

COA No. 28667-3-III

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

STATE OF WASHINGTON, Respondent,

v.

TRAVIS LEE LOCKIE, Appellant.

BRIEF OF APPELLANT

Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

FILED

APR 2 2011

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I. ASSIGNMENTS OF ERROR

A. The court erred by refusing to accept the defense's offer to stipulate to predicate convictions as an element of felony DUI.

B. The State's evidence was insufficient to support a finding of guilt.

Issues Pertaining to Assignments of Error

1. Did the court err by refusing to accept the defense's offer to stipulate to predicate convictions as an essential element of felony DUI when it had no discretion to do so? (Assignment of Error A).

2. Was the State's evidence insufficient to support a finding of guilt beyond a reasonable doubt? (Assignment of Error B).

II. STATEMENT OF THE CASE

After a jury trial, Travis Lee Lockie was convicted of felony DUI. (CP 116, 121-130). He had previously pleaded guilty to second degree driving while license suspended and an ignition interlock violation. (CP 29-38). The court imposed a sentence of 38 months. (CP 125).

On February 2, 2009, WSP Trooper Steve Shiflett was on patrol when he saw Mr. Lockie turning onto highway 397 near the Cable Bridge going over to Pasco. (11/10/09 RP 53). Mr. Lockie

made a left turn and struck a plastic traffic delineator post. (*Id.*). He made a wide turn by Gum Street and went into the oncoming lane by a couple of feet. (11/10/09 RP 54). Trooper Shiflett turned on his emergency lights, whereupon Mr. Lockie swung t the right and hit the curb and sidewalk. (11/10/09 RP 55). He went another twenty feet or so on the sidewalk and stopped. (*Id.*).

Upon contacting Mr. Lockie, Trooper Shiflett noticed he smelled of alcohol, had bloodshot eyes, and slurred his speech. (11/10/09 RP 56). When informed by the trooper what he had observed, Mr. Lockie denied doing any of those things. (*Id.*). Trooper Shiflett said Mr. Lockie was unsteady on his feet and had the odor of alcohol when he got out of his car. (11/10/09 RP 57).

Mr. Lockie agreed to do field sobriety tests, consisting of the horizontal gaze nystagmus (HGN), the walk-and-turn, and one-leg stand tests. (11/10/09 RP 57-59). The trooper said all six of six clues for the HGN test, seven of eight clues on the walk-and-turn test, and four of four clues on the one-leg stand test were exhibited by Mr. Lockie. (*Id.*). No medical history, however, was taken from him. (11/10/09 RP 62-63). Based on his observations, Trooper Shiflett placed him under arrest for DUI. (11/10/09 RP 60).

Mr. Lockie said he had bad hay fever. (11/10/09 RP 75-76). He had been working since 6 a.m. that day at a ranch. (*Id.*). He had bloodshot eyes all day long. (11/10/09 RP 83-84). Mr. Lockie went home, showered, and went to meet a friend on a date. (11/10/09 RP 76). Around 4 p.m., just before the Super Bowl started, he got to the casino, met his friend, watched the game, and had dinner. (11/10/09 RP 77). Mr. Lockie was not drinking that day. (*Id.*). He stayed at the casino until eleven when his friend had to leave. (11/10/09 RP 79).

Mr. Lockie did not hit any traffic post because there was none. (11/10/09 RP 80). He had no difficulties with the field sobriety tests. (11/10/09 RP 82). He also told the trooper he had a birth defect of the right hip that was hurting that day after riding horses at the ranch. (11/10/09 RP 83).

No exceptions were taken to the court's instructions. (11/10/09 RP 87-88). The jury returned a guilty verdict. (11/10/09 RP 119; CP 116). This appeal follows.

III. ARGUMENT

A. The trial court erred by refusing to accept the defense's offer to stipulate to predicate convictions as an essential element of felony DUI when it had no discretion to do so.

Mr. Lockie wanted to stipulate to four prior DUIs “so the prejudicial effect does not get to the jury. . .” (11/10/09 RP 22). Arguing these were predicate convictions it had the burden to prove beyond a reasonable doubt, the State was opposed to the stipulation because it was entitled to refer to the nature and existence of those convictions. (RP 22-24, 28-29). The deputy prosecutor also suggested to the court how the stipulation would be handled and the court agreed:

Okay. I think [the deputy prosecutor] has properly recited the way that the stipulation would be handled. [The defense] would stipulate to it. It would be read to the jury. She would not put in any evidence on – on that subject, but she would be allowed to talk about it and argue it. (11/10/09 RP 29).

The defense, however, continued to point out to the court the highly prejudicial effect of the State being allowed to talk about the prior DUIs despite the stipulation. (11/10/09 RP 31).

The court stopped the discussion and ruled:

Okay. I’m not – not going to allow the stipulation. The State’s going to have to prove the case and is entitled to argue it that way. (11/10/09 RP 31-32).

