IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
April 18, 2006 Session

# STATE OF TENNESSEE v. GARY C. BULLINGTON

**Appeal from the Criminal Court for Sumner County**
**No. 296-2004 Jane Wheatcraft, Judge**

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**No. M2005-02227-CCA-R3-CD** - Filed June 27, 2006

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The Defendant, Gary C. Bullington, was convicted upon a jury verdict of driving under the influence of an intoxicant ("DUI"); felony evading arrest; driving on a revoked license, ninth offense; and two counts of vehicular assault. For these convictions, the Defendant received an effective twenty-four-year sentence in the Department of Correction. In this appeal as of right, the Defendant presents a single issue for our review: whether the trial court properly denied his motion to suppress drug and alcohol test results due to the State's failure to preserve the blood sample taken from the Defendant following his arrest. After a review of the record, we conclude that the test results were admissible; however, finding plain error, double jeopardy principles require us to vacate the Defendant's DUI conviction. In all other respects, the judgments of the trial court are affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

DAVID H. WELLES, J., delivered the opinion of the court, in which JOSEPH M. TIPTON and JOHN EVERETT WILLIAMS, JJ., joined.

Charles Bobbitt, Jr., Hendersonville, Tennessee, for the appellant, Gary C. Bullington.

Paul G. Summers, Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; Lawrence Ray Whitley, District Attorney General; and Lytle Anthony James, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

In the light most favorable to the State, the evidence at trial demonstrated that, on November 6, 2003, Trooper Jose Negrin of the Tennessee Highway Patrol was "running moving radar on South Water" Avenue in Gallatin, Tennessee. At approximately 9:00 p.m., he observed the Defendant's vehicle "doing 47 in a 30-mile-an-hour zone." Officer Negrin activated his blue lights and pursued the Defendant to effectuate a stop of the vehicle. According to Officer Negrin, he had to accelerate "extremely fast to try to catch up" because "it was apparent" the Defendant had "no intention of stopping." During this pursuit, the Defendant attempted unsuccessfully to negotiate a turn and

crashed the vehicle "into a culvert." Upon crashing, the Defendant exited the vehicle and began to run. The Defendant stopped running when he realized escape was futile, and Trooper Negrin thereafter detained the Defendant.

Officer Jeff Wright of the Gallatin Police Department arrived on the scene behind Trooper Negrin. Officer Wright assisted in securing the Defendant in the back of a patrol car and then checked on the two passengers in the Defendant's vehicle, Ms. Melissa Duffer and Mr. George Stafford. Ms. Duffer suffered a broken leg, and Mr. Stafford sustained injuries to his nose. Both were taken to Sumner Regional Medical Center for treatment.

Officer Wright stated that, prior to securing the Defendant, he "noted an odor of alcoholic beverage emitting from his person." After assisting with the injured passengers, he asked the Defendant to submit to field sobriety tests, and the Defendant agreed. Officer Wright reported that the Defendant failed three of four tasks, and he concluded that the Defendant's ability to operate a motor vehicle "was impaired above the legal limit." The Defendant was arrested and, thereafter, consented to blood testing for alcohol and drugs. He was transported to Sumner Regional Medical Center, where two tubes of blood were drawn.

The blood was submitted to the Tennessee Bureau of Investigation ("TBI") for testing. The result of the blood-alcohol test on the specimen indicated an alcohol content of ".09 gram percent blood alcohol." The Defendant's blood also contained "less than 0.05 micrograms per milliliter" of both cocaine and cocaethylene.[1]

During the April 2003 term, a Sumner County grand jury returned a twelve-count indictment against the Defendant, charging him with two alternative counts of DUI; two counts of driving while license suspended, cancelled, or revoked;[2] two counts of vehicular assault; one count of felony evading arrest; one count of simple possession of marijuana; one count of possession of drug paraphernalia; two counts alleging eight prior convictions for driving while license suspended, cancelled, or revoked; and one count alleging seven prior convictions for DUI.

On January 26, 2005, the Defendant filed a "Motion to Order DNA Test" on the blood sample "given by the Defendant upon the occasion of his arrest[.] . . . Said test is for the purpose of making sure that the sample tested was truly that of the Defendant."[3] In support of the motion, the Defendant alleged that he had "only consumed one beer on the day of his arrest" and that "the

[1]TBI Agent Jeff Crews testified that cocaethylene is "a compound that is formed inside the body when cocaine and ethyl alcohol are both present in the body."

