

COURT OF APPEALS NO. 63778-9-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

REC'D  
MAR 31 2010  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

JACKSON MURIUKI,

Appellant.

FILED  
COURT OF APPEALS DIVISION #1  
STATE OF WASHINGTON  
2010 MAR 31 PM 4:01

ON APPEAL FROM THE SUPERIOR COURT  
OF WASHINGTON FOR KING COUNTY

The Honorable Michael J. Fox

OPENING BRIEF OF APPELLANT

DANA M. LIND  
Attorney for Appellant

NIELSEN, BROMAN & KOCH  
1908 East Madison  
Seattle, WA 98122  
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u> .....	1
<u>Issue Pertaining to Assignment of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
C. <u>ARGUMENT</u> .....	10
PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT DEPRIVED MURIUKI OF HIS RIGHT TO A FAIR TRIAL. ....	10
D. <u>CONCLUSION</u> .....	15

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Belgarde</u> , 110 Wn.2d 504, 755 P.2d 174 (1988).....	11-12
<u>State v. Case</u> , 49 Wn.2d 66, 298 P.2d 500 (1956).....	12
<u>State v. Fleming</u> , 83 Wn. App. 209, 921 P.2d 1076 (1996).....	14
<u>State v. Huson</u> , 73 Wn.2d 660, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969).....	12
<u>State v. Jones</u> , 71 Wn. App. 798, 863 P.2d 85 (1993), <u>review denied</u> , 124 Wn.2d 1018 (1994) .....	11-12
<u>State v. Ray</u> , 116 Wn.2d 531, 806 P.2d 1220 (1991).....	12
<u>State v. Reed</u> , 102 Wn.2d 140, 684 P.2d 699 (1984).....	11

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Old Chief v. United States,  
519 U.S. 172, 117 S. Ct. 644,  
136 L. Ed. 2d 574 (1997) ..... 10

RULES, STATUTES AND OTHERS

Const., art. 1, § 22 (amend. 10) ..... 11

RCW 46.20.308(1) ..... 3

RCW 46.20.308(2)(a) ..... 3

Sixth Amendment ..... 11

A. ASSIGNMENT OF ERROR

Prosecutorial misconduct deprived appellant of his right to a fair trial.

Issue Pertaining to Assignment of Error

In the state's prosecution of appellant for felony driving while under the influence, the court excluded evidence appellant was driving without a license at the time of the stop. At a pretrial hearing to determine the admissibility of appellant's statements to the arresting trooper, the trooper testified, inter alia, that he read appellant the implied consent warnings, as required for the breath test. One of the warnings is that refusal to take the breath test will result in automatic revocation of the individual's driver's license. Appellant declined to take the breath test, noting he did not have a license to begin with.

Despite the court's ruling excluding the DWLS offense, however, and the trooper's pre-trial testimony appellant referenced the lack of a license as his reason for not taking the test, the prosecutor argued in closing that appellant's failure to submit to the breath test was evidence "screaming" of his guilt, because he knew he would lose his license for a year.

Considering that evidence of appellant's true reason for refusing the test was excluded for his protection, was the prosecutor's argument regarding consciousness of guilt as the sole reason for the refusal flagrant misconduct, requiring reversal of appellant's conviction?

B. STATEMENT OF THE CASE<sup>1</sup>

On June 25, 2008, the King County prosecutor charged appellant Jackson Muriuki with felony driving under the influence (DUI) and driving while license suspended (DWLS), allegedly committed on June 17, 2008. Muriuki pled guilty to DWLS in advance of trial. CP 23-29; RP (6/17/09) 5-13. Because Muriuki already pled to the offense, and because the court found the evidence was more prejudicial than probative, the court excluded evidence of the DWLS offense in the DUI trial. 4RP 4-5.

In advance of trial, the court also held a hearing to determine the admissibility of Muriuki's statements to the arresting trooper. 1RP 9. The court ultimately held Muriuki's statements were voluntary and admissible. 2RP 8-10. The court's ruling is not challenged herein. However, certain facts were elicited that relate

---

<sup>1</sup> Unless otherwise indicated, this brief refers to the transcripts as follows: 1RP – 6/11/09; 2RP – 6/15/09; 3RP – 6/17/09; 4RP – 6/18/09; 5RP – 6/22/09; and 6RP – 7/2/09.

to the prosecutorial misconduct claim: specifically, the arresting trooper's testimony about the implied consent warnings.

At the police station, trooper George Englebright read Muriuki his rights, including the implied consent warnings. 1RP 25-26. Under the implied consent statute, anyone who drives in this state is deemed to have given consent to a breath test to determine alcohol content or the presence of drugs in his or her system where, at the time of arrest, the arresting officer has reasonable grounds to believe the person was driving under the influence. RCW 46.20.308(1). Before administering the test, however, the officer must inform the driver of his or her right to refuse the test and the consequences of such a refusal, including the loss of one's driver's license for at least a year. RCW 46.20.308(2)(a).