Generally, the admission or exclusion of evidence is reviewed for an abuse of discretion. *State v. Williams*, 156 Wn. App. 482, ___ P.3d ___ (2010); *State v. Thang*, 145 Wn.2d 630,

642, 41 P.3d 1159 (2002). Here, however, the court was required to accept the stipulation and had no discretion to refuse it.

In *Old Chief v. United States*, 519 U.S. 172, 191, 117 S. Ct. 644, 136 L. Ed.2d 574 (1997), the Supreme Court stated that when a defendant stipulates to a prior conviction, the court must accept the stipulation and shield the jury from hearing evidence that led to the conviction. The trial court did not do so.

State v. Roswell, 165 Wn.2d 186, 196 P.3d 705 (2008), is instructive on the issue of stipulating to prior convictions. If a prior conviction is an element of the crime charged, as here, the court noted that evidence of its existence would not be irrelevant and allowing the jury to hear about such evidence would not be error. *Id.* at 189, 197. But the prejudicial effect of such evidence could be tempered. *Id.* at 198; *Old Chief*, 519 U.S. at 191. The court also observed that admission of prior convictions, while prejudicial, does not necessarily deprive a defendant of a fair trial. 165 Wn.2d at 195. This is the procedure acknowledged by the trial court here. But unlike the defendant in *Roswell*, Mr. Lockie was not allowed to stipulate to the prior convictions.. 165 Wn.2d at 191.

For strategic reasons, the defense wanted to stipulate to the four prior DUIs. (11/10/09 RP 22). After the argument of,

and colloquy with, both counsel, the court fashioned an appropriate way for the stipulation to be handled. (11/10/09 RP 29). Although arguing against the court's plan, defense counsel did not take the stipulation off the table. (11/10/09 RP 29-31). But the court then ducked the issue and summarily refused to allow the stipulation. (11/10/09 RP 31). When the defendant stipulates to prior convictions, the court must accept that stipulation. *Old Chief*, 519 U.S. at 191. It did not. The court erred by refusing to accept it.

Moreover, review of the entire discussion on the stipulation shows that the court had no reason for its abrupt decision not to allow it. The court knew how to handle the stipulation, but clearly did not want to deal with weighing the prejudicial effect of allowing references to the convictions in the context of allowing Mr. Lockie to stipulate to them. (11/10/09 RP 30-31). Indeed, the court exercised no discretion whatsoever in throwing up its hands and ducking the issue entirely.

So even assuming *arguendo* that abuse of discretion is the standard for reviewing the decision, the court erred. Discretion unexercised is discretion abused. *Bowcutt v. Delta N. Star Corp.*, 95 Wn. App. 311, 976 P.2d 643 (1999). In *State v. Johnson*, 90 Wn. App. 54, 62-63, 950 P.2d 981 (1998), the court held the trial

judge erred in admitting a prior rape conviction to prove the element of a past felony conviction when the defendant proffered a stipulation to that effect and unfair prejudice resulted. That is the case here. The court's refusal to allow the stipulation was prejudicial error warranting a new trial.

B. The State's evidence was insufficient to support a finding of guilt beyond a reasonable doubt.

In a challenge to the sufficiency of the evidence, the test is whether, viewing the evidence in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980). Credibility determinations are for the trier of fact and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997).

Trooper Shiflett did not take Mr. Lockie's medical history. (11/10/09 RP 62-63). But his performance on the field sobriety tests as well as the trooper's observations of supposed signs of intoxication could have been explained by the medical history that was not taken. Trooper Shiflett did not ask the questions and had already formed his opinion in any event. (11/10/09 RP 64). This was not proof of intoxication, but mere speculation. "Relevant

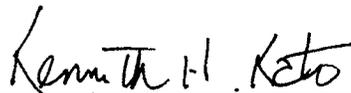
evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401. Speculation is not relevant evidence. There was no credibility determination for the jury to make. Even taken in a light most favorable to the State, the evidence was insufficient to support a finding of guilt. Mr. Lockie’s conviction of felony DUI must be reversed.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Lockie respectfully urges this Court to reverse his conviction and dismiss the charge or remand for new trial.

DATED this 12th day of August, 2010.

Respectfully submitted,

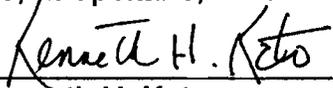


Kenneth H. Kato, WSBA #6400
Attorney for Appellant
1020 N. Washington
Spokane, WA 99201
(509) 220-2237

CERTIFICATE OF SERVICE

I, Kenneth H. Kato, certify that on August 12, 2010, I served a copy of the Brief of Appellant by first class mail, postage prepaid, on Andrew K. Miller, Benton County Prosecutor, 7122 W. Okanogan Pl. – Bldg A, Kennewick, WA 99336-2359 and Travis Lee Lockie #337299, Airway Heights Corr. Center, PO Box 2049, Airway Heights, WA 99001.

DATED this 12th day of August, 2010, at Spokane, WA.



Kenneth H. Kato