TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00820-CR

The State of Texas, Appellant

v.

Stephen Mercantel, Appellee

FROM COUNTY COURT AT LAW NO. 7 OF TRAVIS COUNTY
NO. C-1-CR-16-202586, HONORABLE ELISABETH ASHLEA EARLE, JUDGE PRESIDING

M E M O R A N D U M   O P I N I O N

Stephen Mercantel was charged with driving while intoxicated with a blood alcohol concentration of 0.15 or more. *See* Tex. Penal Code § 49.04(a) (setting out elements of offense), (d) (elevating offense level if defendant had blood-alcohol concentration that was 0.15 or more). Subsequent to his arrest, Mercantel filed a motion to suppress the results of a breath test alleging that he did not voluntarily consent to the test and that the investigating police officers coerced him into submitting to the test. After convening a hearing on the motion, the trial court granted the motion to suppress. Following the trial court's ruling, the State appealed the trial court's order. *See* Tex. Code Crim. Proc. art. 44.01(a)(5) (authorizing State to appeal trial court's ruling on motion to suppress). We will reverse the trial court's order and remand for further proceedings.

BACKGROUND

The underlying events leading to Mercantel's involvement with the police in this case are not in dispute. In February 2016, Officer Paul Murray was dispatched to the scene of a car accident in which Mercantel's vehicle had collided with the car in front of his. During his conversation with Mercantel, Officer Murray noticed that Mercantel "had watery, glassy, bloodshot eyes" and smelled "a strong odor of alcoholic beverage on [Mercantel's] breath." Mercantel initially denied consuming any alcohol on the night in question but later admitted to having two "mixed drinks" that were "less than a shot each." After talking with Mercantel, Officer Murray asked Mercantel to submit to some field-sobriety tests, and Mercantel exhibited signs of intoxication on several of the tests. In addition, Officer Murray informed Mercantel about the Austin Police Department's policy of asking individuals to submit to a voluntary "preliminary breath test" before asking them to submit to an official test that is taken at the police station. Mercantel did not provide a sample for the preliminary test but did agree to later provide a sample for the official test.

Although the facts summarized above are not in dispute, the resolution of the issue presented on appeal requires a more detailed summary regarding Officer Murray's interactions with Mercantel on the night in question. During the suppression hearing, Officer Murray testified that he told Mercantel that the Department allows officers to administer a "preliminary breath test" that was voluntary and differed from the "official test" that is "court admissible" and not voluntary in the sense that there were consequences for failing to provide a sample. Further, Officer Murray related that he emphasized to Mercantel that there were consequences for refusing to provide a sample for "the official test." Moreover, Officer Murray testified that Mercantel ultimately agreed to provide an official breath sample and had no "hesitancy" when providing the sample.

During his testimony, Officer Murray admitted that although he initially asked Mercantel to provide a preliminary sample, he retracted that suggestion when he felt like his request might have been coercive. Officer Murray also admitted that he told Mercantel several times that he would let Mercantel go if the sample he provided revealed a blood-alcohol concentration of less than 0.08 and that Mercantel agreed to provide a sample after being told that he would be let go if the results were below 0.08. Further, Officer Murray testified that on the night in question, he was only aware of the legal definition of intoxication as having a blood-alcohol concentration of 0.08 or more and was unaware of the alternative definition in which a person can be intoxicated with a lower blood-alcohol concentration if the person is still impaired from alcohol. *See* Tex. Penal Code § 49.01(2) (providing one definition of "'[i]ntoxicated'" as "not having the normal use of mental or physical faculties by reason of the introduction of alcohol"). In light of that testimony, Officer Murray explained that he would have released Mercantel that night if the breath-test results showed an alcohol concentration of less than 0.08.

After Officer Murray testified, the State called Officer Eric Wilson to the stand. In his testimony, Officer Wilson explained that he was supervising Officer Murray during the relevant time period and that Officer Murray did "have the authority to release" an individual and could have done that "[a]s a practical matter" without any legal repercussions but that the Department's policy technically requires an officer "to contact a supervisor" to obtain permission before releasing an arrested individual. In addition, Officer Wilson emphasized that an arresting officer does have the discretion to release someone but must comply with "[t]he process" of consulting with a supervisor. During Officer Wilson's testimony, Mercantel moved to admit into evidence a copy of

the Department's policy requiring an arresting officer to contact his supervisor before an arrested individual may be released, and the trial court admitted the evidence.[1]

