

FILED
Court of Appeals
Division III
State of Washington
4/18/2019 1:48 PM

COA No. 36320-1-III

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

STATE OF WASHINGTON,

Respondent

v.

EVAN D. SCHRODER

Appellant.

Appeal from Whitman County Superior Court
The Honorable Gary Libey
No. 17-1-00238-38

BRIEF OF RESPONDENT

Merritt Decker
Senior Deputy Prosecuting Attorney
Whitman County
Attorney for Respondent
400 North Main Street
Colfax, WA 99111
(509) 397-6250

TABLE OF CONTENTS

I. ASSIGNMENT OF ERROR.....1

II. STATEMENT OF THE CASE.....1

III. ARGUMENT.....1

IV. CONCLUSION.....6

TABLE OF AUTHORITIES

CASES

State v. Duncan, 146 Wn.2d 166, 43 P.3d 513 (2002).....1
State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994).....1
State v. McFarland, 127 Wn. 2d 322, 899 P.2d 1251 (1995).....3,4

RULES

RAP 2.5(a).....2
RAP 2.5(a)(3).....3

I. ASSIGNMENT OF ERROR

The Defendant lists several assignments of error. However, because the Defendant's arrest for DWLS was never challenged until this appeal, the only issue before this Court is whether the Findings of Facts pertaining to the Defendant's 3.6 Motion support the trial court's conclusion that there was probable cause for the DUI arrest.

II. STATEMENT OF THE CASE

The State agrees with the Defendant's statement of the case.

III. ARGUMENT

All issues presented by the Defendant in his appeal stem from the Defendant's Motion to Suppress per CrR 3.6 which was filed February 23, 2018 (attached hereto as EXHIBIT A), and the decision on the motion which is presented in the Courts Findings of Fact and Conclusions of Law filed August 10, 2018 (attached hereto as EXHIBIT B).

According to Defendant's brief, and the State agrees, there are no disputed findings of facts on this issue and therefore they are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). In this matter, the Defendant is disputing the conclusions of law found when the trial Court denied his CrR 3.6 motion. The Appellate Court is to review conclusions of law pertaining to a CrR 3.6 motion de novo. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002).

There was one issue presented in the Defendant's Motion to Suppress per CrR 3.6: "Was there probable cause to arrest for DUI." CP 79. Nowhere in the Defendant's motion is there a challenge or even mention of an arrest for driving while license suspended (DWLS). The only place where DWLS is mentioned is in the police report in which the Defendant attached to his motion. The officer writes in his report "... I immediately recognized him as Evan Schroder. I had arrested Schroder the previous week for DWLS in Tekoa[...] Schroder had been run by Whitcom and he was suspended through Idaho." CP 82.

However, in this appeal, the Defendant is now, for the first time, challenging his arrest for DWLS. To sum up the Defendant's contention, because the trial Court considered observations made by law enforcement after the Defendant was placed under arrest for DWLS, the Court erred because the record is deficient of facts to support probable cause for DWLS.

It is the State's position that because the legality of the initial arrest for DWLS was never challenged, and arguably conceded when the Defendant attached the Officer's police report to his motion, this appeal is the first time this issue has been raised.

Pursuant to RAP 2.5(a), "[t]he appellate court may refuse to review any claim of error which was not raised in the trial court." The rule goes

on to carve out exceptions in which the reviewing court can consider; one of which is if the claim concerns a “manifest error affecting a constitutional right.” RAP 2.5(a)(3). The Washington Supreme Court has made it clear that this exception “is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court. *State v. McFarland*, 127 Wn. 2d 322, 332, 899 P.2d 1251 (1995). Instead, “The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights[.]” *Id.*

The *McFarland* case dealt with two separate cases that were consolidated on the issue of whether a defendant should be allowed to challenge a warrantless arrest for the first time on appeal. *Id.* at 326. The case dealing with defendant McFarland is similar to the situation in the case at hand, the main difference being that the defendant sought relief through an ineffective assistance of counsel claim. *Id.* Prior to trial, McFarland’s counsel moved to suppress certain evidence and challenged other actions by the State, but never challenged the warrantless arrest that occurred or motioned to suppress the evidence stemming from the arrest. *Id.* at 329. The Washington Supreme Court stated that in order for McFarland to convince the Court to consider the alleged constitutional

error, he would have to show that he was actually prejudiced because the “trial court likely would have granted the motion if made.” *Id.* at 333-34. The Court ultimately found no prejudice because the record had substantial information which was arguably sufficient to support probable cause for the challenged arrest. *Id.* at 334 n.2.

