STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 27, 2011
v	No. 300385 Grand Traverse Circuit Court
RYAN LEE FASEL, Defendant-Appellant.	LC No. 10-011023-FH

Before: WILDER, P.J., and TALBOT and SERVITTO, JJ.

SERVITTO, J. (*dissenting).*

Because I believe that the trial court abused its discretion in failing to grant an adjournment to allow defendant to present expert witness testimony concerning the independent testing of his blood sample, specifically the low level of preservative found in the sample, or in the alternative, allowing defendant's expert to testify by telephone, I respectfully dissent.

The record establishes that defendant began requesting that his blood be provided to an independent lab for testing almost two months before trial, and less than two months after his blood was tested by Munson Medical Center. The trial court immediately began to urge that the blood be sent to the Michigan State Police lab, apparently in an effort to avoid a dispute over the blood sample at trial. Defendant persisted in requesting that the sample be tested by an independent lab of his choice. In several pre-trial motions he requested adjournments to allow sufficient time to investigate and analyze the results, and on the day of trial requested an adjournment so that the witnesses could be flown in to testify or in the alternative a ruling that they be permitted to testify by telephone. Defendant did not receive the results of the preservative test, indicating that the preservative level in the blood sample was below the industry standard, until 36 hours before trial, due to delays from either the Michigan State Police lab or the postal service. That the blood was even at the State Police lab can be traced directly back to the trial court's repeated urging that the blood be sent there. And, the trial court acknowledged that defendant was not responsible for his late receipt of the results of the testing performed by his independent lab.

The trial court's statement that defendant was at fault for not purchasing tickets in anticipation that he *might* need the expert testimony of a doctor from the independent lab is unjust. Defendant was not required to have behaved flawlessly in anticipating all possible problems that might develop. When considering whether an adjournment is justified, *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992) directs this Court to look at whether

defendant was "negligent." It cannot be said in the instant case that defendant acted negligently where he continually and diligently attempted to secure testing of his blood sample and analysis of the results in a timely manner before trial. Failing to expend significant funds on a ticket for an expert witness prior to finding out that there was any reason to have him or her testify was not negligent. A trial court should grant an adjournment "to promote the cause of justice," MCR 2.503(D)(1) and I believe justice required an adjournment in this matter.

Even if the trial court were not inclined to grant defendant's request for an adjournment, it had before it a viable option that would have avoided the necessity of this appeal. Defendant requested that, given the late receipt of the results of the lab analysis, his expert be allowed to testify telephonically.

MCL 768.29 grants the trial court broad discretion to "control all proceedings during the trial" and MRE 611(a) directs the trial court to exercise "reasonable control over the mode and order of interrogating witnesses and presenting evidence" with the goals of obtaining an effective ascertainment of the truth, avoiding needless consumption of time, and protecting witnesses from harassment or embarrassment. Although this grant of authority is broad, it is bounded by the Due Process and Confrontation Clauses of the United States and Michigan Constitution. US Const, Ams V, VI, XIV; Const 1963, art 1, § 13, 20; *People v Hackett*, 421 Mich 338, 347; 365 NW2d 120 (1984). The Confrontation Clause guarantees a defendant a reasonable opportunity to test the truth of a witness's testimony. *Hackett*, 421 Mich at 347. It is essential to a defendant's right to due process that he is allowed, not only to confront and cross-examine the state's witnesses, but also to call witnesses on his own behalf. *In re Oliver*, 333 US 257, 273; 68 S Ct 499; 92 L Ed 682 (1948).

In its reasoning for disallowing telephonic testimony, the trial court initially stated, "[i]n terms of testifying by phone, there is a problem with it, it's very hard to manage an expert witness anyway and to get him to shut up when they are on the phone is very hard to do and so I don't know[.] [T]hese experts they may be great witnesses or may be difficult, I don't know that's going to be hard and the jury [for] this trial was noticed out toward the end of June . . ." That the only witness who could possibly refute the blood sample evidence may have been "difficult" or "hard to shut up" is not a valid reason for denying defendant the right to present that witness. Moreover, the prosecutor had no constitutional right of confrontation. And, while a *defendant's* right to a fair trial includes making witnesses available so that the jury can judge their demeanor, this right has given way, when necessity dictates, to the presentation of prior testimony (provided the right to cross-examination was preserved). *See, e.g.*, *People v Bean*, 457 Mich 677, 682; 580 NW2d 390 (1998). Here, the prosecution would have had the right to cross-examine these experts in "real time" in front of the jury.

When defendant renewed his request for telephonic testimony mid-trial, the trial court stated, "Again, testimony by phone, we allow that in an important case when it's an uncontested or unimportant point and it's not needed to have the jury see the person. But, I think this is a critical point in the defense and I think the expert ought to be here to have the jury observe them as they are being questioned and see what they look like, I think that's part of it and I don't think a phone call is adequate." That the trial court acknowledged the testimony was critical to defendant's defense, yet still denied an adjournment and denied presentation of the testimony by telephone in lieu of an adjournment, is a model example of an abuse of discretion.

Finally, given the facts of this case, I cannot conclude that defendant was not prejudiced by this error. The blood alcohol percentage reported by Munson Medical Center was a key issue at trial. Moreover, the credibility of the arresting officer was impeached by evidence that he had been terminated from the police force for participating in falsifying information concerning a possible drunk driving charge against a police officer who had been involved in an accident. The officer also admitted that certain sobriety tests were conducted on a gravel surface, in the dark, during rain or wet road conditions, contrary to recommendations. Defendant was not able to present evidence concerning the significance of the lack of preservative in his blood sample. There was only a brief statement from the medical technologist that she had reviewed a report with the prosecution indicating that there might not have been the right amount of preservative in the blood. Since defendant was not able to effectively present his defense due to the trial court's failure to grant an adjournment and its refusal to allow defendant's experts to testify telephonically, I would find that prejudice exists.

I would thus vacate defendant's operating a vehicle while intoxicated conviction and remand for a new trial.

/s/ Deborah A. Servitto