

FILED

SEP 10 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 282406

IN THE COURT OF APPEALS OF THE  
STATE OF WASHINGTON

DIVISION III

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STATE OF WASHINGTON,

Respondent,

vs.

ARTHUR JAMES BERGER, JR.,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
OF YAKIMA COUNTY, WASHINGTON

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THE HONORABLE DAVID ELOFSON, JUDGE

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BRIEF OF RESPONDENT

---

JAMES P. HAGARTY  
Prosecuting Attorney

Kevin G. Eilmes  
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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether Arthur James Berger, Jr.'s refusal to submit to a blood draw was admissible in the absence of testimony that a "qualified technician" was available for the draw?
2. Whether the refusal was properly admitted in light of the fact that Berger made a request for an attorney?
3. Whether Berger was subject to an enhanced penalty as a result of the refusal?
4. Whether the State established, beyond a reasonable doubt, each and every element of the offense of attempting to elude a pursuing police vehicle?
5. Whether the trial court had authority to impose sixty months of probation on a gross misdemeanor conviction of driving under the influence?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The blood draw refusal was properly admitted, as Berger clearly refused the blood draw, and the admissibility of the refusal does not depend on whether the results would themselves have been admissible.

2. The refusal was properly admitted, as Berger's request for an attorney was only made after the refusal was communicated.
3. There was no enhanced penalty; the court imposed a sentence which was comprised of suspended time, as well as actual jail time which was nonsuspendable.
4. Sufficient evidence supported the conviction for attempting to elude a pursuing police vehicle.
5. The trial court had the authority to impose sixty months of probation pursuant to statute and clear legislative intent.

## II. STATEMENT OF THE CASE

The State adopts the Statement of the Case contained in Berger's opening brief. RAP 10.3

## III. ARGUMENT

### **1. Refusal evidence is admissible whether or not the test, if taken, would have resulted in admissible evidence.**

The admission or exclusion of evidence is reviewed for abuse of discretion. State v. Griswold, 98 Wn. App. 817, 823, 991 P.2d 657 (2000). A court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds, or its discretion is exercised for untenable reasons. State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995). A court acts unreasonably if its decision is

outside the range of acceptable choices given the facts and the relevant legal standard. Id.

RCW 46.61.517 provides that a refusal to submit to a breath or blood test, pursuant to the implied consent statute, RCW 46.20.308, is admissible in criminal prosecutions. The Supreme Court has considered the legislative history of RCW 46.61.517, and concluded that the determination that refusal evidence is relevant and fully admissible to infer guilt or innocence was clear. Further, the Legislature could condition the right to refuse a blood or breath test, by so providing that a refusal could be used as evidence in a criminal trial. State v. Long, 113 Wn.2d 266, 272-73, 778 P.2d 1027 (1989).

In the instant case, Berger maintains that the court erred in denying his motion to exclude the blood draw refusal. While there is no dispute that Trooper Rutherford read the implied consent warnings to Mr. Berger, Berger argues that the State presented no evidence as to the qualifications of the ambulance personnel, and that further, since the Trooper did not provide access to counsel before administering a test, the refusal should not have been admitted. He is mistaken.

This issue was settled by Division I of the Court of Appeals in State v. Cohen, 125 Wn. App. 220, 104 P.3d 70 (2005). There, the court held that the trial court had erred in suppressing refusal evidence, as the

basis for the suppression was that there had been no quality assurance procedure performed on the instrument which would have been used to test the defendant's breath, and that therefore any test results would have been inadmissible. Id., at 222-23.

In reversing the suppression order, the Court of Appeals stated that:

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. The hypothetical admissibility of the results of a test not taken is irrelevant to a consciousness of guilt analysis. The court erred in refusing the evidence on this basis.

Id., at 224-25.

Mr. Berger was properly given his implied consent warnings. He clearly refused, thus rendering irrelevant any consideration as to the admissibility of the blood draw.

Similarly, it cannot be overstated that Berger had clearly voiced his refusal, *then* requested a lawyer. **(Trial RP 18)** Thus, the ability to consult counsel before giving a sample was irrelevant with respect to a refusal to give such a sample.

The trial court did not abuse its discretion when it denied the motion to exclude.

**2. Mr. Berger was not subjected to an enhanced penalty, and notice pleading was not required for the court to impose the nonsuspendable jail time as required by statute.**

Berger's reliance upon case authority interpreting the notice pleading requirements of the Sentencing Reform Act, and the provisions themselves, RCW 9.94A.533, RCW 9.94A.602, and RCW 9.94A.605, is misplaced. The provisions governing DUI sentences are found instead at RCW 46.61.5055, thus the SRA, and the cases interpreting it, are not applicable. Under Title 46, the minimum, nonsuspendable penalty for a first-offense DUI is two days, rather than one day, if there is a refusal or there is evidence of a breath or blood alcohol concentration of .15 or above. RCW 46.61.5055(1)(b)(i).

This is not an enhanced penalty, as contemplated by State v Pillatos, 159 Wn.2d 459, 482-83, 150 P.3d 1130 (2007), and the cases cited therein. There is no standard range for a gross misdemeanor offense, and in fact, the trial court would have been within its discretion to impose between two and 365 days in custody. There is no notice requirement in RCW 46.61, and the court did not err in imposing the appropriate minimum penalty.