The case at hand is very similar because although trial counsel moved to suppress evidence, it never challenged the legality of the initial arrest for DWLS, or moved to suppress the evidence obtained after the now alleged illegal arrest. The only thing argued in the Defendant’s motion in this case was that there was no probable cause to arrest for DUI, and in conclusion stated: “...the Court should suppress all evidence of the defendant’s BAC.”

Applying the reasoning of the court in *McFarland*, this Court should find that the trial court would *not* have granted the motion challenging probable cause for DWLS if it were made. Given the fact that the officer’s report attached to the Defendant’s CrR 3.6 motion included the officer’s knowledge of the Defendant’s suspended license, if the issue would have been raised, this Court can clearly see how a couple of statements from the officer at the hearing would have been more than enough to establish the existing probable cause. These statements were never elicited by the State because the issue was not before the court.

This Court should find that because the legality of the arrest for DWLS was not challenged until this appeal, it would be improper for the Defendant to be granted relief based on an alleged inadequacy in the record to support a constitutional violation that was not raised until post-conviction.

Further, given the fact that probable cause for the initial arrest was not challenged at the time of the suppression hearing, it is the State's position that Findings of Fact *do support* the court's conclusion of law that the officer had probable cause to arrest for DUI. Specifically, the Court found the following:

- Deputy Olin activated his emergency lights and the Defendant drove several more blocks, driving through several stop signs, before bringing his vehicle to a stop. CP 57 (FF 6).
- Once apprehended, Deputy Cox observed that the Defendant had blood shot and watery eyes, that his speech was slow and slurred, and that the Defendant had the odor of alcohol on his person. CP 57 (FF 9).
- Deputy Cox asked the Defendant several times if he would be willing to perform Field Sobriety tests but the Defendant would never give a direct answer. CP 57 (FF 10).

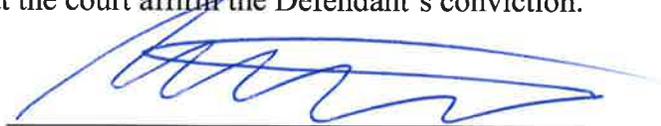
- Deputy Cox asked the Defendant if he would submit to a portable breath tests and the Defendant refused. CP 57 (FF 11).

Now it is true that the court did find that the Defendant was taken into custody and that this occurred prior to some of the observations the court relied upon in finding probable cause for the DUI. CP 57 (FF 8). However, the Defendant being taken into custody is still a *fact* that the court found, and, as argued above, given that it was unchallenged, it was unnecessary at the time for the court to have also found all the facts necessary to establish probable cause for the DWLS as well.

IV. CONCLUSION

The court should affirm the Defendant's conviction because the only issue presented in the contested CrR 3.6 motion was whether there was probable cause to arrest for DUI and the Findings of Fact support the conclusion that probable cause existed for the DUI arrest. It would be unjust for the Defendant to obtain relief now by claiming the facts do not support a finding of probable cause for DWLS when that issue was not raised at the time the court entered its findings.

The State requests that the court ~~affirm~~ the Defendant's conviction.



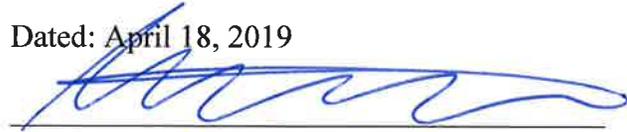
Merritt Decker, WSBA 46248
Senior Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I hereby certify that this day I caused the foregoing document to be served via the Court of Appeals e-filing portal:

Casey Grannis
Nielse, Broman & Koch, PLLC
1908 East Madison
Seattle, WA 98122

Dated: April 18, 2019



Merritt Decker, WSBA# 46248
Senior Deputy Prosecuting Attorney

EXHIBIT A

FILED
Court of Appeals
Division III
State of Washington
4/11/2019 2:17 PM

FILED
23 2018
JILL E. WHELCHER
WHITMAN COUNTY CLERK

17-1-00238-38
MTS 25
Motion to Suppress
2633322



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IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF WHITMAN

STATE OF WASHINGTON,

Plaintiff,

vs.

EVAN SCHRODER,

Defendant.

