IN THE SUPREME COURT OF THE STATE OF NEVADA

RANDALL DEWAYNE BUCHANAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38664

FILED

APR 21 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered on a jury verdict, finding appellant guilty of driving a motor vehicle while under the influence of intoxicating liquor, third offense, a felony (DUI).[1] We affirm.

FACTUAL BACKGROUND

During the morning of July 8, 2000, Churchill County Sheriff's Patrol Sergeant Darl Horsley received information through his dispatcher concerning a possible drunk driver operating a maroon GMC Sonoma truck, Nevada license plate 956GSM, west of Fallon, Nevada. Sergeant Horsley located the vehicle some fifteen minutes later on a side street intersecting State Highway 50. He observed the driver hesitate, enter the highway, travel a short distance, and quickly pull off of the roadway near a drive-in restaurant.[2] Shortly thereafter, the truck reentered the highway with a different driver. Thinking this maneuver suspicious under the circumstances, especially in light of the dispatch report, Sergeant Horsley effected a traffic stop of the vehicle. He then

[1]See NRS 177.015; NRS 484.3792(1)(c).

[2]Other testimony revealed that the truck stopped at Buchanan's mother's house, which was apparently in close proximity to the restaurant.

interviewed the driver, Michael Freeman, and later, the appellant, Randall Dewayne Buchanan.

Following a field sobriety test, Sergeant Horsley placed Freeman, a minor, under arrest for underage drinking and driving. It is not clear whether the sergeant originally arrested Freeman for DUI.

Although Sergeant Horsley never observed Buchanan driving, he proceeded to interview Buchanan. Buchanan admitted to consuming three beers prior to being stopped, that he had been driving earlier, that he became tired and that Freeman took over the wheel from him. The sergeant noticed a strong odor of alcohol during this interview and that Buchanan's eyes were very bloodshot.

Buchanan underwent a battery of six field sobriety tests. Because Buchanan only satisfactorily completed two of the six tests, Sergeant Horsley arrested him for DUI.

Buchanan also underwent two breath tests at the sheriff's station on an Intoxilizer 5000 testing device. Test results showed breath alcohol levels of .131 grams of alcohol and .116 grams of alcohol, respectively.

The case proceeded to trial before a jury on September 4, 2001. The State presented evidence from Michaela Knox and Misty Rauch that Buchanan drove his truck via a public road to his mother's residence on July 8. The State also introduced expert testimony that the breath test results were accurate and reliable, that Buchanan had the equivalent of at least seven drinks in his system when he was tested, and that a person is under the influence or "incapacitated" when his or her breath or blood alcohol content reaches a concentration of .08.[3] Evidence introduced at

[3]A person is not per se deemed under the influence below blood or breath alcohol concentrations of .10.

trial also confirmed that, although the Intoxilizer 5000 was certified as working properly three days after Buchanan's arrest, it failed to operate the day following that certification, and was removed from service two days thereafter.

The jury found Buchanan guilty of driving under the influence of alcohol. The district court enhanced the conviction to felony status per NRS 484.3792(1)(c).[4] The trial court sentenced Buchanan to thirty-six months in state prison with parole eligibility at twelve months, credit for one day served, a fine of $2,000.00, an administrative assessment fee of $25.00, and a $60.00 laboratory fee. In addition, the court required Buchanan to submit to blood and/or saliva testing to determine DNA markers and to pay $150.00 for that testing. Buchanan appeals.

DISCUSSION

1. Buchanan asserts that Sergeant Horsley stopped his vehicle without a reasonable suspicion of criminal activity. Thus,

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[4]NRS 484.3792(1)(c) provides in pertinent part:

> 1. Unless a greater penalty is provided pursuant to NRS 484.3795, a person who violates the provisions of NRS 484.379:
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> . . . .
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> (c) For a third or subsequent [DUI] offense within 7 years, is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years, and shall be further punished by a fine of not less than $2,000 nor more than $5,000.

