxicated. If a person refuses to submit to an evidentiary breath test then they are intoxicated. Ofc. Tyler invaded the province of the jury by detailing what a guilty conscious supposedly looks like and implicated Ms. Kaufman in doing so. This improper opinion testimony is especially damaging considering it came from a law enforcement officer that has been working patrol for 13 years and has

conducted over 200 DUI arrests. RP 83. *See, e.g., Kirkman*, 159 Wn.2d at 928 (testimony from a law enforcement officer may be especially prejudicial because an officer's testimony often carries a special aura of reliability).

The City cannot show that this error was harmless beyond a reasonable doubt as discussed above. Accordingly, the conviction must be reversed.

D. CONCLUSION

Given the foregoing, the Appellant respectfully requests that this court reverse the conviction and remand the case back to District Court for a new trial.

DATED this 6th day of September, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sean M. Downs, a person over 18 years of age, served the Vancouver City Attorney's Office – Criminal Division a true and correct copy of the document to which this certification is affixed, on September 6, 2018 to email address Nicholas.Barnabas@cityofvancouver.us. Service was made by email pursuant to the Respondent's consent. On the same date, I also served Appellant, Melissa Nicole Kaufman, a true and correct copy of the document to which this certification is affixed, via first class mail postage prepaid to 602 SE 131st Ct, Vancouver, WA 98683.

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