During the hearing on the motion to suppress, a video recording from Officer Murray's dashboard camera was admitted into evidence. The video chronicled Officer Murray's interaction with Mercantel, including Mercantel's performance on several field-sobriety tests. In addition to showing the field-sobriety testing, the video documents the following exchange between Officer Murray and Mercantel that forms the basis for this appeal:

> [Murray]: Okay, go ahead and stop. Okay. So this next option is actually something that is required by our policy. We have what's called the preliminary breath test. Uh, it doesn't have any effect on your license or any bearing on that whatsoever. It's just for a department policy that we are mandated to offer to you. Uh, give me just a second, I am going to, uh, go grab the, um—are you going to be willing to give the preliminary breath test?
>
> [Mercantel]: I can, I mean I would rather not. I, uh—
>
> [Murray]: Well this one you don't have to, this one is optional.
>
> [Mercantel]: Okay.
>
> [Murray]: Let me go grab that. I'll read the card to you, uh, and then you can make your decision from there, okay? So give me just a minute.

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[1] After Officer Wilson testified, Mercantel called Officer Martin Whitehead to the stand. In his testimony, Officer Whitehead explained that he was assigned to the Arrest Review unit and that paperwork from a warrantless arrest for driving while intoxicated is sent to the unit as required by the Department's policies to ensure that the paperwork shows that all of "the elements of the crime have been met for the arrest," but he admitted that the unit does not become involved in a case until after an arrest has been made and after an individual has provided a breath or blood sample and that if an arresting officer elected to release someone, that officer would not run that decision by the unit beforehand.

Okay, so just reading this to you, it says this is a preliminary alcohol-screening test used to detect the presence of alcohol. You may refuse this test. This test does not affect your license, permit or privileges to operate a motor vehicle. However if you are arrested you will be asked to submit to the taking of a specimen of your breath and/or blood to determine the actual alcohol concentration and/or drug content in of your blood. Okay, that being said, would you be willing to do a preliminary breath test?

[Mercantel]: I mean, I already kind of told you my situation. I, uh, I'd rather not, I think. I don't know.

. . .

[Murray]: Okay, obviously like I said, or as I am explaining here to you, the tests are not one hundred percent conclusive which is why we also do the breath test. It's up to you whether you feel you are fine. Then you can go ahead and go forward, but again it's still your option.

[Mercantel]: I'm, uh, I mean, I, um, feel like I shouldn't. I'm nervous about it, honestly.

[Murray]: Are you nervous that you're too intoxicated?

[Mercantel]: Well, I'm just nervous that I'm intoxicated, period. And that's going to show up.

[Murray]: Well, here, here's the difference. There's a difference between illegal, having drank too much and driving, versus drinking and driving. Because the way State law says if it's .08 or higher, then yes, that is against the law. But if it's below .08, then that is not against the law. So if you were a .07, let's just say even a .079, you know, then that's still perfectly fine. The law allows that. It's just whether you feel, you think, where you're at. It's your discretion. However it's up to you—

[Mercantel]: Oh man, um. . . can I just go home? I am so sorry, like can I? I live right there.

[Murray]: Well, we are already into the investigation.

[Mercantel]: I know, I know, I know. Hmm. I don't, I don't know what the right answer is right now, honestly.

[Murray]: Only you can make that decision. I cannot make that for you.

[Mercantel]: Right, right. What are the consequences, I mean, if I say no? Am I going to be brought in?

[Murray]: Well, if you say no, then I am going to read a form to you, and then that one, uh, like I said, this one, this one is voluntary. The next one is not voluntary.

[Mercantel]: Right.

[Murray]: That one there will be repercussions for.

[Mercantel]: Well, will I be brought in immediately if I say no?

[Murray]: Yeah, if you say no to the PBT, then I am going to arrest you for DWI. Because that's just my belief. And I believe that you are under the influence of alcohol.

[Mercantel]: Okay.

[Murray]: If you believe that you are not, you know, well then you are allowed that opinion as well. That's what these are for, to see, you know whether you're right or whether you're wrong. It doesn't matter. What does matter is whether or not, you know, you have, you are at .08 or higher. If you're under that, then I let you go for tonight. Of course if you're over that, then I arrest you.

[Mercantel]: Okay, yeah. I guess let's do that.

[Murray]: Okay, you want to refuse this then?

[Mercantel]: No, I. No.

[Murray]: You want to do the preliminary breath test?

[Mercantel]: Well, that's what you said I am going to have to do or I get arrested regardless.

