

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 25, 2011

v

RICHARD KENNETH HEIKKINEN,

Defendant-Appellant.

No. 299558
Delta Circuit Court
LC No. 08-007967-FH

Before: STEPHENS, P.J., and SAWYER and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right following his jury trial conviction for operating a motor vehicle under the influence of intoxicating liquor (OUIL) third offense, MCL 257.625(1) and (9). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to a term of thirty months to ten years' imprisonment. We affirm.

I. BASIC FACTS

On May 18, 2008, defendant was arrested and later charged as an habitual offender with OUIL 3rd and driving on a suspended license – second offense.¹ On May 20, 2008, the prosecutor offered defendant a plea deal that would have resulted in the dismissal of the habitual offender charge. On May 22, 2008, defense counsel filed an appearance and demand, which included a demand for “Copies of all test results, officer notes, evidence in the possession of the police or prosecutor” as well as “results of all chemical/blood tests in the possession of the Prosecutor, which is or might be of an exculpatory nature.” Defendant was sent a copy of the lab results showing a .08 BAL on June 6, 2008. On July 7, 2008, the prosecutor once again offered defendant a plea deal. The cutoff for accepting a plea was July 11, 2008. On July 15, 2008, defense counsel served the prosecutor with a formal discovery request pursuant to MCR 6.201, which included a demand for “[a]ny report of any kind produced by or for an expert witness whom the Prosecutor intends to call at trial.” Believing that his BAL was the minimum threshold, defendant did not accept the plea and proceeded to trial.

¹ This charge was dismissed at trial.

However, during trial, forensic scientist Mark Vandervest testified that two tests revealed defendant's BAL was actually .088 and .089. As standard procedure, the lab used the lower result and also truncated (or removed) the last number, resulting in a report that defendant's BAL was .08.

II. DISCOVERY

Defendant first argues that he was unable to make an informed decision regarding the plea offer because the prosecutor failed to comply with his discovery request. Had the prosecutor done so, defendant would have learned that his BAL was higher than he initially believed and he would not have gone to trial. Instead of receiving a maximum sentence of five years' imprisonment under the plea offer, defendant was sentenced as a fourth habitual offender to a maximum term of ten years' imprisonment. He now argues that the only remedy is specific enforcement of the plea offer. We disagree. A trial court's decision regarding the appropriate remedy for a discovery violation is reviewed for an abuse of discretion. MCR 6.201(J); *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). A trial court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010). To the extent that defendant implicates his due process rights, review is de novo. *People v Izarraras-Placante*, 246 Mich App 490, 493; 633 NW2d 18 (2001).

MCR 6.201(B)(2) provides that "upon request, the prosecuting attorney must provide each defendant . . . any police report and interrogation records concerning the case, except so much of a report as concerns a continuing investigation." To establish a violation of his due process right to the disclosure of information, a defendant must show that: (1) the state possessed evidence favorable to the defendant; (2) the defendant did not possess the evidence and could not have obtained it with reasonable diligence; (3) the prosecutor suppressed the evidence; and (4) if the evidence had been disclosed to the defendant, it is reasonably probable that the result of the proceedings would have been different. *Cone v Bell*, ___ US ___; 129 S Ct 1769, 1783; 173 L Ed 2d 701, 718 (2009); *People v Schumacher*, 276 Mich App 165, 177; 740 NW2d 534 (2007).

Contrary to defendant's assertion, there is no indication that the prosecutor provided any "misleading" discovery information; rather, the prosecutor turned over the lab result that was in his possession. The prosecutor was unaware that other laboratory reports existed and testimony regarding defendant's higher BAL was a surprise to the prosecutor as well. For her part, defense counsel vigorously cross-examined the prosecutor's experts, attacking not only their credentials, but the chain of custody and the method of testing. In light of defense counsel's attack on testing procedures, protocol, and calibration, and given the fact that defendant's BAL was the minimum quantum for a conviction, it would have been reasonable for defense counsel to request the full lab file. As the trial court indicated, the information was equally accessible to defendant as to the prosecutor. In any event, even after evidence of the higher BALs was on the record, the prosecutor did not reference them. In presenting expert testimony on retrograde extrapolation, the prosecutor used a hypothetical asking the expert to "assume that an individual that the blood alcohol result reported by the laboratory was a point zero eight." The prosecutor never used the higher values in his closing arguments.

