IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JOHN PATRICK LEYDON, Appellant, v. MUNICIPALITY OF ANCHORAGE, Appellee.	Court of Appeals No. A-13171 Trial Court No. 3AN-14-08957 CR MEMORANDUM OPINION No. 6950 — June 16, 2021

Appeal from the District Court, Third Judicial District, Anchorage, J. Patrick Hanley, Judge.

Appearances: John Patrick Leydon, *in propria persona*, Anchorage, Appellant. Sarah E. Stanley, Municipal Prosecutor, and Rebecca A. Windt Pearson, Municipal Attorney, Anchorage, for the Appellee.

Before: Wollenberg, Harbison, and Terrell, Judges.

Judge TERRELL.

John Patrick Leydon was convicted of operating a motor vehicle while under the influence of alcohol ("OUI").[1] He raises six claims of error on appeal.

[1] Anchorage Municipal Code (AMC) 09.28.020(A).

Several of Leydon's claims were raised in the trial court. These claims involve breath testing procedures. Specifically, Leydon contends that the district court erred when it ruled: (1) that he did not have a right to a preliminary breath test ("PBT") in the field prior to his arrest; (2) that a PBT administered when he was being booked into jail was inadmissible at trial; (3) that due process did not require the DataMaster processing to be videotaped; and (4) that the DataMaster results were admissible even though he was unable to obtain a video recording of the DataMaster processing (as he claimed he was promised he would be able to do).

Leydon also raises two arguments on appeal that he did not raise in the trial court. First, he contends that the district court erred by failing to advise him that he could represent himself at trial with the assistance of standby counsel. Second, Leydon argues that reversible error occurred when the prosecutor questioned a police officer concerning Leydon's decision to decline his right to an independent chemical test.

For the reasons explained in this decision, we reject these claims, and we affirm the judgment of the district court.

Background facts and proceedings

On September 29, 2014, just before midnight, Leydon was stopped for a traffic violation at Fireweed and A Street. Leydon failed to yield to oncoming traffic in the intersection, and he made a left turn in front of an Anchorage police officer, who was forced to brake quickly to avoid hitting Leydon's vehicle. When contacted, Leydon showed signs of intoxication — watery eyes, slurred speech, poor dexterity, and a strong odor of alcohol. He also admitted he had been drinking since 7:00 p.m. that evening, and he conceded he was "probably not 100% safe to be driving."

Leydon refused to perform field sobriety tests, but requested that the police officer administer a PBT to determine if he was over the legal limit for breath or blood

alcohol concentration when driving. The officer declined, and — based on his observations of Leydon's traffic violation, his admissions about drinking and whether he should be driving, and his signs of intoxication — arrested Leydon for OUI.

Leydon was transported to the Anchorage Correctional Complex to take a DataMaster test. After Leydon completed the test, the police administered a second breath test at Leydon's request. The first test showed that Leydon's breath alcohol content ("BAC") was .107 percent, and the second test showed that his BAC was .106 percent. Both tests were conducted within one hour of the traffic stop, and were administered approximately eight minutes apart. The police offered Leydon an independent chemical test of his blood, but, after initially stating that he wanted an independent test, Leydon changed his mind and declined to provide a blood sample.

When Leydon was remanded to custody, Department of Corrections ("DOC") personnel administered a PBT, which showed that his BAC was .087 percent. At an evidentiary hearing, a DOC witness explained that the purpose of the PBT is to determine whether a remanded prisoner's BAC is so high that medical care is required; it is administered to people who are remanded for impaired driving (or people who appear impaired when remanded), and it is not done for evidentiary purposes for use in criminal proceedings.

Leydon, representing himself in the district court, litigated a number of motions over a period of almost four years. Just prior to trial, Leydon requested the assistance of counsel, and he was represented at trial by court-appointed counsel. After a jury trial, Leydon was convicted of OUI.

Leydon did not have a statutory or due process right to a preliminary breath test in the field

Leydon contends that he had a right to have a PBT administered during the traffic stop so that he could use the field PBT result to challenge the police-administered DataMaster breath test. He claims that this right is guaranteed by Alaska's implied consent statutes and by the due process clause of Article I, Section 7 of the Alaska Constitution, as construed by the Alaska Supreme Court in *Snyder v. State*.[2] Because the police did not administer a PBT at the scene of his arrest, Leydon argues that the district court should have suppressed the later DataMaster results.