) Case No.: 17-1-238-38
)
) MOTION TO SUPPRESS
) PER CrR 3.6 and SUPPORTING BRIEF
)
) HEARING DATE: MARCH 26, 2018 @
) 11:00 A.M.

COMES NOW the defendant and moves this Court to suppress evidence of controlled substances and related evidence and statements obtained pursuant to an unlawful search per Article 1, Section 7 of the Washington State Constitution and CrR 3.5 and 3.6.

FACTS

The facts are set forth in the "bodycam" video and LR 16 probable cause statement.

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ISSUE PRESENTED

1. Was there probable cause to arrest for DUI.

ARGUMENT

I. REASONABLE GROUNDS TO ARREST FOR DUI WERE ABSENT.

Evan Schroder turned 21 prior to the arrest date. Therefore, there must be probable cause for a DUI – not minor driving which would only require age and odor. In *O'Neill v. Department of Licensing*, 62 Wn.App. 112, 116 (1991), the court stated: “Probable cause to arrest exists where the totality of the facts and circumstances known to the officers at the time of arrest would warrant a reasonably cautious person to believe an offense is being committed.” (citations omitted.) In *O'Neill* the court found probable cause existed, noting these facts:

1. O’Neill’s car unaccountably collided with three parked cars.
2. Strong odor of alcohol from his breath and clothes.
3. Thick tongued, slurred speech.
4. Hair and clothes messy.
5. Watery and bloodshot eyes.
6. O’Neill wavered when he walked.
7. Belligerent attitude.

See id. at 114-15.

The *O'Neill* facts should be compared to the facts in *State v. Avery*, 103 Wn.App. 527 (2000). *Avery* is unique. Because Avery submitted to a voluntary blood test without having received the implied consent warnings, he argued that it should be suppressed. The State argued that because there was not probable cause to arrest, the warnings were unnecessary. The Court

1 of Appeals agreed. And so what evidence did the Court of Appeals review and conclude to be
2 **insufficient** for probable cause to arrest for DUI?

3 Avery's automobile drifted toward the curb and struck pedestrian Darryl Jacobson. . . .
4 Avery sped away A witness observed him speeding and running traffic lights Avery
5 told the officers he had consumed a couple of drinks Both officers smelled intoxicants on
6 Avery's breath [One officer's] written report notes that Avery had a faint odor of
7 intoxicants and a slight impairment. But his attitude was cooperative, his coordination was good,
8 his clothes were orderly, his face, eyes and speech was good. *Id.* at 530.

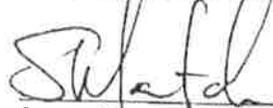
9 No field sobriety tests were performed on Schroder. He was not given the eye test, the
10 portable breath test nor any of the other field test. Based on the video, and given the officer's
11 statements, these facts are more similar to *Avery* than to *O'Neil*.

12
13
14 **CONCLUSION**

15 For the foregoing reasons, the Court should suppress all evidence of the defendant's
16 BAC.

17 Dated this 19th day of February, 2018.

18 MARTONICK LAW OFFICE
19 Attorney for the Defendant

20 
21 Steve Martonick #32213

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DECLARATION OF COUNSEL

I declare under penalty of perjury under the laws of the State of Washington that the foregoing facts are those that I expect to elicit at the suppression hearing held on the above entitled matter. I further declare that the attached exhibits, if any, are true copies.

Dated this 19th day of February, 2018.

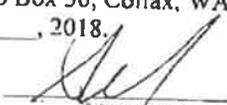


Steve Martonick
Pullman, WA

CERTIFICATE OF SERVICE

I certify that I caused a copy of this document to be served on the Plaintiff by placing in his/her box maintained for purposes of service, hand delivery, faxing, and/or emailing, mailing, postage prepaid to Box 30, Colfax, WA 99111 on this

19 day of Feb, 2018.



Steve Martonick

Narrative:

WHITMAN COUNTY SHERIFF LAW INCIDENT NARRATIVE

Case #:17-S3218

Body/Car Camera:Yes

On 102817 at 0252 hrs, Whitcom advised Whitman County units via emergency tones of a citizen dispute at 135 N Lindsey Street in Tekoa. Whitcom further advised it was reported a person was heard yelling, "Never come on my property again" and then 2 gun shots were heard. Deputy Olin, Sgt Brown and I all responded.