The instant offense resulted in Buchanan's third conviction within a seven-year period.

Buchanan contends the district court should have suppressed any evidence generated from the traffic stop.

The Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures; this protection applies to investigatory stops of persons or vehicles.[5] A police officer is permitted to make a traffic stop, based only upon a reasonable articulable suspicion that criminal activity may be afoot.[6] The officer's suspicion can be justified only via some objective manifestation that criminal activity is in progress, or is about to occur.[7]

Judicial determinations of reasonable suspicion must be based upon a "totality of circumstances."[8] In this, a court may consider an officer's "specialized training to make inferences . . . and deductions . . . that 'might well elude an untrained person.'"[9] In Sonnenfeld v. State,[10] we

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[5]United States v. Arvizu, 534 U.S. 266, 273 (2002) (citing Terry v. Ohio, 392 U.S. 1, 9 (1968)); see also Whren v. United States, 517 U.S. 806, 809-10 (1996) (a traffic stop by an officer, no matter how brief or limited its purpose, is a seizure); Nev. Const. art. 1, § 18.

[6]Arvizu, 534 U.S. at 273 (citing United States v. Sokolow, 490 U.S. 1, 7 (1989) (quoting Terry, 392 U.S. at 30)); see also NRS 171.123(1) which states, in relevant part:

> Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime.

[7]United States v. Cortez, 449 U.S. 411, 417 (1981).

[8]Arvizu, 534 U.S. at 273.

[9]Id. (quoting Cortez, 449 U.S. at 418).

[10]114 Nev. 631, 958 P.2d 1215 (1998).

concluded that traffic stops based upon citizen reports are reasonable if sufficiently corroborated.[11]

Here, the anonymous tip provided a specific description of the vehicle, its license plate number, and its location. Additionally, Sergeant Horsley independently observed a series of maneuvers that, in his experience, reasonably aroused his suspicion that the original driver was under the influence. These maneuvers included the hesitation upon entering the highway, the brief stop, and the apparent "driver switch." Thus, Sergeant Horsley's observations, taken as a whole, sufficiently corroborated the anonymous tip relayed to him through the dispatcher. We therefore conclude that, under a totality of the circumstances, Sergeant Horsley reasonably suspected ongoing criminal activity, i.e., drunk driving. Thus, there was no reason to suppress trial evidence generated after the stop of Buchanan's vehicle.

2. Buchanan contends that the officer had no reasonable articulable suspicion to conduct additional chemical tests after he "passed the difficult [field sobriety] tests." He makes the disjointed argument that Sergeant Horsley improperly relied upon uncorroborated statements of two accomplices, the passengers in his vehicle, in proceeding to conduct the further testing, and that a conviction based upon the testimony of an accomplice is invalid under NRS 175.291(1), absent sufficient corroboration. First, Buchanan points to no evidence in the record

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[11]Id. at 634, 958 P.2d at 1217; see also Alabama v. White, 496 U.S. 325, 332 (1990) (anonymous tip, based upon totality of circumstances and corroboration, possessed sufficient indicia of reliability to justify investigatory stop); State v. Hankey, 11 P.3d 40 (Idaho 2000) (police officer had reasonable suspicion to perform investigatory stop of vehicle based upon an anonymous tip when the totality of circumstances indicated that the officer had sufficiently corroborated the tip).

regarding which tests he passed, or why the two tests he passed were more significant than the tests he failed. Second, he raises this issue for the first time on appeal and we therefore need not consider the claim. Third, the passengers were not accomplices. Fourth, Buchanan admitted at the scene that he was the driver and demonstrated objective signs of intoxication during the interview. Fifth, while the state must establish the elements of the criminal offense independent of any admissions of the defendant,[12] Buchanan's admissions at the scene provided cause to conduct the chemical tests upon which this conviction was based. Finally, the State presented sufficient evidence of the essential elements of the crime independent of Buchanan's admissions through the testimony of the passengers in the vehicle.