We disagree. Beginning with the statutory basis of his claim, Leydon does not cite a particular statute but refers generally to Alaska's implied consent statutes. Given Leydon's references to the PBT being a test of his own choice, he appears to be grounding his claim in AS 28.35.033(e). This statute provides, in relevant part: "The person tested may have a physician, or a qualified technician, chemist, registered or advanced practice registered nurse, or other qualified person of the person's own choosing administer a chemical test in addition to the test administered at the direction of a law enforcement officer."

The "chemical test" referred to in this statute is not a PBT in the field. As this Court recognized in *Snyder v. State*, "[t]he wording of this provision makes it clear that the statutory right to an independent test of choice arises *after* a person has submitted to a breath test."[3] This provision does not speak to the administration of a PBT to an OUI arrestee in the field, but rather to tests that occur after the arrestee has submitted to the primary police-administered breath test, the DataMaster, because the independent test

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[2] *Snyder v. State*, 930 P.2d 1274 (Alaska 1996).

[3] *Snyder v. State*, 879 P.2d 1025, 1028 (Alaska App. 1994) (emphasis added), *rev'd on other grounds*, 930 P.2d 1274 (Alaska 1996).

is intended to be a tool for a person ultimately charged with OUI to challenge the police-administered test.

Moreover, AS 28.35.031(b), which authorizes police officers to administer PBTs, does not authorize a motorist to *demand* such a test. This provision contemplates the use of a PBT as a tool to aid the police in investigations, *i.e.*, as a confirmatory or additional screening tool, for use in the circumstances set out in AS 28.35.031(b)(1)-(3).

Leydon alternatively argues that the due process clause of the Alaska Constitution confers a right to demand a PBT at the scene of arrest. In support of this argument, he relies on the Alaska Supreme Court's decision in *Snyder v. State*, and this Court's interpretation of *Snyder* in *Harvey v. State*.[4] However, these cases do not support Leydon's argument.

Snyder was based on *Gundersen v. Anchorage*.[5] In *Gundersen*, the Alaska Supreme Court held that because a positive DataMaster test result is the "most important piece of evidence" against a person charged with OUI, and because submission to a breath test is compelled by criminal penalties, "due process requires that the defendant be given an opportunity to challenge the reliability of that evidence in the simplest and most effective way possible, that is, an independent test."[6] In *Snyder*, the supreme court recognized that similar fairness concerns support a right to an independent test even when the motorist does not submit to the primary police-administered breath test but still

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[4] *Harvey v. State*, 1999 WL 602971, at *7 (Alaska App. Aug. 11, 1999) (unpublished) (discussing *Snyder*, 930 P.2d at 1277-79).

[5] *Gundersen v. Anchorage*, 792 P.2d 673 (Alaska 1990).

[6] *Id.* at 675-76.

has to counter the prosecution's evidence regarding whether the motorist was under the influence of alcohol while driving or operating a vehicle.[7]

However, the supreme court has never held that this due process right to an independent test attaches prior to arrest. The court's holding in *Snyder* was that "the Due Process Clause of the Alaska Constitution entitles a DWI *arrestee* to an independent chemical test even if that person refuses to take the statutorily prescribed breath test."[8] Prior to arrest, police are not required to offer the motorist any particular test, and may formulate probable cause to arrest based upon standard field sobriety tests and the officer's observations of the motorist or the motorist's driving.

As to Leydon's reliance on this Court's decision in *Harvey v. State* and its discussion of *Snyder*, *Harvey* does not support Leydon's claim. *Harvey* did note that an OUI arrestee has a right to an independent chemical test, but we did not hold or suggest in *Harvey* that the police must administer a PBT in the field to any OUI suspect who requests one.[9]

We accordingly conclude that the district court did not err by denying Leydon's motion to suppress the DataMaster results based on the police officer's decision not to administer a PBT to Leydon at the scene of his arrest.

The district court did not err in excluding the result of the PBT administered at the jail

Leydon next contends that the district court erred by refusing to admit the result of the PBT administered by DOC personnel, which produced a BAC reading of

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[7] *Snyder*, 930 P.2d at 1277-79.

[8] *Id.* at 1277 (emphasis added).

[9] *Harvey*, 1999 WL 602971, at *7.