Upon our arrival at 135 N Lindsey Street, Deputy Olin and I spoke with the RP Robert Drollinger inside his house. Drollinger said he woke up and heard someone yelling. Drollinger said the person yelled, "Don't ever come on my property again." Drollinger said he did not know who the person was that yelled. Drollinger said he then heard 2 gun shots behind his house in the alley. Drollinger said when he was on the phone talking with 911, he saw Evan Schroder drive out of his driveway driving a white Ford Expedition with tan on the bottom. Drollinger said he believes the Expedition belongs to Schroder's wife Alex. I asked Drollinger if he actually saw Schroder driving the vehicle. Drollinger said he did not actually see Schroder driving the vehicle. Drollinger said he knows Schroder as the two of them were going to go into business together.

Deputy Olin, Sgt Brown and I began driving around the city limits of Tekoa in an attempt to locate a white Ford Expedition. Deputy Olin was able to locate a white Ford Expedition traveling at a high rate of speed on Alder Street towards Washington Street. Deputy Olin advised Sgt Brown and I that the vehicle was driving through stop signs on Alder Street and that the vehicle was trying to get away from him. Deputy Olin said the vehicle was now heading down Washington Street crossing over Poplar Street. Refer to Deputy Olin's supplement report for further details on his observations.

I was traveling north on Crosby Street towards Poplar Street. I saw a white Ford Expedition quickly turn left into the CFN Gas Pumps across from Tekoa City Hall on Washington Street. I saw the vehicle pull over and turn its light off. I lost sight of the vehicle as I drove around the Wilbur Ellis Building. As I drove into the CFN gas pumps from the Wilbur Ellis side, Deputy Olin had pulled in behind the vehicle with his emergency lights on. I could see that no one was sitting in the driver's seat of the vehicle. No other people were in the vehicle.

I then heard Sgt Brown behind me yelling at a person to get down on the ground. I ran over to Sgt Brown who had a male subject detained at gun point. As I came up behind the male subject who was down on his knee's, I immediately recognized him as Evan Schroder. I had arrested Schroder the previous week for DWLS in Tekoa. I assisted Sgt Brown in handcuffing Schroder. Sgt Brown told me he observed Schroder run from the vehicle. I told Schroder he was under arrest for DWLS. Schroder had been run by Whitcom and he was suspended through Idaho.

Deputy Olin advised Schroder of his full Miranda rights which he said he understood. Schroder was also told he was being audio and video recorded. During the search incident to arrest of Schroder, he was legally carrying a loaded firearm with several fully loaded magazines. Deputy Olin took possession

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of the firearm and later placed it into safekeeping at the Sheriff's Office. See Sgt. Brown's supplement report and body camera video for full details.

Deputy Olin asked Schroder why he took off from him. Schroder said he saw a car but didn't know it was him. See Deputy Olin's supplement report for full details. While Schroder was talking to Deputy Olin, I could smell the strong odor of intoxicants coming from his breath. Schroder's speech was slow and slurred. Schroder's eye's were glossy and bloodshot. Sgt Brown asked Schroder how much he had been drinking. Schroder said he was not intoxicated at all. Schroder said he had been up for 36 hours. Schroder said he had been out checking his traps and was on his way back. Sgt Brown asked Schroder why he parked his vehicle and ran from it. Schroder said he walked and was not running. Schroder said he parked at the gas station and he started to walk.

I placed Schroder in the backseat of my patrol car. I asked Schroder if he would take some voluntary field sobriety tests. Schroder refused to take the tests. I asked Schroder if he would take a voluntary PBT and he refused. I again told Schroder he was under arrest for DWLS and now DUI. I asked Schroder if he shot off any rounds from his handgun in Tekoa tonight. Schroder said he did not shoot any rounds off from his handgun tonight in Tekoa. Schroder said the only shooting he did tonight was on private property in Idaho. No witnesses could be located and no evidence was found that Schroder was responsible for shooting off two rounds from his handgun in Tekoa.

I transported Schroder to the Whitman County jail. Upon arrival at the jail, I processed Schroder for DUI. I read Schroder a copy of his constitutional rights and he signed the form stating he understood them. I again read Schroder a copy of his constitutional rights after he spoke with attorney Steve Martonick. I then read Schroder a copy of his implied consent warnings for breath and he signed the waiver form. I checked Schroder's mouth and began the 15 minute observation period.