As in *People v Elston*, 462 Mich 751; 614 NW2d 595 (2000), the mere fact that the parties were “surprised” by the testimony concerning defendant’s BAL was no reason to conclude that a discovery violation occurred. *Elston* was a criminal sexual conduct case involving a young child. The emergency room physician who examined the victim conducted two dry swabs of the victim’s rectum, which revealed no evidence of semen. *Elston*, 462 Mich at 755. The physician also took two wet swabs, which he believed were more effective at detecting sperm, and observed two sperm fragments in the wet swabs. Although the emergency room report, which had been provided to defense counsel, contained the physician’s note “wet prep and attempt for motile sperm slide,” neither the prosecution nor the defense counsel questioned the physician at the preliminary examination regarding the meaning of the report or his personal observation. It was only on the first day of trial that the physician told the prosecutor he had observed sperm fragments. *Id.* at 755-757. Defense counsel moved to suppress the testimony based on surprise. The trial court denied the motion, finding that defense counsel had the report and was on notice of the potential testimony. *Id.* at 757-758. The Michigan Supreme Court stated that the emergency physician’s “personal observations of sperm were not otherwise discoverable because evidence of sperm recovered from the victim was not ‘exculpatory’ under MCR 6.201(B)(1), or ‘favorable to an accused’ under *Brady, supra.*” *Id.* at 762-763. The Court further held that exclusion of the evidence was not warranted. “[E]ven if defendant had established an inadvertent discovery violation, a continuance, had one been requested, would have alleviated any harm to defendant’s case by allowing both parties to prepare for the evidence of sperm without requiring the exclusion of relevant evidence. Under such circumstances, the more severe remedy of suppression would not have been appropriate.” *Id.* at 764. The *Elston* Court went to great pains to conclude that the case was *not* about a discovery violation. Its focus was on what the proper remedy would be in a situation in which “surprise” evidence was sought to be admitted at trial. *Elston* supports the prosecution’s argument that the incriminating evidence is not subject to disclosure under MCR. 6.201(B). It also provides support for the prosecution’s claim that defense counsel should have requested a continuance in order to investigate more fully defendant’s BAL, as opposed to simply objecting to the admission of the testimony and moving for a mistrial.

MCR 6.201(J) provides that “[i]f a party fails to comply with this rule, the court, in its discretion, may order the party to provide the discovery or permit the inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances.” See also *People v Greenfield (On Reconsideration)*, 271 Mich App 442, 453; 722 NW2d 254 (2006); *People v Elkhoja*, 251 Mich App 417, 439; 651 NW2d 408 (2002), vacated in part on other grounds 467 Mich 916 (2003). The exercise of that discretion involves a balancing of the interests of the courts, the parties and the public, including an examination of the reason for noncompliance and resultant prejudice. *People v Jackson*, ___ Mich App ___; ___ NW2d ___ (Docket No. 285532, issued May 17, 2011), slip op p 4, *Greenfield*, 271 Mich App at 454 n 10.

Defendant relies upon *People v McCauley*, 287 Mich App 158; 782 NW2d 520 (2010) lv held in abeyance by ___ Mich ___; 792 NW2d 331 (2011), arguing that specific performance of a plea agreement is an appropriate remedy. However, *McCauley* is distinguishable from this case. The defendant in *McCauley* received ineffective assistance of counsel during plea negotiations. The defendant was functioning under the misconception that, because he did not fire the fatal shot that killed the victim, he could not be convicted of first-degree felony murder.

