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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. GREGORY JAMES WRIGHT, Appellant.	)	2 CA-CR 2011-0034 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20102519001

Honorable John S. Leonardo, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
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Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
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E C K E R S T R O M, Presiding Judge.

¶1 Appellant Gregory Wright was convicted after a jury trial of aggravated driving while under the influence of an intoxicant (DUI) while his license was suspended and aggravated driving with an alcohol concentration of .08 or more while his license was suspended. The trial court sentenced Wright to concurrent minimum but enhanced prison terms of eight years on each count. On appeal, he contends the court erred when it denied his motion to preclude the state from introducing evidence that he had the opportunity to obtain an independent test to determine his blood alcohol concentration (BAC), resulting in a violation of his due process rights. We affirm.

¶2 Tucson police officer Colin Hyde observed Wright's vehicle had stopped in a bus lane facing the wrong direction. Wright then drove across the lanes of traffic, partially while facing the wrong direction, and Hyde stopped Wright. Hyde noticed the smell of an intoxicant on Wright's person and other signs of possible intoxication and began a DUI investigation in which a breath test was administered to determine Wright's BAC. Replicate testing established his BAC was .180 and .188. Before trial, Wright filed a motion in limine seeking to preclude the state from introducing evidence he had been told he had the right to obtain independent testing of his BAC, arguing the state has the burden of establishing the elements of the charged offenses. He also argued evidence about independent testing would suggest to the jury that he had a burden to prove the breath tests had been inaccurate. The court denied the motion.

¶3 Wright challenges that ruling on appeal, again contending the introduction of this evidence shifted the burden of proving his innocence and relieved the state of its burden of proving his guilt, which included the fact that his BAC exceeded .08.

"Decisions on the admission and exclusion of evidence are 'left to the sound discretion of the trial court,' and will be reversed on appeal only when they constitute a clear, prejudicial abuse of discretion." *State v. Ayala*, 178 Ariz. 385, 387, 873 P.2d 1307, 1309 (App. 1994), *quoting State v. Murray*, 162 Ariz. 211, 214, 782 P.2d 329, 332 (App. 1989).

¶4 Wright argues the evidence was not admissible, attempting to distinguish *State ex rel. McDougall v. Corcoran (Keen)*, 153 Ariz. 157, 735 P.2d 767 (1987). In that special action, which originated from a municipal court DUI conviction, the supreme court held it was not reversible error for the trial court to have permitted the state to introduce, over the defendant's objection, evidence the defendant had requested and obtained a sample of his breath, even though the defense had not introduced evidence about that sample and testing of it for BAC. 153 Ariz. at 159-60, 735 P.2d at 769-70. Wright contends his case is more like *State v. Corona*, 188 Ariz. 85, 932 P.2d 1356 (App. 1997). There, Division One of this court rejected the applicability of *Keen*, distinguishing it on the ground the defendant in that case had not retained his own expert on gang activity to refute evidence presented by the state, therefore the state could not comment on the defendant's failure to call a gang expert to testify at trial. *Id.* at 89-90, 932 P.2d at 1360-61.

¶5 In *Keen*, the court stated the general proposition that it is not error for the state to point out to a jury that the defendant had the right to obtain a separate breath sample for independent testing and that the jury could infer from the defense's failure to introduce the evidence of the test results that the results would not have been favorable.

153 Ariz. at 160, 735 P.2d at 770. The court stated, "Even where the defendant does not take the stand, the prosecutor may properly comment on the defendant's failure to present exculpatory evidence which would substantiate defendant's story, as long as it does not constitute a comment on defendant's silence." *Id.* The court added, "Such comment is permitted by the well recognized principle that the nonproduction of evidence may give rise to the inference that it would have been adverse to the party who could have produced it." *Id.* The court observed the following:

> We believe that the prosecution's questions on cross-examination and its remarks in closing arguments were simply comments designed to draw reasonable inferences based on [the defendant's] failure to present evidence relating to the breath sample. Although we do not have a complete trial transcript, it is apparent from defense counsel's closing statement that [the defendant] had challenged the validity of the State's blood alcohol test results. It strikes us as elemental fairness to allow the State to comment upon the defense's failure to adduce potentially exculpatory evidence to which defendant had access when defendant is attacking the accuracy of the State's evidence.

Id.

¶6 Here, the jury merely was told Wright had been informed he could obtain an independent blood test. As the state points out, it did not argue to the jury, as the state did in *Keen*, that they could draw any specific inferences from that fact.

¶7 On the other hand, Wright is correct that in *Corona*, Division One of this court distinguished *Keen*, stating as follows:

> Because there was no mention during the trial that the defendant had retained or even consulted an expert witness on gangs, unlike *Keen* in which the defendant had received a sample for the very purpose of independent consultation, the

> prosecutor's comment was improper and the defendant's objection should have been sustained.

Corona, 188 Ariz. at 90, 932 P.2d at 1361.

¶8 But we need not determine which of these two cases applies here because, even were we to conclude the trial court erred, we also conclude beyond a reasonable doubt that any such error would not have affected the outcome of the case. The state simply commented that Wright had a due process right to an independent blood sample. There was no comment, as in *Corona*, that Wright had failed to produce certain evidence. *See* 188 Ariz. at 89, 932 P.2d at 1360. The state neither made nor implied any such argument here. For this reason, we are skeptical that the jury placed considerable weight on that comment. More importantly, the evidence that Wright was guilty of the offense was overwhelming. The state presented evidence that Wright's driving was egregiously poor, and that two replicate breath tests produced results indicating an alcohol concentration level more than twice the legal limit. And, Wright acknowledged he had consumed five beers and believed his license was suspended.

¶9 For similar reasons, we reject Wright's contention that the trial court prejudicially erred when it admitted the evidence over Wright's objection pursuant to Rule 403, Ariz. R. Evid., that the evidence was unduly prejudicial. As the state points out, the court only permitted the state to introduce evidence that the officer had informed Wright he had the right to obtain independent testing, precluding information that he had chosen not to avail himself of that right. And, even assuming the marginal prejudicial impact of the evidence somehow was sufficient to outweigh its probative value, any error

in admitting that evidence, as discussed above, would not have affected the outcome of the case.

¶10 Assuming arguendo that the trial court erred in denying Wright's motion in limine, any such error was not prejudicial. For the reasons stated, we affirm the convictions and the sentences imposed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge