

NO. 289702-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

FILED

DEC 15 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

THE STATE OF WASHINGTON, Respondent

v.

TROY HAMILTON TRUSLEY, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 09-1-00455-6

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

TERRY J. BLOOR, Chief Deputy
Prosecuting Attorney
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STATEMENT OF FACTS

Cindy Goulet and three other women were riding bicycles, on Columbia Park Trail in Kennewick, Washington, on Saturday, May 9, 2009, as part of the Inland Empire Bike Ride, an official 25-mile ride. (02/01/10, RP 9, 33). They were bicycling westward when the defendant came up from behind in his vehicle and collided with Ms. Goulet. (02/01/10, RP 21, 76). Ms. Goulet suffered two broken ribs, a cracked rib, and a concussion. (02/01/10, RP 10-11).

The defendant was traveling between 32.32 to 37 miles per hour, according to police accident reconstructionist, Michael Bowe. (02/01/10, RP 109-10). The speed limit is 25 miles per hour. (02/01/10, RP 67). Drug Recognition Expert, Chris Bennett, examined the defendant and concluded that he was under a central nervous system (CNS) stimulant, such as methamphetamine, and was unable to operate a motor vehicle safely. (02/01/10, RP 148-49).

Toxicologist, Brittany Ball, examined blood drawn from the defendant and found that he had 0.3 milligrams per liter of methamphetamine in his system. (02/02/10, RP 186). Ms. Ball stated that methamphetamine is an active drug, and if it is in your system, it is active. (02/02/10, RP 191).

The defendant had waived a jury, and the trial court found him guilty of Vehicular Assault. (CP 12; 02/02/10, RP 302). This appeal follows. (CP 28).

ARGUMENT TO ISSUES

1. **THE INFORMATION DOES ALLEGE THAT THE DEFENDANT CAUSED THE INJURY TO MS. GOULET.**

The Information is set out as follows:

COUNT I

That the said TROY HAMILTON TRUSLEY in the County of Benton, State of Washington, on or about the 9th day of May, 2009, in violation of RCW 46.61.522(1)(a) and/or (b), did operate or drive a vehicle in a reckless manner and/or did operate or drive a vehicle

while under the influence of central nervous system stimulant **and caused substantial bodily harm to another**, to-wit: broken ribs inflicted on Cindy Goulet, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Washington. (Emphasis added) (CP 1).

The Information is in the language of the statute. The State will accept any suggestion on how the element, that the defendant's driving caused substantial bodily harm, could be more clear.

The defendant did not object to the Information at trial. However, the State does not believe that the Court has to review the Information liberally in favor of its validity, under *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991). On its face, the Information specifically alleges the necessary elements.

2. THE DEFENDANT'S JURY WAIVER WAS KNOWING AND VOLUNTARY.

A. The trial court need not inform a defendant who waives a jury trial that a jury verdict must be unanimous.

The following syllogism applies:

The trial court need not advise a defendant pleading guilty that a jury must be unanimous.

The trial court's colloquy and advice of rights to a defendant waiving a jury need not be as extensive as to a defendant pleading guilty.

Therefore, the trial court need not advise a defendant waiving a jury of the requirement of juror unanimity.

The defendant argues on appeal that his jury waiver was not knowing because the trial court did not advise him a jury had to be unanimous. However, a waiver of a jury trial does not require an extended colloquy. The trial court need not insure that the defendant knows all the benefits and risks of both options. *State v. Pierce*, 134 Wn. App. 763, 771, 142 P.3d 610 (2006).

As stated in *Pierce*, a trial court must undertake a full colloquy with a defendant who wishes to proceed pro se or plead guilty. In contrast, it is easier to waive a jury, and requires only a personal expression of waiver from the defendant.

Even when the defendant pleads guilty, the trial court is not required to advise a defendant that the jury must unanimously convict him or her. CrR 4.2(g). The standard "Statement of Defendant on Plea of Guilty" states only:

5. I Understand I Have the Following Important Rights, and I Give Them All Up by Pleading Guilty:

- (a) The right to a speedy and public trial by an impartial jury in the county where the crime is alleged to have been committed;

CrR 4.2(g).

Likewise, the trial court is not required to inform the defendant of a right to juror unanimity at the Preliminary Appearance. CrR 3.2.1(e)(1).

