

FILED
Court of Appeals
Division II
State of Washington
10/5/2018 10:19 AM
NO. 51202-5-11

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

CITY OF VANCOUVER,
Respondent,
v.
MELISSA NICOLE KAUFMAN,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF CLARK COUNTY
HONORABLE BERNARD VELJACIC, JUDGE
CLARK COUNTY SUPERIOR COURT
CAUSE NUMBER 16-1-02138-7

BRIEF OF RESPONDENT

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IDENTITY OF RESPONDENT

The City of Vancouver is the Respondent.

ISSUES PRESENTED

- I. **Did the Superior Court err in finding evidence of a PBT refusal admissible because the Appellant had no constitutional right to refuse that “search incident to arrest?”**
- II. **Did the Superior Court err in finding Officer Tyler’s opinion about what Appellant’s “refusals” to participate in a DUI investigation meant to him, as being harmless beyond a reasonable doubt?**

RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The Superior Court did not err in finding the PBT refusal was admissible at trial, because the Appellant had no constitutional right to refuse that requested test as it was a “search incident to arrest.”**
- II. **Officer Tyler’s opinion about what a refusal meant to him was a minor irregularity at trial, and the Superior Court did not err in finding the overwhelming, untainted evidence at trial demonstrated that error was harmless beyond a reasonable doubt.**

STATEMENT OF THE CASE

On September 15th, 2016, Appellant Melissa Kaufman was brought to trial on one count of Driving Under the Influence. According to the Record of Proceedings (“RP”), Vancouver Police Officer Keith Tyler stopped a vehicle that had passed him in a school zone, and failed to signal

properly prior to changing lanes. *RP.* at 86-87. After stopping the vehicle, dispatch informed Officer Tyler that the driver, identified as Ms. Kaufman (hereafter “Appellant”), had an active misdemeanor warrant. *Id.* at 87-88. When Officer Tyler was arresting the Appellant on the warrant he smelled the odor of intoxicants on her breath, and observed that her eyes were bloodshot and droopy. *Id.* at 88-89.

At that point he began a DUI investigation. *Id.* at 89. After being transported to the Clark County jail, Officer Tyler conducted a “mouth check.” *Id.* at 90. Appellant was then offered an opportunity to complete voluntary field sobriety tests and submit to a voluntary preliminary breath test which she refused. *Id.* at 90-91. Officer Tyler went through the Implied Consent Warnings with the Appellant, who then chose to decline the breath test. *Id.* at 96-99.

Officer Tyler testified that if someone refuses to take the voluntary tests offered in a DUI investigation, or the breath test, it indicates to him generally that someone was under the influence. *Id.* at 126-127. Defense objected to this line of questioning, but was overruled. *Id.* Appellant was subsequently found guilty of one count of Driving Under the Influence, with a special finding she refused to take the breath test. *Id.* at 157-158.

Appellant appealed her District Court verdict via RALJ appeal to the Superior Court of Clark County, who affirmed her conviction in the Decision and Order of the Court dated November 9, 2017.

ARGUMENT

I. **Evidence of a PBT refusal that occurs post-arrest, is permissible evidence to introduce at trial.**

a. Refusal evidence is relevant

The general rule is that “in the absence of a *Frye* hearing on the PBT [Portable Breath Test], 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 Wash. 2d 215, 222, P.2d 811, 815 (1996) (emphasis added). However, evidence that a defendant **refused** a PBT test does not depend on the device’s scientific accuracy, and therefore testimony about a refusal should be admitted at trial.

When a defendant refuses to participate in the Standardized Field Sobriety Tests (SFST), the government is permitted to comment on that refusal as evidence of a guilty conscience. *State v. Mecham*, 186 Wn.2d 128, 380 P.3d 414 (2016); *Seattle v. Stalsbrotten*, 138 Wn.2d 227, 978 P.2d 1059 (1999). Similarly, the government can comment on a defendant’s refusal to provide a breath sample into the BAC Datamaster. *State v.*

Baird, 187 Wash. 2d 210, 386 P.3d 239 (2016); *See also* RCW 46.61.517.

When a defendant refuses to submit to a PBT, the same argument is applicable - i.e. that the suspect had a guilty conscience so they refused.