Defense counsel failed to advise the defendant that he could still be convicted of first-degree felony murder under the prosecution's theory that the defendant was an aider and abettor. *McCauley*, 287 Mich App at 160-161. During a *Ginther* hearing, the defendant testified that he would have accepted the prosecutor's plea offer of second-degree murder and an 18-year minimum sentence had he been properly informed of the risks of going to trial. *Id.* at 161. The trial court found that counsel was deficient in failing to properly inform the defendant of the risks of going to trial and that the defendant had shown he was prejudiced because he would not have "gambled" on going to trial. *Id.* at 164. In affirming the trial court's decision, this Court then addressed the proper remedy. This Court conditionally vacated the defendant's convictions and sentences and remanded to:

allow the prosecution to reinstate its original plea offer, and to allow defendant, with the assistance of counsel, to consider that offer and enter a plea in accordance with its terms. If the prosecution decides to present a new offer in excess of its original offer, it shall be required to rebut the presumption of vindictiveness that arises. If the prosecution can meet that burden, the parties would also be free to negotiate a new plea. If the prosecution cannot overcome the presumption and refuses to reinstate its original plea offer, then defendant's convictions and sentences shall be vacated in full. [*Id.* at 166-167.]

While *McCauley* provides some support for notion that reinstatement of a plea offer might be an appropriate remedy under some circumstances, the facts of this case are distinguishable. The defendant in *McCauley* received ineffective assistance of counsel and, as a result, was unable to make an informed decision on the prosecutor's plea. Here, there is no dispute that the prosecutor did not have the information available to him and was surprised by the technician's testimony. Balancing of the interests of the courts, the parties and the public, including an examination of the reason for the alleged noncompliance requires a finding that defendant was not entitled to specific performance of the plea offer.

II. EVIDENCE OF DEFENDANT'S REFUSAL TO SUBMIT TO A CHEMICAL TEST

Defendant next argues that the trial court abused its discretion in denying his motion for mistrial after the arresting officer testified defendant "refused a chemical test." He contends that the evidence was irrelevant and unduly prejudicial because it implied that he had something to hide. Although the trial court instructed the jury in accordance with CJI2d 15.9, defendant maintains the instruction should only be given if evidence of defendant's refusal comes in by inadvertence or to rebut a claim by defendant, neither of which occurred in this case. Defendant argues it would be difficult for the jury to do anything other than infer defendant's guilt and that the trial court erred in denying his motion for mistrial. We disagree. We review a trial court's decision regarding a motion for mistrial for an abuse of discretion. *Schaw*, 288 Mich App at 236. A trial court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *Id.*

During direct examination of the arresting officer, the prosecution asked:

Q. Okay. Did you have – did you – did you give the defendant his chemical test rights?

A. Yes.

Q. Okay. And what was his response?

A. “No.”

Q. Okay. And so in receiving a response of a, “No,” to the chemical test rights, what did you do?

A. Well, he said, “No,” at the campground. And then I always give people an opportunity to rethink their answer due to the fact of the penalties involved, then I let him make some calls to attorneys to get legal advice.

Out of the presence of the jury, defense counsel moved for a mistrial, arguing that evidence that defendant refused a breathalyzer test was highly prejudicial and irrelevant. The prosecutor responded that the evidence was used, not as substantive evidence of guilt, but only to show that it had been offered to defendant. The evidence was particularly relevant to show the passage of time between when defendant was arrested and when the chemical testing was performed. The prosecutor suggested that the trial court instruct the jury under CJI2d 15.9. Defense counsel claimed that the cautionary instruction would not be helpful because now defendant was placed in a position of explaining his refusal to submit to the breathalyzer. The trial court disagreed and instructed the jury:

Members of the jury, evidence has been admitted in this case that the defendant refused to take a chemical test. If you find that the defendant did refuse, that evidence is admitted – was admitted solely for the purpose of showing that a test was offered to the defendant. The evidence is not evidence of guilt.

And this instruction is given to you now so you can understand the context in which the evidence was received, but will also be repeated to you when we give you the list of instructions at the end.

MCL 257.625A(9) provides:

A person’s refusal to submit to a chemical test as provided in subsection (6) is admissible in a criminal prosecution for a crime described in section 625c(1) only to show that a test was offered to the defendant, but not as evidence in determining the defendant’s innocence or guilt. The jury shall be instructed accordingly.