[Murray]: Well, like I said, this is just done by policy. This is not, and as I read to you, this is not something you have to do. So if you don't feel that comfortable in doing this, then you don't have to do this.

[Mercantel]: But what I am asking is what is my consequence if I don't do it?

[Murray]: Then I will arrest you based on my decision. And then you will be asked to take the official test.

[Mercantel]: Okay. I just don't want to be arrested, so.

[Murray]: It's up to you whether you want to take this on your own free will. I can't tell you one way or the other.

[Mercantel]: But you're going to arrest me if I don't take it?

[Murray]: Based on my own decision, yes.

[Mercantel]: Well then, yeah, I guess I should take it.

[Murray]: Tell you what. That kind of goes along the coercion stage. Um, so I'm going to go ahead and take that as a no at first and place you under arrest for driving under the influence.

[Mercantel]: What? Why?

[Murray]: Because if you're only going to take it because I am going to arrest you, that's called coercion. And you are legally free from that type of behavior or action. So what I'm going to do is I am going to read a form to you and then I am going to offer you the official test. You'll be offered the official test, and if you say no to that, then also the form I will read to you will tell you the um, the consequences for that. Okay? Come up here.

. . .

Does that make sense what I was explaining to you about the preliminary breath test? The courts consider it coercion if I say if you don't take this test, then you will get arrested. So since you asked me my opinion, I told you what it was. And since you stated then that the only reason that you would take the test is to avoid arrest, that's considered coercion, and it's no longer voluntary.

[Mercantel]: Good to know that.

[Murray]: So you kind of put me in a rock and a hard spot when you asked me what my opinion was. I already had my opinion formed.

[Mercantel]: Is there, is there no way I can go? Like, I, I—

> [Murray]: Well, there's still a way you can go if you take the breath test and you pass that breath test, then, yes, I have to release you legally.
>
> [Mercantel]: I would gladly do that.
>
> [Murray]: Okay, I will read the form to you that will be offered to you and then you, um, make your decision. We'll go down to the jail. You can take the test down there. 'Cause that's the official, you know, State test—
>
> . . .
>
> But I'm telling you if you pass it down there, and the intoxilyzer machine shows that you were under the legal limit, then legally I have to, you know, release you. Unless you're under some influence of, you know, an illegal narcotic. But I don't think that's the case.

In addition, the video shows that following this exchange, Officer Murray told Mercantel that he was being arrested for driving while intoxicated and read to Mercantel the contents of a DIC-24 form, which explained the legal consequences for failing or refusing to take the official breath test. Moreover, the video documents how Mercantel agreed to provide a breath sample after listening to the warnings, how Officer Murray drove Mercantel to the police station for testing, and how the results of the testing revealed that Mercantel's blood-alcohol concentration was more than twice the legal limit.

At the end of the hearing, Mercantel argued in his closing arguments that Officer Murray's statements to Mercantel were coercive and rendered Mercantel's consent involuntary. After considering the arguments of the parties and considering the evidence, particularly the video, the trial court granted the motion to suppress and subsequently issued findings of fact and a conclusion of law.

Regarding the unofficial breath test, the trial court explained in its findings that Mercantel refused to take the test and repeatedly asked about the consequences of not taking the test. In addition, the court stated that Officer Murray told Mercantel that if the test showed that Mercantel had a blood-alcohol concentration of less than 0.08, Officer Murray would have to legally release Mercantel. Further, the court related that Officer Murray removed the option of taking the preliminary test after concluding that Mercantel agreeing to submit to the test could be considered coercion. Regarding the official test, the court stated that Officer Murray told Mercantel that he would be released if the results were less than 0.08 and that Mercantel agreed to provide the sample.

In addition, the court discussed how Officer Murray, "at the time of the arrest of" Mercantel believed that the law in Texas "mirrored Idaho law, where he had previously worked as a police officer," and, accordingly, believed that "if a person's breath test was under 0.08 that they could not be charged with DWI." Further, the court discussed how "[i]t would be against the department policy for [an] arresting officer to make the decision to release [a] driver" "who has blown under the l[ega]l limit of .08." Moreover, the court found as follows:

> The information provided by the officer, that he was legally required to release the defendant, was untrue. The defendant's inquiries about both the preliminary breath test and the intoxilyzer strongly suggest he was engaged in a decision-making process based on whether he would be released in the event of a successful test. After being incorrectly informed that he would have to be released upon passing the intoxilyzer test, the Defendant choose to provide a sample.