In *State v. Cohen*, 125 Wn.App. 220, 224, 104 P.3d 70, 72 (2005),

Division I stated:

The rationale for admission of refusal evidence is that a refusal to take the test demonstrates the driver's consciousness of guilt. The refusal is the relevant fact, and the admissibility of the refusal **does not depend on whether or not the results themselves, had any existed, would have been admissible.** (emphasis added)

Refusing to submit to a PBT has a tendency to make it more probable than not that a suspect has alcohol in their system, otherwise he or she would arguably not refuse to submit to the PBT. The City agrees that had the PBT been administered in this case, the results would not have been admissible at trial; however, the fact the Defendant *refused* the PBT is relevant evidence, and in line with *Cohen* the mere fact the PBT results would not themselves have been admissible does not undermine the relevancy of the refusal evidence. 125 Wn.App. at 224. Thus, the Defendant's refusal to submit to the PBT in this case was relevant testimony at trial.

b. *The request to provide a PBT sample occurred subsequent to custodial arrest, therefore the Appellant had no constitutional right to refuse that request as it fell within the “search incident to arrest” warrant exception.*

Generally, the City cannot comment on a defendant’s refusal to waive a constitutional right. *Mecham*, 186 Wn.2d at 137. However, the City *is* permitted to comment on a defendant’s refusal if there was no constitutional right to refuse the requested test. *Baird*, 187 Wn.2d at 222.

Case law is clear that a breath test is a search under the Fourth Amendment and under article I, section 7 of the Washington State constitution. *Id.* However, in *Baird* the court found that an evidentiary breath test conducted post-arrest falls within the “search incident to arrest” warrant exception. *Baird*, 187 Wn.2d at 222. That court stated:

A driver thus has no *constitutional* right to refuse a breath test because the breath tests fall under the search incident to arrest exception to the warrant requirement. 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.*

Furthermore, in *State v. Sosa*, Division III stated “because [the defendant] opted not to participate in the PBT, the State was entitled to elicit evidence of his refusal to take the test.” 198 Wn. App. 176, 185, 393 P.3d 796, 801 (Wash. Ct. App. Mar. 16, 2017) (Review denied 08/02/2017).

In her brief, the Appellant argues the Superior Court erred by finding that the PBT was administered pursuant to a valid search incident to arrest, because she was arrested for a warrant. *Appellant's Brief* at 10. However, Officer Tyler arrested the Appellant, took her to jail, and *then* requested that a PBT sample be given. *RP.* at 88-90. The facts elicited at trial establish she was under arrest for a DUI *and* for her active warrant at the time the PBT was requested.

At trial, Officer Tyler testified after he stopped the Appellant for multiple traffic infractions, he arrested her for her warrant. *RP.* at 86-88. Upon handcuffing her, he noticed an odor of intoxicants on her breath, and also observed bloodshot, droopy eyelids. *Id.* at 87-88, 95. He testified that her coordination was “fair.” *Id.* at 96. He testified that she had a “flushed” face. *Id.* at 95. He also explained his training and experience in dealing with suspected drunk drivers. *Id.* at 82-84. Based on his training and experience, he chose to conduct a DUI investigation. *Id.* at 89. Most importantly, Officer Tyler testified that the “first thing we do when we come to the jail while we’re waiting to go inside we do what’s called a mouth check to make sure they don’t have any foreign objects in their mouth that would upset or throw off a alcohol test.” *Id.* at 90.

This testimony draws a necessary inference that the Appellant was in custody for the DUI *and* warrant upon arriving at jail. A mouth check

is done prior to submitting to the BAC Datamaster to comply with the requirements of admitting those samples at trial. BAC Datamasters are *not* available in the field for police officers to use, so suspects are arrested for a DUI then taken to jail or a police station to submit to that test. Because Officer Tyler did a mouth check upon arriving at jail, it follows that he already intended on requesting the Appellant submit a breath sample. This further shows the Appellant was in custody for the DUI at that point. Appellant is mistaken in asserting that just because she was initially arrested for the warrant, she was not also arrested for the DUI. Additionally, the Appellant refused to participate in SFST's prior to being asked to submit to the PBT. *Id.* at 91. That refusal to participate in the SFST's was further evidence showing the Appellant was in custody for a DUI, prior to being asked to give a PBT sample.