3. Buchanan contends that the State's failure to disclose its expert's "Smith Widmark"[13] calculation notes constituted a clear discovery violation and warrants reversal.[14] We disagree.

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[12]See, e.g., Hass v. State, 92 Nev. 256, 259, 548 P.2d 1367, 1369 (1976); Sheriff, Washoe County v. Dhadda, 115 Nev. 175, 180-81, 980 P.2d 1062, 1066 (1999) (at preliminary examination to hold a defendant on an indictment, corpus delicti must be demonstrated by evidence independent of defendant's confessions or admissions).

[13]This formula determines the amount of alcohol consumed based upon a person's breath alcohol content, sex, weight, and body size.

[14]Buchanan raises in his reply brief for the first time that the State's failure to disclose the expert's notes violated his rights under Brady v. Maryland, 373 U.S. 83 (1963). NRAP 28(c) bars consideration of this argument because it was neither raised in Buchanan's opening brief nor raised by the State in its answering brief. Rather, the opening and answering briefs were devoted to arguing the scope of the statutory discovery requirements. See Elvik v. State, 114 Nev. 883, 888, 965 P.2d 281, 285 (1998).

The State disclosed in its pre-trial notice of trial witnesses that its expert would testify regarding "the absorbtion [sic], metabolization and elimination of alcohol; [and] the effects of alcohol on a person's ability to operate a motor vehicle." Thus, Buchanan was on notice that the expert would testify about alcohol's effect on driving ability. At trial, the expert testified to her Smith Widmark calculations, concluding that the equivalent of seven drinks were in Buchanan's system when his breath was tested. Defense counsel objected to this testimony, contending that the State had not disclosed any report of this calculation. The prosecutor replied that he did not know of any report on this formula and the district court overruled the objection.

Later, on cross-examination, the expert admitted that she made several calculations in a notebook. The trial court granted defense counsel's request to examine the notebook and its calculations. The expert provided the notebook to defense counsel for review and defense counsel was able to conduct a complete cross-examination. We conclude that any prejudice from pre-trial non-disclosure was cured by defense counsel's ability to review the notes and cross-examine the expert based upon them.

4. Buchanan argues that subsequent malfunctions of the Intoxilizer 5000 machine cast doubt on the accuracy of his breath test results and, thus, the expert testimony regarding the results was speculative. He also argues that the machine results must have been in error, because he passed several of the field sobriety tests and "[h]is physical actions were consistent with a person that was not intoxicated."

First, because Buchanan has not supported his contention that his "actions were consistent with a person that was not intoxicated" with specific argument, we will not consider the contention on appeal.[15]

Second, whether the Intoxilizer 5000 device operated correctly was ultimately a decision for the jury.[16] Substantial evidence in the record supports a determination that the machine did not malfunction in this instance, such as the expert's testimony that the machine would have provided an error message in the event of a faulty test, that the two test results were within an acceptable margin of error, and that Sergeant Horsley properly administered the tests. We will therefore not disturb the jury's conclusion on appeal.[17]

5. The State's expert testified that a .08 breath alcohol level is the minimum level at which all persons become intoxicated to the point that they cannot drive safely. Buchanan argues that the jury's consideration of this evidence improperly allowed the jury members to "act as legislators and impose a lesser burden of proof [on] the state." We disagree.

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[15]See Rhyne v. State, 118 Nev. ___, ___, 38 P.3d 163, 171 (2002) ("'Contentions unsupported by specific argument or authority should be summarily rejected on appeal.'") (quoting Mazzan v. Warden, 116 Nev. 48, 75, 993 P.2d 25, 42 (2000)). Even if we were to reach Buchanan's argument, Sergeant Horsley's testimony regarding Buchanan's physical characteristics tend to show that he appeared intoxicated.

[16]See Middleton v. State, 114 Nev. 1089, 1102-03, 968 P.2d 296, 306 (1998) (jury determines weight and credibility of conflicting evidence).

