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ATTORNEY FOR APPELLANT:

CARL PAUL LAMB
Carl Lamb and Associates
Bloomington, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

J.T. WHITEHEAD
Deputy Attorney General
Indianapolis, Indiana

FILED
Mar 30 2010, 9:06 am
CLERK
of the supreme court, court of appeals and tax court

IN THE
COURT OF APPEALS OF INDIANA

WILLIAM GARRETT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 53A05-0908-CR-446
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MONROE CIRCUIT COURT
The Honorable Elizabeth N. Mann, Senior Judge
Cause No. 53C02-0803-CM-1334

March 30, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Following a jury trial, Appellant-Defendant William Garrett was convicted of Class A misdemeanor Operating a Vehicle While Intoxicated Endangering a Person.[1] Upon appeal Garrett challenges his conviction by claiming that certain evidence was improperly admitted at trial. We affirm.

FACTS AND PROCEDURAL HISTORY

Approximately two hours after sunset at 8:41 p.m. on March 14, 2008, Indiana State Police Trooper Mike Adams initiated a traffic stop of Garrett's vehicle on State Road 37 in Monroe County. Garrett was traveling approximately seventy-six miles per hour and did not have his headlights illuminated, which Trooper Adams believed was necessary at that hour. Upon approaching Garrett and requesting identification, Trooper Adams noticed the odor of alcohol on Garrett's breath, observed that his speech was slow and deliberate, and saw that he had glassy, bloodshot eyes. Concerned that Garrett was intoxicated, Trooper Adams asked Garrett to step out of his vehicle. Trooper Adams asked Garrett whether he had been consuming alcohol, and Garrett admitted to having had a couple of alcoholic drinks. Trooper Adams performed a horizontal gaze nystagmus field sobriety test ("FST"), which Garrett did not pass. At that point, Trooper Adams read Garrett an implied consent warning on the basis that he had probable cause to believe Garrett was operating a motor vehicle while intoxicated, and Garrett consented to a certified breath test. After Garrett stepped into Trooper Adams's vehicle, Trooper Adams checked his mouth with a flashlight, including by lifting Garrett's tongue, and noted that the time was 8:50 p.m. Trooper Adams saw nothing in Garrett's mouth, and

[1] Ind. Code § 9-30-5-2 (2007).

he did not notice that Garrett had any burping, belching, or other digestive problems. At 9:21 p.m., after Trooper Adams had transported Garrett to the Sheriff's Department, Trooper Adams performed additional FSTs on Garrett, including a "one-leg stand" test and a "walk and turn" test. Tr. p. 49. Trooper Adams did not inquire into any potential injury to Garrett's legs or ankles. Garrett failed both tests.

Trooper Adams administered a certified breath test at 9:21 p.m. The certified breath test required that the subject not have any foreign substance in his mouth or respiratory tract twenty minutes prior to talking the breath sample. While monitoring Garrett prior to the test, Trooper Adams saw nothing out of the ordinary and did not ask him about his acid reflux condition. The results of the breath test indicated that Garrett had an alcohol concentration equivalent ("ACE") of .13. Trooper Adams advised Garrett that he was under arrest.

On March 14, 2008, the State charged Garrett with Class A misdemeanor operating a vehicle while intoxicated endangering a person (Count 1) and Class C misdemeanor operating a vehicle with an ACE of .08 or greater (Count 2).

Prior to trial, Garrett moved to suppress the results of the certified breath test on the grounds that Trooper Adams failed to conduct a visual inspection of his mouth immediately prior to administering the test. Garrett additionally moved to suppress the results of the FSTs on the grounds that Trooper Adams failed to ask Garrett whether he had any impairments which might affect his performance on these tests. The trial court denied Garrett's motion.

At the May 22, 2009 jury trial, the State introduced evidence of Trooper Adams's certification to administer the certified breath test. Garrett objected to this evidence on the grounds that it was not properly certified. Also at trial, Garrett testified that he had problems with his acid reflux condition immediately prior to the administration of the certified breath test. In addition, Garrett testified that he had sustained past injuries to and had screws in his ankles.

Garrett was subsequently found guilty of both counts. The trial court entered judgment of conviction on Count 1, Class A misdemeanor operating a vehicle while intoxicated, and dismissed Count 2. The trial court sentenced Garrett to serve one year in the Monroe County Jail with all but sixty days suspended.

Garrett filed his notice of appeal on August 4, 2009. On August 6, 2009, Garrett petitioned this court with an emergency motion for stay pending appeal, which was denied. This appeal follows.

DISCUSSION AND DECISION

Upon appeal, Garrett challenges the certified breath tests results by claiming that (1) the FSTs did not establish probable cause, (2) the certified breath test was improperly administered, and (3) the State failed to demonstrate admissible evidence of Trooper Adams's certification to administer the test.

Garrett's challenges are both to the trial court's denial of his motion to suppress as well as to the admissibility of evidence at trial. Our standard of review on the admissibility of evidence is the same whether the challenge is made by a pre-trial motion to suppress or by a trial objection. *Ackerman v. State*, 774 N.E.2d 970, 974 (Ind. Ct. App.