.087 percent. Although that result is over the legal limit of .08 percent set out in AMC 09.28.020(B)(2), Leydon sought to offer it into evidence on the theory that the differences between the PBT result and the two DataMaster tests (.107 and .106) were so great that the jury should disbelieve them all. The district court declined to admit the PBT result unless Leydon could show that the PBT devices used by DOC met the standard for the admission of scientific evidence established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* and *State v. Coon*.[10]

After conducting an evidentiary hearing, the district court ruled that the PBT results were not admissible because Leydon had not met the *Daubert/Coon* standard. The court found that Leydon provided (1) no evidence to establish that the PBT theory and technique had been empirically tested; (2) no evidence that the PBT theory and technique had been subjected to peer review; (3) no evidence that the error rate of PBT testing was acceptable; and (4) no evidence to demonstrate that PBT theory and technique had attained general acceptance. In addition, the district court found that the particular PBT used was not identified, that the maintenance and calibration of that particular PBT was not established, and that the calibrations of the PBTs used at the Anchorage Correctional Complex were not scientifically valid or reliable.

Leydon acknowledges that there was a "gap in the [PBT] calibration log," but argues that this problem goes to the weight of the PBT result, not its admissibility. But Leydon fails to address the district court's finding that he provided no evidence to show that the PBT satisfied the factors in *Daubert/Coon* for the admissibility of scientific

[10] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993); *State v. Coon*, 974 P.2d 386 (Alaska 1999).

evidence, and thus fails to show that this finding was clearly erroneous.[11] We therefore uphold the district court's decision to exclude evidence of the PBT result.

Leydon had no right to have the breath testing process videotaped

Leydon moved to suppress the DataMaster results based on the fact that the testing process was not videotaped. The district court rejected this claim.

The district court's ruling is consistent with our case law. In *Swanson v. Juneau*, we held that due process does not require the police to videotape the breath testing process in drunk-driving cases, and that the government's decision to audiotape was reasonable.[12] In *Selig v. State*, we went further, holding that due process does not require any type of recording, audio or video, for OUI breath test processing, except where required by *Stephan v. State* — that is, when custodial interrogation occurs.[13]

The holdings in *Swanson* and *Selig* refute Leydon's contention that due process requires police to videotape OUI processing. We therefore affirm the district court's denial of Leydon's motion to suppress the breath test.

The district court did not abuse its discretion in declining to suppress the DataMaster results based on Leydon's theory that the police misled him into believing that the testing process was being videotaped

While Leydon was in the Anchorage Correctional Complex for purposes of taking the main police-administered breath test on the DataMaster, he asked the officer administering the test, "Are they videotaping me right now?" The officer answered,

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[11] *See Guerre-Chaley v. State*, 88 P.3d 539, 544 (Alaska App. 2004).

[12] *Swanson v. Juneau*, 784 P.2d 678, 681 (Alaska App. 1989).

[13] *Selig v. State*, 286 P.3d 767, 769, 771 (Alaska App. 2012); *see Stephan v. State*, 711 P.2d 1156, 1162 (Alaska 1985).

"This whole place is under surveillance, Mr. Leydon." Based on this conversation, Leydon asserts that he reasonably believed that he was being videotaped during the administration of the DataMaster test.

It turned out that DOC does not videotape either of the two rooms at the Anchorage Correctional Complex where the police administer DataMaster tests. Leydon asserts that had he known that the room he was in was not being video recorded, he could have asked to be moved to a room that was video recorded, and thus would have obtained additional evidence that, in his view, would have shown that he was not under the influence of alcohol and thus called into question the DataMaster results. Based on this claim that the officer's statement resulted in prejudice to his case in the form of loss of exculpatory evidence, Leydon sought suppression of the DataMaster results.

But, as we have previously noted, Leydon had no right to have his breath test processing video recorded, so even if he had asked to be moved to a room that was video recorded, the police officer could have rightfully declined the request. Moreover, the district court did not abuse its discretion in concluding that no sanction was required for the officer's purportedly misleading statement. When Leydon advanced this claim in the district court, he relied on *State v. Ward*.[14] In that case, the police mistakenly informed Ward, who had been arrested for OUI, that the hospital would keep the blood it had drawn until Ward wanted to test it.[15] In fact, unknown to the police, the hospital policy was to destroy blood samples if the hospital did not receive a request to analyze them within three months.[16] By the time Ward wanted to test the sample, it had been

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[14] *State v. Ward*, 17 P.3d 87 (Alaska App. 2001).

[15] *Id.* at 88.