During the DUI interview questions, Schroder admitted to having a shot of Jagermeister and half a beer earlier that night and C&D's bar in Tekoa.

Upon completion of the 15 minute observation period, I administered the Draeger Alcotest 9510 to Schroder. Schroder's first breath sample was taken at 0557 hrs with a IR result of .082 and EC result .085. Schroder's second breath sample was taken at 0601 hrs with a IR result of .081 and a EC result of .083. I explained the test results to Schroder and gave him his copy.

The Draeger Alcotest 9510 was administered in accordance to the methods approved by the Washington State Toxicologist.

I transported Schroder to the Whitman Hospital in Colfax as he requested a blood draw. The blood draw was not completed as Schroder was unable to pay for the procedure.

I transported Schroder back to the Sheriff's Office and released him. Schroder was issued his request to a hearing form. I issued Schroder his notice of hearing, conditions of release and promise to appear form. Schroder signed the form which stated he was to appear at the Whitman County Courthouse in Colfax on 103017 at 4:00pm.

I am having criminal citation 720877294 for DUI and DWLS 3rd Degree mailed by the court to Schroder.

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Schroder's vehicle was towed from the scene by Colfax Auto Body.

I completed the Washington State DUI Arrest Report and faxed to the DOL.

I am requesting an additional charge of Attempting to Elude a Police Vehicle based on Deputy Olin's report.

FORWARD CASE TO PROSECUTOR

Deputy T. Cox WCSO P3
Sun Oct, 29 23:13:55 PDT 2017

I certify (declare) under penalty of perjury under the laws of the State of Washington that the foregoing information is true and correct.

Date: _____

Place: _____

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EXHIBIT B

17-1-00238-38
FNFCL 74
Findings of Fact and Conclusions of Law
3635810



FILED
AUG 10 2018
JILL E. WHELCHER
WHITMAN COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WHITMAN

STATE OF WASHINGTON

Plaintiff,

vs.

EVAN DANIEL SCHRODER,

Defendant.

Case No.: 17-1-00238-38

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

This matter came before the Court on Defendant's Motion to Suppress filed on February 23, 2018. A hearing was held on July 18, 2018. The Court having considered briefing by both parties, hearing testimony of Deputy Tim Cox, viewing body camera footage, and after hearing oral argument from both parties, finds as follows:

FACTS

1. On October 28, 2017, Deputy Tim Cox, Deputy Chris Olin, and Sgt. Dan Brown responded to a call of shots fired in the town of Tekoa.
2. The Deputies responded and spoke with the reporting party.
3. After speaking with the reporting party, Deputies obtained a description of the vehicle which had left the scene and believed that Evan Schroder, the Defendant was the driver.

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4. Based on the information provided, the Deputies began to search the town of Tekoa for the suspect vehicle.
5. Deputy Olin was the first to observe the vehicle.
6. Deputy Olin activated his emergency lights and the Defendant drove several more blocks, driving through several stop signs, before bringing his vehicle to a stop.
7. Once the vehicle was stopped, the Defendant exited his vehicle and ran to some nearby buildings.
8. The Defendant was eventually found and taken into custody.
9. Once apprehended, Deputy Cox observed that the Defendant had blood shot and watery eyes, that his speech was slow and slurred, and that the Defendant had the odor of alcohol on his person.
10. Deputy Cox asked the Defendant several times if he would be willing to perform Field Sobriety tests but the Defendant would never give a direct answer.
11. Deputy Cox asked the Defendant if would submit to a portable breath test and the Defendant refused.
12. The Defendant was eventually arrested for DUI.

CONCLUSION

1. The Court finds that based on the information above, Deputy Cox had probable cause to arrest the Defendant for DUI.
2. Because Deputy Cox had probable cause to arrest for DUI, the Defendant's BAC results are admissible at trial.

July 10, 2018



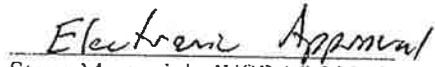
Superior Court Judge

Presented By:



Merritt Decker, WSBA# 46248

Agreed as to Form



Steve Martonick, WSBA# 32212

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WHITMAN COUNTY PROSECUTOR'S OFFICE

April 18, 2019 - 1:48 PM

Transmittal Information

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Appellate Court Case Number: 36320-1
Appellate Court Case Title: State of Washington v. Evan D. Schroder
Superior Court Case Number: 17-1-00238-5

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