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PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 27, 2011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 SERVITO, JJ.

PER CURIAM.

Ryan Lee Fasel challenges his jury trial convictions for his third offense of operating a vehicle while intoxicated (OWI)[1] and operating a motor vehicle with a suspended license.[2] Fasel was sentenced to nine months in jail for the OWI conviction and two months in jail for his conviction of operating a motor vehicle with a suspended license. Fasel asserts on appeal that the trial court erred in refusing to grant him an adjournment to secure the testimony of an expert witness regarding the blood sample used to determine his blood alcohol level or, in the alternative, to permit his expert witness to testify telephonically. We affirm.

On April 6, 2010, at approximately 12:45 a.m., police officers were dispatched following a report by Dustin Kantz that an intoxicated male driver had pulled into his residence driveway. Kantz indicated that the driver of the vehicle, Fasel, appeared intoxicated and after leaving his driveway drove next door and parked the vehicle. Kantz telephoned the police department. When the police officers arrived they found Fasel in the driver's seat of the vehicle, with no one else present and emitting a "strong odor of alcohol." When questioned by the police officer, Fasel admitted to being drunk. Following the administration of several sobriety tests and a refusal by Fasel to submit to a breathalyzer or blood test, the police officer transported Fasel to a local hospital and obtained a warrant for a blood draw. The blood draw occurred on April 6, 2010, at 2:00 a.m. and was placed in a refrigerated lock box by 4:52 a.m. An analysis of the

[1] MCL 257.625.

[2] MCL 257.904.

blood sample was conducted on April 15, 2010, at Munson Medical Center, resulting in the determination of a blood alcohol level of 193 mg/dL, or .19 percent.

As early as May 28, 2010, defense counsel indicated to the trial court that it was seeking discovery and was contemplating the request of a Daubert[3] hearing regarding the "policies and procedures" of the hospital laboratory that conducted the blood analysis. On June 8, 2010, defense counsel requested that Fasel's blood sample be sent to an independent laboratory of defense counsel's choosing for testing and seeking an adjournment based on speculation that testing of the blood sample by Munson Hospital might be suspect. The trial court suggested that the sample be sent to the Michigan State Police Crime Lab for testing as their results are typically unimpeachable. Permission was given to provide the blood sample for additional testing, but the adjournment of trial was denied.

On June 11, 2010, it was ordered that the blood sample be forwarded to the Michigan State Police Crime Lab and then on to the independent laboratory selected by defense counsel for additional testing. Defense counsel indicated he wished to secure the opinion of an independent laboratory[4] as:

> We have a right to test the evidence and not just take the government's word that they are doing more than good enough for government work. They have one test, I would like my own test.

Defense counsel reiterated that he required additional "time to meet with my expert, have him review this and help me figure out if we have a defense on the blood issue, I don't know right now." Trial was adjourned to July 21, 2010. In the interim, the Michigan State Police Laboratory confirmed Fasel's blood alcohol level from the provided sample as being .19.

On July 16, 2010, the trial court conducted a status conference as it was acknowledged that the independent laboratory did not receive the blood sample until July 8, 2010. While acknowledging that the preliminary results obtained from the independent laboratory confirmed a blood alcohol level of .19, defense counsel indicated he was waiting for "some additional testing with regard to the preservative levels" contained in the blood vial necessitating an additional adjournment, which the trial court denied. Reportedly, vials to be used for blood alcohol level draws are obtained from a manufacturer, which are sealed to avoid contamination, and contain pre-administered amounts of sodium fluoride and potassium oxalate to preclude fermentation and coagulation of the blood sample. Fasel asserted, according to research, that the preferred level of sodium fluoride for sample preservation is one percent and that testing by the independent laboratory indicated less than optimal amounts of sodium fluoride in his sample of .3 percent. As such, Fasel was implying that fermentation could have occurred regarding the sample, producing an elevated blood alcohol level.

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[3] *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

[4] Rocky Mountain Instrumental Laboratory.

