106 Wash.App. 1053

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 2.

William C. MALONEY, Appellant,
v.
STATE of Washington, DEPARTMENT OF LICENSING, Respondent.

No. 25379–8–II. | June 29, 2001.

Appeal from Superior Court of Clallam County, Docket No. 93–2–00438–1, judgment or order under review, date filed 11/18/1999; George L. Wood Jr., Judge.

Attorneys and Law Firms

Craig A. Ritchie, Ritchie Law Firm P.S., Port Angeles, WA, for appellant(s).

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Opinion

UNPUBLISHED OPINION

QUINN–BRINTNALL.

***1** William C. Maloney appeals the judgment of the superior court sustaining the decision of the Department of Licensing (hereafter 'Department') to revoke his driver's license for refusing to take a blood test. We affirm.

Facts

On January 21, 1993, Washington State Patrol Trooper Trenton Clasen was dispatched to a one-car injury accident on State Route 112. At the accident scene, Clasen met Clallam County Deputy Cortani who gave him Maloney's driver's license and said Maloney was the driver. Maloney had already been taken to the hospital.

Clasen investigated the damage to Maloney's vehicle, a small Mazda pickup. It had slid into a ditch and was damaged on the right front side. Clasen found blood stains on the inside of the passenger side door. There were clothing items in disarray on the passenger seat and on the floorboard. The front windshield was cracked and shattered on the passenger side. The rear view mirror had broken off.

Clasen contacted Maloney at the Forks Community Hospital and arrested him at approximately 1:15 a.m. He first read Maloney his Miranda rights. Maloney said he understood them, and he did not ask for an attorney. When Clasen asked Maloney to sign the form, Maloney responded, 'I don't need this, I don't need to.' Report of Proceedings (November 1, 1999) at 28.

Clasen next advised Maloney that he was going to request a blood test. Using a rights/warning form (Exhibit 1), Clasen read to Maloney:

> You are under arrest for driving a motor vehicle while under the influence of intoxicating liquor. Further you are now being asked to submit to a test of your blood to determine alcohol content where, A, you are incapable due to physical limitation of of {sic} providing a breath sample, or as a result of a traffic accident you are being treated for a medical condition in a hospital or other similar facility in which a breath testing instrument is not present a blood test should be administered by a qualified person. You are advised you have the right to refuse. If you do refuse your privilege will be revoked or denied, and you have the right to a test by a person of your own choosing and your refusal to take the test can be used in a criminal trial{.}

Report of Proceedings (November 1, 1999) at 29–30. Maloney refused Clasen's offer to reread these warnings. He said he understood them and he did not ask any questions or express any confusion. Clasen then asked Maloney if 'he would allow the doctor to take a blood sample' and Maloney replied, 'No.' Report of Proceedings (November 1, 1999) at 31. Maloney also refused to sign the form, stating: 'I don't want to sign anything. I see no reason to sign anything for you.' Report of Proceedings (November 1, 1999) at 56.

Sometime during their conversation, Maloney asked Clasen: "Did I hurt anybody{ ((?}" Report of Proceedings (November 1, 1999) at 28.

The Department revoked Maloney's driver's license under the implied consent statute, RCW 46.20.308. Maloney appealed to a hearing examiner for the Department, who affirmed the decision. Maloney then appealed to the superior court where a jury trial was held.

***2** Clasen testified to the facts of the arrest, as set out above, and described Maloney's condition: his eyes were 'very bloodshot and glassy, his speach {sic} was loud and slurred,' and he emanated a 'strong odor of intoxication.' Report of Proceedings (November 1, 1999) at 32. Clasen also saw lacerations on Maloney's right ear and on his head. He opined that these injuries were consistent with the damage to the pickup truck.

On cross-examination, Maloney's counsel asked Clasen about the availability of a portable breath testing (PBT) instrument in his patrol vehicle. Clasen stated that he did not recall if there was a PBT in his car.

Jolene Sarnowski, the hospital laboratory supervisor, testified that the hospital did not have a data master unit or any other instrument for testing breath alcohol content on January 21–22, 1993.

