

FILED
Court of Appeals
Division III
State of Washington
3/24/2020 4:15 PM
No. 36961-7-III

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

STATE OF WASHINGTON, Respondent

v.

DAVID KALANI GRAY, Appellant

APPEAL FROM THE SUPERIOR COURT
OF OKANOGAN COUNTY
THE HONORABLE CHRISTOPHER CULP
THE HONORABLE HENRY RAWSON

REPLY BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

- A. Mr. Gray's constitutional right to refuse to submit to a preliminary breath test was admitted into evidence, in violation of the defense motions in limine and in violation of his Fourth Amendment and Wash. Const. art. I, § 7 rights and WAC 448-15-030(1).
- B. The evidence was insufficient to sustain the conviction.
- C. The trial court erred in sentencing Mr. Gray in excess of the court's authority and in violation of the Sentencing Reform Act 'washout' provisions.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. An individual has a constitutional right to refuse a search. Under Washington law, admission of the person's refusal to submit to a portable breath test search violates the Fourth Amendment. Must this matter be reversed where evidence of Mr. Gray's constitutional right to refuse the search was admitted?
- B. Must this matter be remanded for resentencing because the trial court erred by including offenses subject to the washout provisions under the SRA?

II. STATEMENT OF FACTS ON REPLY

Mr. Gray relies on the statement of facts presented in his opening brief and emphasizes the following facts for purpose of this reply.

The defense and prosecution agreed, and the court granted the defense motion in limine to preclude any reference, direct or indirect pertaining to the defendant's exercise of his/her constitutional rights. CP 45; RP 83.

The arresting officer testified that Mr. Gray declined the portable breath test. RP 132. The officer arrested him after he declined the test. RP 133.

In closing arguments, the prosecutor stated, "When you put it all together, (inaudible), and you can look at all the elements they have all been satisfied. Then he refused. He refused to take the breath test...." RP 217.

The State calculated an offender score of 9+ with a range of 63-84 months. RP 245; CP 32.

2.2 Criminal History (RCW 9.94A.525):

	<i>Crime</i>	<i>Date of Crime</i>	<i>Date of Sentence</i>	<i>Sentencing Court (County & State)</i>	<i>A or J Adult, Juv.</i>	<i>Type of Crime</i>	<i>DV* Yes</i>
1	Possession of a Controlled Substance Methamphetamine	12/14/13	01/17/14	SPOKANE COUNTY, WA	A	FC	
2	Second Degree Possession of Stolen Property	09/03/12	09/26/12	SPOKANE COUNTY, WA	A	FC	
3	Second Degree Possession of Stolen Property	09/03/12	09/26/12	SPOKANE COUNTY, WA	A	FC	
4	Vehicular Assault Domestic Violence	10/16/06	12/08/06	SPOKANE COUNTY, WA	A	FB	YES
5	Taking a Motor Vehicle Without Permission Second	07/28/05	10/05/05	SPOKANE COUNTY, WA	A	FC	
6	Attempted Burglary in the Second Degree	11/04/98	01/19/99	SPOKANE COUNTY, WA	A	FC	
7	Taking a Motor Vehicle Without Permission Second	10/26/97	06/15/98	SPOKANE COUNTY, WA	A	FC	
8	Taking a Motor Vehicle Without Permission Second	10/26/97	06/15/98	SPOKANE COUNTY, WA	A	FC	
9	Taking a Motor Vehicle Without Permission Second	10/26/97	06/15/98	SPOKANE COUNTY, WA	A	FC	
10	Second Degree Possession of Stolen Property	05/13/97	06/27/97	SPOKANE COUNTY, WA	A	FC	
11	Taking a Motor Vehicle Without Permission Second	10/24/95	06/27/97	SPOKANE COUNTY, WA	A	FC	

2.3 Sentencing Data:

<i>Count No.</i>	<i>Offender Score</i>	<i>Seriousness Level</i>	<i>Standard Range (not including enhancements)</i>	<i>Plus Enhancements*</i>	<i>Total Standard Range (including enhancements)</i>	<i>Maximum Term</i>
1	9+	IV	63 to 84 months		63 to 84 months	10 years

CP 32.

III. ARGUMENT ON REPLY

A. Evidence Of Refusal Of The Preliminary Breath Test Violated Mr. Gray's Constitutional Right To Privacy.

Like the City's argument in *City of Vancouver v. Kaufman*, 10 Wn. App. 2d 747, 450 P.3d 196 (2019), the State's response brief conflates the portable breath test (PBT) governed by WAC 448-14-030(1) with the Draeger breath test governed by RCW 46.20.308(1), (2)(b).