[16] *Id.*

destroyed.[17] Because the police were responsible for causing Ward to believe the blood sample would be held until he requested it, we held that Ward's right to an independent test had been violated, and that he was thus entitled to an appropriate sanction.[18]

The district court rejected Leydon's claim that *Ward* controlled, finding that even if the police officer had unintentionally led him to believe that the breath testing process was videotaped, no sanction was required because Leydon — who ostensibly believed that DOC had videotaped him — did not timely act to collect the alleged evidence from DOC.[19]

The record supports the district court's finding. At an evidentiary hearing, DOC established that the videotapes for those parts of the jail that were recorded were recorded over every thirty days. The court found that Leydon did not make a discovery request for videotapes until approximately fifty days after his arrest. In other words, Leydon did not make a request to DOC to provide videotape evidence until after DOC's videotapes were automatically reused. Thus, had there actually been a videotape of the DataMaster processing room, it would not have been available to Leydon. (We note that nothing in the record shows that the police said anything to mislead Leydon as to how long any DOC videotapes would remain available for discovery.)

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[17] *Id.*

[18] *Id.* at 90 (the case was returned to the trial court to determine the appropriate sanction).

[19] *See Stamper v. State*, 402 P.3d 427, 430-32 (Alaska App. 2017) (where defendants knew security video existed, knew its importance, and knew it was in the hands of a non-law-enforcement third party, and were not misled by state agents into thinking the evidence would be preserved for any particular length of time, defendants could have made a timely request to obtain the evidence, and given their failure to do so, no evidentiary sanction against the state was warranted); *Carter v. State*, 356 P.3d 299, 301 (Alaska App. 2015) (same).

We uphold the district court's refusal to suppress the breath test results due to the officer's purported misstatement about whether Leydon's actions were being recorded on video.

The district court did not commit plain error by not advising Leydon about the possibility of representing himself with standby counsel

Leydon argues that the district court erred by not advising him of the option to represent himself with standby counsel available. More specifically — relying on *Massey v. State*, a case concerning a defendant's request for pure self-representation[20] — Leydon contends that the district court committed structural error (*i.e.*, error that requires automatic reversal) when he failed to "address the option of self-representation" with the benefit of standby counsel that he now claims he "unequivocally wanted."[21]

As noted previously, Leydon represented himself for several years, then requested and had counsel appointed as the case neared trial. Just prior to trial, an *ex parte* representation hearing was held in which Leydon unsuccessfully sought co-counsel status and to have his appointed counsel replaced. During this hearing, Leydon never raised a request regarding standby counsel, nor did he waive his right to counsel or otherwise invoke his right to self-representation. Because Leydon never sought to represent himself with the benefit of standby counsel, he must now show that the district court committed plain error by not *sua sponte* addressing this option with Leydon. Plain

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[20] *Massey v. State*, 435 P.3d 1007, 1011 (Alaska App. 2018).

[21] By pure self-representation, we mean the situation where a defendant exercises his right of self-representation, without any assistance of counsel. Self-representation with the assistance of standby counsel means that an attorney is assigned to advise and assist the defendant, who has waived their constitutional right to counsel and retains ultimate responsibility for presenting the defense. *See Alaska Pub. Def. Agency v. Superior Court*, 343 P.3d 914, 915 (Alaska App. 2015).

error is an error that (1) was not the result of intelligent waiver or a tactical decision not to object, (2) was obvious, (3) affected substantial rights, and (4) was prejudicial.[22] When the alleged error is not a constitutional violation, the defendant must show that the error appreciably affected the jury's verdict.[23] But any error, even constitutional error, "must still be obvious in order to constitute plain error."[24]

Leydon fails to show plain error. We have previously held that "an indigent defendant has no constitutional right to the assistance of standby counsel."[25] Because there was no right to this status, it cannot be said that it was obvious that the district court judge should have inquired about whether Leydon wished to represent himself with the assistance of standby counsel. Moreover, at the time when Leydon now claims the trial judge should have made this inquiry, Leydon did not seek self-representation, but instead only requested that his appointed counsel be replaced. And Leydon proceeded to trial represented by counsel.

We therefore reject this claim.

The testimony that Leydon declined an independent test was harmless and does not require reversal of his conviction

Finally, relying on *Bluel v. State*, Leydon argues that reversible error occurred when the prosecutor asked the officer who administered the DataMaster

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[22] *Adams v. State*, 261 P.3d 758, 771 (Alaska 2011); *see also* Alaska R. Crim. P. 47(b).

[23] *Adams*, 261 P.3d at 771.

[24] *Id.*

[25] *Pub. Def. Agency*, 343 P.3d at 915-16 (citing *Ortberg v. State*, 751 P.2d 1368, 1375 (Alaska App. 1988)).

whether Leydon was offered, but declined, an independent chemical test.[26] Although Leydon did not object to this testimony, the Municipality concedes that this line of questioning was improper under *Bluel*. The Municipality's concession is well-founded.

However, the Municipality argues that Leydon cannot show plain error because the error was harmless in the context of Leydon's case. We agree.