At the conclusion of the prosecution's proofs, defense counsel confirmed to the trial court that "it's not going to be possible to get the doctors here from Rocky Mountain Instrumental" to testify. Counsel renewed her motion to permit the expert witness to testify by telephone "based on the fact that's [sic] certainly not the fault of the defendant that the sample was tested so late. I think it would have been unreasonable to ask the defendant to spend several thousand dollars to get the doctors here if in fact the test result was not favorable to him. . . . I think it would have been unreasonable based on not having knowledge of what the test results were to ask the defendant bring them here and, you know, basically fly them out, pay their fee, then ultimately not have them testify because the test result wasn't favorable to him."

Citing to the study provided by defense counsel regarding the optimal level of sodium fluoride and the potential for fermentation of a blood sample, the trial court noted that the document

> found that blood without sodium fluoride, that's with none in it, blood without sodium fluoride is reliable at room temperature for about two days, refrigeration of five degree [sic] for about two weeks. Then, it goes on to talk about four weeks if it was the freezer. So, if there had been no preservative in it, and we have no testimony contrary to the fact that it was refrigerated promptly for the eight or nine days until it was tested, even if it had no sodium fluoride in it this report, or article, says it would still be testable and valid for two weeks, even if it was blood without any preservative at all.

Following inquiry by the trial court, defense counsel acknowledged it had not provided the prosecutor's office with "anything about what [defense experts] are going to say about, for instance, this business that it starts fermenting with this lesser amount of preservative. . . ." In denying Fasel's request to permit testimony by telephone, the trial court indicated:

> I would point out that this question of a preservative, of course the test wasn't completed until a couple days ago, but, it was an issue that [defense counsel] raised in previous hearings. He was obviously honing in on this as a real possibility and he sent it to an expert laboratory to do a test, I would think having an airplane ticket, even if it's cancelled and you lose a couple hundred dollars . . . it's insignificant and it could have been done. This trial was adjourned once because of these problems and was noticed out in late June for this date, there has been quite a bit of lead time on this particular date."

On appeal, Fasel first alleges that the trial court abused its discretion in failing to grant an adjournment of trial to permit him additional time to secure and present an expert witness to provide testimony regarding the blood sample and testing. This Court reviews a trial court's determination to grant or deny an adjournment for an abuse of discretion.[5] An abuse of

[5] *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000).

discretion is found to have occurred when a trial court selects an outcome that "falls outside the range of reasonable and principled outcomes."[6]

In order to invoke a trial court's discretion to grant an adjournment, a party must demonstrate good cause.[7] In determining whether a party has demonstrated good cause, a trial court is to consider whether a defendant "(1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments."[8] In addition:

> An adjournment may be granted on the ground of unavailability of a witness or evidence only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence.[9]

The decision of a trial court to deny a request for adjournment does not constitute grounds for reversal unless a defendant demonstrates prejudice.[10]

Fasel requested and did receive one adjournment in this matter related to his request for independent testing of the blood sample. While inadvertent delays occurred in the receipt of the blood sample by the independent laboratory, Fasel was not denied his right to have the sample tested. Defense counsel had indicated, over an extended period of time preceding trial, the intention to procure independent testing and to secure the testimony of an expert witness on this subject matter. Having indicated concerns regarding the method and results of the testing of the blood sample for alcohol content since late May or early June, defense counsel failed to diligently secure the availability and testimony of his identified expert in anticipation of a known trial date merely because he believed the cost of producing the expert at trial to be prohibitive. This is insufficient to demonstrate the existence of "good cause."

Additionally, even if the trial court were deemed to have abused its discretion in denying the adjournment request, Fasel has not established he was prejudiced by the trial court's decision.[11] Fasel has failed to explain how the testimony of his expert witness and the research data he relies on would contradict the initial test results that obtained a blood alcohol level of .19 by the Munson Hospital Laboratory, or the same, subsequent testing results obtained by both his expert and the Michigan State Police Crime Laboratory of a blood alcohol level of .19 in the provided sample. Further, while the alleged industry standard for sodium fluoride content may be one percent, there is no evidence provided to indicate that a lower level necessarily results in fermentation of the sample. In fact, the research relied on by Fasel indicates that refrigeration,

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[6] *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

[7] MCR 2.503(B)(1); *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002).

[8] *People v Coy*, 258 Mich App 1, 18; 669 NW2d 831 (2003) (quotation omitted).

[9] MCR 2.503(C)(2).

[10] *Snider*, 239 Mich App at 421.