MCL 257.625a(6) provides that “[t]he following provisions apply with respect to chemical tests and analysis of a person’s blood, urine, or breath, *other than preliminary chemical breath analysis . . .*” (emphasis added.) On appeal, defendant states “it is indeed correct that the legislature has sanctioned the admission of evidence of the refusal of a ‘chemical test,’ and that the jury instruction delivered in this case, CJI2d 15.9, comports with the statute. However, this statutory provision specifically applies to more scientifically reliable chemical tests [and] does not apply [to] preliminary breath tests, such as was refused” by defendant. (Defendant’s Brief on Appeal, p 18.) At defendant’s motion for new trial, defense counsel conceded that defendant

had, in fact, submitted to preliminary breath test (PBT), but that he refused to submit to further testing. Therefore, MCL 257a(6) clearly applies and, in relevant part, provides:

The following provisions apply with respect to chemical tests and analysis of a person's blood, urine, or breath, other than preliminary chemical breath analysis:

* * *

(b) A person arrested for a crime described in section 625c(1) shall be advised of all of the following:

* * *

(iv) If he or she refuses the request of a peace officer to take a test described in subparagraph (i), a test shall not be given without a court order, but the peace officer may seek to obtain a court order.

(v) Refusing a peace officer's request to take a test described in subparagraph (i) will result in the suspension of his or her operator's or chauffeur's license and vehicle group designation or operating privilege and in the addition of 6 points to his or her driver record.

Because of defendant's refusal, the arresting officer was required to obtain a court order for further testing. Obtaining the warrant took approximately twenty-five minutes. Thus, while defendant had been arrested at approximately 7:00 p.m., he was not transported to the hospital until approximately 8:00 p.m. and his blood was drawn at approximately 8:30 p.m. The passage of time was extremely relevant to this case where defense counsel focused on the fact that defendant's BAL was at the minimum threshold. Defense counsel focused on the minimum threshold during opening statements, stating "lo and behold, it came out to be a point zero eight, not a point zero nine nine, not a point zero eight one one, but exactly a point zero eight, so Mr. Heikkinen is charged with drunk driving." During trial, defense counsel attacked the testing procedures, including the chain of custody, the calibration of the machines, and the expertise of the lab technicians. In contrast, the prosecutor questioned its expert on the theory of retrograde extrapolation to show that defendant's BAL was probably not just the threshold .08, but was much higher. The arresting officer's testimony regarding the delay in getting defendant to the hospital because of his need for a court order was relevant, therefore, to provide a time line of events and to rebut defense counsel's theory that defendant could not have tested at .08. The delay due to defendant's refusal was relevant for the jury to consider, not because it showed defendant had something to hide, but because it delayed testing and allowed for an inference that defendant's BAL would have been higher had he been tested immediately.

We are persuaded that the evidence of defendant's refusal to submit to chemical testing was not used by the prosecution in its case in chief for the purpose of establishing defendant's guilt; rather, the evidence was relevant to rebut defendant's theory of the case. While evidence of a defendant's refusal to submit to testing may not be used for the purpose of establishing guilt, such evidence may be admissible "where the defendant opens the controversy by a showing of lack of credibility or competence of the police officer and it is necessary to rebut defendant's evidence." *People v Duke*, 136 Mich App 798, 803; 357 NW2d 775 (1984). The prosecution

tried to show that the delay between defendant's arrest and when his blood was drawn is what led to the low BAL and that, by retrograde extrapolation, defendant's BAL was likely higher at the time of his arrest than it was when he was actually tested.

“[I]f evidence of refusal comes into the case by inadvertance [sic] or is required to rebut the evidence of the defendant and is admitted, then the instruction set forth in the act is mandated if requested by either party.” *Id.* at 803-804. The trial court then properly instructed the jury pursuant to CJI2d 15.9, which provides:

Evidence has been admitted in this case that the defendant refused to take a chemical test. If you find that the defendant did refuse, that evidence was admitted solely for the purpose of showing that a test was offered to the defendant. That evidence is not evidence of guilt.

Juries are presumed to have followed the court's instructions. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). The trial court did not err in denying defendant's motion for mistrial.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ David H. Sawyer

/s/ Kirsten Frank Kelly