

62726-1

62726-1

NO. 62726-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT L. CASTLE,

Appellant.

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COURT OF APPEALS
STATE OF WASHINGTON
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BRIEF OF RESPONDENT

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I. ISSUES

1. Where the officer offered to contact an attorney by phone, and defendant, arrested for driving under the influence of intoxicants, refused, did the officer violate defendant's right to consult with an attorney before deciding whether to take a blood-alcohol test?

2. Where there was no affirmative evidence that defendant's driving was not reckless after he was given a visual and audible signal to stop by a uniformed police officer, did the court err by not instructing the jury that failure to obey a police officer was a lesser included offense of attempting to elude a pursuing police vehicle?

II. STATEMENT OF THE CASE

A. EVIDENCE OF GUILT.

A uniformed officer was driving his fully marked patrol car behind defendant when he saw defendant swerve to the right and hit the curb. Defendant then jerked his car back to the left and crossed the lane divider. 11/24 RP 53. The next traffic light was red, but defendant did not slow down approaching the light. Instead, he slammed on his brakes and "skidded to a stop into the intersection." 11/24 RP 56-57.

After the light turned green, defendant continued to drive with his left tires across the lane line. The officer determined he had seen enough to warrant investigating defendant for driving under the influence of intoxicants (DUI), so he illuminated his emergency signal lights. Defendant continued to drive. The officer turned on his siren. Defendant continued to drive. The officer illuminated the interior of defendant's car with his spotlight. Defendant continued to drive. 11/24 RP 57-58.

Defendant almost ran into a wall, and then entered onto I-405. 11/24 RP 59. While on I-405, defendant was driving at 60 to 70 miles per hour and "weaving over the fog line." 11/24 RP 61.

Defendant took the next exit off I-405, and turned onto a residential street that paralleled the highway. As soon as he got on the street, defendant "accelerated heavily" reaching speeds of 70-80 miles per hour. The speed limit on that street was 35 miles per hour. 11/24 RP 62-63.

The street was a dead-end with a barricade at the end. Defendant stopped "right at the barricade." 11/24 RP 63-64. Defendant got out of his car and "staggered" towards the officer. After the officer arrested defendant, he noticed the "odor of intoxicants emanating from [defendant's] breath; bloodshot eyes,

bloodshot droopy eyes; his speech was very slurred.” 11/24 RP 71. When he searched the car, the officer found an open can of beer on the floor of the car and a plastic six pack holder “that had only one beer in the – left in the six pack holder.” 11/24 RP 73. A third beer can was found laying on the ground outside the vehicle. 11/24 RP 73, 11/25 RP 3.

B. DEFENDANT’S DEMANDS FOR COUNSEL.

Before trial, defendant moved to suppress evidence that he refused to submit to a test to determine the alcohol concentration in his blood. At a hearing on the motion, the only witness was the arresting officer.

After defendant was arrested, the arresting officer read him his Miranda¹ rights. Defendant told the officer that he “wanted a lawyer there to see his injuries because he was going to sue the [Sheriff’s] Department, not so much talk to a lawyer.” The officer asked defendant if he had an attorney in mind. Defendant said no, it was the officer’s job to get an attorney there. The officer offered to call the public defender. Defendant made it clear he did not want to talk to “anybody on the phone.” 11/20 RP 4-5.

¹ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

The officer took defendant to a hospital to be cleared for booking, since defendant had gotten injured during the arrest. The officer again advised defendant of his Miranda rights. Defendant said he wanted an attorney “there in the hospital.” When the officer again offered to call the public defender, defendant said, “No. You just need to get [an attorney] here.” Defendant again said he did not want to talk to an attorney on the phone. He wanted an attorney “in the room.” 11/20 RP 5-6.

The officer testified that he had a cell phone and the number for the on-call public defender. Had defendant agreed to talk to a public defender, the officer would have allowed him to use his cell phone. The officer did not recall whether there was a phone in the emergency room where defendant was being treated. 11/20 RP 6-7.