[11] *Id.*

even without the presence of sodium fluoride, will maintain the integrity of the blood sample of a period of time consistent with the initial testing of the sample by the Hospital. Based on Fasel's own lack of diligence in securing his expert to testify at trial and the failure to demonstrate prejudice, we find the trial court's refusal to grant an adjournment was not an abuse of discretion.

In the alternative, Fasel suggests the trial court erred in refusing to permit his identified expert to testify by telephone. Having determined that the trial court did not abuse its discretion in denying an adjournment of trial for presentation of the expert witness, the failure to permit the witness to testify by telephonic communication is rendered moot as "this Court does not reach moot questions or declare principles or rules of law that have no practical legal effect in the case before it."[12]

We note the trial court's concerns regarding the preference for and inherent benefits of face-to-face confrontations in trial when it denied Fasel's request for telephonic examination of his witness. As recognized by this Court:

> The Sixth Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment, provides in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." US Const, Am VI; *People v Burton*, 219 Mich App. 278, 287; 556 NW2d 201 (1996). The United States Supreme Court has recognized that a primary objective of the Confrontation Clause is to compel witnesses to "stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox v United States*, 156 US 237, 242–243, 15 S Ct 337; 39 L Ed 409 (1895). The right of confrontation "is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Barber v Page*, 390 US 719, 721; 88 S Ct 1318; 20 L Ed 2d 255 (1968) (quotation marks and citation omitted).[13]

Required elements of the Confrontation Clause have been identified as comprising: "(1) physical presence, (2) an oath, (3) cross-examination, and (4) observation of demeanor by the trier of fact. . . ."[14] As a result of the combination of all of these identified elements there arises

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[12] *People v Richmond*, 486 Mich 29, 34; 782 NW2d 187 (2010), amended 784 NW2d 204 (2010), reh granted 486 Mich 1041 (2010) (citation omitted).

[13] *People v Buie*, 285 Mich App 401, 407-408; 775 NW2d 817 (2009). We acknowledge, following remand of this case in *People v Buie*, 291 Mich App 259; ___ NW2d ___ (2011), our Supreme Court has granted leave to appeal, which remains pending. See *People v Buie*, 489 Mich 938; 797 NW2d 640 (2011).

[14] *Id*. at 408, citing *Maryland v Craig*, 497 US 836, 846; 110 S Ct 3157; 111 L Ed 2d 666 (1990) and *People v Pesquera*, 244 Mich App 305, 309; 625 NW2d 407 (2001).

an assurance "that evidence admitted against an accused is reliable and subject to . . . rigorous adversarial testing. . . ."[15]

It is recognized, however, "that the right of the accused to meet witnesses face-to-face is not absolute and the Confrontation Clause simply reflects a preference for face-to-face confrontation at trial." This preference must occasionally give way to considerations of public policy and the necessities of the case."[16] Further, in this instance, the request for an alternative means to present the testimony was initiated by Fasel, indicating a waiver of his right to confrontation.

The relevant court rule provides:

> As long as the defendant is either present in the courtroom or has waived the right to be present, upon a showing of good cause, district and circuit courts may use two-way interactive video technology to take testimony from a person at another location in the following proceedings:
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> * * *
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> (2) with the consent of the parties, trials. A party who does not consent to the use of two-way interactive video technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting.[17]

This rule has been interpreted by this Court to mean that "a trial court may take witness testimony by two-way, interactive video technology if: (1) the defendant is either present in the courtroom or has waived the right to be present, (2) there is a showing of good cause, and (3) the parties consent."[18] As such, the use or permissibility of alternative mechanisms to present testimony at trial are not subject to automatic approval and must meet certain criteria.

In this instance, the prosecutor did not concur with Fasel's request and there has been no demonstration of "good cause." Fasel had the opportunity to secure his expert to testify in person at trial or to provide a de bene esse deposition or more adequate, interactive electronic

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[15] *Craig*, 497 US at 846.

[16] *Buie*, 285 Mich App at 408 (internal quotation marks and citations omitted).

[17] MCR 6.006(C).

[18] *Buie*, 285 Mich App at 417.

means other than telephone communication. He failed to do so. As such, the trial court's decision to preclude testimony by telephone of the expert was not an abuse of discretion.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Michael J. Talbot