102 Wash.App. 1055

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 2.

STATE of Washington, Respondent,
v.
Jason C. STYMACKS, Appellant.

No. 24055–6–II. | Oct. 12, 2000.

Appeal from Superior Court of Mason County, Docket No. 98–1–00030–9, judgment or order under review, date filed 11/19/1998; James B. Sawyer II, Judge.

Attorneys and Law Firms

Thomas E. Doyle, Attorney At Law, Hansville, WA, Patricia A. Pethick, Attorney At Law, Tacoma, WA, for appellant(s).

Carol L. Case, Mason Co. Deputy Pros. Atty., Shelton, WA, for respondent(s).

Opinion

UNPUBLISHED OPINION

MORGAN.

***1** Jason C. Stymacks appeals from convictions for vehicular homicide and driving while under the influence. He claims through counsel that the trial court erred by denying his motion to suppress the results of a blood test, on the ground that the arresting officer failed to inform him that he had the right to an additional independent test of his blood. He claims in his pro se brief that the trial court erred by finding that there was probable cause to arrest him for driving under the influence; that the arresting officer was not authorized to perform a mandatory blood draw given that the then-existing charge was only driving under the influence; that he was released by medical staff, and thus never formally arrested; that statements he made to the arresting officer were produced by emotional stress, medications, and injuries, and thus were not voluntary; and that he received ineffective assistance from counsel. We affirm.

FACTS

On January 26, 1998, Stymacks was driving his pickup in Shelton. His passenger was his friend and brother-in-law, Wilson Blueback. After speeding his pickup down West E Street to its intersection with VanBuren, he tried unsuccessfully to negotiate a left turn while going 43 to 47.7 miles per hour. [1] The pickup left the roadway, crashed sideways through a fence, and struck several trees before stopping in a cemetery. Blueback died two days later from injuries sustained in the crash.

Responding police officers believed Stymacks was intoxicated, and they doubted Blueback would survive. Accordingly, they subjected Stymacks to a mandatory blood draw. The result was a reading of 0.15 g/100ml.

Two days after the accident, and after Blueback had died, Stymacks went to the police station and admitted driving the pickup with Blueback as his passenger. He said:

> {W}e are friends. We had been out having a good time. We stopped at PJ's out by the airport and had some drinks until Wilson got cut off. I was drinking beer. So was Wilson. He had a couple of straight shots of Tequila too. Wilson was buying. After Wilson was cut off, he wanted to leave. We left in my truck, and he wanted to go down to Shooters in Shelton and drink some more. I came off Highway 101 onto Wallace, then I turned onto Olympic Highway North. Somewhere around McDonalds, I passed a semi-truck.
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> We continued down Olympic Highway North until I got to E Street. I turned there because I wanted to go to the cemetery to see a few family members' gravesites. I was talking to Wilson as I drove. I must have been looking at Wilson as I talked because I didn't realize I had come to the end of the street until it was too late. When I looked forward, it was too late. I saw the corner, the fence, the trees. I jammed on the brakes, tried to maneuver around the corner. I hit the trees. The next thing I remember, I was being strapped down to a backboard. I was taken to Mason General Hospital. I remember the police being there, but I don't remember what happened. [2]

***2** The State charged Stymacks with one count of vehicular homicide, RCW 46.61.520, and with one count of driving under the influence, RCW 46.61.502(1). In pretrial hearings, the trial court denied Stymacks' motion to suppress the blood draw and the statement to the police. A jury found him guilty of both charged offenses. It also found by special verdict that he had been operating his vehicle (a) under the influence of

intoxicating liquor, (b) in a reckless manner, and (c) with disregard for the safety of others. The court imposed 160 months of incarceration for the vehicular homicide.

I. BLOOD TEST

A. Findings of fact

The suppression court entered the following contested findings of fact and conclusions of law after a hearing on Stymacks' CrR 3.6 motion to suppress: [3]

> 1. That upon his arrival at Mason General Hospital, Officer Mak made contact with the defendant. Using a pre-printed Washington State Patrol DUI Arrest Report form, Officer Mak advised the defendant of his constitutional rights at approximately 10:05 p.m., which the defendant refused to acknowledge by signature.
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> 2. That Officer Mak next, at approximately 10:13 p.m., read to the defendant, using that same form, the Implied Consent Warning For Blood. That such warning begins with the language: 'Warning! You are under arrest for:'. Using that section of the form and that introductory language, Officer Mak advised the defendant that he was under arrest for driving while under the influence of intoxicating liquor.
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> 3. That Officer Mak then waited for a period of time because of the combative mood the defendant was displaying. Ultimately, at approximately 10:45 p.m., he read to the defendant, again using that same form, the Special Evidence Warning. That such warning begins with the language: 'As a Result of a Motor Vehicle Accident You are Under Arrest For:'. Using that section of the form and that introductory language, Officer Mak advised the defendant that he was also under arrest for Vehicular Assault.
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> Clerk's Papers at 53.