Defendant never indicated any desire to talk to an attorney especially on the phone. He just wanted the officer to get an attorney to see him at the roadside, and again in the hospital. 11/20 RP 12.

After hearing argument, the court made an oral ruling. The court denied the motion, but expressed reservations.

I'd feel much more comfortable if, somewhere along the line, it had been clarified for [defendant's] benefit that he needs to make that decision [to submit to the blood test] without the benefit of anything more than telephone advice or access to counsel if he wishes to have that access to counsel.

11/20 RP 33.

Defendant argued that the court should "determine what the language of 'any other means necessary' [in CrR 3.1] actually means." 11/20 RP 43.

The court then took a recess. When it was back on the record, the court again stated that the motion was denied. The court specifically found:

So it seems to me that it would be futile to offer the phone number of a public defender when the defendant has just said that he doesn't wish to talk to the public defender. . . . So while it might have fulfilled the court rule had the officer provided a phonebook and a telephone to the defendant, the purpose for the rule which is to provide meaningful access to counsel at a critical stage of the proceedings was more than fulfilled by the officer's efforts here to call any attorney of the defendant's own choosing if he had someone in mind or to place him in contact with a public defender.

11/20 RP 47.

The court entered written findings of fact and conclusions of

law. 3 CP ____.² The court concluded that defendant was not confused about these rights to counsel, and attempted to exercise his right to have counsel present. The court then concluded:

The court finds that the officer did not limit the Defendant's right to have advice of counsel prior to making the critical decision whether to submit to a blood test. The officer tried to provide the Defendant with access to an attorney which the defendant refused and that was all the officer was required to do.

3 CP ____.

C. DEFENDANT'S REQUEST FOR AN INSTRUCTION ON THE LESSER INCLUDED CRIME OF FAILURE TO OBEY.

After both parties rested, the court went over the instructions it intended to give. Defendant excepted to the court not giving an instruction on failure to obey a police officer as a lesser included offense of attempting to elude a pursuing police vehicle. 11/25 RP 7. Defendant argued that inconsistencies between the officer's description of him driving at 70-80 miles per hour and his description of "a strip of was extremely dark that was a short road." 11/25 RP 8.

The court ruled:

² Defendant supplementally designated the CrR 3.6 Certificate, Sub # 65, to be part of the record on appeal. The clerk sent the Certificate Pursuant to CrR 3.5 of the Criminal Rules for Superior Court, Sub # 67. The State has asked the Clerk's Office to send the correct Certificate.

And certainly here a jury could find there was insufficient evidence of the greater [crime]. There's no affirmative evidence to support giving just the lesser and not the greater, so I am following what I believe to be the analysis in [State v. Gallegos, 73 Wn. App. 644, 871 P.2d 621 (1994)]. I'm not prepared to give the lesser included.

11/25 RP 10.

III. ARGUMENT

A. SUMMARY OF ARGUMENT.

Before a driver may be asked to submit to a test of his breath or blood to determine if he was driving under the influence of intoxicants, he must be informed of his right to consult with counsel. The right is more of an opportunity to consult rather than actual contact with counsel. Defendant was given this opportunity. A driver has no right to have counsel present before he decides whether to submit to the test. Here, defendant made it clear that he did not want to talk to counsel over the phone, but rather wanted counsel to be physically present. Defendant's right to counsel under CrR 3.1 was not violated. If this Court concludes defendant's rights were violated, any such violation was harmless in light of the uncontested, overwhelming evidence of guilt of driving under the influence of intoxicants.

Defendant was entitled to a lesser included offense instruction only if there was evidence that would allow a reasonable jury to conclude that he exercised due care for the safety of persons or property while he was fleeing the pursuing police vehicle. There was no such evidence in the record.

B. STANDARD OF REVIEW.

Factual findings that are not assigned as error or are supported by substantial evidence are verities on appeal. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). "Conclusions of law in an order pertaining to suppression of evidence [are reviewed] de novo." State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

Because the asserted error is a violation of a court rule (rather than a constitutional violation), it is governed by the harmless error test. . . . Thus, only if the error was prejudicial in that "within reasonable probabilities, [if] the error [had] not occurred, the outcome of the [motion] would have been materially affected' "will reversal be appropriate.

State v. Robinson, 153 Wn.2d 689, 697, 107 P.3d 90 (2005), quoting State v. Templeton, 148 Wn.2d 193, 220, 59 P.3d 632 (2002).

[A] defendant is entitled to an instruction on a lesser included offense, if 1) each of the elements of the lesser offense must be an element of the offense charged; and 2) the evidence must support an

inference that the lesser crime was committed. . . .
The decision not to give an instruction is reviewed for
an abuse of discretion.

State v. Buzzell, 148 Wn. App. 592, 602, 200 P.3d 287 (2009).

**C. THE OFFICER DID NOT VIOLATE DEFENDANT'S RIGHT TO
CONSULT WITH AN ATTORNEY.**

At the earliest opportunity a person in custody who
desires a lawyer shall be provided access to a
telephone, the telephone number of the public
defender or official responsible for assigning a lawyer,
and any other means necessary to place the person
in communication with a lawyer.

CrR 3.3(c)(2).

[CrR 3.1] means that while in custody [for DUI] a
suspect must be advised of the right to counsel and
provided access to counsel in order that the suspect
may determine whether to submit to the BAC breath
test, arrange for alternative testing, and present other
exculpatory evidence such as video and disinterested
third party witnesses.

Templeton, 148 Wn.2d at 212.

“[T]hese rules require more an opportunity, rather than
actual communication with an attorney.” Airway Heights v. Dilley,
45 Wn. App. 87, 93, 724 P.2d 407 (1986). “The officer gave [the
defendant] the opportunity to call an attorney. That is all the officer
is required to do.” Leininger v. Department of Licensing, 120 Wn.
App. 68, 73, 83 P.3d 1049 (2004).

Here, immediately after arresting defendant, the officer advised defendant of his right to consult with counsel. He offered to call the on-call public defender for defendant or other counsel if defendant knew one who would come to the scene. Defendant did not want to talk to an attorney on the phone, but wanted an attorney present at the scene. Defendant did not have the right to have an attorney present at the scene of his arrest.

At the hospital, the officer again informed defendant of his right to counsel. He again offered to call the on-call public defender or private counsel if defendant knew one he wanted. The officer had his cell phone with him, and intended to allow defendant to use that phone. Again, defendant refused to use the phone. He wanted an attorney brought to the hospital. CrR 3.1 does not give a defendant the right to have counsel present before deciding whether to take a blood test.

“Principally, we find that, while an accused must be provided reasonable access to counsel, there is no right to have an attorney physically present during the chemical testing.” State v. Staeheli, 102 Wn.2d 305, 309-10, 685 P.2d 591 (1984).

Resolution of this issue is controlled by the legal reasoning in State v. Kronich, 131 Wn. App. 537, 128 P.3d 119 (2006).

There, after being arrested, the defendant initially indicated he wanted to speak to an attorney. When the officer offered to call one, the defendant “changed his mind.” Kronich, 131 Wn. App. at 543. The Court found no violation of the defendant’s right to counsel. It stated, “While CrRLJ 3.1 requires the State to offer access to counsel, it is not required to force the defendant to accept.” Kronich, 131 Wn. App. at 543-44.

Here, access was offered. Defendant declined to contact an attorney by phone. There was no violation.

Citing City of Seattle v. Sandholm, 65 Wn. App. 747, 829 P.2d 1133 (1992), defendant acknowledged that CrR 3.1 does not give him “a right to specific counsel of his choosing.” Yet he argues that “At a minimum, [to comply with CrR 3.1] the State should have given [him] access to a phone and phone book to contact an attorney of his choosing[.]” Brief of Appellant 8-9. Defendant misconstrues the facts and asks this Court to enforce a right he acknowledged he did not have.