Maloney testified on his own behalf. He denied that he was the driver and he described the circumstances surrounding the accident and his subsequent arrest by Clasen. He attended a party earlier in the evening, became too drunk to drive, and arranged for someone at the party to drive him home in his (Maloney's) pickup. He did not know the person's last name and could not recall his first name. En route to Maloney's house, the pickup slid on the icy road, striking a driveway crossing, and landed in a ditch. Maloney was in the passenger seat and did not have his seat belt on. He was hurt when his head and shoulder hit the windshield, he bled 'a lot' due to his injuries. After the accident, the driver said to Maloney, 'I'm sorry; I don't need troubles like this; I'm out of here,' and then disappeared. Report of Proceedings (November 2, 1999) at 13.

Maloney also testified that he was confused when he responded to Clasen's request for a blood test. After Clasen read him the implied consent warnings, Maloney asked to read the form (Exhibit 1) for himself. [1] The form included a section titled 'Implied Consent Warnings For Blood,' and the section below it had the heading 'Voluntary Blood/Urine/Breath.' [2] Clerk's Papers at 89. Maloney said he believed that he was refusing the 'voluntary blood' test rather than the implied consent test.

The jury entered a verdict affirming the Department's decision to revoke Maloney's driver's license.

On appeal, Maloney argues that the trial court erred in denying his motions for a directed verdict at the end of the State's case and for a new trial after the jury's verdict, based on three grounds: (1) the State failed to establish reasonable grounds to believe Maloney was the driver and probable cause to arrest, (2) the State failed to show the unavailability of a PBT prior to Clasen's request for a blood test, and (3) the evidence failed to establish a knowing, intelligent refusal of the blood test because he was confused by the rights advisement form. He further argues that the court erred in admitting Clasen's testimony over his objection and in refusing his proposed 'confusion' instruction.

Analysis

I. Sufficiency of the Evidence

***3** The implied consent statute provides that a driver is deemed to have consented to a blood or breath test if he has been arrested and the arresting officer has reasonable grounds to suspect that the person was driving under the influence of intoxicants. RCW 46.20.308. [3] The arresting officer shall inform the driver that (1) he has the right to refuse the test, (2) such refusal will result in his license being revoked, (3) he has the right to obtain additional tests, and (4) refusal to take the test may be used in a criminal trial. RCW 46.20.308(2). This rights advisement insures that the driver has the opportunity to make a knowing and intelligent decision. *State v. Rogers*, 37 Wn.App. 728, 731, 683 P.2d 608 (1984) (citing *Schoultz v. Dep't of Motor Vehicles*, 89 Wn.2d 664, 668, 574 P.2d 1167 (1978)). If the driver refuses to take the test after receiving the required warnings, then his consent is deemed revoked, and his license may be revoked. *Rogers*, 37 Wn.App. at 731.

Maloney contends that the State failed to produce evidence to satisfy the statutory conditions for a blood test. We review the record to determine whether the trial court's findings are supported by substantial evidence. *Shelden v. Department of Licensing*, 68 Wn.App. 681, 684, 845 P.2d 341 (1993). 'Substantial evidence' means evidence which would 'convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.' *Shelden*, 68 Wn.App. at 685 (citation omitted).

A. Reasonable Grounds

A lawful arrest is a prerequisite to the application of the implied consent statute. *O'Neill v. Dep't of Licensing,* 62 Wn.App. 112, 116, 813 P.2d 166 (1991). *Cf. State v. Rivard,* 131 Wn.2d 63, 71, 929 P.2d 413 (1997). The State must prove by a preponderance of the evidence that the arresting officer had reasonable grounds to believe the person had been driving while under the influence of intoxicants. *O'Neill,* 62 Wn.App. at 116. The reasonable grounds requirement is separate from the requirement of probable cause to arrest. *O'Neill,* 62 Wn.App. at 116. Probable cause to arrest exists where the totality of the facts and circumstances known to the arresting officer would warrant a reasonably cautious person to believe an offense is being committed. *O'Neill,* 62 Wn.App. at 116–117.

Maloney argues that Clasen's testimony was speculative and, thus, insufficient to meet the requirements of reasonable grounds and probable cause to arrest. Both inquiries turn on the factual question of whether Maloney was the driver. Maloney's assertion that '{t}here was no dispute that he was in the passenger seat' (Br. of Appellant at 8) ignores other evidence which pointed to him as the driver.