Officer Tyler's testimony shows that at the time he arrived at the jail with the Appellant, she was in custody for the DUI as well as her active warrant. Therefore, the requested PBT sample in this case falls within the "search incident to arrest" exception, and as in *Baird*, the Appellant had no Constitutional right to refuse the breath sample. 187 Wn.2d at 222.

A court's findings of fact, if supported by substantial evidence, are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994). In

this case, the Superior Court ruled that “the court agrees with Appellant’s reasoning if the PBT was attempted before arrest; however, the substantial evidence in the record supports that the PBT was attempted after arrest.”

Decision and Order of the Court at 3. Because the request to submit to the PBT occurred after custodial arrest for the warrant *and* for DUI at the point the PBT was requested – Officer Tyler was properly allowed to comment on Appellant’s refusal.

II. The overwhelming evidence presented at trial shows that minor error in testimony given to the jury by Officer Tyler, was harmless beyond a reasonable doubt.

The Superior Court found Officer Tyler’s comments on what a “refusal” meant to him were improper. Although an error was found by that court, case law demonstrates that irregularity was *de minimis* and had no impact on the outcome of the trial. The Superior Court correctly found the overwhelming other evidence presented at trial demonstrated that error was harmless beyond a reasonable doubt.

a. Statements about what a “refusal” meant was a minor irregularity.

The general rule is that in trial proceedings, “no witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.” *State v. Black*, 109 Wash. 2d 336, 348, 745 P.2d 12, 19 (1987) (citing *State v. Garrison*, 71 Wash. 2d 312, 315, 427

P.2d 1012 (1967)). However, “testimony that is not a direct comment on the defendant’s guilt . . . and is based on inferences from the evidence is not improper opinion testimony.” *City of Seattle v. Heatley*, 70 Wash. App. 573, 578, 854 P.2d 658, 661 (1993).

With respect to government officials, such as police officers, testimony that “encompass[es] ultimate factual issues support[ing] the conclusion that the defendant is guilty,” likewise are admissible so long as the testimony is “helpful to the jury, and is based on inferences from the evidence.” *Id.* at 578-79. “It is the very fact that such opinions imply that the defendant is guilty which makes the evidence relevant and material.” *Id.* at 579 (citing *State v. Wilber*, 55 Wash. App. 294, 298 n.1, 777 P.2d 36, 39 (1989)).

For example, in *Heatley* a police officer testified that he had performed Field Sobriety Tests around 1,500 times when conducting DUI investigations, and then gave the following testimony during a DUI trial:

Based on my, his physical appearance and my observations of that and based on all the tests I gave him as a whole, I determined that Mr. Heatley was obviously intoxicated and affected by the alcoholic drink that he'd been, he could not drive a motor vehicle in a safe manner. At that time, I did place Mr. Heatley under arrest for DWI. *Id.* at 576.

Defense argued that the police officer’s “opinion encompassed what was essentially the only disputed issue,” arguing that opinion implied the

defendant was guilty of the DUI charge. *Id.* at 577. On appeal, the appellate court held the officer's "opinion was based solely on his experience and his observation of [the defendant's] physical appearance and performance on the field sobriety tests. The evidentiary foundation "directly and logically" supported the officer's conclusion." *Id.* at 580. The court therefore found that testimony did not constitute an improper opinion on the defendant's guilt. *Id.* The court found that the testimony was admissible within the scope of ER 704 (expert testimony). *Id.* Further, that court found the testimony was also admissible as a lay witness opinion on that defendant's level of intoxication (Stating "if a lay witness may express an opinion regarding the sobriety of another, there is no logic to limiting the admissibility of an opinion on intoxication when the witness is specially trained to recognize characteristics of intoxicated persons"). *Id.* The court further stated that this opinion did not encompass "excessively technical matters," and the jury was in the position to "independently assess the opinion in light of the foundation evidence." *Id.* at 581.

