

FILED
Court of Appeals
Division II
State of Washington
11/13/2018 8:00 AM

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 REPLY BRIEF

Sean M. Downs
Attorney for Appellant

GRECCO DOWNS, PLLC
500 W 8th Street, Suite 55
Vancouver, WA 98660
(360) 707-7040
sean@greccodowns.com

TABLE OF CONTENTS

A. ARGUMENT.....1

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

 2. The court committed reversible error in allowing Ofc. Tyler to comment on Ms. Kaufman’s alleged consciousness of guilt.....9

B. CONCLUSION.....10

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

City of College Place v. Staudenmaier, 110 Wn. App. 841, 43 P.3d 43 (2002).....3

State v. Baird, 187 Wn.2d 210, 386 P.3d 239, 245 (2016).....1, 2

State v. Garcia–Salgado, 170 Wn.2d 176, 240 P.3d 153 (2010).....2

State v. Hurd, 5 Wn.2d 308, 105 P.2d 59 (1940).....3

State v. Mecham, 186 Wn.2d 128, 380 P.3d 414 (2016).....2

State v. Smith, 88 Wn.2d 127, 559 P.2d 970 (1977).....1

State v. Smith, 130 Wn.2d 215, 922 P.2d 811 (1996).....4

Washington Court of Appeals Decisions

Bokor v. Dep’t. of Licensing, 74 Wn. App. 523, 874 P.2d 168 (1994).....4

O’Neill v. Dep’t of Licensing, 62 Wn. App. 112, 813 P.2d 166 (1991).....4

State v. Avery, 103 Wn. App. 527, 13 P.3d 226 (2000).....5, 6

State v. Gillenwater, 96 Wn. App. 667, 980 P.2d 318 (1999).....2, 3, 8

State v. Griffith, 61 Wn. App. 35, 808 P.2d 1171 (1991).....4

State v. Sosa, 198 Wn. App. 176, 393 P.3d 796 (2017).....2

United States Supreme Court Decisions

Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710, 1714, 173 L. Ed. 2d 485 (2009).....1

Birchfield v. North Dakota, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016)....1

Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).....2

Schneekloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).....2

Washington State Constitution

WA Const. Art. I, Sec. 7.....2

United States Constitution

U.S. Const. Amend IV.....1, 2

Out of State Court Decisions

People v. Brodeur, 189 Ill.App.3d 936, 545 N.E.2d 1053 (Ill. App. 2 Dist., 1989).....8

Saucier v. State, 869 P.2d 483 (AK Ct. App., 1994).....8

State v. Finch, 24 Ohio App.3d 38, 492 N.E.2d 1254 (Ohio App., 1985)...5

State v. Taylor, 3 Ohio App. 3d 197, 444 N.E.2d 481, 482 (OH App., 1981).....8

Miscellaneous Resources

Stuster, Jack , U.S. Department of Transportation, NHTSA, Final Report,
The Detection of DWI at BACs Below 0.10, DOT HS-808-654 (Sept. 12,
1997).....7

A. ARGUMENT

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

The City confuses the rationale for admitting evidence of refusal of an evidentiary breath test with admitting evidence of refusal of a PBT. An evidentiary breath test is administered after a person has been arrested for DUI. A PBT is administered before someone has been arrested for DUI. In the instant case, Ms. Kaufman was not arrested for DUI; she was arrested for an outstanding warrant. The plurality opinion in *Baird* makes clear that an evidentiary breath test search incident to arrest must be done pursuant to a DUI arrest. *State v. Baird*, 187 Wn.2d 210, 222, 386 P.3d 239, 245 (2016) (“the Fourth Amendment permits breath tests as a search incident to arrest for *drunk driving*”) (emphasis added) (citing *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2184, 195 L. Ed. 2d 560 (2016)). The Washington Supreme Court has stated that the search incident to arrest is “restricted in time and place in relation to the arrestee and the arrest”. *State v. Smith*, 88 Wn.2d 127, 135, 559 P.2d 970 (1977). Therefore, the search incident to arrest for an outstanding bench warrant, such as in the instant case, would be limited to searching Ms. Kaufman’s person for weapons. *See, e.g., Arizona v. Gant*, 556 U.S. 332, 335, 129 S. Ct. 1710,

1714, 173 L. Ed. 2d 485 (2009) (citing *Chimel v. California*, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969)).