[2]These two counts relate to separate incidents, one occurring on October 19, 2003, and the other on November 6, 2003.

[3]It is unclear whether the Defendant wanted the trial court to obtain an independent analysis of the blood or was asking the trial court to order the State to provide him with a sample.

blood alcohol level of .9 [sic] reported in the blood sample is inconsistent with the amount of alcohol consumed." The motion was denied by written order dated January 28, 2005.[4]

On February 3, 2005, the Defendant filed a motion to suppress the drug and alcohol test results. The Defendant again questioned the "authenticity of the blood sample" and stated that the sample "has been destroyed rendering positive identification of the blood sample in question impossible." A brief hearing was held on February 7, 2005, and the trial court denied the Defendant's motion to suppress, finding that "we go through these all the time and obviously the state has to prove the chain of evidence. So just based on the fact that he couldn't have an independent DNA analysis is not grounds to suppress the results."

Also on February 7, the Defendant pled guilty to one count of driving on a revoked license, ninth offense. In exchange for his plea, the State recommended that the charges of simple possession, possession of drug paraphernalia, and the remaining count of driving while license suspended, cancelled, or revoked be declared nolle prosequi. The trial court accepted the Defendant's plea and dropped the recommended charges.

The following day, February 8, 2005, a jury trial was held on the remaining counts. Following the presentation of evidence and the arguments of counsel, the Defendant was convicted of DUI,[5] felony evading arrest, and two counts of vehicular assault. Thereafter, on March 24, 2005, the trial court imposed an effective sentence of twenty-four years,[6] and judgments were filed on March 29, 2005. On April 27, 2005, the Defendant filed his motion for new trial, which was amended on July 1, 2005. The motions were denied, and this appeal followed.

## ANALYSIS

The Defendant argues that he was entitled to a DNA test on the sample or specimen of the blood drawn following his November 6, 2003 arrest and, because the sample had been destroyed rendering such a test impossible, the drug and alcohol test results should have been suppressed. Tennessee Rule of Criminal Procedure 16(a)(1)(c) provides that a defendant has a right to inspect "tangible objects . . . which are within the possession, custody or control of the State, and which are material to the preparation of the defendant's defense or are intended for use by the State as evidence in chief at the trial, or were obtained from or belong to the defendant." This Court has held that:

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[4] The record does not include a transcript of the hearing on the motion to order a DNA test.

[5] It appears from the judgment form that the Defendant received a Class A misdemeanor sentence for his DUI conviction.

[6] The Defendant was sentenced as a career offender to a term of twelve years for his felony evading arrest conviction and for each vehicular assault conviction. He received sentences of eleven months and twenty-nine days for his DUI and driving on a revoked license, ninth offense, convictions. The sentences for vehicular assault were to be served consecutively to each other. The remaining sentences were to be served concurrently to each other and to one count of vehicular assault, resulting in an effective sentence of twenty-four years in the Department of Correction.

> [w]hen an accused is charged with the offense of driving while under the influence, and blood is drawn from the accused for the purpose of a blood-alcohol test, the accused has a right to demand and receive a sample or specimen of his blood in order to have an independent analysis made by an expert of his own selection.

State v. Gilbert, 751 S.W.2d 454, 460 (Tenn. Crim. App. 1988) (citations omitted). Furthermore, an accused has a statutory right "to demand and receive such a specimen of blood when the State procures a sample for testing pursuant to Tennessee Code Annotated section 55-10-410(e)." State v. Jerry Douglas Franklin, No. 01C01-9510-CR-00348, 1997 WL 83772, at *3 (Tenn. Crim. App., Nashville, Feb. 28, 1997). However, "this right presupposes that a sample or specimen is in existence at the time of the request; and the sample or specimen is of sufficient size or quantity that it can be made available to the accused or his expert." Gilbert, 751 S.W.2d at 460. Furthermore, there is no right to be informed of the statutory privilege to obtain a sample of blood for independent testing. Id. (citing State v. McKinney, 605 S.W.2d 842, 846 (Tenn. Crim. App. 1980)).

