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COURT OF APPEALS
DIVISION II

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No. 37131-6-II

STATE OF WASHINGTON
BY *[Signature]*

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL A. ELLIOTT

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Chris Wickham, Judge
Cause No. 06-1-02132-4

BRIEF OF RESPONDENT

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pm 11/24/08

TABLE OF CONTENTS

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

B. STATEMENT OF THE CASE..... 1

C. ARGUMENT..... 3

1. The arresting officer had knowledge that the medics at the scene believed the victim had a broken bone. That knowledge gave probable cause to arrest Elliott for vehicular assault..... 3

D. CONCLUSION 8

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Bishop v. Miche,
137 Wn.2d 518, 973 P.2d 465 (1999) 5

State v. Broadway,
133 Wn.2d 118, 942 P.2d 263 (1997) 5

Decisions Of The Court Of Appeals

State v. Gillenwater,
96 Wn. App. 667, 980 P.2d 318 (1999), *review denied*,
140 Wn.2d 1004, 999 P.2d 1262 (2000) 5

State v. O'Cain,
108 Wn. App. 542, 31 P.3d 733 (2001)..... 7

Statutes and Rules

RCW 46.20.308(3) 8

RCW 46.61.522(1)(b)..... 6

RCW 9A.04.110(4)(b) 6

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the arresting officer had probable cause to arrest Elliott for vehicular assault and thus obtain a mandatory blood sample.

B. STATEMENT OF THE CASE.

Elliott's assignments of error address only the trial court's denial of his motion to suppress the blood alcohol evidence.

On November 15, 2006, Elliott was involved in a two-car collision on Carpenter Road in Lacey, Washington. Officer Newcomb was the first officer on the scene, followed by Officer David Johansen and Officer Ken Westphal, all of the Lacey Police Department. [RP 70]¹ Officer Westphal is a Drug Recognition Expert [RP 9] and was assigned to evaluate whether Elliott was under the influence of alcohol. [RP 61-62] Officer Johansen is a member of the Collision Investigation Team. [RP 68] His role was to investigate the collision. [RP 11] From Newcomb, Johansen learned that Elliott had said he was driving, swerved to the right and then the left, and his vehicle was positioned sideways as it traveled in the oncoming lane of traffic. [RP 70] The officers observed tire marks on the grass and damage to the vehicles, indicating that the

¹ Unless otherwise noted, all references to the Report of Proceedings are to the July 9, 2007, suppression hearing.

impact occurred in the southbound lane. Elliot had told Newcomb that he was traveling northbound. [RP 71]

The medics told Johansen that they had smelled alcohol on Elliott's breath, and based upon that, Johansen called Westphal to the scene to investigate him for DUI. [RP 76-77] The medics also told Johansen that they believed the victim had a broken wrist [RP 82] based upon her complaints of pain. [RP 83]

Officer Westphal testified that he was dispatched to the collision at 6:13 p.m. [RP 51] He was told by Johansen that the victim possibly had broken bones. [RP 13] He then spoke to Elliott, who was distraught but denied being injured. Westphal could smell alcohol coming from his person and observed that his face was red, his eyes were red, droopy, and watery, he slurred his words, and his facial features were relaxed. Elliott was very withdrawn. [RP 15]. Elliott told Westphal that he had swerved to miss a car coming at him. [RP 15] When Westphal asked Elliott if he had been drinking, Elliott said he had prior law enforcement experience and would not discuss anything but the accident and would not take any field sobriety tests, even though he had not been asked to perform any such tests. [RP 16]

Westphal formed the opinion that Elliott was under the influence of alcohol based upon "his facial indicators, his characteristics, [and] the odor of alcohol." [RP 17] Westphal had planned to arrest Elliott for DUI, but when told about the possible broken bones, arrested him for vehicular assault. [RP 18] The arrest was made at 6:47 p.m., Elliott was read his *Miranda* rights at 6:50 p.m. and again at 7:18 p.m., and, after Westphal read the special evidence warning for vehicular assault, [RP 18-19] blood was drawn at 7:43 p.m. at the hospital. [RP 51-53] Moments later, a second technician performed a second blood draw at Elliott's request. [RP 22] At 9:36 p.m. Westphal received confirmation that the victim's wrist was broken. [RP 53]

C. ARGUMENT.

1. The arresting officer had knowledge that the medics at the scene believed the victim had a broken bone. That knowledge gave probable cause to arrest Elliott for vehicular assault.

Elliott assigns errors to Conclusion of Law 3.1, and Findings of Fact 1.2 and 1.4. The only such document that he has designated as clerk's papers, however, is the Findings of Fact and Conclusions of Law prepared by the defense, [CP 72-74] which contains a different numbering system. He assigns error to Finding of Fact 1.2, asserting that the court found that "medical technicians

told officers that they thought Mr. Elliott might be affected by drinking.” [Appellant’s Brief, page 4] In fact, the court’s Finding of Fact No. 2 reads:

Upon arriving at the scene, Officer Westphal was approached by Officer Johansen. Officer Johansen told Officer Westphal that a Lacey Medic had approached him and said he could smell an odor of intoxicants coming from Mr. Elliot’s (sic) breath. Officer Johansen requested that Officer Westphal investigate Mr. Eliot for driving under the influence.

