DIVISION III

CACR07-455

DECEMBER 19, 2007

THEODORE IRVING	APPELLANT	APPEAL FROM THE FRANKLIN COUNTY CIRCUIT COURT [NO. CR-2005-215]
V.		HON. JOHN S. PATTERSON, JUDGE
STATE OF ARKANSAS	APPELLEE	AFFIRMED

Appellant Theodore Irving appeals his conviction by a Franklin County jury on charges of driving while intoxicated (DWI) and careless or hazardous driving, for which he was sentenced to thirty days in the county jail and an $1100 fine. On appeal, appellant argues that the circuit court erred in admitting the results from his blood test taken by a hospital medical technologist because it was not in substantial compliance with Ark. Code Ann. § 5-65-204(d)(1). We disagree and affirm.

On February 3, 2005, appellant was involved in a one-vehicle accident when he lost control of his vehicle while maneuvering a curve. The responding State Police Officer, Phillip Pierce, observed that the vehicle left marks in the north-bound lane of travel and then continued back to a ditch by the south-bound lane where it came to a final stop. Trooper Pierce noted extensive damage to the front end of the vehicle, smelled alcohol on appellant's

person, and noticed the odor of alcohol in the vehicle itself, although no bottles, cans, or the like were discovered in or around the vehicle. Appellant was unsteady on his feet, had bloodshot eyes, and was bleeding from his nose and mouth. No field sobriety tests were performed, and appellant was transported to Turner Mercy Hospital via ambulance. Trooper Pierce requested that appellant submit to a blood test and explained the implied consent rights to appellant. Delores Wilson, a medical technologist with the hospital, then drew the blood and handed it to Trooper Pierce. Trooper Pierce then made arrangements to have the blood sent to the Arkansas State Crime Laboratory, where the analysis indicated a blood-alcohol level of 0.25. Following a de novo appeal from the district court, a jury trial was held on October 6, 2006. The jury found appellant guilty and sentenced him as previously set forth. The judgment was filed on October 26, 2006, and appellant filed a timely notice of appeal on November 20, 2006. This appeal followed.

The admissibility of evidence rests in the broad discretion of the trial court. *Sauerwin v. State*, 363 Ark. 324, 214 S.W.3d 266 (2005). The specific applicable standard of review is whether the trial court abused its discretion by admitting the results of his blood test based upon its finding that there were sufficient facts present to show substantial compliance with Ark. Code Ann. § 5-65-204(d)(1). To qualify as an abuse of discretion, the trial court must have acted improvidently, thoughtlessly, or without due consideration. *Sauerwin*, *supra*. Further, appellant points out that it is the State's burden to establish the admissibility of the chemical analysis. *See Tenner v. State*, 88 Ark. App. 123, 195 S.W.3d 383 (2004).

We note initially that the State argues that appellant failed to preserve this argument for our review. The hospital medical technologist, Ms. Wilson, testified during the State's case-in-chief regarding her qualifications, supervisory personnel, and the standard protocol followed, without objection from appellant, followed by both cross-examination and re-direct. After her testimony was completed, appellant's counsel made a motion to exclude the testimony, and then, it was not in the appropriate form of an objection. Appellant's counsel made "a motion to exclude the drawing of blood in this case. There has to be, as the [c]ourt well knows, testimony that the blood was drawn under direct supervision of a physician. That's the law; and they have not - they have skirted away from it; and this testimony is very weak in that area."

An appellant's failure to make a contemporaneous objection prevents him from asserting any error on the part of the trial court for admitting the evidence. *See McClain v. State*, 361 Ark. 133, 205 S.W.3d 123 (2005). An additional procedural problem occurred when the State subsequently offered appellant's blood-test results for admission into evidence during the direct examination of Trooper Pierce, and appellant's counsel specifically stated that he had no objection to its admission into evidence. Even if we were to deem the earlier comments a proper objection, appellant's failure to renew the objection when the State attempted to introduce similar evidence, the actual test results from the blood drawn by Ms. Wilson, would prevent him from raising the issue on appeal. *See Lowry v. State*, 364 Ark. 6, 216 S.W.3d 101 (2005).

Alternatively, were we to reach the merits of appellant's argument, we would likewise affirm based upon the following analysis. Arkansas Code Annotated section 5-65-204(d)(1) provides:

> When a person submits to a blood test at the request of a law enforcement officer under a provision of this section, blood may be drawn by a physician or a person acting under the direction and supervision of a physician.

Ms. Wilson testified about drawing appellant's blood, stating that she prepped the area with a non-alcohol cleanser, labeled the tube with appellant's name, and handed the freshly-drawn blood sample to Trooper Pierce. She testified that she was working under the supervision of Carol Carrick, the lab manager and a medical technologist, and Ms. Carrick's direct supervisor is the hospital administrator, who is not a physician. She also explained that there was an emergency-room physician on duty at the time, and although she did not interact with the physician during the course of the withdrawal of blood from appellant, the emergency-room physician is always there and is the ultimate supervisor of the emergency room.