On January 26, 2005, the Defendant filed a "Motion to Order DNA Test," requesting the trial court "to order a DNA test on the blood sample given by the Defendant upon the occasion of his arrest . . . for the purpose of making sure that the sample tested was truly that of the Defendant." He questioned "the authenticity of the blood sample claimed by the state to be that of the Defendant due to the fact that the blood alcohol level of .09% found in the sample was not consistent with the amount of alcohol consumed by the Defendant prior to his arrest." Thereafter, the Defendant was apparently informed that the blood specimen had been destroyed in accordance with the established procedures of the TBI, to wit: destruction of the sample after sixty days.

Initially, we note that the Due Process Clause of the Fourteenth Amendment to the United States Constitution and article I, section 8 of the Tennessee Constitution afford every criminal defendant the right to a fair trial. See Johnson v. State, 38 S.W.3d 52, 55 (Tenn. 2001). As such, the State has a constitutional duty to furnish a defendant with exculpatory evidence pertaining to the defendant's guilt or innocence or to the potential punishment faced by a defendant. See Brady v. Maryland, 373 U.S. 83, 87 (1963).

In State v. Ferguson, 2 S.W.3d 912 (Tenn. 1999), our supreme court addressed "what consequences flow from the State's loss or destruction of evidence alleged to have been exculpatory." Ferguson, 2 S.W.3d at 915. Specifically, our supreme court rejected the bad faith analysis required under the United States Constitution, set forth in Arizona v. Youngblood, 488 U.S. 51 (1988), and held that a broader inquiry is required under article 1, section 8 of the Tennessee Constitution. Ferguson, 2 S.W.3d at 914. The critical inquiry is whether a trial conducted without the lost or destroyed evidence would be fundamentally fair. Id.

In resolving the question of fundamental fairness, a court must first determine whether the State had a duty to preserve the lost or destroyed evidence. Id. at 917; see also State v. Coulter, 67 S.W.3d 3, 54 (Tenn. Crim. App. 2001). "Generally speaking, the State has a duty to preserve all

evidence subject to discovery and inspection under Tenn. R. Crim. P. 16, or other applicable law." Ferguson, 2 S.W.3d at 917. However,

> [w]hatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

Id. (quoting California v. Trombetta, 467 U.S. 479, 488-89 (1984)). Only if the proof demonstrates the existence of a duty to preserve and further shows that the State has failed in that duty must a court turn to a balancing analysis involving consideration of the following factors: "1. The degree of negligence involved; 2. The significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and 3. The sufficiency of the other evidence used at trial to support the conviction." Id. (footnote omitted); see also State v. Ricky Hill Krantz, No. M1999-02437-CCA-RM-CD, 2000 WL 59915, at *1 (Tenn. Crim. App., Nashville, Jan. 25, 2000).

Applying the above analysis to the instant case, we conclude that the trial court properly denied the Defendant's motion to suppress. First,

> the State is not required to preserve samples taken for the limited purpose of determining the defendant's blood-alcohol level. See *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). It is common knowledge that human blood is perishable, and specimens of blood can only be maintained for a short period of time. Also, such evidence would not be expected to play a significant role in the accused's defense. *California v. Trombetta*, supra. Second, the . . . Tennessee Bureau of [Investigation] acted in good faith and apparently destroyed the blood specimen in conformity with the established procedures of the laboratory. See *California v. Trombetta*, supra; *State v. Brownell*, 696 S.W.2d 362, 363-364 (Tenn. Crim. App. 1985); *State v. Dowell*, 705 S.W.2d 138, 141-142 (Tenn. Crim. App. 1985).

Gilbert, 751 S.W.2d at 460; but cf. Krantz, 2000 WL 59915 (in a first degree murder and aggravated assault case, the State had a duty to preserve evidence when the blood sample was lost or destroyed prior to *any* blood-alcohol testing). The evidence did not possess any exculpatory value that was apparent prior to its destruction, as the test results showed a blood-alcohol concentration of .09% and the presence of drugs. Accordingly, the TBI had no duty to preserve the evidence beyond its established procedures. Franklin, 1997 WL 83772, at *3.

