STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VICTOR WAYNE GRINWIS, JR.,

Defendant-Appellant.

UNPUBLISHED
November 14, 1997

No. 193886
Kent Circuit Court
LC No. 95-002211 FH

Before: Griffin, P.J., and Wahls and Gribbs, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of operating a vehicle with an unlawful blood alcohol level (OUIL/UBAL), MCL 257.625; MSA 9.2325, and fleeing and eluding the police, MCL 750.479a; MSA 28.747(1). Defendant subsequently pleaded guilty to being a fourth habitual offender, MCL 769.12; MSA 28.1084, and being an OUIL third offender, MCL 257.625(7)(d); MSA 9.2325(7)(d). He was sentenced to 30 to 120 months' imprisonment for the OUIL/UBAL conviction, and five months imprisonment, with credit for five months served, for the fleeing and eluding conviction. He appeals as of right and we affirm.

After a fifteen-mile chase that occurred between defendant and several police agencies, defendant was arrested on suspicion of operating a vehicle under the influence of alcohol. At the time of his arrest, defendant refused to submit to a physical field sobriety test[1] or a Breathalyzer test. Defendant was transported to jail, where he eventually submitted to a blood test. The results of this test revealed that defendant's blood contained 0.14 grams of alcohol per one hundred milliliters, above the legal limit. MCL 257.625(1)(b); MSA 9.2325(1)(b).

Defendant first argues that the trial court violated his Fifth Amendment right against self-incrimination by admitting into evidence his refusal to submit to field sobriety tests. We disagree. The question whether evidence of a refusal to submit to a field sobriety test implicates a defendant's Fifth Amendment right against self-incrimination is a question of law. We review questions of law regarding constitutional issues de novo. *People v Slocum (On Remand)*, 219 Mich App 695, 697; 558 NW2d 4 (1996).

In *People v Burhans*, 166 Mich App 758; 421 NW2d 285 (1988), another panel of this Court held that physical sobriety tests do not implicate a defendant's privilege against self-incrimination. *Id.* at 761-762. Recognizing this, defendant argues that we should overrule *Burhans* and adopt the rationale from *Oregon v Fish*, 893 P2d 1023 (Or, 1995) (holding that admission of evidence regarding a defendant's refusal of a field sobriety test violates the Oregon constitution's prohibition against compelled self-incrimination). We decline defendant's invitation, as we believe that *Burhans* was properly decided. Because the Fifth Amendment is not implicated by submission to a field sobriety test, evidence of a defendant's refusal to submit to such a test does not violate his right against self-incrimination. See *People v Benson*, 180 Mich App 433, 437; 447 NW2d 755 (1989), rev'd in part on other grounds 434 Mich 903 (1990). Thus, defendant's Fifth Amendment right against self-incrimination was not violated.

Defendant next argues that the trial court abused its discretion by admitting the results of his blood test because the blood was drawn ninety minutes after his arrest. We disagree. We review a trial court's decision to admit the results of chemical tests of blood alcohol for an abuse of discretion. *People v Schwab*, 173 Mich App 101, 103-104; 433 NW2d 824 (1988). The panel in *Schwab* outlined the proper test for determining whether the results of a blood alcohol test are admissible:

> In order for the results of chemical tests of blood alcohol to be admitted into evidence, the proponent of such tests must meet four foundational requirements. First, it must be shown that the operator is qualified. Second, the proper method or procedure must be demonstrated as having been followed in the tests. Third, the tests must have been performed within a reasonable time after the arrest. Finally, the testing device must be shown to be reliable. Failure to meet any of these foundational requirements will preclude the use of the test results. [*Id.* at 103 (citations omitted).]

Defendant takes issue solely with the time delay between his arrest and the administration of the blood test. Reasonableness of a time delay will vary, and "[t]rial judges are capable of protecting each defendant's right to a fair trial by making case-by-case evaluations based on the prosecutor's ability to prove the reasonableness of the delay." *Id.* at 104-105.

Here, following a high-speed chase that lasted twenty-five minutes, defendant was arrested at approximately 5:40 a.m. He refused to submit to a physical field sobriety test and a Breathalyzer test. Defendant arrived at the jail, and, at approximately 6:22 a.m., a search warrant was issued to conduct a chemical test of his blood. A request was submitted for a nurse to conduct the test, and defendant's blood was drawn at 7:05 a.m. Defendant maintains that the delay between his arrest and the blood test creates the possibility that he might not have been legally intoxicated at the time of his arrest.

We find that the test results were administered within a reasonable time after defendant's arrest. Inevitably, there will always be some time delay between arrest and administration of a blood test. In the instant case, defendant's uncooperative behavior increased that delay. Once it became clear to the arresting officers that a blood test was needed, they immediately followed the necessary procedures for taking such a test. There was no evidence that the arresting officers acted improperly or in bad faith. Under these circumstances, we agree with the trial court that the delay in this case was reasonable.

Thus, defendant's blood alcohol at the time of his arrest should be regarded as equivalent to his blood alcohol as determined by the subsequent blood test. *People v Kozar*, 54 Mich App 503, 508; 221 NW2d 170 (1974). Therefore, the trial court did not abuse its discretion in admitting the results of the blood test.

Defendant also argues that, during closing argument, the prosecutor improperly shifted the burden of proof. We disagree. We review a prosecutor's remarks in context to determine whether the defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Viewed in context, the prosecutor was merely arguing that defendant's theories (that, based on the manner in which he was driving, he could not have been intoxicated, and that the blood test was unreliable) were not supported by the evidence. Under these circumstances, the prosecutor's remarks did not shift the burden of proof. See *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995).

Finally, defendant argues that the trial court erred by failing to instruct the jurors that refusal to submit to a physical field sobriety tests is not evidence of guilt. While such an instruction might have been appropriate,[2] we decline to reverse on this issue. Defendant did not request that such an instruction be given. Absent a request that an instruction be given, this Court's review of an instructional error is limited to whether relief is necessary to avoid manifest injustice to defendant. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). Here, we find no manifest injustice. The results of defendant's blood test showed that he was legally intoxicated, and the jurors had no cause to rely on defendant's refusal to take a field sobriety test as evidence of his guilt.

Affirmed.

/s/ Richard Allen Griffin
/s/ Myron H. Wahls
/s/ Roman S. Gribbs

[1] We refer to a test of a driver's coordination, memory, etc. as a "physical field sobriety test" in order to distinguish it from chemical tests, some of which may also be performed in the field.

[2] We note that, as regards chemical tests, jurors *must* be instructed that a person's refusal to submit to chemical tests and analysis of their blood, urine, or breath is "admissible in a criminal prosecution . . . only to show that a test was offered, but not as evidence in determining the defendant's innocence or guilt." MCL 257.625a(10); MSA 9.2325(1)(10). This provision, however, fails to address physical field sobriety tests. Thus, it appears that such an instruction is not *required* where a defendant refuses to submit to a physical field sobriety test. However, the statute leaves open the question whether such an instruction may still be appropriate under those circumstances.