First, it is clear from the record that defendant did not want to talk to an attorney on the phone. He twice refused the offer to talk to the on-call public defender.

Second, there is nothing in the record that indicates the officer had access to a phone book when he arrested defendant or at the hospital. Even if defendant had asked to look up an attorney, the earliest opportunity for the officer to provide a phone book would have been after defendant had to decide whether to take the blood test.

Last, CrR 3.1 contemplates the officer enabling the arrestee to contact a public defender or assigned counsel. Here, defendant specifically refused the offer of the public defender. CrR 3.1 does not require the officer to acquire a phone book and wait while the arrestee looks through the book and randomly calls attorneys. See Leininger, 120 Wn. App. at 73.74 (no requirement that the arresting officer have a list of “after-hours attorneys”).

Should this Court determine that the officer violated defendant’s rights under CrR 3.1, defendant is not entitled to relief. The only relief available is suppression of all evidence acquired after the violation. City of Spokane v. Kruger, 116 Wn.2d 135, 147, 803 P.2d 305 (1991). Defendant must then show that absent that evidence, the outcome of the case would have been materially different. Kronich, 131 Wn. App. at 122. He can not make that showing.

Here, the officer observed defendant's erratic driving. After defendant was stopped, the officer noted the defendant staggered when he walked, the "odor of intoxicants emanating from [defendant's] breath; bloodshot eyes, bloodshot droopy eyes; his speech was very slurred." 11/24 RP 71. The officer found an open can of beer and a full can of beer inside the car. 11/24 RP 73. A third can was found on the ground near the car. 11/25 RP 3. "Within reasonable probabilities, even if the jury did not learn of [defendant's] refusal to perform the [blood] test, it would have still convicted him of DUI." Kronich, 131 Wn. App. at 544.

D. THE EVIDENCE DID NOT SUPPORT GIVING AN INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF FAILURE TO OBEY.

Defendant requested the court instruct the jury that failure to obey a police officer was a lesser included crime of attempting to elude a pursuing police vehicle. 11/6 RP 201. The court found that failure to obey was legally, but not factually, a lesser offense. 11/6 RP 203.

[A] defendant is entitled to an instruction on a lesser included offense if two conditions are met. First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed.

State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

It is not enough that the jury might simply disbelieve the State's evidence. Instead, some evidence must be presented which affirmatively establishes the defendant's theory on the lesser included offense before an instruction will be given.

State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), overruled on other grounds, State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991).

A defendant, charged with attempting to elude a pursuing police officer is entitled to an instruction on failure to obey a police officer, only if there is affirmative evidence to rebut the inference that the defendant drove recklessly. State v. Gallegos, 73 Wn. App. 644, 653, 871 P.2d 621 (1994).

Here, there was no evidence that after the officer turned on his emergency lights and siren, defendant's driving was anything but reckless. He consistently drove with his car straddling the lane dividing line. Defendant almost ran into a wall before turning onto I-405. On I-405, defendant drove at 60 to 70 miles per hour and was "weaving over the fog line." After defendant got off I-405, he immediately sped up to 70 to 80 miles per hour in a residential area where the speed limit was 45 miles per hour.

There was no evidence that defendant was not driving recklessly once the pursuit started. Defendant argued that since

he avoided crashing into the barricade at the end of the road, his driving was not reckless. 11/25 RP 36. The jury found otherwise.

The evidence did not rebut the inference that defendant was guilty of the greater charge. No reasonable jury could find that defendant committed only the lesser crime of failure to obey a police officer to the exclusion of committing the greater crime of attempting to elude. Thus, defendant was not entitled to an instruction on failure to obey because the factual prong of the Workman test was not satisfied. There was no error.

Defendant asserts "Here, the deputy clearly admitted that there was reason to believe that the defendant may not have either been driving recklessly, or that he even saw the deputy's signal to stop." Brief of Appellant at 15. Defendant misstates the record.

