

FILED  
Court of Appeals  
Division III  
State of Washington  
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No. 36961-7-III

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

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STATE OF WASHINGTON, Respondent

v.

DAVID KALANI GRAY, Appellant

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

---

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. WAC 448-15-030(1) requires the operator to advise the individual that a PBT test is voluntary and "that it is not an alternative to any evidential breath alcohol test." Where the State does not present evidence that Mr. Gray received such

information, was the testimony about his refusal wrongly admitted, requiring reversal?

C. Was the evidence insufficient to sustain a conviction for driving under the influence?

D. Must this matter be remanded for sentencing because the trial court erred by including offenses subject to the washout provisions under the SRA?

## II. STATEMENT OF FACTS

Okanogan prosecutors charged David Gray with one count of felony driving under the influence. CP 42-43.

On September 19, 2018, Devon Archambault saw a car drive over a curb, alongside a retaining wall, come back down and veer over to the center median of the road. RP 105-106. He reported the incident to his trucker dispatch. He said he saw the car get close to the back of his own trailer and swerve in the road. RP 106. Police were notified. RP 118. When Mr. Gray was stopped at a stop sign, Archambault directed deputies to the vehicle. RP 38,71.

Deputy Hawley saw the vehicle make “kind of a wide” turn into a gas station, stopping near the diesel gas pump. RP 122. He testified the turn did not violate the rules of the road, and he did not

see Mr. Gray violate any rules of the road. RP 160. Mr. Gray did not speed. RP 71.

As Mr. Gray got out of the car at the gas station, Hawley asked him to stop. RP 123. Mr. Gray complied. RP 124. Hawley noticed an odor of intoxicants coming from Mr. Gray. RP 124-25; CP 123. He said Mr. Gray had bloodshot, watery eyes, and his speech was slurred. RP 153. Mr. Gray cooperated during the entire encounter and did not fumble for his driver's license. RP 168.

Mr. Gray agreed to participate in a field sobriety test (FST). RP 125. Hawley determined that Mr. Gray displayed six "clues" during the horizontal nystagmus test, indicating he had taken a central nervous system depressant. RP 127. Hawley qualified his observation did *not* signify impairment, but "that that's on board in the body". RP 128.

Hawley directed Mr. Gray to walk steps in a line, turn around, walk back, and then stand on one leg. RP 130-131. He reported Mr. Gray did *not* step off the line or stop walking. RP 169. He took 10 steps instead of 9, began the test during the instructional phase, and missed steps both ways by two to four inches. RP 131. He said Mr. Gray held his hands out at a 45-degree angle instead of at his sides, although Mr. Gray did not use

his arms to prevent himself from falling over. RP 170. He put his foot down once during the 30 second one leg stand. RP 131,170. He did not sway or hop. RP 169.

He testified that Mr. Gray declined the portable breath test and the breath test at the jail. RP 132,157. He stated that after Mr. Gray declined the portable test: "At that time I make a decision as far as everything - - the information that I have, so I decide to place him under arrest for investigation of DUI." 7/9/19 RP 133.

In pretrial motions in limine, the court granted the defense motion to exclude "any reference, direct or indirect, pertaining to the defendant's exercise of his/her constitutional rights, including any evidence that the defendant was read his rights." CP 45; 7/9/19 RP 83.

The court gave jury instruction 10:

A person is under the influence of or affected by the use of intoxicating liquor if the person's ability to drive a motor vehicle is lessened in any appreciable degree. It is not unlawful for a person to consume intoxicating liquor. The law recognizes that a person may have consumed intoxicating liquor and yet not be under the influence of it.

CP 13.

Jury Instruction 11(in pertinent part):

To convict the defendant of the crime of felony driving under the influence, each of the following three elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or (sic) September 19, 2018, the defendant drove a motor vehicle in the State of Washington;
- (2) That the defendant at the time of driving a motor vehicle was under the influence of or affected by intoxicating liquor; and
- (3) That the defendant had been previously convicted of vehicular assault while under the influence of intoxicating liquor or any drug.

CP 14.

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.

During deliberations the jury submitted a question to the court: “What is the definition of ‘under the influence’? Compared to the legal limit.” The court responded: “No measurements were made. See Instruction 10 for definition.” CP 44.