First, when Clasen arrived at the accident scene, Cortani gave him Maloney's driver's license and told him Maloney was the driver. Second, there were clothing items on the passenger seat and on the floorboard, from which it could reasonably be inferred that no one was in the passenger seat. Third, Maloney's question to Clasen, "Did I hurt anybody{?}" (Report of Proceedings (November 1, 1999) at 28) created a reasonable inference that he was behind the wheel. This was substantial evidence from which the jury could find that Clasen had reasonable grounds to believe that Maloney was the driver under the influence of intoxicants at the time of the accident. This evidence also established probable cause for Clasen to arrest Maloney for the same. *See, e.g., State v. Smith,* 130 Wn.2d 215, 224, 922 P.2d 811 (1996) (cases cited therein).

B. Breath Testing Instrument Unavailability

***4** Where the driver, as the result of an accident, is being treated at a medical facility, the State must show that a breath testing instrument was not available before the arresting officer requests a blood test. RCW 46.20.308(2); *Shelden,* 68 Wn.App. at 686. The State had the burden of proving that such instrument was not present at the Forks Community Hospital where Maloney was treated. *See Shelden,* 68 Wn.App. at 686. We reject Maloney's contention that the evidence was insufficient to establish this statutory condition. Sarnowski's testimony that the hospital did not have an instrument for testing breath alcohol content on the day of Maloney's arrest was substantial evidence on this requirement. The availability of a PBT in Clasen's patrol car was immaterial. See *Mairs v. Dep't of Licensing,* 70 Wn.App. 541, 548–49, 854 P.2d 665 (1993) (holding trial court erred in concluding that Mairs was improperly asked to take a blood test where the trooper had a PBT in his patrol car, but there was no evidence showing that the PBT was properly maintained).

C. Confusion Claim

If the information conveyed by the arresting officer confuses the driver about his rights under the implied consent law, the driver may claim he had no reasonable opportunity to refuse the blood test. *Mairs,* 70 Wn.App. at 546 (citations omitted). Once the driver explicitly exhibits his lack of understanding or confusion regarding the rights advisement, then the officer must clarify the information. *Dep't of Licensing v. Sheeks,* 47 Wn.App. 65, 68, 734 P.2d 24 (1987). It is the driver's burden to make his confusion apparent to the officer. *Sheeks,* 47 Wn.App. at 68. 'A lack of understanding not made apparent to the officer is of no consequence.' *Strand v. Department of Motor Vehicles,* 8 Wn.App. 877, 878, 509 P.2d 999 (1973).

Maloney claims that his refusal of the implied consent blood test was not knowing and intelligent because he was confused by his own reading of the rights advisement form. Maloney had the burden of showing that he objectively and clearly manifested his confusion to Clasen. See *Sheeks,* 47 Wn.App. at 68. The record is devoid of any evidence that Maloney expressed his confusion to Clasen. Even in his own testimony, Maloney did not claim that he told Clasen he was confused. Further, Clasen testified that Maloney refused his offer to reread the warnings, and Maloney did not ask any questions or exhibit confusion. Even assuming that Maloney was confused, absent any evidence that he made his confusion known to Clasen, the refusal of the blood test cannot be excused on this basis. *See, e .g., Sheeks,* 47 Wn.App. at 70–72 (holding the trial court's finding that Sheeks was confused was unsupported where there was only evidence that Sheeks may have been suffering from the effects of hypothermia).

Additionally, Maloney's reliance on *Rivard,* 131 Wn.2d 63, is misplaced. There, the officer did not fully advise Rivard of his rights under the implied consent statute prior to obtaining Rivard's agreement to a blood test. 131 Wn.2d at 63. Finding that Rivard was not under arrest at the time, the Rivard court

held that it was inconsequential that the officer's implied consent warnings were incomplete. 131 Wn.2d at 77.

***5** Here, it is undisputed that Maloney was under arrest when Clasen read him the implied consent warnings. Thus, while Maloney correctly states that there is a difference between a blood sample provided in response to a voluntary blood test and one obtained as a result of an implied consent test, such difference is inconsequential here because the implied consent statute was clearly invoked given the fact of Maloney's arrest.

In sum, Maloney's sufficiency of the evidence challenge fails on all grounds argued below and on appeal. The trial court did not err by denying Maloney's motions for a directed verdict and for a new trial.