Therefore, advising the defendant that a jury would have to be unanimous is not necessary for a valid waiver. The Court Rules do not require such an advisement on more important hearings, like a guilty plea. No case has stated that the trial court must advise a defendant of the requirement of juror unanimity before allowing a jury waiver.

B. Regardless of the juror unanimity issue, the written waiver and the court's colloquy establish the defendant voluntarily waived a jury.

A defendant's waiver of a jury is knowing, voluntary, intelligent, and free from improper influences where a waiver is submitted by the defendant in writing after receiving advice of counsel; the defendant indicates that he understands the right to a jury trial after it is explained by the trial court, and the defendant indicates to the trial court that the right is freely and voluntarily waived. *State v. Pierce*, 134 Wn. App. at 771.

Some factors to consider in determining the voluntariness:

- The defendant's experience and circumstances.
- Whether there is a written waiver. If so, it is "strong evidence" that a defendant has validly waived his right to a jury trial.
- Whether the defendant's attorney represents that the client has knowingly, intelligently and voluntarily waived a jury.
State v. Pierce, 134 Wn. App. at 771.

These factors argue in favor of a valid waiver. The circumstances were that the defendant had methamphetamine in his system and struck an innocent bicyclist. The defendant probably concluded that a jury would have less sympathy than a judge with his argument that he did not cause the victim's injuries. Further, the written waiver states he has weighed the facts of the case with his attorney. (CP 12). His attorney stated that he was fully informed and prepared the Waiver of Jury Trial. (01/14/10, RP 3).

Further, the trial court's colloquy with the defendant was adequate. The defense attorney told the trial court that she discussed the waiver with the defendant and stated that he was fully informed. The trial court advised the defendant he had a right to a 12-person jury trial, ensured that he understand the right, and the defendant stated that he was giving up that right. (01/14/10, RP 3).

This colloquy is consistent with others which have passed muster on appeal, such as *State v. Pierce*, 134 Wn. App. at 767-768; *State v. Ramirez-Dominguez*, 140 Wn. App. 233, 241, 165 P.3d 391 (2007); *State v. Donahue*, 76 Wn. App. 695, 696, 887 P.2d 485 (1995); and *State v. Bugai*, 30 Wn. App. 156, 157, 632 P.2d 917 (1981).

In *State v. Pierce*, the following exchange occurred in open court:

[Defense counsel]: ...I have gone over the situation with Mr. Pierce and he has indicated that he would like to waive jury at this time, so I would

file a waiver. I believe it is set before Judge Brosey.

THE COURT: Mr. Pierce,...[defense counsel] has presented the court with a waiver of jury trial. Do you understand that by waiving your right to a jury trial, that you waive your right to have your case heard by 12 people?

THE DEFENDANT: Yes.

THE COURT: And do you understand that all 12 people have to agree on a verdict?

THE DEFENDANT: Yes.

THE COURT: And do you understand that if you waive jury trial, your case will be heard by one person, a judge?

THE DEFENDANT: Correct.

THE COURT: And are you doing this freely and voluntarily?

THE DEFENDANT: Sir.

THE COURT: I'll approve the waiver subject to acceptance by the trial judge.

State v. Pierce, 134 Wn. App. at 767-68.

At the beginning of the trial, the trial judge had this colloquy:

THE COURT: Mr. Pierce, I want to remind you, you have the right to have this matter heard by the Court sitting with a 12 person jury. That's automatic. You don't have to ask for that. I have before me a signed waiver of jury trial which is dated the 11th of January which was approved by Judge Hall subject to my accepting it. Do you have any question about your right to trial by jury?

THE DEFENDANT: No.

THE COURT: Is it your request that this matter be heard by me?

THE DEFENDANT: Yes.

State v. Pierce, 134 Wn. App. at 768.

In *State v. Bugai*, the trial court noted that there was no written jury waiver in the file and the following occurred:

MR. NEAL (Defense Counsel): I will take care of that, Your Honor.

MS. ANTONIK (Deputy Prosecuting Attorney): But perhaps the Defendant can indicate at this time his desire to so waive on the record.

MR. NEAL: Mark Bugai, do you waive a jury, request for a jury, is that correct?

THE DEFENDANT: Yes, sir.

MR. NEAL: We discussed the right, your right to have a jury?