[17]Hernandez v. State, 118 Nev. ___, ___ 50 P.3d 1100, 1113 (2002) ("This court will not disturb a jury verdict where there is substantial evidence to support it . . . .").

Under NRS 484.379(1)(a), it is unlawful for a person to drive a vehicle while "under the influence of intoxicating liquor."[18] This statutory provision does not require a specific blood or breath alcohol concentration level for conviction. We have defined the term "under the influence" as intoxication "to a degree that renders [a defendant] 'incapable of safely driving or exercising actual physical control of the vehicle.'"[19]

The expert's testimony regarding a .08 level as a level at which persons are incapacitated was not improper under NRS 484.379(1)(a). While a person is per se guilty of DUI under NRS 484.379(1)(b) if he or she drives a vehicle with a blood/breath alcohol concentration of .10, NRS 484.379(1)(a) contemplates that a person can be "under the influence" with a lesser level. To construe otherwise would render it meaningless.[20] Thus, in Long v. State[21] we held that, "[u]nder

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[18]NRS 484.379(1) states:

> 1. It is unlawful for any person who:
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> (a) Is under the influence of intoxicating liquor;
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> (b) Has a concentration of alcohol of 0.10 or more in his blood or breath; or
>
> (c) Is found by measurement within 2 hours after driving or being in actual physical control of a vehicle to have a concentration of alcohol of 0.10 or more in his blood or breath,
>
> to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access.

[19]Cotter v. State, 103 Nev. 303, 306, 738 P.2d 506, 508 (1987) (quoting NRS 484.3795).

[20]See Diaz v. Dist. Ct., 116 Nev. 88, 94, 993 P.2d 50, 54-55 (2000) (""[N]o part of a statute should be rendered nugatory, nor any language turned to mere surplusage, if such consequences can properly be

continued on next page . . .

the plain language of NRS 484.379, a person driving a vehicle may violate NRS 484.379 in either of two ways: by driving while under the influence . . . or by driving while having 0.10 percent or more by weight of alcohol in the blood." We therefore conclude that the expert testimony did not lower the State's burden of proof.[22]

6. Buchanan contends that he could not adequately cross-examine Sergeant Horsley because the sergeant intentionally destroyed his notes relating to the field sobriety testing of Freeman.

"The State's loss or destruction of evidence constitutes a due process violation only if the defendant shows either that the State acted in bad faith or that the defendant suffered undue prejudice and the exculpatory value of the evidence was apparent before it was lost or destroyed."[23]

If a defendant cannot show bad faith, he has the burden of showing prejudice. To meet that burden, the

> defendant must show that "'it could be reasonably anticipated that the evidence sought would be exculpatory and material to [the] defense.'" It is not sufficient to show "'merely a hoped-for

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. . . *continued*
avoided'"") (quoting Paramount Ins. v. Rayson & Smitley, 86 Nev. 644, 649, 472 P.2d 530, 533 (1970) (alteration in original) (quoting Torreyson v. Board of Examiners, 7 Nev. 19, 22 (1871))).

[21]109 Nev. 523, 528, 853 P.2d 112,115 (1993).

[22]Buchanan does not attack the scientific basis of the expert testimony concerning blood alcohol levels below .10.

[23]Leonard v. State, 117 Nev. 53, 68, 17 P.3d 397, 407 (2001).

> conclusion'" or "'that examination of the evidence would be helpful in preparing [a] defense.'"[24]

According to Buchanan, the exculpatory value of the notes was inherent because the sergeant's lack of testing skills was critical to the defense and, accordingly, he could not effectively cross-examine the sergeant concerning the adequacy of Freeman's testing without the notes.[25] We conclude that Buchanan has neither shown that Sergeant Horsley acted in bad faith or that he was prejudiced because of the destruction of the field notes.