Englebright testified that after reading these warnings, Muriuki declined to take the test. 1RP 26. As Englebright explained, "After stating he wasn't going to take the test he indicated that he didn't have anything to lose because he didn't have a license to begin with." 1RP 26.

At trial, Muriuki denied that he was affected by alcohol when stopped by trooper Englebright. 5RP 138. Rather, it was his

passenger's abrupt directions that caused Muriuki to make an admittedly unconventional turn. 5RP 138.

Earlier that evening, around 8:00 p.m., Muriuki had gone for dinner. 5RP 118, 136. He ordered a bottle of beer while he waited for his Kung Pau chicken and rice. 5RP 118-119, 141. Another gentleman who was alone in the restaurant started up a conversation with Muriuki. The man was an Army officer leaving for Japan in the morning. 5RP 118. The man intended to eat and go right to sleep, due to his early flight. 5RP 119.

Muriuki ordered a second beer when his meal arrived. 5RP 119. He had nothing else to drink. 5RP 120.

As Muriuki prepared to leave around 9:45-10:00 p.m., the other gentleman asked for a ride to the store for drinking water and then to his room at the Super 8 Motel. Muriuki agreed. 5RP 120, 136.

Muriuki drove to a nearby 7-Eleven, and then followed the gentleman's directions to the motel, heading south on Highway 99 (International Boulevard). 5RP 121. Muriuki thought he knew the area where the motel was located. 5RP 121. At the first intersection south of 7-Eleven – Hwy 99 and 192<sup>nd</sup> Street – Muriuki started to make a U-turn, which was legally permitted. 4RP 30. He

intended to head north on Hwy 99, turn right onto 188<sup>th</sup> Street and take an arterial road south to the Super 8. 5RP 22. As Muriuki made the U-turn, however, his passenger abruptly explained that the motel was just east on 192<sup>nd</sup>. 5RP 122. Seeing that the road was clear of traffic, Muriuki (now facing north) decided he could safely turn to his right, east onto 192<sup>nd</sup>. Because of the lateness of the turn, however, Muriuki had to turn into the wrong, westbound lane of 192<sup>nd</sup> Street. 5RP 123.

Almost immediately, Muriuki saw the flashing lights of trooper Englebright's patrol car behind him. 5RP 123. Realizing the need to pull over safely and quickly, Muriuki immediately turned left (from the westbound lane) into a driveway, which, unbeknownst to Muriuki, was the Super 8 parking lot and motel. 5RP 123-24.

Trooper Englebright testified he activated his emergency lights as soon as he saw Muriuki's "weird turn." 4RP 30, 44. It was around 10:00 p.m. 4RP 47. Englebright estimated Muriuki did not exceed 10 m.p.h., before immediately turning into the driveway of the Super 8. 4RP 45. Englebright did not see anything inappropriate about the way Muriuki stopped his car. 5RP 77. Englebright acknowledged Muriuki went to the first safe place and stopped. 5RP 79.

Englebright claimed he smelled alcohol on Muriuki's breath upon contacting him and his passenger in the Super 8 parking lot. 4RP 53-54. He also claimed Muriuki had red, watery eyes. 4RP 53. Englebright acknowledged that the smell of alcohol alone does not indicate the amount or time it was consumed, nor or its affect on the individual. 5RP 104.

Muriuki agreed to submit to field sobriety tests. 4RP 56. According to Englebright, Muriuki exited slowly, used the car to steady himself and was "wobbly" on his feet. 4RP 57. Muriuki himself could not recall if he had difficulty getting out of the car. However, he testified that whenever he sits for a long period of time, his left knee pains him. 5RP 130. He also had a bad back at the time, from lifting elderly people at the nursing home where he worked. 5RP 130.

The first test Englebright administered was the horizontal gaze nystagmus. 4RP 58. He claimed Muriuki had jerky eye movements. 4RP 68. Jerky eye movement is considered by police to be a "clue" the individual is intoxicated. 4RP 60, 70. However, jerky eye movement can have other causes, including excessive exposure to caffeine, possibly nicotine. 5RP 43-49. Muriuki testified he is a heavy smoker. 5RP 125. In fact, he was smoking

when Englebright stopped him, but he put out his cigarette. 5RP 126.

The next test Englebright administered was the “walk and turn.” 4RP 74. Englebright claimed Muriuki attempted to start the test before he had completed the instructions. 4RP 74. He also claimed Muriuki missed placing his heel right in front of his opposite toe on each step, and that he stepped off the line three times on his first nine steps and two times on the return nine. 4RP 76.