A breath test is a search under the Fourth Amendment and under article I, section 7. *Baird*, 187 Wn.2d at 218 (citing *State v. Garcia-Salgado*, 170 Wn.2d 176, 184, 240 P.3d 153 (2010)).¹ Therefore, a comment on the refusal to subject oneself to a Fourth Amendment / Article I, Section 7 search is impermissible. *State v. Mecham*, 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).

i. Ms. Kaufman was not under arrest for DUI at the time Ofc. Tyler requested a PBT.

In cases of DUI, evidence that a person has had “something to drink” is insufficient to convict, and likely insufficient to establish probable cause. *See State v. Gillenwater*, 96 Wn. App. 667, 671, 980 P.2d 318 (1999). Similarly, the smell of alcohol, coming from a person over the age of 21, does not establish probable cause that he or she has committed a

¹ The City cites *State v. Sosa*, 198 Wn. App. 176, 393 P.3d 796 (Div. 3, 2017) for the proposition that the prosecution is allowed to elicit evidence of refusal of the PBT. The *Sosa* court relied on *Baird, supra*, in its holding. This issue was not fully fleshed out in the *Sosa* opinion as it was raised by the appellant as a SAG, alleging ineffective assistance of counsel. However, it does appear that Mr. Sosa was under arrest for vehicular assault by DUI at the time he was asked to submit to a PBT, which would make it a search incident to arrest for DUI.

crime. *Id.* One can legally drink some alcohol and drive without committing the offense of driving under the influence. *Id.* Therefore, observations that someone has consumed some alcohol and then driven, alone, does not amount to facts and circumstances known to the officer at the time of the arrest that would warrant a reasonably cautious person to believe that an offense is being committed, because consuming some alcohol and driving is not an offense. *See State v. Hurd*, 5 Wn.2d 308, 316, 105 P.2d 59 (1940) (“The law recognizes that a person may have drunk liquor and yet not be under the influence of it. It is not enough to prove merely that a driver had taken liquor.”). Something more is necessary to amount to probable cause to arrest.

Washington courts have typically required a substantial factual basis to find the existence of probable cause to arrest for DUI. The cases cited below support the assertion that something beyond driving and evidence of some consumption is needed to arrest for DUI. *See, e.g., City of College Place v. Staudenmaier*, 110 Wn. App. 841, 43 P.3d 43 (2002) (probable cause found where defendant smelled strongly of alcohol, his eyes were bloodshot and watery, he admitted to drinking 5-6 beers, and failed three of four field sobriety tests); *Gillenwater*, 96 Wn. App. at 668-69 (probable cause found where defendant was in an accident caused by another, smelled strongly of alcohol and his vehicle smelled strongly of

alcohol, had a cooler full of beer in his car; three empty beer cans were found on his floorboard, and was incoherent); *State v. Smith*, 130 Wn.2d 215, 922 P.2d 811 (1996) (probable cause found where defendant had strong odor of intoxicants, poor finger dexterity, bloodshot and watery eyes, failed several field sobriety tests, and gave a PBT of 0.12); *Bokor v. Dep't. of Licensing*, 74 Wn. App. 523, 874 P.2d 168 (1994) (probable cause found where defendant involved in a car accident, had strong odor of intoxicants, swayed while talking to officer, performed field sobriety tests badly, and gave a PBT of 0.21); *O'Neill v. Dep't of Licensing*, 62 Wn. App. 112, 813 P.2d 166 (1991) (probable cause found where defendant crashed his car into numerous parked cars, had strong odor of intoxicants, watery and bloodshot eyes, slurred speech, staggered as he walked, and was belligerent); *State v. Griffith*, 61 Wn. App. 35, 808 P.2d 1171 (1991) (probable cause found where defendant crossed center line, was weaving in his lane, struck a post sign, had a strong odor of intoxicants, watery and bloodshot eyes, slurred speech, and failed several field sobriety tests).