**3. Sufficient evidence supported the conviction for attempting to elude a pursuing police vehicle.**

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Id. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). An appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992).

In reviewing the sufficiency of the evidence, an appellate court not be convinced of guilt beyond a reasonable doubt, but must determine only whether substantial evidence supports the State’s case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303, *review denied*, 119 Wn.2d 1003, 832 P.2d 487 (1992).

Mr. Berger argues here that the State failed to establish the following: 1) that Berger was driving his car when the signal to stop was

given; 2) that Berger had an opportunity to stop immediately after Officer Leary activated his lights and sirens on his patrol car; and 3) that Berger knew Officer Leary was in pursuit.

It is not necessary that a signal to stop be given while the officer is driving a car. In State v. Stayton, 39 Wn. App. 46, 691 P.2d 596 (1984), the Court of Appeals held that the “statutorily appropriate signal *may but need not necessarily* be given by the officer while in a pursuing police vehicle.” Id., at 50. (italics in the original) In that case, a uniformed officer, whose vehicle was appropriately marked, was stationed by the side of the road and signaled to the defendant to stop. Id., at 49. The appellate court elaborated that the expression “while attempting to elude a pursuing police vehicle” modified only the element that specifies the criminal manner of driving after a willful failure to stop, but that it need only follow upon the officer’s giving of the signal. Id., at 50.

In this case, the uniformed officer gave a verbal, audible signal to Mr. Berger to stop. Berger’s response to that signal involved eye contact, a smile, and a gesture involving his finger. He accelerated away. Officer Leary immediately ran to his marked patrol car, and activated his emergency lights and siren. **(TrialRP 149)** In light of Slayton, then, there was a sufficient signal to stop. Furthermore, while Berger denied seeing the officer’s vehicle behind him, his acceleration to over one hundred

miles per hour could convince a rational trier of fact that Berger had an opportunity to stop, and that he knew that Officer Leary was in pursuit. Sufficient evidence supported the conviction.

**4. The DUI sentence was in compliance with clear statutory authority to suspend a period of confinement for up to five years.**

Mr. Berger argues that the trial court did not have authority to impose five years of probation pursuant to RCW 46.61.5055, as the court had already imposed a jail sentence of one year. Furthermore, he maintains that the probation, when combined with the jail sentence, exceeds the statutory maximum for the offense. He is incorrect.

District Court and Superior Court exercise concurrent jurisdiction over all misdemeanors and gross misdemeanors committed within their jurisdiction. RCW 3.66.060. Similarly, the Superior Court has original jurisdiction over all misdemeanors. RCW 2.08.010.

It is RCW 3.66.068 which confers upon the sentencing courts the continuing jurisdiction and authority to suspend or defer sentences entered pursuant to RCW 46.61.5055 for up to five years. That period was increased from two years by legislative amendment in 1999. LAWS OF 1999, ch. 56, sec. 2.

Accordingly, the DUI sentencing statute provides:

In addition to any nonsuspendable and nondeferrable jail sentence

required by this section, whenever the court imposes less than one year in jail, the court shall also suspend but shall not defer a period of confinement for a period not exceeding five years.

...

RCW 46.61.5055(11)(a).

In the instant case, the court imposed the minimum, nonsuspendable jail time of two days in jail as required by RCW 46.61.5055(1)(b)(i). This is less than one year, so the remaining period of confinement, 363 days, was suspended for five years. Statutory language clear on its face does not require or permit judicial interpretation. State v. Keeney, 112 Wn.2d 140, 142, 769 P.2d 295 (1989), *cited in* State v. Sparks, 119 Wn.2d 204, 209, 829 P.2d 1096 (1992).

Furthermore, Avlonitis v. Seattle District Court, 97 Wn.2d 131, 641 P.2d 169, 646 P.2d 128 (1982), cited by Berger in his opening brief, is of doubtful authority here. Not only does it predate the amendments to RCW 3.66.068, it relies on a pre-SRA case interpreting RCW 9.95.210, in turn made applicable to gross misdemeanors, for the proposition that a municipal court could not suspend a sentence for any longer than the term of the sentence actually imposed. Id., at 134-35.

In its current incarnation, RCW 9.95.210 provides that a suspension may extend for the maximum term of sentence, or up to two years, whichever is longer. RCW 9.95.210 conflicts with RCW 3.66.068,

and RCW 46.61.5055, which are specific to DUI sentences, and thus supersede the older enactment. A more specific statute supersedes a general statute only if the two statutes pertain to the same subject matter and conflict to the extent that they cannot be harmonized. In re the Estate of Kerr, 134 Wn.2d 328, 343, 949 P.2d 810 (1998).

Also, In re Personal Restraint of Brooks, 166 Wn.2d 664, 211 P.3d 1023 (2009), is easily distinguished from the facts present here. Again, that case interprets the combination of confinement and community custody under the SRA. Id., at 675.

#### IV. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the conviction on Count 1, and the sentence imposed on Count 2.

Respectfully submitted this 8<sup>th</sup> day of September, 2010.

  
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