STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EMMET ALLEN LUBERDA,

Defendant-Appellant.

UNPUBLISHED
March 6, 1998

No. 197490
Livingston Circuit Court
LC No. 96-009286 FH

Before: McDonald, P.J., and Sawyer and Hoekstra, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of resisting and obstructing a police officer, MCL 750.479; MSA 28.747, and operating a motor vehicle with an unlawful blood alcohol level, second offense, MCL 257.625(1) and (7); MSA 9.2325(1) and (7). He thereafter admitted to being a habitual offender, fourth offense. MCL 769.12; MSA 28.1084. He was sentenced to four to seven years in prison on the resisting and obstructing conviction and to ninety days imprisonment for the UBAL conviction. Defendant now appeals and we affirm.

Defendant first argues that there was insufficient evidence to support the resisting and obstructing conviction because there was insufficient evidence to establish that there was a lawful traffic stop in the first place. We disagree. We review this issue by looking at the evidence in the light most favorable to the prosecution and determining whether a rational trier of fact could find each element proven beyond a reasonable doubt. *People v Head*, 211 Mich App 205, 210; 535 NW2d 563 (1995).

The traffic stop was justified on two reasons: that defendant had two burned out taillights and that there was excessive noise. Defendant points to conflicting evidence over whether there were two burned out taillights or only one, with a traffic stop being justified only if both taillights were burned out. However, there was testimony that both taillights were burned out. If the jury chose to believe that testimony, it could find that the traffic stop was justified. Whether that testimony was believable in light of the evidence that only one taillight was burned out was a determination for the jury, not for this Court. Similarly, it was for the jury to decide if there was enough evidence to conclude that defendant's vehicle

was excessively loud. There was testimony to this effect, so the evidence was legally sufficient. Simply put, defendant asks us to substitute our judgment for the jury's. We decline to do so.

Defendant next argues that he was not adequately informed of his "chemical rights" with respect to the blood alcohol test. Specifically, defendant was screaming and kicking while the police officer read him his chemical rights. Defendant argues that the officer should have waited until defendant was calm before advising him of his rights. We disagree. Specifically, we believe that whether defendant was adequately advised of his chemical rights is irrelevant because the blood test was ultimately performed pursuant to a search warrant.

MCL 257.625a(6)(b)(i); MSA 9.2325(1)(6)(b)(i) provides that a drunk driving arrestee must be advised of his right to an independent chemical test if he takes a test "administered at the request of a peace officer . . . ." Here, defendant did not take a test administered at the request of the police officer. Rather, defendant refused the test. Accordingly, the statute does not provide the right to an independent chemical test. This conclusion is further buttressed by the provisions of § 625a(6)(d), which provides in part that 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 detention."

The legislative mandate is clear: the right to an independent test is dependent upon the defendant submitting to the officer's request for a chemical test. If the defendant refuses to submit to the officer's request and a test is performed under a warrant, the statute no longer affords a right to an independent test. See also *People v Snyder*, 181 Mich App 768, 770; 449 NW2d 703 (1989) (blood tests obtained under a warrant are not subject to the evidentiary or procedural restrictions of the OUIL statute; the warrant procedure is independent of the testing procedures of the OUIL statute).

For the above reasons, we conclude that defendant was not denied a fair trial because of the trial court's refusal to suppress the results of the blood-alcohol test even if defendant was not properly advised of his chemical rights.

Finally, defendant argues that he was denied a fair trial because the trial court did not disqualify itself even though it had served as factfinder in a probation violation hearing based upon the same circumstances at issue in the instant offense. The issue, however, is not properly before this Court. First, defendant did not file a timely motion to disqualify the trial judge as required by MCR 2.003. Rather, defendant merely requested, on the first day of trial, that the judge disqualify himself. The trial court did address the issue, despite it not being properly before the court, and denied it on the merits. At this point, the proceeding was recessed to give defendant an opportunity to have the issue reviewed by the chief judge, as required by MCR 2.003(C)(3). There is no indication on the record that the chief judge did in fact rule on the motion. For these reasons, we conclude that the issue was not properly raised and preserved. Accordingly, we decline to address it.

Affirmed.

/s/ Gary R. McDonald
/s/ David H. Sawyer
/s/ Joel P. Hoekstra