The officer described defendant's driving. He was not asked if that driving was reckless. He did not testify there was any reason to believe that defendant's driving was not reckless. Defendant's entire argument at trial was that the State had not proved he drove recklessly. 11/25 RP 36. In asking the jury to find that the State had not proved that element of the crime, defendant asked the jury to disbelieve the officer's testimony. 11/25 RP 36-37. That is not a

basis for giving a lesser included instruction. Fowler, 116 Wn.2d at 67.

Further, if there had been evidence that defendant did not see the emergency lights or spot light, or hear the siren, that would have been a defense to both attempting to elude and to failure to obey. There was no such evidence before the jury.

The ruling of the trial court should be affirmed.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on August 4, 2009.

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By:



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COPY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

The State of Washington,

Plaintiff,

vs.

Castle, Robert L

Defendant.

07-1-03673-8

CERTIFICATE PURSUANT TO
CrR 3.6 OF THE CRIMINAL RULES
FOR SUPPRESSION HEARING

On 11/20/2008, a hearing was held on the defendant's motion to suppress evidence. The court considered the testimony of the witnesses at the hearing and the arguments and memoranda of counsel. Being fully advised, the court now enters the following findings of fact and conclusions of law:

1. The Undisputed Facts

1. On 02/16/07 at approximately 11:24 p.m., Deputy Dean Peckham of the Snohomish County Sheriff's Office was on routine patrol southbound on SR 527 in a marked patrol car when he observed a vehicle in front of him driven by Robert Lewis Castle (herein after Defendant) strike the curb.
2. Deputy Peckham then observed the Defendant's vehicle weave over the lane marker with its left side tires in the other southbound lane of travel. As the Defendant's vehicle approached the intersection of SR 527 and SR 524, the traffic light at the intersection turned red and the Defendant's

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1 vehicle continued without slowing until it got extremely close to the
2 intersection and then the Defendant suddenly slammed on the brakes
3 causing the vehicle to skid to a stop.

- 4 3. When the light changed the Defendant's vehicle continued through the
5 intersection and Deputy Peckham observed the Defendant's vehicle again
6 weave over the lane dividers.
- 7 4. Deputy Peckham activated his emergency lights but the Defendant
8 continued driving and Deputy Peckham immediately activated his vehicle's
9 siren and still the Defendant failed to yield.
- 10 5. Deputy Peckham continued to follow the Defendant's vehicle with his
11 lights and siren activated and observed the Defendant's vehicle nearly
12 strike the wall of the bridge where SR 527 crosses over I-405.
- 13 6. The Defendant got onto southbound I-405 and traveled at speeds
14 between 60 and 70 mph and his vehicle continued to weave over the fog
15 line and into the other southbound lane of travel.
- 16 7. The Defendant took the Beardsley exit off the freeway and immediately
17 increased his speed turning northbound on 112th Ave N.E. The Defendant
18 then sped up rapidly and Deputy Peckham paced the Defendant at
19 speeds of 70 to 80 mph in a 35mph zone.
- 20 8. Deputy Peckham observed that the Defendant was driving recklessly as
21 he attempted to elude the deputy. The Defendant continued to travel
22 northbound on 112th street failing to stop until the street came to a dead
23 end.
- 24 9. Deputy Peckham conducted a high risk stop with his gun drawn and
25 ordered the Defendant to place his hands out of the car window. The
26 Defendant immediately jumped out of his vehicle and walked toward the

1 deputy ignoring repeated commands from the deputy to show his hands
2 and get on the ground.

3 10. Deputy Peckham did not see a weapon with the Defendant so he
4 substituted his gun for a taser. The Defendant continued to approach the
5 deputy ignoring repeated commands to stop. When Deputy Peckham
6 advised the Defendant that if he continued approaching he would be tased
7 the Defendant stated "go ahead".

8 11. Deputy Peckham fired his taser just as the Defendant turned away from
9 him. The taser contacted the Defendant in the back causing him to fall
10 face down on the ground striking his chin against the pavement. The
11 Defendant was placed in custody by Deputy Holmes who had arrived to
12 assist with the chase.

