STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v MICHAEL DENNIS REID, Defendant-Appellant.	FOR PUBLICATION May 10, 2011 9:05 a.m. No. 286784 Wayne Circuit Court LC No. 07-020203

ON REMAND

Before: DONOFRIO, P.J., and SAWYER and OWENS, JJ.

PER CURIAM.

This case is once again before us, now on remand by the Michigan Supreme Court. In our original opinion, we concluded that the circuit court does not possess the jurisdiction to try a defendant on a misdemeanor charge when the accompanying felony charge was dismissed before the beginning of trial. *People v Reid*, 288 Mich App 661; ___ NW2d ___ (2010). The Supreme Court reversed and remanded the matter to us to consider issues previously raised by defendant but not addressed in our original opinion. *People v Reid*, 488 Mich 917; 789 NW2d 492 (2010). We consider those issues and now affirm defendant's conviction for operating a motor vehicle while intoxicated (OWI).[1]

Defendant first argues that the trial court erred in denying his motion to suppress the result of his blood-alcohol test, as well as his motion to dismiss. We disagree.

Defendant's motion to suppress is based upon an argument that he was deprived of his right under MCL 257.625a(6) to have an independent chemical test performed on the blood sample. We disagree. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

MCL 257.625a(6)(d) provides that a defendant in an OWI case be given a "reasonable opportunity" to obtain an independent analysis of his blood sample:

[1] MCL 257.625(1)

> A chemical test described in this subsection shall be administered at the request of a peace officer having reasonable grounds to believe the person has committed a crime described in section 625c(1). A person who takes a chemical test administered at a peace officer's request as provided in this section shall be given a reasonable opportunity to have a person of his or her own choosing administer 1 of the chemical tests described in this subsection within a reasonable time after his or her detention. The test results are admissible and shall be considered with other admissible evidence in determining the defendant's innocence or guilt. If the person charged is administered a chemical test by a person of his or her own choosing, the person charged is responsible for obtaining a chemical analysis of the test sample.

In this case, defendant's blood was drawn following his arrest on November 13, 2005. The sample was destroyed by the State Police Crime Lab in February 2008 pursuant to a policy to destroy samples two years after receipt unless there is a request to preserve the sample longer. There is no indication that, at any time during the over two-year period that the crime lab was storing defendant's blood sample, that defendant made a request for an independent analysis that was denied. While it is true that defendant may not have been particularly motivated to have an independent test of his blood sample performed until after he was actually charged with a crime, he was charged on August 3, 2007. While this was almost two years after his initial arrest, it was still approximately six months before the blood sample was actually destroyed. We conclude that defendant had more than an ample opportunity to have his blood sample independently tested and, therefore, the trial court did not abuse its discretion in denying defendant's motion to suppress the test results.

This brings us to a second argument that defendant raises under this issue, whether the delay in charging defendant violated his right to due process of law. We review this question de novo. *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999). For a defendant to be entitled to dismissal on this basis, he must show that the delay caused an "actual and substantial prejudice to the defendant's right to a fair trial and an intent by the prosecution to gain a tactical advantage." *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000), overruled in part on other grounds *People v Miller*, 482 Mich 540; 759 NW2d 850 (2008). We are not persuaded that defendant had made such a showing in this case.

Defendant argues that there was prejudice due to his inability to obtain an independent analysis of his blood sample. But as discussed above, the sample was not destroyed until approximately six months after defendant was eventually charged. Defendant had over two years to obtain an independent testing of the blood sample, including six months after he was actually charged. Any prejudice from failing to obtain an independent test stemmed from defendant's failure to promptly request such a test, not because the delay in charging him precluded him from requesting a test.

Defendant also argues that the prosecutor gained a tactical advantage in the delay in bringing charges because the prosecutor knew that the Michigan State Police would have long since destroyed the videotape of the traffic stop, thus depriving defendant of potentially exculpatory evidence from the videotape. But this argument also fails. First, defendant merely speculates that this is the reason for the delay. Indeed, defendant is unable to establish that a

videotape ever even existed. The arresting officer, Trooper Bommarito, testified that he could not recall whether the police car that he was driving that evening had a video camera. Based upon the fact that there was a blank space under "video" on his police report, he concluded that there "might not have been a video" because the normal practice is to write the car number in that spot if the car is equipped with video. He further testified that, even if a video had existed, it would have been taped over after 60 days. A second officer, Trooper Rowe, who arrived at the scene at approximately the time defendant's vehicle was stopped, did have a car with video. But that video was presumably turned in and taped over under the 60-day rotation policy.

But defendant does not show that the prosecution deliberately waited to bring charges so that the tapes would be lost. Indeed, the prosecutor did not merely wait two months to bring charges, but almost two years. Not only is it mere speculation that the videotape would have been helpful to defendant and further speculation that the prosecutor waited to bring charges until any such tape was reused under the 60-day rotation policy, that speculation falls apart in light of the fact that the prosecutor then waited an additional 18 months or so to bring charges. It would seem that if the prosecutor's motivation in delaying the charges was to wait for any videotape to be reused, the charges would have been brought much sooner than was the case.

For the above reasons, we conclude that defendant has not shown a due process violation arising from the delay in charging him.

Next, defendant argues that the jury's verdict that he was intoxicated was against the great weight of the evidence. We disagree. Because defendant did not move for a new trial, his unpreserved great weight of the evidence argument is reviewed for plain error. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). A verdict is against the great weight of the evidence if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow it to stand. *Id.* at 218-219.

In this case, there was substantial evidence of defendant's guilt. Trooper Bommarito testified as to defendant's physical abilities, including the failing of field sobriety tests, at the time of the traffic stop. Additionally, the lab technician testified as to the results of the blood tests, the level of alcohol and drugs in defendant's system, and the effects of the alcohol and drugs on defendant's ability to drive. In light of this evidence, the jury could reasonably conclude that defendant was guilty.

Defendant next argues that he was unfairly prejudiced when the prosecutor was permitted to amend the information after the jury was impaneled. Specifically, defendant argues that the prosecutor should not have been allowed to change the theory of the case from operating a motor vehicle under the influence of alcohol to operating "while under the influence of alcohol and/or a controlled substance" because defendant had prepared his defense to defend against alcohol only, with a BAC of only 0.02. We disagree.

Defendant concedes that he did not object in the trial court to the amendment and, therefore, we review this issue for plain error. *People v Carines*, 460 Mich App 750, 763-764; 597 NW2d 130 (1999). The record does reflect that, after the jury was sworn but before opening statements, the prosecutor moved to amend the information to state "while under the influence of alcohol and/or a controlled substance." But the record also reflects that, when the trial court read

the information to the prospective jurors at the beginning of jury selection, the information stated "while under the influence of a controlled substance." Therefore, the amendment was to add the claim of alcohol, not to add a claim of a controlled substance. Because defendant's argument is premised upon adding the claim of a controlled substance and this did not happen, there is no plain error to correct.

Finally, defendant argues that the trial court erred in instructing the jury on intoxication. At trial, however, defense counsel expressly approved the instruction given. Therefore, this issue is waived. *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000).

Affirmed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Donald S. Owens