Stymacks now challenges these findings. We review these findings to see if they are based on substantial evidence. [4] A finding to which error is not assigned is a verity on appeal. [5]

Officer Mak's testimony supports the first finding. In that testimony, he said that he contacted Stymacks in the hospital's emergency room at about 10 p.m. He stated Stymacks was under arrest, and he advised Stymacks of his rights by reading from a preprinted form. Although Stymacks refused to sign the form, the record contains evidence sufficient to support the first finding.

Officer Mak's testimony supports the second finding. In that testimony, he said that he read Stymacks the implied consent form for a blood draw because breath-test facilities were not available. He said Stymacks was 'under arrest for driving or being in actual physical control of a motor vehicle while under the influence of intoxicating liquor and/or any drugs.' [6] At about 10:13, Stymacks refused to acknowledge that he had been given his implied consent warnings or that he had been advised he was under arrest for driving under the influence. Nonetheless, the record contains evidence sufficient to support the second finding.

***3** Officer Mak's testimony supports finding three. He stated that Stymacks told them they would have to fight him in order to take blood. Mr. Stymacks, at that point, was again still very —I would use the word volatile. He was very upset. He was, oh, arguing with the medical staff. He was basically upsetting the whole hospital emergency room. At that point, I chose to step back a little bit and let the medical staff tend to his injuries prior to pressing on with the mandatory blood draw. [7]

A half hour later, at about 10:45, Mak learned that the likelihood of Blueback's survival was 'very grave'; thus, he reapproached Stymacks, said he was under arrest for vehicular assault, and 'advised {him} of the special evidence warning as a result of the motor vehicle accident regarding the vehicle assault, and I read to him the above statement.' [8] The form he read stated:

> {A} blood /breath test will be administered to determine the concentration of alcohol and/or any drug in your blood. However, I must advise you that because of the nature of the arrest, according to the law a blood or breath test may be administered without your consent and that you have the right to additional tests administered by a qualified person of your own choosing. [9]

Although Stymacks 'did not acknowledge{,}' [10] this is evidence sufficient to support the trial court's third finding.

B. Conclusions of law

Based on its findings, the trial court concluded:

> 2. That the defendant was properly placed under arrest by Officer Mak on January 26, 1998.

3. That Officer Mak followed the proper and appropriate procedures for obtaining an involuntary blood sample from the defendant on January 26, 1998.

4. That the blood sample obtained from the defendant by Officer Mak on January 26, 1998, will be admissible into evidence at trial. [11]

Stymack now challenges the third of these conclusions.

Washington's Implied Consent Statute is RCW 46.20.308. Under subsection (1) of that statute, any person who operates a vehicle in this state is deemed to consent to blood or breath tests if the arresting officer has reasonable grounds to believe the driver is under the influence of alcohol or drugs. Under subsection (2), '{t}he officer shall inform the person of his or her right to refuse the breath or blood test, and of his or her right to have additional tests administered by any qualified person of his or her choosing as provided in RCW 46.61.506.' After doing that, the arresting officer may give or direct the test unless the person is incapable of providing a breath sample, or is 'being treated in a hospital ... in which a breath testing instrument is not present{.}' In the latter cases, 'a blood test shall be administered by a qualified person{.}' Under subsection (3), a breath or blood test may be administered without the consent of the arrested person, if the arrest is for (a) vehicular homicide, (b) vehicular assault, or (c) driving under the influence and there has been serious bodily injury to another person resulting from the accident for which the person is under arrest.

***4** Here, Officer Mak arrested Stymacks for driving under the influence. He requested that Stymacks submit to a blood test because breath testing equipment was unavailable. He informed Stymacks of his right to refuse the test, although Stymacks refused to acknowledge that he had been informed of these rights. A half hour later, Mak told Stymacks that Stymacks was under arrest for vehicular assault, that a blood test was mandatory, and that Stymacks had the right to his own test by an independent qualified person. Although Stymacks refused to acknowledge that Officer Mak had informed him of these rights, these facts fully warrant the trial court's third conclusion of law.

Stymacks relies on *State v. Anderson*, [12] which held that substantial compliance with the notice provisions of RCW 46.20.308(2) was insufficient. Although the trial court did not find that Stymacks acknowledged his right to independent testing, neither the statute nor Anderson requires such an acknowledgement. The suppression court did not err by admitting the blood test result.

II. PRO SE ISSUES

A. Probable Cause to Arrest

Stymacks argues pro se that the suppression court erred by finding that Officer Mak had probable cause to arrest. He argues that Officer Ecklund never saw, smelled, or observed any indicators of intoxication, and that there were no containers of alcohol or drugs in the truck or at the scene. [13] In our view, however, the evidence supports the officers' belief that probable cause existed. Officer Mak testified that he observed prior to arrest: 'Yeah, attitude, he was argumentative. Strong odor of intoxicants-excuse me. His eyes were watery and bloodshot. His speech was actually fair. It was not real bad. And in my opinion, he was obviously intoxicated at that point.' [14]

B. Formal Arrest

Stymacks next argues that he was never formally arrested. This is contrary to Officer Mak's testimony, and it is obvious that he was not free to leave the hospital before the officers obtained a blood sample. This argument fails.