Courts in sister states have recognized the need for a substantial basis required to make a valid arrest for DUI. For example, “[w]here a police officer had not observed the arrestee driving in an erratic or unsafe manner, had not witnessed impaired motor coordination, and had not

instructed the arrestee to perform field sobriety tests, the officer did not have probable cause to arrest the driver for [DUI]; i.e., the mere appearance of drunkenness (bloodshot eyes, slurred speech, the odor of alcohol) is not sufficient to constitute probable cause for arrest for driving while under the influence.” *State v. Finch*, 24 Ohio App.3d 38, 492 N.E.2d 1254 (Ohio App., 1985). That court went on to explain:

In the case at bar, there is no evidence that the officer witnessed any impaired motor coordination on the part of appellee, and it is not a violation of the law to drive smelling of alcohol, or with bloodshot eyes, a flushed face, or slurred speech. In other words, merely appearing to be too drunk to drive is not, in our opinion, enough to constitute probable cause for arrest [for DUI]. Had Ranger Jones instructed appellee to perform field sobriety tests prior to placing him under arrest, and had appellee failed the tests, she would have had reasonable grounds to believe that he was operating the vehicle while under the influence of alcohol, at which time she would have had probable cause to arrest appellee.

Finch, 24 Ohio App.3d at 40. Every case described above cites some combination of a PBT, failed FSTs, erratic and dangerous driving, and odor of alcohol coming specifically from the defendant.

Contrastingly, in *Avery*, the court found there was not enough indication of intoxication at the time of arrest to justify probable cause to arrest. *State v. Avery*, 103 Wn. App. 527, 541, 13 P.3d 226 (2000). There, the officers smelled an odor of intoxicants on the defendant’s breath, the

defendant kept falling asleep, the defendant's vehicle had been involved in a fatal accident where the defendant struck a pedestrian located on a curb, and the defendant had admitted to having consumed a couple of drinks. *Avery*, 103 Wn. App. at 530, 541. The court determined that those facts did not rise to the level of probable cause to arrest for driving under the influence. *Id* at 541.

In the instant case, there was insufficient evidence of impairment to justify an arrest of Ms. Kaufman for DUI. Even though the officer made the perfunctory observations of a flushed face and bloodshot eyes, these observations are also consistent with common occurrences such as caused by fatigue, or for any other number of innocuous, commonplace reasons. Of course, watery eyes can be caused by any of the following non-exclusive reasons: allergy (e.g. to mold, dander, dust), conjunctivitis, environmental irritants (e.g. smog or chemicals in the air, wind, strong light, blowing dust), foreign bodies and abrasions, infection, irritation, eyestrain, laughing, vomiting, yawning, dry eyes, straining or coughing, cold, or crying.²

In fact, watery eyes or even bloodshot eyes are such vague, indeterminate, non-probative observations that they cannot be considered as indicators of impairment for purposes of DUI detection. NHTSA released a

² U.S. Department of Health and Human Services, U.S. National Library of Medicine, National Institutes of Health, *Watery eyes* <<http://www.nlm.nih.gov/medlineplus/ency/article/003036.htm>> (accessed July 21, 2009); *Watery eyes*.

report in 1997 that removes “bloodshot eyes” as an indicator of impairment.

Specifically, the report states:

Finally, some cues were eliminated because they might be indicators more of social class than of alcohol impairment. For example, officers informed us that a flushed or red face might be an indication of a high BAC in some people. However, the cue also is characteristic of agricultural, oil field, and other outside work. Similarly, bloodshot eyes, while associated with alcohol consumption, also is a trait of many shift workers and people who must work more than one job, as well as those afflicted by allergies. A disheveled appearance similarly is open to subjective interpretation. We attempted to limit the recommendation to clear and objective post-stop behaviors.

Stuster, Jack , U.S. Department of Transportation, NHTSA, Final Report, *The Detection of DWI at BACs Below 0.10*, DOT HS-808-654 (Sept. 12, 1997), p. E-10. In that study, law enforcement agencies recorded driving and post-stop cues observed for all enforcement stops, regardless of the disposition of the stop. The BACs of all drivers who exhibited objective signs of having consumed alcohol also were recorded. “By collecting data about all enforcement stops that were made, it was possible to calculate the proportions of the stops in which specific cues were found in association with various BAC levels.” *Id* at p. i. Therefore, the report concluded, observations concerning bloodshot eyes were not considered a clear, objective indicator of alcohol impairment.