THE DEFENDANT: That's correct.

MR. NEAL: And you feel that, upon my recommendation, that a waiver of a jury and have all issues tried before a judge is proper and your decision, is that right?

THE DEFENDANT: That's correct.

THE COURT: For the record then, I would like a form completed for the file.

MR. NEAL: Yes.
State v. Bugai, 30 Wn. App. at 157.

The following is a colloquy of *Ramirez-Dominguez*:

With the help of a Spanish interpreter, Ramirez-Dominguez told the trial court ... that he had gone over the waiver and its meaning with his trial attorney. Additionally, defense counsel told the trial court that counsel communicated with his client through "a number of discussions" about the waiver and that his client decided to "try this case in front of a judge." ... [T]he trial court asked Ramirez-Dominguez whether he understood his right to a trial by jury of 12 people and whether he understood that by waiving, he was also giving up that right.

State v. Ramirez-Dominguez, 140 Wn. App. at 241.

The following is a colloquy of *State v.*

Donahue:

THE COURT: As I noted before formally commencing the trial, there is no written waiver of jury trial in the file.

Mr. Donahue, it is my understanding that you have elected to proceed with this trial with the Court sitting as both the trier of the fact and the judge of the law. Is that accurate?

THE DEFENDANT: Yes, sir.

THE COURT: Do you wish to proceed without a jury?

THE DEFENDANT: Yes, sir.

THE COURT: You understand you have a right to a jury trial, but you are waiving that right. You understand that?

THE DEFENDANT: Yes sir.

THE COURT: And that's your intent?

THE DEFENDANT: Yes, sir.

THE COURT: And that done after conference with your attorney?

THE DEFENDANT: Yes.

THE COURT: All right.
State v. Donahue, 76 Wn. App. at 696.

In the present case, the trial court's acceptance of the waiver was appropriate. The jury waiver was voluntary. The defendant knew what he was doing and thought he would have better success with a judge than a jury. There is no reason to reverse the conviction based on his jury waiver.

3. THE TRIAL COURT WAS CORRECT TO ADMIT THE RESULTS OF THE BLOOD TEST.

A. The defendant did not object to admission of the blood test results, and this Court need not address his argument that its admission was in error.

The defendant objected to the admission of photographs during the testimony of drug recognition expert, Chris Bennett. (02/02/10, RP 160). He did not object to the testimony from toxicologist, Brittany Bell, regarding the results of the test of his blood, which showed the presence of methamphetamine and amphetamine.

(02/02/10, RP 186). This Court should refuse to review the alleged error, under RAP 2.5(a).

B. Nevertheless, the defendant's argument is without merit. The State proved that the proper enzymes and anticoagulants were used regarding the blood test.

The reason the defendant did not object at trial regarding the blood test is obvious: The State made a proper foundation.

The defendant's argument is very technical.¹ WAC 448-14-020(3)(b) refers to an enzyme poison to prevent clotting and an anticoagulant for preservation. Was an enzyme poison and anticoagulant used? The answer is, "Yes." (02/02/10, RP 183, 185). Under WAC 488-14-020, a suitable anticoagulant is sodium fluoride. Was that used? Again, the answer is, "Yes." (02/02/10, RP 160-61). But was enough anticoagulant and enzyme poison used to accomplish the purposes of preservation and

¹ WAC 448-14 attached as "Appendix A."

clotting prevention? There's the rub, argues the defendant. (Appellant's Brief at 14).

There are several problems with this argument. First, the state toxicologist can be assumed to know the proper amounts of enzyme and anticoagulant needed. Certainly, a toxicologist is in a better position than a judge to make that call. Second, because of the reliance on the state toxicologist, the WAC is silent on this point. The defendant cannot claim that the WAC was violated because too little or too much enzyme or anticoagulant was used. Third, WAC 448-14 sets forth *criteria* which must be met for approval of a method of testing blood samples for alcohol. *State v. Clark*, 62 Wn. App 263, 268, 814 P.2d 222 (1991). WAC 448-14 does not specify the specific, approved, testing methods.

In any case, the defendant did not object to the admission of the results of the test, the test met the requirement of WAC 448-14, and the results should have been admitted.