II. Clasen's Testimony

We review a trial court's evidentiary decisions for an abuse of discretion. *State v. Wade*, 138 Wn.2d 460, 463–64, 979 P.2d 850 (1999). An abuse of discretion exists when the court's decision is manifestly unreasonable or based on untenable grounds. *Wade*, 138 Wn.2d at 464; *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Maloney contends that the trial court erred by admitting, over his foundation objection, Clasen's testimony—'whatever struck the mirror and windshield had been traveling through the vehicle from the left to the right.' [4] Report of Proceedings (November 1, 1999) at 26. Maloney also claims that admitting this testimony contradicted the court's earlier in limine ruling. [5] The court had ruled that Clasen's testimony on the damage to the pickup was admissible to show that he had reasonable grounds to suspect Maloney as the driver, but Clasen could not opine that the driver caused the damage to the windshield. Because Clasen did not testify as an expert that the driver caused the damage to the windshield, his testimony did not conflict with the in limine ruling.

Even assuming the trial court erred by overruling Maloney's objection, the improper admission of evidence is not prejudicial unless, within reasonable probability, the outcome of the trial would have been materially affected had the error not occurred. *State v. Smith*, 67 Wn.App. 838, 842, 841 P.2d 76 (1992) (citations omitted). Here, we find no prejudice given other evidence, as previously discussed, which pointed to Maloney as the driver.

III. Confusion Instruction

Though Maloney assigns error to the refusal of his proposed 'confusion' instruction, he fails to explain why this was error. Instead, he simply reiterates his earlier argument that his refusal of the blood test was not intelligent and knowing due to his confusion. To the extent that Maloney argues that the trial court erred by refusing his proposed 'confusion' instruction, we disagree.

The test for reviewing jury instructions is 'whether the instructions, read as a whole, allow counsel to argue their theory of the case, are not misleading, and properly inform the trier of fact of the applicable law.' *O'Neill v. Dep't of Licensing*, 62 Wn.App. 112, 119–20, 813 P.2d 166 (1991) (quoting *Gammon v. Clark Equip. Co.*, 104 Wn.2d 613, 617, 707 P.2d 685 (1985)). In this case, the court instructed the jury on 'confusion' as follows:

> ***6** It is a defense to the claim of refusal to submit to a blood test if the petitioner was confused about either the implied consent warnings or about the consequences of a refusal to take the test. The petitioner has the burden of proving this defense by showing: (1) that he objectively and clearly manifested or exhibited confusion to the officer regarding the implied consent warnings or the consequences of refusal to take the test, and (2) that the officer denied clarification. A lack of understanding not made apparent to the officer is of no consequence. If you find that the petitioner has proven both propositions, your verdict must be for the petitioner. If you find that the petitioner has failed to prove either proposition, the claim of confusion is not relevant.

Clerk's Papers at 49 (Instruction No. 9). This instruction correctly states the law. See *Sheeks*, 47 Wn.App. at 68. It also allowed Maloney to argue his theory of the case, as evidenced by Maloney's counsel's closing statement to the jury. We find no instructional error.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

HOUGHTON, J., and HUNT, A.C.J., concur.

Parallel Citations

2001 WL 738373 (Wash.App. Div. 2)

Footnotes

1 On cross-examination, Clasen stated he could not recall if he showed Maloney the form.

2 Clasen testified that he did not read the bottom 'voluntary blood' section of the form to Maloney.

3 The statute in effect at the time of Maloney's arrest, former RCW 46.20.308 (1989), is identical to the current statute in all relevant respects.

4 In Maloney's argument, he makes passing reference to the Frye test. Under the Frye test, 'evidence deriving from a scientific theory or principle is admissible only if that theory or principle has achieved general acceptance in the relevant scientific community .' *State v. Baity*, 140 Wn.2d 1, 10, 991 P.2d 1151 (2000) (quoting *State v. Martin*, 101 Wn.2d 713, 719, 684 P.2d 651 (1984)). Because Maloney fails to argue how Clasen's testimony involved novel scientific evidence, we do not address the admissibility of Clasen's testimony under the Frye standard. RAP 10 .3(a)(5).

5 The court ruled on Maloney's in limine motion that:

> I'm not going to have the officer get up and say as a{n} expert this damage to the windshield was caused by the driver. I hope you understand the distinction I'm making. One goes to reasonable cause and one to whether or not he's going to state for certain in my professional opinion he was driving. I don't think he can say that without the foundation he has expertise to do that. At this point I haven't heard that. I think just general accident investigation, and general training on accident investigation, is probably not enough to allow the officer to state as a{n} expert that windshield damage was done by the driver. So I will allow him to say it with regard to his reasonable cause, but I'm not going to allow him to say it as a{n} expert....

Report of Proceedings (November 1, 1999) at 7–8.