In light of the preceding, the court concluded that "the State has failed to prove by clear and convincing evidence that the defendant, Stephen Mercantel, voluntarily consented to the breath test."

Following the trial court's ruling, the State appealed the trial court's order granting the motion to suppress.

STANDARD OF REVIEW AND GOVERNING LAW

Appellate courts review a trial court's ruling on a motion to suppress for an abuse of discretion. *Arguellez v. State*, 409 S.W.3d 657, 662 (Tex. Crim. App. 2013). Under that standard the record is "viewed in the light most favorable to the trial court's determination, and the judgment will be reversed only if it is arbitrary, unreasonable, or 'outside the zone of reasonable disagreement,'" *State v. Story*, 445 S.W.3d 729, 732 (Tex. Crim. App. 2014) (quoting *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006)), or if "the trial court fails to correctly analyze or apply the law," *Konkel v. Otwell*, 65 S.W.3d 183, 186 (Tex. App.—Eastland 2001, no pet.). Moreover, appellate courts apply "a bifurcated standard, giving almost total deference to the historical facts found by the trial court and analyzing *de novo* the trial court's application of the law." *State v. Cuong Phu Le*, 463 S.W.3d 872, 876 (Tex. Crim. App. 2015); *see Arguellez*, 409 S.W.3d at 662 (explaining that appellate courts afford "almost complete deference . . . to [a trial court's] determination of historical facts, especially if those are based on an assessment of credibility and demeanor"). "The same deference is afforded the trial court with respect to its rulings on application of the law to questions of fact and to mixed questions of law and fact, if resolution of those questions depends on an evaluation of credibility and demeanor." *Crain v. State*, 315 S.W.3d 43, 48 (Tex. Crim. App. 2010). Appellate courts review "*de novo* 'mixed questions of law and fact' not falling within this category." *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997) (quoting *Villarreal v. State*, 935 S.W.2d 134, 139 (Tex. Crim. App. 1996) (McCormick, J., concurring)). In addition, "appellate

courts may review *de novo* 'indisputable visual evidence' contained in a videotape" but "must defer to the trial judge's factual findings on whether a witness actually saw what was depicted on a videotape or heard what was said." *State v. Duran*, 396 S.W.3d 563, 570-71 (Tex. Crim. App. 2013) (quoting *Carmouche v. State*, 10 S.W.3d 323, 332 (Tex. Crim. App. 2000)).

"To be effective, consent to a breath test must be voluntary." *See Myers v. State*, No. 03-11-00078-CR, 2012 WL 3797599, at *5 (Tex. App.—Austin Aug. 28, 2012, no pet.) (mem. op., not designated for publication). Indeed, to be voluntary, submission to a breath test "must not be the result of physical pressure or psychological pressure brought to bear by law enforcement officials." *Gette v. State*, 209 S.W.3d 139, 145 (Tex. App.—Houston [1st Dist.] 2006, no pet.). "The ultimate question is whether the person's 'will has been overborne and his capacity for self-determination critically impaired' such that his consent . . . must have been involuntary." *Fienen v. State*, 390 S.W.3d 328, 333 (Tex. Crim. App. 2012) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26 (1973)). In other words, a "suspect's decision to submit to a breath test must be his own, made freely, and with a correct understanding of the statutory consequences of refusal." *Gette*, 209 S.W.3d at 145. In addition, "before an officer may request a specimen, the officer must give the person certain statutory admonishments," *Saenz v. State*, No. 08-12-00344-CR, 2014 WL 4251011, at *4 (Tex. App.—El Paso Aug. 26, 2014, no pet.) (not designated for publication), including the consequences for refusing to provide a sample, *see* Tex. Transp. Code § 724.015. "[T]he voluntariness of consent must be analyzed based upon the totality of the circumstances," and "non-statutory language does not automatically amount to coercion or create an inference thereof" and should be examined in light of "the surrounding circumstances." *Fienen*, 390 S.W.3d at 335.

"The validity of an alleged consent is a question of fact," and the State has the "burden to prove voluntary consent by clear and convincing evidence." *Id.* at 333, 335.

DISCUSSION

In its sole issue on appeal, the State urges that the trial court abused its discretion "when it suppressed the breath-test results . . . on grounds that Mercantel's consent to the test was involuntarily given." In response, Mercantel contends that the district court's ruling did not constitute an abuse of discretion because "looking at the totality of the circumstances," including the statements by Officer Murray that he would release Mercantel if his breath test was below 0.08, "the State did not prove by clear and convincing evidence that [Mercantel]'s consent to take the breath test was voluntary." In addition, Mercantel argues that "[t]her is no evidence in the record to show that the incorrect information given to [Mercantel] by Officer Murray had no bearing on his decision to consent to the breathalyzer."