Mr. Gray stipulated he had a 2006 conviction of vehicular assault while under the influence. CP 11. The jury found Mr. Gray guilty. CP 120-121.

At the sentencing hearing, the court noted “the only thing that came out in the trial was you hit a curb, and there was some

erratic driving behind which caught the attention of the driver<sup>1</sup>.” RP 254. 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 &amp; 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. The court imposed a 64-month sentence, and 12-months of

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<sup>1</sup> In its written findings of fact and conclusions of law from the CrR 3.5 hearing the court made the same finding. Supp. CP 123.

community custody. RP 256-257. Mr. Gray makes this timely appeal. CP 64-81.

### III. ARGUMENT

#### A. The Court Committed Reversible Error By Allowing Evidence Of Refusal Of The Preliminary Breath Test.

A breath test is a search under both the Fourth Amendment to the United States Constitution and under art. I, § 7 of the Washington State Constitution. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); *State v. Garcia-Salgado*, 170 Wn.2d 176, 240 P.3d 153 (2010). Unless accompanied by a warrant or an exception to the warrant requirement, such a search violates the guarantees of the Fourth Amendment and art. I, § 7. *State v. Baird*, 187 Wn.2d 210, 218, 386 P.3d 239 (2016). "Breath tests conducted *subsequent to an arrest* for a DUI fall under the search incident to arrest exception to the warrant requirement." *Baird*, 187 Wn.2d at 222.

A Portable Breath Test (PBT)<sup>2</sup> is authorized and governed by WAC 448-15 and administered *before* an arrest. Its purpose is to

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<sup>2</sup> By contrast, an evidentiary breath test is governed by RCW 46.20.308, implied consent, test refusal, procedures. Refusal to submit to the evidentiary breath test may be used in a criminal trial. RCW 46.20.308 (2)(b).

determine whether the individual has consumed alcohol and to *establish probable cause* to place a person under arrest for alcohol related offenses or probable cause to support issuance of a search warrant for blood to test for alcohol. WAC 448-15-020(1). Further: “This preliminary breath test is voluntary, and participation in it does not constitute compliance with the implied consent statute (RCW 46.20.308).” WAC 448-15-020. The “results may not be used on their own for determining, beyond a reasonable doubt, that a person’s breath alcohol concentration exceeds a proscribed level such as anticipated under the ‘per se’ statutes for intoxication.” WAC 448-15-020(4).

- a) The State Presented No Evidence The Officer Followed The Procedure Outlined In WAC 448.15.030(1).

In *City of Vancouver v. Kaufman*, the Court found the failure to show compliance with WAC 448-15-030(1) rendered the refusal to take the PBT inadmissible. WAC 448-15-030(1) requires the officer to advise a subject that a PBT is not an alternative to any evidentiary breath test. *City of Vancouver v. Kaufman*, --Wn. App. --, 450 P.3d 196, 205 (published October 15, 2019).

Similarly, here, the State presented no evidence the officer provided Mr. Gray with the required advisement. RP 132. Under the

WAC and *Kauffman*, the refusal to take the PBT should not have been admitted.

- b) Mr. Gray's Constitutional Right To Not Be Disturbed Absent A Warrant Or An Exception To The Warrant Was Violated When Evidence Of His Refusal To Take The PBT Was Admitted At Trial.

An error raised for the first time on appeal must be manifest and of constitutional dimension. To show an error raised for the first time on is a manifest constitutional error, the appellant must show the alleged error affected his rights at trial. RAP 2.5(a)(3).

A constitutional issue is reviewed *de novo*. *State v. Jorgenson*, 179 Wn.2d 145, 312 P.3d 960 (2013). Individuals have a constitutionally protected privacy interest in the privacy of their internal bodily functions and fluids. *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 308, 178 P.3d 995 (2008). Unlike the FST, blood tests, breath tests, DNA, and urine tests are searches, infringing on the reasonable expectations of privacy, and require authorization of law. *State v. Mecham*, 186 Wn.2d 128, 148, 380 P.3d 414 (2016); *Garcia-Salgado*, 170 Wn.2d at 184. Exercise of a constitutional right is not admissible as evidence of guilt. *State v. Jones*, 168 Wn.2d 713, 725, 230 P.3d 576 (2010).