13 12. The Defendant sustained cuts to his face and Deputy Peckham requested
14 aid units to the scene to check out the injuries sustained by the Defendant.

15 13. An empty beer can was located on the floor of the Defendant's vehicle as
16 well as a plastic six pack with one beer can remaining in the holder.

17 14. Deputy Peckham advised the Defendant of his *Miranda* rights and the
18 Defendant stated that he wanted an attorney at the scene immediately.
19 Deputy Peckham asked the Defendant if he knew of an attorney that
20 would respond and the Defendant indicated that he did not. The
21 Defendant also informed the deputy that he wanted an attorney to see his
22 injuries and that he was going to sue the police.

23 15. Deputy Peckham observed a strong odor of alcohol on the Defendant's
24 breath. The Defendant's eyes were bloodshot, watery, and appeared
25 sleepy. The Defendant's speech was slurred and Deputy Peckham
26 observed that the Defendant had staggered as he walked toward the
deputy upon exiting his vehicle.

1 16. Deputy Peckham transported the Defendant to the Providence Hospital to
2 be checked out by medical personnel before being transported to the
3 Snohomish County Jail.

4 17. At the hospital in the examination room, Deputy Peckham again advised
5 the Defendant of his *Miranda* rights from the DUI packet and the
6 Defendant demanded to have an attorney present at the hospital.
7 (Amongst the constitutional rights read to the Defendant by Deputy
8 Peckham were "the right to talk to an attorney before answering any
9 questions" and "the right to have an attorney present during the
10 questioning).

11 18. Deputy Peckham asked the Defendant if he had an attorney or knew of
12 one that would respond to the hospital and the Defendant stated that he
13 did not. Deputy Peckham then offered to call a public defender on the
14 phone so the Defendant could have advice of counsel but the Defendant
15 stated that he did not want to speak with a public defender on the phone
16 but rather wanted an attorney present at the hospital.

17 19. Deputy Peckham advised the Defendant of the Implied Consent Warnings
18 for blood and asked the Defendant if he would submit to a blood test. The
19 Defendant refused to submit to the blood test. Deputy Peckham noted the
20 refusal on the DUI form.

21
22 2. The Disputed Facts

23 1. No facts in dispute for purposes of the 3.6 hearing.

24
25
26 3. Conclusions of Law

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1. The court finds that the Defendant's motion to suppress his refusal of the officers request that he submit to a blood test (for purposes of determining the Defendant's blood alcohol level) due to the Defendant's assertion that the officer failed to comply with the Defendant's request for an attorney, is hereby denied.
2. The court finds that the Defendant at the scene of the arrest and again in the hospital room stated that he wanted to have an attorney physically present. When asked the Defendant stated that he did not have a specific attorney he wished to contact and he did not wish to speak with a public defender. If a public defender was contacted by telephone late at night they probably would be willing to provide advice to the Defendant by telephone, but most unlikely a public defender on duty would not be willing to come to the hospital and talk to the Defendant in person.
3. The court finds that the Defendant was not confused and sought to exercise the right that he had been advised of and wanted an attorney physically present before any questioning.
4. The court finds that the officer did not limit the Defendant's right to have advice of counsel prior to making the critical decision whether to submit to a blood alcohol test. The officer tried to provide the Defendant with access to an attorney which the Defendant refused and that was all the officer was required to do.
5. The court finds that it is not custodial interrogation for a suspect to be asked to take a breath/blood alcohol test and it is not incumbent upon the officer to explain to the ~~officer~~^{Defendant} that *Miranda* warnings do not extend to that decision.

DONE IN OPEN COURT this 6th day of March 2009.

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George N. Bowden
Judge George N. Bowden

Presented



EDIRIN O. OKOLOKO, 35138
Deputy Prosecuting Attorney

Copy received by:


Jason Weiss, # 3322
Defense Attorney

Δ not present
Robert L. Castle
Defendant (Signed by attorney)