Appellant submits that this testimony was not sufficient to establish the necessary foundation to demonstrate that Ms. Wilson drew appellant's blood under the direction and supervision of a physician, as required by the statute, and that accordingly the test results should have been excluded at trial. He acknowledges the holding in *Gavin v. State*, 309 Ark. 158, 827 S.W.2d 161 (1992), where our supreme court expressly held that a physician's presence is not required under Ark. Code Ann. § 5-65-102(d)(1) provided that the nurse's normal duties included taking blood samples and standard hospital policy for extracting

blood is followed; however, he claims that the instant case is distinguishable. He focuses on Ms. Wilson's mere assumption that the emergency-room physician was her ultimate supervisor at the time she drew the blood, even though she admitted acting under the supervision of Ms. Carrick, another medical technologist. He also points out that no proof was presented that it was normal hospital policy for blood to be drawn when a physician was not present, and contends that the results in *Gavin* were admissible because the registered nurse followed standard hospital policy in taking a defendant's blood with a physician on call but not present.

Appellant asserts that the admission of the blood-test results into evidence clearly demonstrates prejudice because it is unlikely that he would have been found guilty of DWI in the absence of this proof. Specifically, Trooper Pierce acknowledged that he initially only had a suspicion, rather than a strongly-held opinion, that appellant was intoxicated, based upon four factors: (1) he was unsteady on his feet; (2) his eyes were bloodshot; (3) he had an odor of alcohol about his person; (4) his vehicle smelled of alcohol. Trooper Pierce stated on re-direct that his opinion that appellant was intoxicated was solidified once he got the results from the crime lab, after which his "final opinion was that [appellant] was intoxicated a hundred and ten percent." Appellant points out that his injuries from hitting his head on the windshield would explain why he was unsteady on his feet, and further states that bloodshot eyes are equally as common to symptoms of fatigue and tiredness as with intoxication.

He contends that there was no testimony presented that contradicted his assertion that the accident was actually caused by a defective-steering mechanism that caused the steering wheel to jerk from his hands just before the accident or his observation the next day of the complete lack of power-steering fluid in the vehicle. Accordingly, he asks for a reversal of the conviction.

The State counters, and we agree, that the trial court did not abuse its discretion in admitting the evidence regarding the drawing of appellant's blood. Ms. Wilson gave detailed testimony about her qualifications and education, procedures, and protocol routinely used at the hospital when taking blood for law-enforcement purposes, as well as providing information about her supervisors at the hospital. The regulations promulgated by the Arkansas Department of Health are to ensure that alcohol-concentration test results are accurate, and we agree that the State proved substantial compliance therewith. Additionally, the level of compliance goes to the weight of the evidence to be considered by the finder of fact when considering the totality of the circumstances. *See McKim v. State*, 25 Ark. App. 176, 753 S.W.2d 295 (1988). The record reflects that she was a proper person to draw the blood, under the supervision of Ms. Carrick and ultimately the ER physician on duty. Despite appellant's argument to the contrary, this case is quite similar to *Gavin*, *supra*.

Appellant also fails to demonstrate how the lack of direct physician supervision pursuant to Ark. Code Ann. § 5-65-204 affected the reliability of his blood test, and the State argues that even if we were to determine that the admission of the results was error, the error was harmless. The main purpose of the statute is to clarify who can withdraw blood,

specifically medical personnel rather than law-enforcement, and their liability. Subsection (e) allows a person to have an additional test to be administered by a physician, *qualified technician*, registered nurse, or other qualified person. (Emphasis added.) Because appellant does not specifically contest the actual method used for the blood draw or the competence of Ms. Wilson, and because he fails to show any prejudicial error, any failure to follow the statutory limitations of Ark. Code Ann. § 5-65-204(d)(1) should not have resulted in the exclusion of the test results.

Finally, even if appellant could show prejudice, the State maintains that any error was harmless because there was overwhelming evidence of guilt. *See Bledsoe v. State*, 344 Ark. 86, 39 S.W.3d 760 (2001). Arkansas Code Annotated section 5-65-103 provides for two ways to prove DWI: (1) proving intoxication; or (2) proving an alcohol concentration in breath or blood that is greater than (0.08). *See Porter v. State*, 356 Ark. 17, 145 S.W.3d 376 (2004). An officer's observations and opinions with regard to the smell of alcohol and actions consistent with intoxication can constitute competent evidence to support a DWI conviction. *See Johnson v. State*, 337 Ark. 196, 987 S.W.2d 694 (1999). It was the province of the jury to determine the weight and credibility of the evidence. *Wortham v. State*, 65 Ark. App. 81, 985 S.W.2d 329 (1999). Even without the blood-test results, there was evidence from which the jury could have determined that appellant was intoxicated: (1) he drove into a ditch; (2) he was unsteady on his feet; (3) he eyes were glassy and bloodshot; (4) Trooper Pierce detected the odor of alcohol on his person *and* in his vehicle; (5) Trooper Pierce still smelled the odor of alcohol when he spoke with appellant at the hospital; (6)

appellant admitted to drinking the night before (although he said it was only a couple of drinks); (7) appellant admitted taking Tylenol-3 with codeine, which makes him sleepy, the morning of the accident. While some of these indicators of intoxication could be attributed to other causes, including the impact of the wreck, there was overwhelming evidence before the jury from which they could have reached the conclusion that appellant was intoxicated at the time of the accident, even absent the blood-test results.

We affirm the conviction because appellant failed to preserved the issue for review, and alternatively, because the trial court did not abuse its discretion in admitting the evidence.

Affirmed.

GRIFFEN, J., agrees.

HART, J., concurs.

HART, J., concurring. I agree that this case must be affirmed. However, I disagree with the majority's conclusion that appellant's argument has not been preserved, and even if it had been, it was harmless error. This case is controlled by *Gavin v. State*, 309 Ark. 158, 827 S.W.2d 161 (1992), and I would affirm on that basis alone.