Elliott also assigns error to the court’s Finding of Fact 1.4 that the medical technicians reported that it appeared the victim had a broken bone. Finding of Fact No. 5 does include that finding:

Officer Westphal asked Mr. Elliot (sic) whether he had been drinking and Mr. Elliot said he had not been drinking and that he would not do any field sobriety tests. At this point, Officer Westphal conferred with Officer Johansen who told Officer Westphal that the other driver had been transported to the hospital and that the medics believed she possibly had a broken wrist. Accordingly, Officer Westphal arrested Mr. Elliot for vehicular assault. Officer Westphal invoked the mandatory blood draw provisions of the implied consent statute and later obtained blood from Mr. Elliot.

Elliott further assigns error to the court’s Finding of Fact 1.4 that the treating physicians also believed that the passenger had a broken bone. As mentioned, there is no Finding of Fact 1.4, and this finding does not appear anywhere in the Findings of Fact and Conclusions of Law signed by Judge Wickham. [CP 72-74]

An appellate court will overturn a lower court's findings of fact only if they are unsupported by substantial evidence. State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 263 (1997). Questions of law are reviewed de novo. Bishop v. Miche, 137 Wn.2d 518, 523, 973 P.2d 465 (1999).

It is clear from the Findings of Fact and Conclusions of Law Pursuant to CrR 3.6 [CP 72-74] that the trial court found that probable cause existed to arrest Elliott for vehicular assault and the mandatory blood draw was permissible, and thus denied the motion to suppress.

Probable cause to arrest must be judged on the facts known to the arresting officer before or at the time of arrest. "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." Probable cause to arrest requires more than "a bare suspicion of criminal activity," but does not require facts that would establish guilt beyond a reasonable doubt. Probable cause has also been defined as "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty." And "the question of probable cause should not be viewed in a hypertechnical manner."

State v. Gillenwater, 96 Wn. App. 667, 670, 980 P.2d 318 (1999) (internal citations omitted), *review denied*, 140 Wn.2d 1004, 999 P.2d 1262 (2000).

Elliott was charged with vehicular assault as defined in RCW

46.61.522(1)(b) [CP 114]:

(1) A person is guilty of vehicular assault if he or she operates or drives any vehicle:

(b) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.51.502, and causes substantial bodily harm to another;

(3) As used in this section, "substantial bodily harm" has the same meaning as in RCW 9A.04.110.

RCW 9A.04.110(4)(b) provides:

"Substantial bodily harm" means injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.

Elliott does not claim that there was insufficient evidence of his intoxication, or that a broken wrist does not constitute substantial bodily harm. His sole contention is that the officer did not have sufficient reason to believe that the victim had suffered a fracture. The State maintains that a reasonably cautious person would believe that Elliott had committed the crime of vehicular assault.

Westphal was told by Johansen that the victim was being attended by medics, and she possibly had broken bones, but that had not been confirmed by a doctor. [RP 13, 52, 57] He understood that the medics were sufficiently concerned about the victim's wrist

that she was being taken to the hospital. [RP 57] Both Officer Johansen and Sgt. Eastman told him they believed broken bones were possible, and the victim was being evaluated. [RP 60] Those officers were relying on information from the medics. [RP 61] Johansen testified that he relied on the medical knowledge of the aid personnel, and they told him they believed the victim had a broken wrist. [RP 82]

Information obtained from medical personnel about medical matters, particularly when those medical personnel are taking action based on that information, is sufficient to meet the Gillenwater test. Westphal had more than a bare suspicion, but not enough to establish a fracture beyond a reasonable doubt.

Elliott cites to State v. O'Cain, 108 Wn. App. 542, 31 P.3d 733 (2001), a case where the court held that a dispatch report that a vehicle was stolen was insufficient to form probable cause. However, that is not the situation here. Westphal was receiving information from a fellow officer who was obtaining it from medics who were at the scene, and Westphal could see that they were attending to the victim. He could plainly see that there had been a collision sufficient to cause such an injury.

Elliott also cites to cases holding that an informant's reliability must be substantiated before an arrest can be made on a tip. Again, this is not the situation here. Westphal was not relying on an informant, but on fellow officers and medics. He had a specific factual basis; the medics thought the wrist was broken. It was more than a suspicion, but obviously could not be confirmed without an x-ray. That is exactly what probable cause is—more than a suspicion and less than certainty.

The trial court based its findings on substantial evidence and that evidence supports the conclusion of law. Officer Westphal had probable cause to arrest, and thus the mandatory blood sample was properly obtained, pursuant to RCW 46.20.308(3), and admissible at trial.

D. CONCLUSION

The arresting officer had sufficient, and sufficiently reliable, information on which to find probable cause to arrest Elliott for vehicular assault. The State respectfully asks this court to affirm his conviction.

Respectfully submitted this 24th day of November, 2008.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent No. 37131-6-II, on all parties or their counsel of record on the date below as follows:

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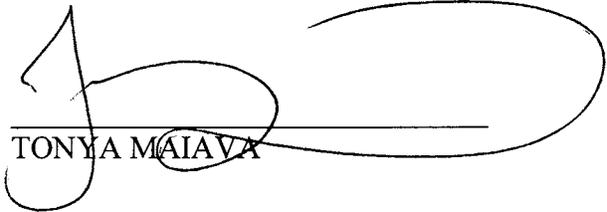
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 24th day of November, 2008, at Olympia, Washington.



TONYA MAIAVA