In *Kaufman*, the Court reasonably concluded that a PBT performed to establish probable cause occurs *before* an arrest, and therefore, cannot be justified under the search incident to arrest exception. *Kaufman*, 450 P.3d at 204, n. 8. The Court held that “if a search of Kaufman’s breath was not permitted under the search incident to arrest exception or any other exception to the warrant requirement, she retained a constitutional right to refuse to consent to the search and her refusal to offer her consent cannot be used as evidence against her.” *Kaufman*, 450 P.3d at 204.

Kaufman was stopped for a traffic infraction. The officer learned she had an outstanding misdemeanor warrant and arrested her on the warrant. *Id.* at 199. As he handcuffed her he smelled alcohol. *Kaufman*, 450 P.3d at 199. At the jail, he offered to administer a PBT, which she refused. She also refused to perform the FSTs. *Id.* He read her the implied consent warnings for breath, and she refused to submit to the Datamaster breath test. *Id.* at 200.

She moved to exclude evidence of her refusal to submit to the PBT and FST. The court admitted the evidence. *Id.* The Court of Appeals agreed the trial court committed reversible error by admitting evidence of her refusal to take the PBT because she had a *constitutional* right to refuse to take the test and admission of her

refusal to take the test violated the Fourth Amendment to the U.S. Constitution and art. I, § 7 of the Washington Constitution. *Id.* at 201.

Where a defendant has a constitutional right to refuse a search, admitting evidence of that refusal improperly penalizes him for the lawful exercise of a constitutional right<sup>3</sup>. *Id.* at 202.

Here, before his arrest, Mr. Gray declined to the search of his breath by use of the PBT, which occurred before his arrest. It could not be justified under a search incident to arrest. It was not the subject of a warrant. His refusal was an exercise of his constitutional rights. Because Washingtonians have the right to refuse to consent to a warrantless search with no penalty, any comment on exercising that right violates art. I, § 7, and the Fourth Amendment. Evidence of the refusal violated his constitutional rights, requiring reversal<sup>4</sup>.

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<sup>3</sup> As discussed above, a PBT is not the same as evidentiary breath test, for which refusal can be admitted because it is governed by the “implied consent law” and is conducted as a search incident to arrest. RCW 46.20.308(1), (2)(b); *Baird*, 187 Wn.2d at 222.

<sup>4</sup> In a pre-trial hearing, the parties 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; 7/9/19 RP 83.

Some fundamental constitutional errors are so harmful they can only be remedied by a reversal. *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). If a trial error is of constitutional magnitude, prejudice is presumed, and the State bears the burden of proving the error was harmless beyond a reasonable doubt. *State v. Irby*, 170 Wn.2d 874, 886, 246 P3d 796 (2011).

The Court may find constitutional 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.*

Here, the error is not harmless. First, Mr. Gray had a constitutional right to refuse consent and not be punished for exercising his right. The jury was told that Mr. Gray refused to perform a breath test. Without a definition of which breath test, the jury was asked and answered a special verdict: "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.

Second, 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 could 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.

Finally, as will be discussed below, the evidence was not so overwhelming that it necessarily leads to a finding of guilt.

B. The Evidence Is Insufficient To Sustain A Conviction  
For Driving Under The Influence.

Mr. Gray's DUI conviction must be reversed because it is not supported by sufficient evidence he was under the influence of or affected by intoxicating liquor when he was stopped.

In a criminal prosecution, the State must prove each element of the charged crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d. 368 (1970). This Court reviews a challenge to the sufficiency of the evidence by determining whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt after viewing the evidence in the light most favorable to the State

and after drawing all reasonable inferences therefrom. *State v. Green*, 94 Wn.2d 216, 222, 616 P.2d 628 (1980).

However, the existence of a fact cannot rest upon guess, speculation, or conjecture. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). Rather, the evidence must be substantial, and of such a character it convinces an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed. *State v. Zamora*, 6 Wn. App. 130, 491 P.2d 1342 (1997).

Whether there is substantial evidence is a question of law. *Id.*

A person is guilty of driving while under the influence of intoxicating liquor if he drives a vehicle while under the influence of or affected by intoxicating liquor. RCW 46.61.501(1)(c). Driving “under the influence” is not statutorily defined, but some proof of impairment is necessary. *State v. Hurd*, 5 Wn.2d 308, 315, 105 P.2d 59 (1940). In *Hurd* and later cases, the phrase “under the influence of intoxicating liquor” when the car operated was defined as:

evidence beyond a reasonable doubt establishes that intoxicating liquor has so far affected his nervous system, brain, or muscles, so as to impair, to an appreciable degree, his ability to operate his car in the manner that an ordinary prudent and cautious man, in the full possession of his

faculties, using reasonable care, would operate or drive a similar vehicle under like circumstances.

