

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD RICHARD GREIG,

Defendant-Appellant.

UNPUBLISHED

August 18, 2000

No. 212294

Shiawassee Circuit Court

LC No. 95-007318-FH

Before: Neff, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of operating a motor vehicle under the influence of liquor, third offense (OUIL), MCL 257.625(1)(b); MSA 9.2325(1)(b), and one count of driving with a suspended license, second offense (DWLS), MCL 257.904(1)(b); MSA 9.604(1)(b).¹ The circuit court sentenced defendant as a fourth habitual offender, MCL 769.12; MSA 28.1084, to a term of eight to twenty years' imprisonment for the OUIL conviction and a term of 407 days for the DWLS conviction. Defendant appeals as of right. We affirm.

Defendant first contends that the trial court erroneously denied his motion to suppress the results of a blood alcohol test, which registered defendant's blood alcohol content at .28 percent, well in excess of the legal limit. Defendant argues that police failed to properly test the machine used to analyze his blood alcohol content. Defendant also argues that the arresting officer failed to properly observe him before administering the test. For these reasons, defendant argues that the test results should have been excluded from evidence. We disagree.

Defendant correctly notes that the Michigan Administrative Code requires breath analysis machines to be tested for accuracy at least once during each calendar week. 1999 AC, R 325.2653(1). In this case, police administered the breath test to defendant on March 26, 1995. The machine had been tested for accuracy two days earlier, on March 24, 1995. The machine was subsequently tested for accuracy on April 5, 1995. Both tests demonstrated that the machine was

¹ Although both statutory sections were subsequently amended, the citations relate to the law in effect when defendant committed the instant offenses, on March 26, 1995.

functioning within acceptable tolerances. However, the police technically violated the administrative rule because they failed to test the machine within the calendar week following defendant's arrest.

The purpose of the administrative rules regarding breath test procedures is to ensure the accuracy of the test results. *People v Wujkowski*, 230 Mich App 181, 187; 583 NW2d 257 (1998); *People v Rexford*, 228 Mich App 371, 378; 579 NW2d 111 (1998). Technical violations of the administrative rules do not require suppression of breath test evidence where there is nothing to indicate that the test results were inaccurate. *Wujkowski*, *supra* at 187; *Rexford*, *supra* at 377-378. In this case, the evidence indicates that the breath analysis machine was functioning accurately at the time defendant's breath samples were tested for alcohol content.

Defendant also argues that the arresting officer failed to properly observe him before administering the breath test. The Michigan Administrative Code provides that a breath alcohol analysis test may only be administered when the machine operator has observed the person to be tested for fifteen minutes before the collection of the breath sample, in order to ensure that the person to be tested does not smoke, regurgitate, or place anything in his mouth except for the mouthpiece used in the test. 1999 AC, R 325.2655(1)(e). We believe the evidence indicated that the officer who administered the test followed proper observation procedures. Because defendant does not allege that he placed anything in his mouth or regurgitated before the test was administered, and because there is no evidence indicating that the test results were inaccurate, any technical violations of the administrative rules do not require suppression of the breath test evidence. *Wujkowski*, *supra* at 187; *Rexford*, *supra* at 378.

Defendant next contends that he was denied due process of law when prior bad acts evidence was revealed to the jury. During voir dire, the prospective jurors were asked whether they knew defendant. One of the prospective jurors stated that he had previously worked with defendant. He did not know how long it had been since they had worked together, but he volunteered the information that defendant had been wearing a tether at that time. The juror further stated that his working with defendant would not influence him in deciding the case. Defendant did not object to the prospective juror's statement. Because defendant has not identified a plain error that was outcome determinative, this issue is not preserved for appellate review and does not warrant relief. *People v Grant*, 445 Mich 535, 547, 553; 520 NW2d 123 (1994).

Defendant next contends that the prosecutor engaged in misconduct when he discussed the facts surrounding defendant's arrest, during voir dire. The prosecutor asked prospective jurors if they were familiar with the symptoms evident when a person is under the influence of alcohol, including stumbling, slurring of speech, bloodshot or glassy eyes, and impaired memory. Defendant's trial counsel did not object to the prosecutor's voir dire questions regarding the symptoms of alcohol intoxication.² Again, because defendant has not identified a plain error that was outcome determinative, this issue is not preserved for appellate review and does not warrant relief. *Id.*

² Defense counsel did later object that the prosecution was effectively making an opening statement during voir dire, which objection the trial court sustained. However, that objection was not related to the prosecutor's voir dire questions regarding the symptoms of alcohol intoxication.

Finally, defendant contends that the trial court employed an impermissible factor at sentencing. We believe that the circuit court properly considered the fact that defendant fled the court's jurisdiction while on bond. A sentencing court may consider evidence of other criminal behavior as an aggravating factor when determining an appropriate sentence. *People v Shavers*, 448 Mich 389, 393; 531 NW2d 165 (1995).

Affirmed.

/s/ Janet T. Neff

/s/ Michael R. Smolenski

/s/ Patrick M. Meter