On cross-examination, Englebright acknowledged Muriuki missed placing his heel in front of his opposite toe by about half an inch on each occasion. 5RP 41. He also acknowledged the pavement where the test took place sloped towards a drainage area. 5RP 28-29. Muriuki stepped off the line with his left foot – in the direction of the downhill slope – as he walked east on the first nine steps, while he stepped off twice with his right foot on the return nine. 5RP 39-41. Accordingly, on each pass, Muriuki stepped off the line with the foot on the downward side of the slope. 5RP 39-41. A defense investigator testified she confirmed with a level that the ground where Muriuki did the turn test was sloped or graded for drainage. 5RP 157.

The final test Englebright administered was the “one leg stand.” 4RP 79. According to Englebright, Muriuki was swaying and put his foot down on four occasions. 4RP 81. In Muriuki’s opinion, however, he performed the tests fairly agilely, considering his back problems. 5RP 133. Englebright acknowledged back and knee problems could affect an individual’s performance on the walk and turn and one leg stand, as could a sloped ground. 5RP 38-39, 70.

Although the timing is unclear, Englebright testified that he instructed Muriuki to move his car into a parking stall. 5RP 96. Muriuki testified he initially parked on the side of the parking lot. 5RP 126-28. Muriuki explained that after he got out of his car, Englebright asked if he would mind parking it in one of the stalls. Muriuki agreed and moved the car forward, close to the motel’s entrance. 5RP 131. According to Muriuki, it was thereafter the trooper asked him to do the field sobriety tests. 5RP 132. Englebright’s testimony suggests his request to move the car may have come earlier. 5RP 96-97.

Englebright ultimately arrested Muriuki and took him to the Sea-Tac police station. 4RP 84. At the station, Englebright read Muriuki his rights, including the implied consent warnings. 4RP 86.

In response to questioning, Englebright explained the warnings indicate “what happens to your driver’s license if you take the test or you don’t take the test.” 4RP 86. When asked “what happens to your driver’s license if you don’t take the test,” Englebright responded: “It will be – omatically [sic] suspended, revoked, or denied by the department of licensing for at least a year and can be used against you in a criminal trial[.]” 4RP 86. Englebright testified Muriuki declined to take the test. 4RP 87.

On cross, Muriuki acknowledged he declined to take the breath test. 5RP 134. The prosecutor attempted to elicit the content of the implied consent warnings, but defense counsel’s objections were sustained. 5RP 147-49.

In closing, the prosecutor argued Muriuki’s failure to take the breath test showed consciousness of guilt, because an innocent person would not risk losing his or her license for a year otherwise:

And that’s one thing that just is screaming that “I was affected by alcohol” was his refusal to take the breath test. He is going to lose his license for a year, and he doesn’t blow into the machine? Why would anybody risk losing their license for a year when they don’t think they are intoxicated, or they don’t think they’re affected by alcohol? If he – he knew he was affected by alcohol, and that’s why he chose to refuse that breath test and lose his license for a year. That screams that he knew he was under the influence or affected by alcohol.

5RP 186.

The jury convicted Muriuki of felony DUI,<sup>2</sup> and the court sentenced him to 15 months to run consecutively to the 2 months imposed for DWLS. CP 48, 53-64. Muriuki appeals. CP 65-77.

C. ARGUMENT

PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT DEPRIVED MURIUKI OF HIS RIGHT TO A FAIR TRIAL.

The prosecutor committed misconduct by extorting an in limine ruling entered for Muriuki's protection to insinuate consciousness of guilt and unfairly prejudice him. The prosecutor knew Muriuki did not have a driver's license. Indeed, he had been convicted of being a habitual traffic offender. CP 1-6, 23-29. The prosecutor knew Muriuki therefore had no driving privilege to risk by refusing to take the breath test, as Muriuki himself recognized and stated to trooper Englebright. And finally, the prosecutor knew the DWLS offense was excluded for Muriuki's protection, as the court found it more prejudicial than probative. Despite this knowledge,

---

<sup>2</sup> Muriuki stipulated he had a prior qualifying conviction, although the nature of the offense was not disclosed to the jury. CP 46-47; 5RP 115; Old Chief v. United States, 519 U.S. 172, 191, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997) (defendant may stipulate to the fact that he has a prior conviction in order to prevent the state from introducing evidence concerning details of the prior conviction to the jury).

the prosecutor argued Muriuki must have believed he was impaired or he would have taken the test, because no innocent person would have risked losing his or her license. This argument was flagrantly improper.

Prosecutorial misconduct may deprive the defendant of the right to a fair and impartial trial guaranteed by the Sixth Amendment to the United States Constitution and Const., art. 1, § 22 (amend. 10). State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). A defendant is deprived of a fair trial when there is a "substantial likelihood" that the prosecutor's misconduct affected the verdict. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

A prosecuting attorney's misconduct during closing argument can deny an accused's constitutional right to a fair trial. Belgarde, 110 Wn.2d at 508. Where no objection is made during summation, reversal is still required when remarks are so flagrant and ill-intentioned they could not have been cured by instruction. Belgarde, 110 Wn.2d at 507.