2002), *trans. denied*. A trial court has broad discretion in ruling on the admissibility of the evidence. *Gibson v. State*, 733 N.E.2d 945, 951 (Ind. Ct. App. 2000). We will reverse a trial court's ruling on the admissibility of the evidence only when it has been shown that the trial court abused its discretion. *Id.* An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. *Id.* We consider the evidence most favorable to the court's decision and any uncontradicted evidence to the contrary. *Id.*

I. Probable Cause

We first address Garrett's claim that the results of the FSTs were inadequate to establish probable cause to administer the certified breath test. Garrett claims that he was suffering from acid reflux and was on medication for this condition, and he had injuries to and pins in his ankles, making the field sobriety tests more difficult to pass.

Objectively observed clear indications of intoxication include dilated pupils, bloodshot eyes, glassy eyes, and the odor of alcohol on the person's breath. *Frensemeier v. State*, 849 N.E.2d 157, 162 (Ind. Ct. App. 2006), *trans. denied*. "'[T]he amount of evidence needed to supply probable cause of operating while intoxicated is minimal[.]'" *Id.* (quoting *Hannoy v. State*, 789 N.E.2d 977, 989 (Ind. Ct. App. 2003)).

Apart from pure speculation, Garrett fails to demonstrate that his conditions somehow affected his performance on the FSTs. Of course, even without the results from the failed FSTs, Trooper Adams had probable cause to believe Garrett was operating a vehicle while intoxicated, justifying implied consent and administration of the certified breath test. At the time Trooper Adams stopped Garrett, he was speeding and had failed

to illuminate his headlights. Garrett's eyes were glassy and bloodshot; he had a slow, deliberate speech pattern; and he admitted having recently had two alcoholic drinks. Garrett's challenge on this ground warrants no relief.

II. Proper Administration of Certified Breath Test

Garrett additionally claims that Trooper Adams improperly administered the certified breath test, rendering its results inadmissible. According to Garrett, Trooper Adams failed to conduct a visual inspection of his mouth immediately prior to administering the test. In addition, Garrett contends that his acid reflux condition caused "regurgitation into the respiratory tract during the chemical test," rendering the results unreliable. Appellant's Br. p. 19.

Defendant's Exhibit A, the certified breath test checklist, requires that the person tested have "nothing to eat or drink," have no "foreign substance in his/her mouth or respiratory tract, and . . . not smoke within twenty (20) minutes prior to the time a breath sample is taken." In compliance with this requirement, Trooper Adams testified that he checked Garrett's mouth, with a flashlight, at 8:50 p.m. and saw nothing inside it. Thirty-one minutes later, at 9:21 p.m., Trooper Adams administered the test, after having monitored Garrett the entire time. The record demonstrates that Trooper Adams ensured compliance with the above requirement by inspecting Garrett's mouth, monitoring him, and administering the test over twenty minutes later. To the extent Garrett suggests that Trooper Adams was required to re-inspect his mouth immediately prior to administration of the test, he fails to point to any part of the record or to authority supporting such an additional requirement.

Garrett additionally argues that his acid reflux condition likely caused a foreign substance to enter his respiratory tract, in violation of the requirement that no foreign substance enter a subject's respiratory tract prior to the test. Garrett's contention that his digestive problems affected his respiratory system at the time in question is purely speculative. While Garrett's expert witness testified that Garrett suffered from acid reflux, and that acid reflux conditions may affect the respiratory system, this witness did not testify that Garrett's acid reflux affected his respiratory system at the time of the certified breath test. Trooper Adams, who was monitoring Garrett and trained to watch for vomit, testified that Garrett did not burp, belch, or complain about his condition, and that nothing from his observations suggested that the test would be compromised. The jury was within its fact-finding discretion to credit Trooper Adams's testimony. Garrett's challenge to the admissibility of the certified breath test results based upon the test's allegedly improper administration warrants no relief.

III. Admissibility of Certified Document

Garrett's final challenge is based upon what he alleges was the inadmissibility of the document demonstrating that Trooper Adams was certified to operate the breath test. For results of a breath test to be admissible, three foundational requirements are necessary: (1) the operator who administered the test must be certified by the Indiana University School of Medicine Department of Pharmacology and Toxicology (Department of Toxicology); (2) the equipment used in the test must have been inspected and approved by the Department of Toxicology; and (3) the operator must have followed

the procedures approved by the Department of Toxicology. *State v. Lloyd*, 800 N.E.2d 196, 199 (Ind. Ct. App. 2003).

Garrett claims that State's Exhibit 1, the Indiana University School of Medicine document indicating Trooper Adams's certification, was improperly used to establish prong (1), above, because the second page of this exhibit, where Trooper Adams was listed as a certified operator, did not contain a certification stamp. As the State pointed out at trial, while the certification stamp was not duplicated on the second page of State's Exhibit 1, the certification seal was imprinted on this second page, and the second page was stapled to the first page. The trial court relied upon this imprint in admitting the document as properly certified. We find no abuse of discretion.[2]

The judgment of the trial court is affirmed.

RILEY, J., and MATHIAS, J., concur.

[2] To the extent Garrett challenges the admissibility of State's Exhibit 1 on other grounds, these were not the basis for his objection at trial and we deem them waived. If a defendant fails to make "'a timely trial objection clearly identifying both the claimed objectionable matter and the grounds for the objection,'" the claim of error is waived. *Luna v. State*, 758 N.E.2d 515, 518 (Ind. 2001) (quoting *Scisney v. State*, 701 N.E.2d 847, 849 (Ind. 1998)).