As an initial matter, we note that the testimony and video evidence establish that consent was not obtained through any improper physical or psychological pressure exerted by Officer Murray. *See Saenz*, 2014 WL 4251011, at *5. On the contrary, the video recording shows that Officer Murray acted professionally during the encounter, took steps to ensure that Mercantel did not feel coerced, did not threaten or improperly touch Mercantel, and did not use harsh language or a demanding tone. *See Fienen*, 390 S.W.3d at 336 (determining that consent was voluntary, in part, because officer "did not use threats, deception, or physical touching, or a demanding tone of voice or language"); *State v. Wickson*, No. 03-15-00661-CR, 2016 WL 3361180, at *4 (Tex. App.—Austin June 7, 2016, pet. ref'd) (mem. op., not designated for publication) (noting when

reversing suppression order that officer's "testimony and the recording of the encounter demonstrate that at no time did [officer] force [defendant] to provide a breath sample" and that officer "conducted himself in a professional manner"). In addition, the video shows that although Mercantel expressed his desire to not go to jail, he remained calm throughout the encounter and engaged with Officer Murray. *See Saenz*, 2014 WL 4251011, at *5. Furthermore, the majority of the evidence pertaining to the issue of voluntary consent was presented through the video recording, and nothing in the trial court's findings suggest that its resolution was dependent on an evaluation of credibility and demeanor of the witnesses. *See id.* at *6. In fact, there does not seem to be any factual dispute regarding whether Officer Murray and Mercantel saw or heard what was depicted in the video recording. *See id.* Relatedly, although Mercantel introduced evidence and testimony attacking the propriety of Officer Murray's repeated assertions on the video that he would release Mercantel if the results showed an alcohol concentration of less than 0.08, there is no dispute about whether Officer Murray made those statements, and Officer Murray himself admitted that he made those statements under the mistaken belief that Texas law only defined intoxication by reference to someone's blood-alcohol concentration.

Regarding the preliminary breath test, the video chronicles Officer Murray asking Mercantel if he would like to submit a sample for unofficial testing and later stating in response to Mercantel's questions that Officer Murray was going to arrest Mercantel if Mercantel elected not to take the optional step of providing a breath sample, but the video also shows that Officer Murray explained that the test was "optional" and could be refused, that the results of the unofficial test would not have any impact on Mercantel's driving privileges, that the decision to submit to the

preliminary test was entirely up to Mercantel, and that Officer Murray's decision to arrest was independently based on his personal assessment that Mercantel was "under the influence of alcohol" that Officer Murray made before asking Mercantel to provide a sample and after being called to the scene of an accident in which Mercantel's car collided with the car in front of it, after having observed Mercantel exhibit several indicators of intoxication while performing field-sobriety testing, after smelling alcohol on Mercantel's breath, after noticing that Mercantel had bloodshot eyes, and after Mercantel admitted to having consumed alcohol during the evening. *See Kirsch v. State*, 306 S.W.3d 738, 745 (Tex. Crim. App. 2010) (listing erratic driving, bloodshot eyes, swaying, inability to perform field-sobriety tests, stumbling, and admissions regarding amount of alcohol consumed as indicators of intoxication); *Cotton v. State*, 686 S.W.2d 140, 142 n.3 (Tex. Crim. App. 1985) (explaining that evidence of intoxication can include presence of odor of alcohol on person and unsteady balance). In addition, the video documents that Mercantel freely refused to provide a sample on multiple occasions before being told that he was going to be arrested. Perhaps more importantly, Officer Murray attempted to remove any potential coercive impact from his statement that he was going to arrest Mercantel based on Officer Murray's observations by withdrawing his request that Mercantel submit a preliminary sample for an unofficial breath test.