Buchanan fails to show that Sergeant Horsley should have reasonably anticipated that his notes would have been exculpatory or material to the defense. The notes dealt with testing of someone other than Buchanan. Thus, the sergeant could have reasonably concluded that they were no longer relevant or material to a pending case when he destroyed them. It was also reasonable for the sergeant to conclude that the notes were not pertinent because he arrested Freeman for underage drinking and driving, not DUI. Additionally, had Buchanan used the notes at trial to cross-examine the sergeant, it is unlikely the result of the trial would have been different given overwhelming evidence of guilt at trial: eyewitness testimony that he had been driving the truck,

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[24]Williams v. State, 118 Nev. ___, ___, 50 P.3d 1116, 1126 (2002) (quoting Leonard, 117 Nev. at 68, 17 P.3d at 407)).

[25]The sergeant admitted to defense counsel that he could not testify or be cross-examined on Freeman's field sobriety tests without his notes.

Buchanan cites cases such as Power v. State, 102 Nev. 381, 724 P.2d 211 (1986), and Dias v. State, 95 Nev. 710, 601 P.2d 706 (1979), for the proposition that a "mere opportunity to cross-examine is not sufficient" for Sixth Amendment purposes. Those cases dealt with situations where a declarant was not available. Because Sergeant Horsley was available, those cases are inapplicable to the current case.

Buchanan's admission confirming the eyewitnesses' testimony, his admission of consumption of alcohol prior to driving, his failure of four of six sobriety tests, and breath alcohol testing showing a per se violation of NRS 484.379.

7. Buchanan claims that one of the two prior convictions used by the State to enhance his conviction from misdemeanor to felony status was "constitutionally infirm" because the State failed to meet its burden of proof regarding that prior conviction.

NRS 484.3792(1)(c) provides that a person's third or subsequent misdemeanor conviction for DUI within seven years is punishable as a felony. The State has the burden of proving the existence of prior offenses by a preponderance of the evidence demonstrating "either that the defendant was represented by counsel or validly waived that right, and that the spirit of constitutional principles was respected in the prior misdemeanor proceedings."[26] We have found evidence consisting of a citation received for a charge and a plea of nolo contendre sufficient to meet that evidentiary standard.[27]

With regard to the prior conviction Buchanan now attacks on appeal, the State provided the trial court at sentencing with a misdemeanor complaint for DUI dated July 31, 1999, a transcript of Buchanan's arraignment before a municipal court on August 12, 1999, and a waiver of rights form dated September 12, 1999.[28] The transcript of the

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[26]Dressler v. State, 107 Nev. 686, 697, 819 P.2d 1288, 1295 (1991); see also English v. State, 116 Nev. 828, 836, 9 P.3d 60, 64 (2000).

[27]See Isom v. State, 105 Nev. 391, 394, 776 P.2d 543, 546 (1989).

[28]The State concedes that this date was incorrect; that the waiver was signed on August 12, 1999.

prior proceedings reflects Buchanan's waiver of his right to counsel, as well as his plea of no contest to misdemeanor DUI after the municipal court questioned him as to whether he understood the consequences of the wavier and his plea. The municipal court then convicted Buchanan of DUI and set a sentencing date. Thus, we conclude that the trial court correctly determined that the State proved by a preponderance of the evidence that Buchanan had been convicted twice previously of DUI within the past seven years. Accordingly, the penalty enhancement to felony status was valid.

CONCLUSION

We conclude that Sergeant Horsley properly conducted a traffic stop and subsequent sobriety testing of Buchanan; the State did not improperly present expert testimony; Buchanan failed to meet his heavy burden of proving bad faith or prejudice regarding the destruction of evidence; and the trial court correctly enhanced Buchanan's conviction to felony status.[29]

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Rose

_____, J.
Maupin

_____, J.
Gibbons

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[29]We have carefully considered Buchanan's other arguments and conclude that they lack merit.

cc: Hon. Robert E. Estes, District Judge
Karla K. Butko
Attorney General Brian Sandoval/Carson City
Churchill County District Attorney
Churchill County Clerk