C. Confession

Stymacks argues that the trial court erred in admitting his pre-trial statement because (1) he was medicated, (2) he was under extreme emotional distress, (3) the statement was not recorded, (4) the detective did not arrest him despite multiple opportunities to do so, (5) the detective did not read him his Miranda rights, and (6) counsel should have made a more adequate inquiry.

Detective Adams testified before trial and at trial that he advised Stymacks of his rights. The record supports the trial court's finding that neither Stymacks' emotional state nor his pain medication prevented him from understanding the consequences of talking with Detective Adams. The record supports a finding that Stymacks was not coerced. While it is a good practice for police officers to record statements from defendants, they are not required to do so. The record supports the admission of Stymacks' pre-trial statement. [15]

D. Effective Assistance of Counsel

***5** Stymacks argues that he was denied his right to effective assistance of counsel. More specifically, he maintains (1) that his attorney inadequately cross-examined Detective Adams concerning the pre-trial statement; (2) that his attorney failed to call key witnesses, such as hospital medical staff; (3) that his attorney failed to prove the effects of Haldol, which had rendered him nearly unconscious; (4) that his attorney failed to spend time with him before trial; [16] and (5) that his attorney allowed him to go to court in prison garb. To show ineffective assistance, a defendant must demonstrate that counsel's performance was (1) deficient and (2) prejudicial. [17]

The present record does not show that counsel would have produced anything helpful by further questioning Adams, by calling witnesses from the hospital, by exploring the effects of Haldol, or by spending more time with Stymacks. It does show that when Stymacks came to trial improperly dressed, he was allowed to change clothes before trial resumed. This record does not show deficient or prejudicial performance.

Affirmed.

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 and BRIDGEWATER, JJ., concur.

Parallel Citations

2000 WL 1514846 (Wash.App. Div. 2)

Footnotes

1 Several witnesses testified that Stymacks' truck roared passed them before crashing. Some estimated his speed at 60–70 miles per hour. Officer Michael Hudnell concluded from tiremarks on the road that Stymacks had not applied his brakes before leaving the road.

2 Report of Proceedings at 282–83.

3 The court also made two findings of uncontested fact:

> 1. On January 26, 1998, at approximately 9:33 p.m., Sergeant Eklund and Officer Mak of the Shelton Police Department responded to a one car accident in Shelton, Mason County, Washington. Their investigation of the accident scene gave them probable cause to believe that the defendant was under the influence of intoxicants and had been operating the motor vehicle involved in the accident. In addition, the officers had probable cause to believe that the defendant had committed the crime of vehicular assault because there was a serious injury to Wilson Blueback, who was determined to have been a passenger both by his location in the vehicle and on the basis of observations of witnesses on the scene related to the law enforcement officers.
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> 2. The defendant was transported by ambulance to Mason General Hospital in Shelton, Washington, for treatment of his injuries. At approximately the same time Officer Mak was directed by Sergeant Eklund to obtain a blood draw kit from the Shelton Police Station and then proceed to Mason General Hospital to obtain a blood sample from the defendant.
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> Clerk's Papers at 52–53.

4 *State v. Hill,* 123 Wn.2d 641, 647, 870 P.2d 313 (1994) (independent evaluation of evidence improper).

5 *State v. Christian,* 95 Wn.2d 655, 656, 628 P.2d 806 (1981); *Hill,* 123 Wn.2d at 644.

6 Report of Proceedings at 32.

7 Report of Proceedings at 33–34.

8 Report of Proceedings at 36.

9 Report of Proceedings at 37.

10 Report of Proceedings at 37.

11 Clerk's Papers at 54.

12 *State v. Anderson,* 80 Wn.App. 384, 909 P.2d 945 (1996).

13 Stymacks also argues that Officers Mak and Eklund were not authorized to perform a mandatory blood draw because he, Stymacks, was not charged with DUI, vehicular assault, or vehicular homicide. The record shows, however, that before blood was drawn, he was charged with vehicular assault and so advised. Under RCW 46.20.308, moreover, a person is subject to mandatory blood testing when another is seriously injured in the accident, and that was clearly the situation here.

14 Report of Proceedings at 38.

15 *Hill,* 123 Wn.2d at 647.

16 Stymacks was housed in the Washington Correction Center's Intensive Management Unit because he was an 'administrative management problem' in the local jail. Report of Proceedings at 262. He told the trial court that this impeded his ability to use the law library, and to talk with his attorney or anyone else.

17 *State v. Thomas*, 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987) (adopting test from *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).