ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SAM BIRD, JUDGE

DIVISION IV

CACR07-1083

MAY 7, 2008

DIANA MOORE APPELLANT	APPEAL FROM THE INDEPENDENCE COUNTY CIRCUIT COURT [NO. CR-06-107]
V.	HON. JOHN DAN KEMP JR., JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

Dr. Diana Moore was convicted in a jury trial for one count of driving while intoxicated, first-offense, and two counts of second-degree endangering the welfare of a minor. She was fined $1000 for the DWI and was sentenced for the three offenses to consecutive sentences totaling fifty days in the county jail. She appeals the convictions, contending that the trial court erred by refusing to exclude the results of a breathalyzer test introduced by the State and by excluding photographs that she proffered into evidence. We affirm.

The charges against Dr. Moore, an optometrist, arose from a traffic stop initiated by Arkansas State Trooper Terral Harsson at 7:50 p.m. on October 22, 2005, when he observed an oncoming car with a headlight out. Moore was driving the car, and her two minor children were in the back seat. After smelling alcohol, observing Moore, and administering

field sobriety tests to her, Harsson arrested her for driving while intoxicated. He transported her to jail for a BAC Datamaster breath test, which produced a reading of .09. Moore requested an additional test upon being informed of the right to do so. Harsson immediately took her to the White River Medical Center, the nearest facility available at that time of night. Moore slipped and fell while walking up a grassy incline from the patrol car to the hospital entrance, Harsson helped her up, and her blood was drawn inside the hospital without further incident. The blood-test results were sent to Moore four weeks later.

Breathalyzer Test Results

The admission of breathalyzer results is addressed by Ark. Code Ann. § 5-65-204(e) (Repl. 2005), which provides:

> (1) The person tested may have a physician or a qualified technician, registered nurse, or other qualified person of his or her own choice administer a complete chemical test in addition to any chemical test administered at the direction of a law enforcement officer.
>
> (2) The law enforcement officer shall advise the person in writing of the right provided in subdivision (e)(1) of this section and that if the person chooses to have an additional chemical test and the person is found not guilty, the arresting law enforcement agency shall reimburse the person for the cost of the additional chemical test.
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> (3) The refusal or failure of a law enforcement officer to advise a person of the right provided in subdivision (e)(1) of this section and to permit and assist the person to obtain a chemical test under subdivision (e)(1) of this section precludes the admission of evidence relating to a chemical test taken at the direction of a law enforcement officer.

The statutory provision for assistance does not extend to transporting the accused to another locale when there is no showing that facilities at the place of arrest are inadequate to perform the necessary tests, nor does case law require an officer to structure proposals or options for

the arrestee to pursue. *Weatherford v. State*, 286 Ark. 376, 692 S.W.2d 605 (1985); *Reynolds v. State*, 96 Ark. App. 360, 241 S.W.3d 765 (2006).

When a defendant moves to exclude admission of a test pursuant to this statute, the State bears the burden of proving by a preponderance of the evidence that the defendant was advised of her right to have an additional test performed and that she was assisted in obtaining a test. *Lampkin v. State*, 81 Ark. App. 434, 105 S.W.3d 363 (2003). Substantial compliance with the statutory provision about the advice that must be given is all that is required, and the officer need provide only such assistance in obtaining an additional test as is reasonable under the circumstances presented. *Id.* Whether the assistance provided was reasonable under the circumstances is ordinarily a fact question for the trial court to decide. *Id.* On appeal, the question to be decided is whether the trial court's finding of reasonable assistance to obtain another test is clearly against the preponderance of the evidence. *Id.*

Moore filed a pretrial motion seeking suppression of the breathalyzer test results on the basis of the officer's noncompliance with her statutory right to an independent test. Moore testified at a hearing that she asked for a "split sample" of the blood in the hospital and asked to see that the sample was secure and properly marked, but Harsson "confiscated" it and did not allow her to view it. Harsson testified that he followed the procedures of his field training in completing appropriate paperwork, which included a statement that the sample was requested by the subject rather than law enforcement, and in sending the sealed sample by certified mail to the Arkansas Department of Health for analysis. He stated that he had never done this any other way. The trial court held that under the circumstances of the case the

officer had provided reasonable assistance. The court concluded that there was substantial compliance with the governing statute, and the motion to suppress was denied.

Moore asserts on appeal that the statute's purpose is to permit an arrestee "to choose her own second test" and that the State does not have the statutory right to decide who will conduct it. She argues that Harsson's "refusal to permit testing by a person of her own choice [was] not in substantial compliance" with the statute. She also claims that her constitutional right to gather exculpatory evidence and present a defense was violated. Case law does not support her arguments.

In *Hudson v. State*, 43 Ark. App. 190, 863 S.W.2d 323 (1993), the hospital to which appellant was transported was unable to perform his requested urine test, but he presented no evidence that any other facility in the area could have done so; we upheld the trial court's finding that the level of assistance offered by the officer was reasonable under the circumstances. In *Fiegel v. City of Cabot*, 27 Ark. App. 146, 767 S.W.2d 539 (1989), the only officer on duty refused to offer transportation to a hospital, which would have left the city without police protection; he provided appellant an opportunity to call a qualified person to draw blood at the station or have someone pick him up and take him elsewhere for a test, thus acting reasonably under the circumstances in assisting appellant's attempt to obtain an additional test. In *Lampkin v. State*, *supra*, we viewed the lack of an offer to transport appellant for an additional test as an insignificant fact in the absence of evidence that he had chosen a facility and requested to be transported there.

Moore testified that she could have gone to Newport and that she would have asked particular doctors whom she trusted professionally to draw her blood, but there is no evidence in the record that she indeed asked to be taken to a particular facility or qualified person. Trooper Harsson determined Moore to be under the influence of alcohol, she requested a second test, he transported her immediately to the only facility in the county that he knew to be open, and the blood sample was drawn there. We hold that the trial court's finding that the assistance offered was reasonable under these circumstances is not clearly against the preponderance of the evidence.

Additionally, because the independent test that Moore requested was indeed administered, there is no merit to her claim that she was deprived of her right to exculpatory evidence and a defense. *See*, *e.g.*, *Kenyon v. State*, 58 Ark. App. 24, 946 S.W.2d 705 (1997) (rejecting appellant's argument that the blood-alcohol-test result should have been suppressed because his right to have his own test performed was destroyed by the removal of his blood sample from refrigeration: there was no evidence of bad faith, the exculpatory value of the sample was not apparent, and appellant put on evidence through his expert that the test results could be inaccurate).

Photographic Evidence

As her second point on appeal, Dr. Moore contends that the trial court erred by refusing to admit photographs of the parking and entrance area outside the White River Medical Center on the grounds that they were not relevant. She argues that the photographs were relevant to the fact that Trooper Harsson required her to climb a grassy hill, causing her

to fall, which impacted "the bias and credibility of Harsson's testimony and whether her fall was while under the influence of alcohol." Moore argued to the trial court, however, that the photographs were relevant to show the way that Harsson treated her, why she was afraid of him, and why she felt that he was not acting in a proper manner. An argument is not preserved for appeal unless an objection to the trial court was sufficient to apprise the court of the particular error alleged; the appellate court will not address arguments raised for the first time on appeal. *Ellison v. State*, 354 Ark. 340, 123 S.W.3d 874 (2003).

Affirmed.

GRIFFEN and GLOVER, JJ., agree.