The testimony at issue came at the end of the prosecutor's direct examination of the police officer who administered the DataMaster tests. The prosecutor had led the officer through a series of questions concerning the testing process, and then asked the officer to "give us a summary of how do you wrap up [DataMaster] processing?" The officer responded, "I would start reading the battery of forms that we have[,]" and described the right to an independent test form as one of those forms.

The prosecutor noted that earlier in the breath testing process, Leydon had asked for a blood test, and then asked, "Did he take you up on the offer of an independent chemical test?" The officer responded that Leydon initially requested an independent test but changed his mind when the phlebotomist arrived to take a blood sample. The prosecutor then asked if Leydon could have had the test at municipal expense, and the officer responded affirmatively and explained the process. Leydon's attorney did not object to this testimony.

In *Bluel*, the defendant testified on cross-examination that he was "surprised" by the results of his breath test.[27] Following this statement, and over Bluel's objection, the prosecutor was permitted to question Bluel about the fact that he had been

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[26] *Bluel v. State*, 153 P.3d 982, 992 (Alaska 2007) (holding that evidence about the offer of an independent blood test and a defendant's response to that offer is generally inadmissible because the probative value of that evidence will almost always be outweighed by the danger of unfair prejudice).

[27] *Bluel*, 153 P.3d at 984.

offered the opportunity to take an independent test and had declined it.[28] On appeal, Bluel challenged the admissibility of this testimony and in particular whether it should have been excluded under Evidence Rule 403 as more prejudicial than probative.[29]

The supreme court recognized that, unlike questions about refusal to submit to a breath test, which is itself a crime (and thus questions about it implicate the privilege against self-incrimination), the introduction of evidence about declining to take an independent test is not strictly forbidden in a criminal trial.[30] But the court concluded that the probative value of the evidence in establishing a defendant's guilt of OUI was relatively low, in that arrestees may decline an independent test for many reasons unrelated to guilt.[31] The court also concluded that the prejudicial impact of the evidence was relatively high, in that jurors might view the decision not to seek an independent test as a tacit admission of guilt, and thus improperly penalize an OUI arrestee's protected exercise of his right to decline an independent test.[32] The supreme court concluded that reversal was necessary because Bluel's rejection of an independent breath test was used to attack his trial testimony and to undermine his credibility.[33]

Here, as in *Bluel*, the prosecutor improperly elicited testimony that Leydon declined the opportunity to take an independent blood test. But Leydon's counsel did not object to the prosecutor's question, so Leydon is only entitled to reversal if he can

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[28] *Id.*

[29] *Id.* at 985.

[30] *Id.* at 987.

[31] *Id.*

[32] *Id.*

[33] *Id.* at 986, 992.

show that the trial court committed plain error in not *sua sponte* interjecting and issuing a curative instruction to the jury.

We conclude that Leydon has failed to satisfy the prejudice prong of the plain-error standard for non-constitutional matters — *i.e.*, that the error appreciably affected the jury's verdict.[34] Unlike the defendant in *Bluel*, Leydon did not testify at trial, and the officer's testimony regarding the independent blood test was brief and part of a larger narrative of the different steps of the OUI processing. Moreover, the prosecutor did not mention Leydon's decision to decline the test during closing argument.

Leydon nonetheless contends that the improper question appreciably affected the verdict because his case was tried solely on the .08 *per se* theory of OUI, and the jury may possibly have decided that the DataMaster results were accurate based solely on his declining to challenge the test results. But in reaching its verdict, the jury heard significant evidence that corroborated the accuracy of the two DataMaster tests. The jury heard evidence that: (1) Leydon was driving dangerously (failing to yield to oncoming traffic while turning left and causing a police officer to have to brake to avoid a collision with him), (2) he exhibited multiple signs of intoxication (watery eyes, slurred speech, poor dexterity, and a strong odor of alcohol), (3) he was stopped at approximately midnight and admitted he had been drinking since 7:00 p.m., and (4) he conceded he was "probably not 100% safe to be driving." Moreover, there were two DataMaster test results, only .001 apart (.107 and .106 BAC, respectively), on tests taken eight minutes apart.

Accordingly, we conclude that the error was harmless and therefore did not amount to plain error. We have declined to find plain error on highly similar facts.[35]

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[34] *See Adams*, 261 P.3d at 771.

[35] *See Yang v. State*, 2017 WL 838809, at *2 (Alaska App. Mar. 1, 2017) (unpublished).

Conclusion

The judgment of the district court is AFFIRMED.