Moreover, even if the State had a duty to preserve the blood sample and failed to do so, the Defendant has failed to demonstrate that his right to a fair trial was affected by the destruction of the

evidence. See Ferguson, 2 S.W.3d at 917. The Defendant waited over fourteen months to request a specimen of his blood. He has not alleged that the State acted in bad faith in the destruction of the evidence. "[T]he mere loss or destruction of evidence does not constitute bad faith." Edward Thompson v. State, No. E2003-01089-CCA-R3-PC, 2004 WL 911279, at *2 (Tenn. Crim. App., Knoxville, Mar. 16, 2004).

The second factor is the significance of the missing evidence. The Defendant has not offered any evidence that the State acted improperly in collecting or testing his blood. It is undisputed that the Defendant signed a consent form to have his blood drawn and the specimen provided to the officer for the purpose of drug and alcohol testing. At trial, the chain of custody was sufficiently established, and there was no evidence of tampering prior to testing.

Finally, the State's other evidence of the Defendant's intoxication was strong. Officer Wright testified that, following his arrival at the scene, he recognized "an odor of alcoholic beverage emitting from" the Defendant and that the Defendant failed to successfully perform three of four field sobriety tests. Officer Wright concluded that the Defendant's ability to operate a motor vehicle "was impaired above the legal limit[,]" and he then transported the Defendant to the Sumner Regional Medical Center to have the Defendant's blood drawn. The Defendant is not entitled to relief.

**PLAIN ERROR**

At no point in these proceedings has the Defendant argued that his dual convictions for vehicular assault and DUI violate double jeopardy principles. Typically under these circumstances, our analysis of an issue is waived. See Tenn. R. App. P. 13(b). Nevertheless, review of this issue is permitted if plain error exists.

Rule 52(b) of the Tennessee Rules of Criminal Procedure provides that "[a]n error which has affected the substantial rights of an accused may be noticed at any time, even though not raised in the motion for a new trial or assigned as error on appeal, in the discretion of the appellate court where necessary to do substantial justice." Tenn. R. Crim. P. 52(b). In order to find plain error, we must consider five factors:

> (a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused [must not have waived] the issue for tactical reasons; and (e) consideration of the error [must be] necessary to do substantial justice.

State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994) (citations and quotations omitted). Taking these factors in sequence, the record clearly establishes that the Defendant was convicted of both vehicular assault and DUI. See Tenn. Code Ann. §§ 39-13-106, 55-10-401. Second, multiple convictions for the same offense breach a clear and unequivocal rule of law. Third,

a fundamental constitutional right of the Defendant, his Fifth Amendment right to be free from double jeopardy, is affected. Fourth, the record is devoid of any evidence that the Defendant waived the issue for tactical reasons. Fifth, we consider violation of the Defendant's protection against double jeopardy to be sufficiently serious as to require our review in order to do substantial justice. Accordingly, we will review the trial court's error in this regard in spite of the Defendant's failure to raise it as an issue.

It is well established that the double jeopardy guarantees of the Fifth Amendment to the United States Constitution, and article I, section 10 of the Tennessee Constitution, protect individuals from the imposition of multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717 (1969); State v. Denton, 938 S.W.2d 373, 378 (Tenn. 1996). The proper remedy for such situations is a merger of the two convictions into one by vacating the conviction on the lesser offense. State v. Zirkle, 910 S.W.2d 874, 889 (Tenn. Crim. App. 1995).

This Court has previously held that double jeopardy prohibits separate convictions for DUI and vehicular assault arising out of the same act of causing serious bodily injury while operating a motor vehicle intoxicated. See State v. Rhodes, 917 S.W.2d 708, 713-14 (Tenn. Crim. App. 1995); State v. Thomas W. Cothran, No. M2005-00559-CCA-R3-CD, 2005 WL 3199275, at *8 (Tenn. Crim. App., Nashville, Nov. 29, 2005); State v. Steven T. Wall, No. M2000-01059-CCA-R3-CD, 2001 WL 385383, at *6-7 (Tenn. Crim. App., Nashville, Apr. 16, 2001). Because of double jeopardy prohibitions, plain error requires us to vacate the Defendant's DUI conviction. We note the Defendant's effective sentence remains unchanged.

**CONCLUSION**

Based upon the foregoing reasons and the record before this Court, we vacate the judgment of conviction for DUI. The Defendant's remaining convictions and resulting sentences are affirmed.

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DAVID H. WELLES, JUDGE