Distinguishable from that case, in *State v. Quaale*, 182 Wn.2d 191, 340 P.3d 213 (2014), that court analyzed a case in which a law enforcement officer *did* give improper testimony. In that case, "the arresting trooper in [a] DUI ... trial testified that he had "no doubt" that the

defendant was impaired based solely on a horizontal gaze nystagmus (HGN) test”. *Id.* 182 Wn.2d at 193-194. The court found this testimony improper for two reasons. First, the officer testified in a way that implied an “aura of scientific certainty.” *Id.* at 198. The court stated that “by saying that he had “no doubt” that the defendant was impaired based on the HGN test, that testimony “case his conclusion in absolute terms and improperly gave the appearance that the HGN test may produce scientifically certain results.”” *Id.* at 197. Second, the court said the testimony relayed a specific level of intoxication, “i.e. that the defendant consumed a sufficient quantity of intoxicants that *impaired* him, “which is the legal standard for guilt.”” *Id.* at 199.

i. Heatley

Officer Tyler’s testimony regarding a “refusal” is similar to the officer’s comments in *Heatley*. Officer Tyler explained the SFSTs he asked the Appellant to perform, then explained they were voluntary, and that he wanted to perform the tests in accordance with a DUI investigation. *RP.* at 89-90. He explained that the Portable Breath Test (PBT) was another voluntary test that would show if there was alcohol in the Appellant’s system. *RP.* at 91. Finally, he explained that he requested the Appellant to give a breath sample once they got to jail, and read for the jury the pertinent Implied Consent Warnings that were read to the

Appellant on the day of the DUI arrest. *RP.* at 97-99 (Basically stating that if she gave a breath sample and there was no alcohol in her system there would be no license suspension/revocation – however, there would be negative consequences for refusing to provide any breath sample).

Like the officer’s testimony in *Heatley*, Officer Tyler explained his investigations, training and experience regarding DUI’s, and that he has been involved in over 200 DUI investigations. *RP.* at 83. In the course of performing DUI investigations, he testified that someone’s refusal to submit to the SFSTs “usually shows me they are under the influence.” *Id.* at 127. He also testified that based on that training and experience, Appellant’s refusal of the PBT “would show she was under the influence.” *Id.* And refusing a BAC sample would “usually” indicate the same thing. *Id.* The testimony about what a refusal means to *him* is based on the evidence presented, and the evidentiary foundation “directly and logically” supported the officer’s conclusion.” *Heatley*, 70 Wash. App. at 580.

Furthermore, this testimony was merely explaining that someone may refuse to comply with DUI investigation’s tests, because the suspect did not want the police to know there was alcohol in their system. This is a straight-forward interpretation, and any lay person could easily come up with that same inference. *Heatley*, 70 Wash. App. at 580 (Stating “if a lay witness may express an opinion regarding the sobriety of another, there is

no logic to limiting the admissibility of an opinion on intoxication when the witness is specially trained to recognize characteristics of intoxicated persons”). Also as in *Heatley*, Officer Tyler’s testimony did not encompass “excessively technical matters,” and the jury was in the position to “independently assess the opinion in light of the foundation evidence.” *Id.* at 581.

ii. Quaale

Officer Tyler’s testimony is distinguishable from the officer’s testimony in *Quaale*. First, Officer Tyler’s opinion was not expressed in absolute terms like the trooper’s testimony in *Quaale*. The trooper in *Quaale* testified that he had “no doubt” that the defendant was impaired based solely on a horizontal gaze nystagmus (HGN) test”. *Quaale*, 182 Wn.2d at 193-194. In this case, Officer Tyler merely testified that based on his training and experience, an individual’s refusal to submit to the SFSTs and the BAC test usually indicates to him they are under the influence. *RP.* at 127.

This is not the equivalent of stating the Appellant was guilty of DUI. It was the province of the jury to determine whether the Appellant’s was guilty by applying the law that “a person is under the influence of or affected by the use of [intoxicating liquor] **if the person’s ability to drive**

a motor vehicle [was] lessened in any appreciable degree. WPIC 92.10; *RP.* at 137 (emphasis added). Officer Tyler did not testify to this. Thus, Officer's Tyler's testimony is distinguishable from the trooper in *Quaale*, because Officer Tyler did not cast his opinion testimony in "absolute terms" using language indicating the Appellant was intoxicated beyond "[any] doubt" nor did his testimony equate to opining the Appellant was under the influence and her ability to drive was lessened in any appreciable degree because of that. *Quaale*, 182 Wn.2d at 197, 199.