*State v. Engstrom*, 79 Wn.2d 469, 474, 487 P.2d 205 (1971).

An individual may drink and drive because the law recognizes that a person may consume alcohol and drive a car, but not be under the influence. *State v. Wilhelm*, 78 Wn. App. 188, 193, 896 P.2d 105 (1995); *Hurd*, 5 Wn.2d at 316. A person is under the influence of or affected by alcohol if his ability to drive a car is lessened in any “appreciable degree.” *Peralta v. State*, 191 Wn. App. 931, 946, 366 P.3d 45 (2015); *Hurd*, 5 Wn.2d at 315; WPIC 92.01<sup>5</sup>. “Appreciable degree” is not quantified by either statute or case law.

Here, the officer first saw Mr. Gray when he had appropriately stopped at stop sign. Mr. Gray did not speed. The officer testified in the time he observed him he saw no traffic infractions. Mr. Gray was compliant and did not exhibit the mood swings or bellicosity associated with individuals under the influence of alcohol.

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<sup>5</sup> The Washington Pattern Jury Instructions are not authoritative and do not have prior approval from any court, they are persuasive as restatements of the existing law. *State v. Mills*, 116 Wn. App. 106, 64 P.3d 1253 (2003), *rev'd on other grounds by* 154 Wn.2d 1, 109 P.3d 415 (2005).

The court itself said, “The only thing that came out in the trial was you hit a curb, and there was some erratic driving behind which caught the attention of the driver.” RP 254; CP 123, Finding of Fact 2. Going up on a curb is not technically a violation of the law. As counsel argued, “it’s entirely possible that there are locations where jumping a curb, or a vehicle driven over a curb may be perfectly acceptable because it fits within the rules of the road.” RP 56. The officer admitted Mr. Gray’s vehicle did not strike a trailer as he originally thought. RP 69.

Mr. Gray may have had alcohol in his system which resulted in less than a perfect response with certain parts of the FST. However, as the officer testified, Mr. Gray’s score on the FST did not signify impairment.

As stated above, one can drink alcohol and drive. One cannot drive in an impaired state. The State did not prove beyond a reasonable doubt that Mr. Gray’s ability to drive was lessened in any appreciable degree. This matter must be reversed and dismissed with prejudice.

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

An appellate court reviews de novo a sentencing court's calculation of an offender score. *State v. Howell*, 102 Wn. App. 288, 292, 6 P.3d 1201 (2000). Using RCW 9.94A.525, an offender score calculation involves three steps: (1) identify all prior convictions; (2) eliminate those convictions which "wash out"; and (3) count the prior convictions that remain to arrive at an offender score. *State v. Moeurn*, 170 Wn.2d 169, 175, 240 P.3d 1158 (2010).

At Mr. Gray's sentencing hearing, the State provided a statement of Mr. Gray's criminal history, which was replicated on the judgment and sentence. (See Supp. CP). According to the statement, Mr. Gray's criminal history shows no convictions between January 19, 1999 and October 5, 2005. CP 32.

The 1999 conviction was a class C felony for attempted burglary in the second degree. Based on the criminal history, his offender score would have been "5" and the standard range

sentence 12.75 to 16.5 month, with a middle range of 14.625 months<sup>6</sup>. RCW 9.94A.510.

Even assuming Mr. Gray served a full 16.5 months, with no credit for time served in jail or good time credit, he would have been released no later than June 2, 2000. The time difference between June 2, 2000 and October 5, 2005 (the next date of sentence), is 64 months.

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.

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<sup>6</sup> For persons convicted of anticipatory offenses of criminal attempt, the standard sentence range is determined by multiplying the appropriate range by 75 percent. RCW 9.94A.533(2).

#### 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 24<sup>th</sup> day of January 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 January 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 ksloan@co.okanogan.wa.us and to David Gray/DOC#767870, Airway Heights Corrections Center, PO Box 2049, Airway Heights, WA 99001.

*Marie Trombley*

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