While a prosecutor has latitude to express reasonable inferences from the evidence, "a prosecutor may not make statements that are unsupported by the record and prejudice the defendant." State v. Jones, 71 Wn. App. 798, 808, 863 P.2d 85

(1993) (citing State v. Ray, 116 Wn.2d 531, 550, 806 P.2d 1220 (1991)), review denied, 124 Wn.2d 1018 (1994). It is improper for the state, which bears the burden of proof, to argue facts that are not in evidence. Belgarde, 110 Wn.2d at 506-510 (conviction reversed where the prosecutor "testified" during closing argument regarding a political organization he claimed was responsible for terrorist incidents when there was no evidence to support that argument); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968) (improper for prosecutor to argue, without supporting evidence, that the defendant was trying to frame the victim's ex-husband for murder), cert. denied, 393 U.S. 1096 (1969); State v. Case, 49 Wn.2d 66, 68-70, 298 P.2d 500 (1956) (no evidence supported prosecutor's argument that incest victims often reported belatedly; argument constituted misconduct).

When a prosecutor fails to confine closing argument to evidence in the record, he introduces "facts" into the case and becomes an unsworn witness against the defendant. Belgarde, 110 Wn.2d at 508.

By arguing Muriuki would lose his license for a year by virtue of his refusal to take the breath test, the prosecutor introduced facts not in evidence, i.e. that Muriuki had a license. This was "fact" was

not only not in evidence, but it was not true. And the prosecutor knew it. By arguing that Muriuki's refusal showed consciousness of guilt, the prosecutor also expressed an inference that was not reasonable, based on what the prosecutor knew. Indeed, it was dishonest, because the prosecutor knew there was another explanation for Muriuki's refusal that had been excluded: Muriuki had nothing to risk by refusing the test as he was driving without a license in the first place.

There is a substantial likelihood the prosecutor's misconduct affected the verdict. Muriuki testified he only had two beers with dinner and was not affected. He had a reasonable explanation for his "weird turn." Trooper Englebright testified there was nothing inappropriate about the way Muriuki stopped his car. He pulled over safely and quickly. While Englebright testified Muriuki performed poorly on the field sobriety tests, plausible reasons existed, apart from being under the influence, to explain Muriuki's poor performance. First, his heavy smoking could have caused the jerky eye movements observed by Englebright. Second, Muriuki's performance on the walk and turn could have been adversely affected by the downward slope. Finally, Muriuki's performance on the one leg stand could have been adversely affected by Muriuki's

back and knee problems. Significantly, Englebright testified he had Muriuki move his car at some point. Presumably, Englebright would not have asked him to do so if he believed Muriuki was a threat to public safety. Accordingly, there were many reasons to doubt Muriuki was under the influence. No doubt in this close case the jury was swayed by the prosecutor's misstatement of fact and improper argument. See e.g. State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996) (agreeing that "trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case").

Although no objection was made, the prosecutor's remarks were so flagrant and ill intentioned that no curative instruction could have cured the resulting prejudice. The only effective means to rebut the prosecutor's consciousness of guilt insinuation would have been to instruct the jury that in fact, Muriuki had no driver's license. Such an instruction, however, would have allowed the prosecutor to circumvent the court's pre-trial ruling. It would also have the effect of introducing evidence the court already ruled was more prejudicial than probative. Such evidence might also tip the

scale in favor or conviction, as it would paint Muriuki as someone with a penchant to violate traffic laws and therefore more likely to have committed the instant offense as well. For these reasons, there was no instruction that could have been given to remedy the prosecutor's misconduct. The prosecutor's conduct was egregious and mandates reversal.

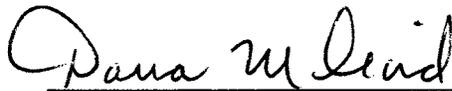
D. CONCLUSION

Because prosecutorial misconduct deprived Muriuki of his right to a fair trial, this Court should reverse.

Dated this 31<sup>st</sup> day of March, 2010.

Respectfully submitted

NIELSEN, BROMAN & KOCH



---

DANA M. LIND, WSBA 28239  
Office ID No. 91051  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

---

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 63778-9-I
	)	
JACKSON MURIUKI,	)	
	)	
Appellant.	)	

---

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31<sup>ST</sup> DAY OF MARCH, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JACKSON MURIUKI  
27316 23<sup>RD</sup> PLACE  
APT. 50  
FEDERAL WAY, WA 98003

**SIGNED** IN SEATTLE WASHINGTON, THIS 31<sup>ST</sup> DAY OF MARCH, 2010.

x *Patrick Mayovsky*