Officer Tyler's opinion testimony did address whether Appellant was driving under the influence, but his testimony "directly and logically" followed from his training and experience, and a lay witness could easily come up with the same inference that a suspect may refuse to submit to a DUI investigation because they did not want the police to know what was in their system. Officer Tyler's opinion was not related to any technical issue, he did not testify he had "no doubt" he believed Appellant was guilty of driving under the influence, and finally the jury still had the ability to "independently assess the opinion in light of the foundation evidence" while making the ultimate determination of whether the Appellant's ability to drive was "lessened in any appreciable degree." Though the Superior Court found this was improper testimony, by

applying and distinguishing *Heatley* and *Quaale* the testimony relayed in this trial was arguably an insignificant irregularity at the trial.

III. The overwhelming other evidence presented at trial shows that any error was harmless beyond a reasonable doubt.

Even with any minor error at trial, overwhelming untainted evidence of guilt was presented in this case. That evidence was:

- Officer Tyler has been a Vancouver police officer since 1999, and worked for the Orville police department for two and a half years prior to that. *RP.* at 82.
- He went through the standard police academy, completes annual trainings, and went through two 32-hour schools dealing with DUI investigation. *Id.*
- He has encountered numerous people that were under the influence of alcohol. He worked nights for 13 years of his career, and arrested around 200 people for DUI. *Id.* at 83.
- He testified about the effects of alcohol on the human body, and explained that slower reaction time, bloodshot and watery eyes, droopy eyes, slurred speech, *inter alia* – were all indicators that someone could have consumed alcohol. *Id.* at 83-84.
- He testified that on the day in question, he was traveling through a 20mph school zone (which had flashing amber lights active at that moment) when he observed the Appellant’s vehicle pass him estimating her speed at 25-28mph. *Id.* at 86.
- He testified he activated his overhead lights to give a “visual warning” to slow down. And the Appellant’s vehicle slowed, but not all the way down to 20mph. *Id.*

- He stated he observed the Appellant also quickly enter a turn lane, not using her turn signal for greater than 100 feet as required. He also testified that multiple traffic infraction tend to increase the chances that someone may be impaired while driving. *Id.* at 83, 87.
- That he smelled the odor of intoxicants on the Appellant's breath. *Id.* at 88.
- The Appellant stated she had no physical impairments, she was not sick or injured, she was not under the care of a doctor or dentist, and was not diabetic or epileptic. *Id.* at 93-94.
- When asked how many hours of sleep she got last night, she said "don't know." *Id.* at 94.
- When asked what time it was, she said 7am or 8am (the actual time was 8:25am). *Id.*
- When asked when she started driving, she said "don't know." *Id.*
- When asked the date, she said March 10th or March 11th. *Id.*
- He observed watery, bloodshot eyes, and droopy eyelids. He testified the Appellant's eyes looked different to him on the day in question compared to observing her during the trial proceeding. *Id.* at 89, 95
- He testified the Appellant had a flushed face on the day in question, once again stating her face looked different that day, as compared to observing her face during the trial. *Id.*
- He testified that the Appellant had "fair" speech, indicating it was a little slow on the day in question. *Id.* at 96.

- That he requested the Appellant perform the SFST's but she refused. *Id.* at 90.
- That after reading the Appellant the Implied Consent Warning for breath, she refused to provide a breath sample into the BAC Datamaster. *Id.* at 97-99.

This constitutes overwhelming evidence of the Appellant's guilt, more than sufficient for the jury to find the Appellant guilty. The Superior Court did err in finding any error was harmless in light of the untainted evidence in the case.

CONCLUSION

The Appellant was under arrest for a DUI and a warrant at the time she was requested to give a PBT sample, there is substantial evidence on the record to support that conclusion, and therefore the Superior Court did not err in finding the PBT refusal was admissible evidence at trial. That conclusion is in line with *Cohen, Mecham, and Baird*.

Officer Tyler's opinion on what a "refusal" meant was a minor irregularity at trial, the jury could easily come up with the same inference from the evidence presented, and the overwhelming other evidence presented at trial establish the Superior Court did not err in finding that error harmless beyond a reasonable doubt.

Accordingly, this court should deny Appellant's request for relief.

Respectfully submitted this 5 of OCTOBER, 2018.



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October 05, 2018 - 10:19 AM

Transmittal Information

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Appellate Court Case Title: City of Vancouver, Respondent v Melissa Nicole Kaufman, Petitioner
Superior Court Case Number: 16-1-02138-7

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