Though the officer detected an odor of alcohol on Ms. Kaufman, the smell of alcohol, coming from a person over the age of 21, does not establish probable cause that he or she has committed the crime of DUI. *Gillenwater*, 96 Wn. App. at 671. As courts in sister states have phrased it: “The mere odor of alcohol about a driver’s person, not even characterized by such customary adjectives as “pervasive” or “strong,” may be indicia of alcohol ingestion, but is no more a probable indication of intoxication than eating a meal is of gluttony.” *Saucier v. State*, 869 P.2d 483, 486 (AK Ct. App., 1994) (quoting *State v. Taylor*, 3 Ohio App. 3d 197, 444 N.E.2d 481, 482 (OH App., 1981)).

Speeding does not *manifestly* imply that the defendant was “under the influence”. Bloodshot eyes does not *manifestly* imply “under the influence”. The odor of alcohol may imply the “consumption of alcohol” but that is the only inference that may be drawn. “Bloodshot eyes” and “odor of alcohol” are qualitative rather than quantitative analyses. Qualitative analysis is to detect an element or substance in a sample. Quantitative analysis is to determine the amounts of elements or groups in a sample. Webster’s Third New International Dictionary 1858, 1859 (1981). There is no authority stating that depending upon the strength or weakness of the odor or the extent of bloodshot eyes, a reasonable person could extrapolate and reasonably opine as to “under the influence.” *People*

v. Brodeur, 189 Ill.App.3d 936, 943-44, 545 N.E.2d 1053 (Ill. App. 2 Dist., 1989) (J. McLaren dissenting).

In the instant case, it is clear from Ofc. Tyler's own words that he was conducting a DUI investigation. RP 89. Meaning, that Ms. Kaufman was not under arrest for DUI at the time of Ofc. Tyler requesting the PBT.

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

The City appears to concede that the following statements by Ofc. Tyler were improper: (1) if someone refuses to perform FSTs then it is evidence of being under the influence; (2) that if someone refuse to submit to a PBT then it is evidence of being under the influence; (3) that if someone refuses to submit to the BAC then it is evidence of being under the influence. However, the City apparently believes that this error was harmless beyond a reasonable doubt.

Ofc. Tyler spelled out Ms. Kaufman's alleged consciousness of guilt for the jury, not once, not twice, but three times in succession. Ofc. Tyler invaded the province of the jury by detailing what a guilty conscious supposedly looks like and implicated Ms. Kaufman in doing so. There is scant evidence of impairment in this case:

- The speed zone is normally 35 miles per hour. RP 147. Ms. Kaufman was only visually estimated to be travelling 5 miles

per hour over the speed limit. There was no speed measuring device used. RP 102.

- Ms. Kaufman pulled over to the side of the roadway when indicated and she was not having a hard time maintaining a straight line when driving. RP 105.
- Ms. Kaufman signaled while she was changing lanes and was able to turn in a safe manner. RP 107.
- Ms. Kaufman was observed to have bloodshot eyes and a flushed face when she was crying. RP 110.
- Ms. Kaufman was observed to have fair speech, fair coordination, and “slight” impairment. RP 98. Her speech was not slurred.
- No objective indicators of intoxication were presented: no FSTs were performed and no breath test was administered.

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

B. 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 12th day of November, 2018

Respectfully submitted,

s/ Sean M. Downs
Sean M. Downs, WSBA #39856
Attorney for Appellant
GRECCO DOWNS, PLLC
500 W 8th Street, Suite 55
Vancouver, WA 98660
(360) 707-7040
sean@greccodowns.com

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 November 12, 2018 to email address Nicholas.Barnabas@cityofvancouver.us. Service was made by email pursuant to the Respondent's consent.

s/ Sean M. Downs
Sean M. Downs, WSBA #39856
Attorney for Appellant
GRECCO DOWNS, PLLC
500 W 8th Street, Suite 55
Vancouver, WA 98660
(360) 707-7040
sean@greccodowns.com

GRECCO DOWNS, PLLC

November 12, 2018 - 10:44 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51202-5
Appellate Court Case Title: City of Vancouver, Respondent v Melissa Nicole Kaufman, Petitioner
Superior Court Case Number: 16-1-02138-7

The following documents have been uploaded:

- 512025_Briefs_20181112224358D2923440_4961.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was Kaufman Appellant Reply Brief.pdf

A copy of the uploaded files will be sent to:

- nicholas.barnabas@cityofvancouver.us

Comments:

Sender Name: Sean Downs - Email: sean@greccodowns.com
Address:
500 W 8TH ST STE 55
VANCOUVER, WA, 98660-3085
Phone: 360-707-7040

Note: The Filing Id is 20181112224358D2923440