4. **FINDINGS OF FACT, CONCLUSIONS OF LAW ON BENCH TRIAL WERE FILED ON DECEMBER 9, 2010.**

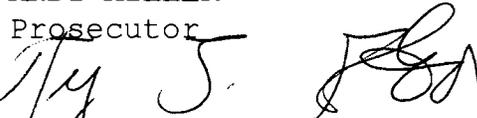
The State should have previously prepared the Findings of Fact and Conclusions of Law. However, the State has now done so, and subsequently filed a Supplemental Designation of Clerk's Papers on December 10, 2010 requesting the Benton County Court Clerk to transmit the findings to the Court of Appeals.

CONCLUSION

The conviction should be affirmed.

RESPECTFULLY SUBMITTED this 14TH day of December 2010.

ANDY MILLER
Prosecutor



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APPENDIX A

WAC 448-14

WAC 448-14-010

Criteria for approved methods of quantitative analysis of blood samples for alcohol.

Any quantitative blood alcohol analysis method which meets the following criteria is approved by the state toxicologist and may be used in the state of Washington. Analysis of urine for estimation of blood alcohol concentrations is not approved by the state toxicologist in the state of Washington.

The blood analysis procedure should have the following capabilities:

(1) Precision and accuracy.

(a) The method shall be capable of replicate analyses by an analyst under identical test conditions so that consecutive test results on the same date agree with a difference which is not more than 3% of the mean value of the tests. This criterion is to be applied to blood alcohol levels of 0.08% and higher.

(b) Except for gas chromatography, the method should be calibrated with water solutions of ethyl alcohol, the strength of which should be determined by an oxidimetric method which employs a primary standard, such as United States National Bureau of Standards potassium dichromate.

(c) The method shall give a test result which is always less than 0.005% when alcohol-free living subjects are tested.

(2) Specificity.

(a) On living subjects, the method should be free from interferences native to the sample, such as therapeutics and preservatives; or the oxidizable material which is being measured by the reaction should be identified by qualitative test.

(b) Blood alcohol results on post-mortem samples should not be reported unless the oxidizable substance is identified as ethanol by qualitative test.

WAC 448-14-020

Operational discipline of blood samples for alcohol.

(1) Analytical procedure.

(a) The analytical procedure should include:

(i) A control test

(ii) A blank test

(iii) Duplicate analyses that should agree to within 0.01% blood alcohol deviation from the mean.

(b) All sample remaining after analysis should be retained for at least three months under suitable storage conditions for further analysis if required.

(c) Each analyst shall engage in a program in which some blood samples containing alcohol are exchanged with other laboratories and tested on a blind basis so that precision and accuracy can be evaluated no less than one time per year.

(2) Reporting procedure.

(a) The results should be expressed as grams of alcohol per 100 ml of whole blood sample.

(b) The analysis results should be reported to two significant figures, using the mathematical rule of rounding.

(c) Blood alcohol results on living subjects 0.0009% or lower shall be reported as negative. Blood alcohol results on post-mortem samples of 0.019% or less shall be reported as negative. (See WAC 448-14-010 (2)(b))

(3) Sample container and preservative.

(a) A chemically clean dry container consistent with the size of the sample with an inert leak-proof stopper shall be used.

(b) Blood samples for alcohol analysis shall be preserved with an anticoagulant and an enzyme poison sufficient in amount to prevent clotting and stabilize the alcohol concentration. Suitable preservatives and anticoagulants include the combination of sodium fluoride and potassium oxalate.

WAC 448-14-030

Qualifications for a blood alcohol analyst.

(1) Minimum qualifications for the issuance by the state toxicologist of a blood alcohol analyst permit shall include college level training in fundamental analytical chemistry with a minimum of five quarter hours of quantitative chemistry laboratory or equivalent, with a passing grade.

(2) The state toxicologist shall issue a blood alcohol analyst permit to each person he finds to be properly qualified, and he shall hold written, oral or practical examinations to aid him in judging qualifications of applicants. Such permits shall bear the signature or facsimile signature of the state toxicologist and be dated.

(3) The blood alcohol analyst permits are subject to cancellation by the state toxicologist if the permittee refuses or fails to obtain satisfactory results on samples periodically distributed to the permittees by the state toxicologist.

[Order 4, § 448-14-030, filed 7/9/70; Emergency and Permanent Order 3, § 448-14-030, filed 9/23/69.]