Regarding the official breath test, Officer Murray did characterize that test as "not voluntary" and as having "repercussions," but Officer Murray also communicated to Mercantel that he could refuse to provide a sample for the official test when Officer Murray read to Mercantel the contents of a DIC-24 form listing the statutory warnings for refusing to provide a breath sample. *See* Tex. Transp. Code § 724.015. In addition, Mercantel demonstrated that he understood that he

had the ability to refuse to provide a sample by initially refusing multiple times to provide an optional sample for the preliminary test, but he agreed to provide a sample for the official test on two occasions: after Officer Murray read the statutory warnings and after Officer Murray told Mercantel that he was being arrested regardless of whether he provided a sample. *See Fienen*, 390 S.W.3d at 330-31, 336 (noting that defendant initially declined to provide breath test but changed his mind after officer explained that she was applying for warrant to obtain blood sample and determining that consent was voluntary, in part, because defendant had been told "that he could refuse the breathalyzer test"); *Wickson*, 2016 WL 3361180, at *1, *4 (reversing trial court's order granting suppression motion where police officer asked defendant to submit to preliminary and unofficial breath test, where officer later read defendant statutory warnings regarding providing official breath sample, where defendant initially refused to provide sample for official test, where officer then stated that he was going to obtain mandatory blood draw and that defendant "had 'no choice in the matter,'" and where defendant "then agreed to provide a breath sample" and explaining that reversal was warranted, in part, because officer told defendant that he had right to decide whether to provide sample, because evidence showed that defendant initially refused to provide sample several times before ultimately agreeing to provide sample, and because evidence revealed that defendant "made an informed decision to provide a breath sample" "after being informed of the possibility of a mandatory blood draw"); *Myers*, 2012 WL 3797599, at *6-7 (upholding denial of suppression motion where defendant initially refused to provide breath sample but changed her mind after officer told her that he was going to get warrant to obtain blood sample because officer's statement did not invalidate "subsequent consent under the circumstances of this case" where officer "did not threaten

or attempt to intimidate" defendant and where defendant "believed that she could have withdrawn her consent after giving it"). Moreover, nothing in the video indicates that Mercantel withdrew his consent "even though he had ample time to withdraw his consent on the way to the station and while the testing device was being prepared."[2] *See Wickson*, 2016 WL 3361180, at *4.

Finally, although Mercantel presented evidence during the suppression hearing establishing that Officer Murray's statements regarding potentially releasing Mercantel if the results of the test were less than 0.08 were inconsistent with the policies implemented by the Department and establishing that Officer Murray was under the mistaken impression on the night in question that Texas only had one definition for intoxication based on alcohol concentration, we cannot conclude "in light of the totality of the circumstances and in the absence of any evidence of coercive police tactics" that "the extra-statutory admonishments invalidated consent that was otherwise voluntary." *See Saenz*, 2014 WL 4251011, at *1, *6 (determining that extra-statutory information that district attorney's office would likely drop charges if results showed alcohol concentration of 0.08 or less did not invalidate consent); *State v. Ramsey*, No. 05-10-00971-CR, 2011 WL 5009794, at *1, *3 (Tex. App.—Dallas Oct. 21, 2011, no pet.) (not designated for publication) (reversing suppression order and rejecting argument that statement made by officer after defendant initially consented to provide sample that defendant "would get an 'unarrest' letter" and be sent home "if his blood-alcohol concentration was less than .08 percent" coerced defendant into consenting when officer told defendant that he had to wait fifteen minutes before providing sample after defendant agreed to

[2] We do note that the video documents that Mercantel was asleep for much of the ride to the police station.

provide one and when statement was made during exchange in which officer explained testing procedure and in which defendant asked about consequences of not passing breath test); *see also Gette*, 209 S.W.3d at 145 (explaining that statements about consequences for passing or failing breath test are less coercive than statements about repercussions for refusing to take test); *cf. Baxter v. State*, No. 14-13-00479-CR, 2015 WL 1143106, at *1, *2-3 (Tex. App.—Houston [14th Dist.] Mar. 12, 2015, no pet.) (mem. op., not designated for publication) (noting that officer told defendant that defendant "would be released if he consented to a search of the hotel room and no narcotics were found" and rejecting argument that conditional promise coerced defendant into signing consent form).

In light of the preceding, we must conclude that even when viewing the evidence in the light most favorable to the trial court's ruling, the State proved by clear and convincing evidence that Mercantel voluntarily consented to providing a breath sample and, therefore, also conclude that the trial court abused its discretion by granting Mercantel's motion to suppress. Accordingly, we sustain the State's appellate issue.

CONCLUSION

Having sustained the State's sole issue on appeal, we reverse the trial court's order granting Mercantel's motion to suppress and remand the case to the trial court for further proceedings consistent with this opinion.

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David Puryear, Justice

Before Justices Puryear, Pemberton, and Goodwin

Reversed and Remanded

Filed: May 26, 2017

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