The implied consent statute, RCW 46.20.308, allows refusal or consent to a breath test. RCW 46.20.308(2)(b). By statute, the refusal or results are admissible as evidence of guilt because they are the result of a search incident to arrest, an exception to the warrant requirement. *State v. Baird*, 187 Wn.2d 210, 222, 225, 386 P.3d 239 (2016). The right to refuse is a statutory right, not a constitutional right. *Baird*, 187 Wn.2d at 222.

By contrast, submission to a PBT is not part of the implied consent statute. WAC 448-15-020. A *prearrest* PBT refusal implicates constitutional rights, and admission of the refusal violates both the Fourth Amendment to the U.S. Constitution and art. I, § 7 of the Washington Constitution. *Kaufman*, 10 Wn. App. 2d

at 755. Here, the officer asked Mr. Gray to perform a PBT *before* he arrested him.

The search (PBT) for probable cause is not a search incident to arrest and does not meet any other exception to the warrant requirement. *Kaufman*, 450 P.3d at 204. Mr. Gray retained a constitutional right to refuse to consent to the search and his refusal to offer his consent *cannot be used as evidence against him*. The admission of the refusal evidence improperly penalized him for the lawful exercise of his constitutional right. *Id.* at 202.

Finally, under WAC 448-15-030(1), the operator must advise the subject that the test is voluntary and that it is not an alternative to the evidentiary breath alcohol test. Like the defendant in *Kaufman*, the State presented evidence that the officer told Mr. Gray the PBT was voluntary. (RP 137). However, just like *Kaufman*, the State presented no evidence the officer ever met the WAC requirement of telling Mr. Gray the PBT was not an alternative to any evidentiary breath test. *Kaufman*, 10 Wn. App. 2d at 763. The State's argument that *Kaufman* is distinguishable is incorrect. (Br. Of Resp. at 9).

Where there is a constitutional error, this Court may find such error harmless *only* if convinced beyond a reasonable doubt

that any reasonable jury would reach the same result absent the error, and where the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. *State v. Gauthier*, 174 Wn. App. 257, 270, 298 P.3d 126 (2013). Where the error is not harmless, reversal and a new trial are required. *Id.*

The State relies on the nonspecific statement by the prosecutor that “Mr. Gray refused a breath test” to persuade this Court that it cannot be assumed the jury did not rely on the inadmissible PBT refusal. (Br. Of Resp. at 11). The failure of the prosecutor to be more specific does not solve the problem because the jury was specifically asked : Did the defendant refuse to submit to a test of his or her breath which was requested by a law enforcement officer for the purpose of determining alcohol concentration?” RP 234; CP 121. There is no basis for a jury to understand the prosecutor referred to the evidentiary breath test, not the PBT, nor is there any basis for this Court to make such an assumption.

Finally, as discussed in the opening brief, art. I, § 7 recognizes an individual’s right to privacy with no express limitations. *State v. Cheatham*, 150 Wn.2d 626, 81 P.3d 830 (2003). If the error here, evidence of refusal of an unwarranted

search is found harmless, courts may continue to allow such evidence, resulting an erosion of the constitutional right. It allows juries to consider the evidence, which is violative of the constitutional guarantees to Washington citizens.

**B. Mr. Gray's Offender Score Was Wrongly Calculated
And Requires Remand For A Corrected Sentence.**

Without citation to the record, the State asserts that Mr. Gray's offender score was properly calculated. (Br. Of Resp. at 15). The record does not support the claim.

The criminal history provided to the trial court does not document any convictions between January 19, 1999 and October 5, 2005. CP 32. The washout provisions of the SRA apply, and all offenses before October 5, 2005 must be removed from the offender score. RCW 9.94A.525(1)(c).

The standard range sentence for a level IV seriousness offense with an offender score of '6' is 33-43 months. RCW 9.94A.515. The sentencing court here sentenced Mr. Gray to 64 months, which is outside of the correct standard range. This matter must be remanded to the trial court to resentence Mr. Gray with a corrected offender score and within the standard range.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Gray respectfully asks this Court to reverse his conviction for insufficient evidence. In the alternative, he asks the Court to remand for a new trial based on a violation of his constitutional rights; or remand for a correction of his offender score and a resentencing.

Respectfully submitted this 24th day of March 2020.



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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on March 24, 2020, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the following: Okanogan County Prosecuting Attorney at clevine@co.okanogan.wa.us and anoma@co.okanogan.wa.us and to David Gray/DOC#767870, Airway Heights Corrections Center, PO Box 2049, Airway Heights, WA 99001.

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March 24, 2020 - 4:15 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36961-7
Appellate Court Case Title: State of Washington v. David Kalani Gray, aka David Tyack
Superior Court Case Number: 18-1-00392-8

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