In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00095-CR

CHARLA PACE, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 137th District Court
Lubbock County, Texas
Trial Court No. 2013-438,353, Honorable John J. "Trey" McClendon III, Presiding

March 16, 2017

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

Appellant Charla Pace appeals her conviction by jury of the third-degree felony offense of driving while intoxicated[1] and the trial court's imposition of punishment at fifty years of imprisonment. Her two appellate issues challenge the trial court's exclusion of evidence and its denial of a challenge for cause to a venire member. We will affirm.

[1] TEX. PENAL CODE ANN. §§ 49.04, 49.09(b)(2) (West 2014). Appellant pleaded "true" to each of the enhancement paragraphs set forth in the indictment. *See* TEX. PENAL CODE ANN. § 12.42 (West 2015).

Background

At trial, the State presented evidence showing that near midnight one night, appellant's vehicle collided with another in Lubbock when she pulled out in front of the other vehicle. The crash was minor and appellant was not injured. A passenger in the other vehicle sustained minor injuries. Responding Lubbock officers spoke with appellant, asked for and obtained her license and insurance information and inquired about the collision.

One officer returned to his patrol car and, as he did so, appellant attempted to walk away from the scene. Another officer handcuffed her and put her in the back of his patrol car. A third officer arrived and removed appellant from the patrol car. The officer who eventually arrested appellant testified he observed that she "smelled strongly of a consumed alcoholic beverage, her eyes were glassy and bloodshot, and she was unsteady on her feet. She was shuffling, she was unable to walk." Appellant was asked to perform field sobriety tests but refused.

The arresting officer read to appellant the contents of a form[2] which included a statutory warning concerning the refusal to provide a blood specimen. The form stated in part, "If you refuse to submit to the taking of a specimen, the officer may apply for a warrant authorizing a specimen to be taken from you." Appellant refused to provide a voluntary blood sample but one was later taken based on a statute authorizing such a

[2] Texas Department of Public Safety form DIC-24.

sample.[3] After appellant refused to perform field sobriety tests and refused to voluntarily provide a blood sample, she was arrested for driving while intoxicated.

The blood sample taken that night was later excluded from evidence by agreement of the parties.[4] Without evidence of appellant's blood alcohol level, the State was required at trial to prove appellant did not have the normal use of her mental and physical faculties when she operated the vehicle.

Appellant made an effort to exclude incriminating statements she made after her arrest. She filed a motion to suppress the evidence, which the trial court denied. The court did, however, agree to give the jury an instruction under Code of Criminal Procedure 38.23(a).[5]

The form containing the statutory warning was introduced by the State and admitted into evidence. During a break on the second day of trial, appellant's counsel approached the bench and asked the trial court if it would permit him to ask the arresting officer, then on the stand, "about whether he did, in fact, apply for that warrant,

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[3] TEX. TRANSP. CODE ANN. § 724.012 (West 2013).

[4] In *Missouri v. McNeely,* 569 U.S.___, 133 S. Ct. 1552, 1558, 185 L. Ed. 2d 296 (2013), the court ruled that a warrantless blood draw may be taken only when the circumstances fall under one of the previously recognized exceptions to the warrant requirement. *See State v. Villarreal,* 475 S.W.3d 784, 813 (Tex. Crim. App. 2014), reh'g denied, 475 S.W.3d 784 (Tex. Crim. App. 2015) (per curiam) (applying *McNeely* and holding "the provisions in the Transportation Code do not, taken by themselves, form a constitutionally valid alternative to the Fourth Amendment warrant requirement").

[5] TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (providing, "[i]n any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained").

pursuant to the statutory warning, without opening the door to an illegally obtained blood sample." After hearing argument and counsel's proffer of evidence, the trial court denied appellant's request.

Analysis

Exclusion of Evidence

In appellant's first issue, she contends the trial court erred by not permitting her to ask the arresting officer whether he sought a warrant to take her blood sample. In support of the request, appellant argued at trial the evidence was relevant to the issue of the officer's probable cause to arrest her. She reasoned that the officer's failure to apply for a search warrant indicated he did not have probable cause to support such a warrant and also did not have probable cause to arrest her for driving while intoxicated. In this Court, appellant argues the article 38.23 instruction "did little good because [the court] erroneously refused to permit [appellant] to introduce all the facts relevant to the jury's determination."

We review a trial court's decision to admit or exclude evidence under an abuse of discretion standard. *Cameron v. State,* 241 S.W.3d 15, 19 (Tex. Crim. App. 2007). A trial court abuses its discretion when its decision is so clearly wrong as to lie outside that zone within which reasonable persons might disagree. *McDonald v. State*, 179 S.W.3d 571, 576 (Tex. Crim. App. 2005). We will uphold the trial court's evidentiary ruling if the ruling is reasonably supported by the record and correct on any theory of law applicable to that ruling. *Carrasco v. State,* 154 S.W.3d 127, 129 (Tex. Crim. App. 2005).

We overrule appellant's challenge to the court's exclusion of evidence the officer did not seek a blood draw warrant, for several reasons. First, we note that among the reasons the court voiced for its ruling was that such evidence was not relevant. We agree with the court's assessment.

Evidence is relevant if it has any tendency to make a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. TEX. R. EVID. 401.

Appellant sought to ask the officer whether he applied for a warrant for the blood draw because she believed that line of questioning would illustrate the officer's lack of probable cause. That lack of probable cause, she asserted, would show the officer should not have arrested her for driving while intoxicated. But the officer did not need a warrant to require appellant's blood draw at that time, and in fact obtained the draw without a warrant. Under those circumstances, the officer's failure to apply for a warrant says nothing about his possession of facts demonstrating probable cause for the warrant's issuance, or facts justifying appellant's arrest.

The State also argues the trial court properly refused to admit the evidence under Rule of Evidence 403, which permits the exclusion of evidence if its probative value is substantially outweighed by such dangers as confusing the issues or misleading the jury. TEX. R. EVID. 403; *Gigliobianco v. State,* 210 S.W.3d 637, 641-42 (Tex. Crim. App. 2006). As it considered appellant's request, the trial court remarked that her proposed line of questioning would leave a "false impression in the mind of the jury that a blood sample wasn't taken." Appellant sought to pursue the questioning, but stopped short of

explaining to the jury that a blood draw was taken without the need of a warrant, and certainly without allowing the jury to know the results of the draw. Even if the evidence appellant sought to elicit had probative value, we see no abuse of discretion in the trial court's conclusion that value would have been substantially outweighed by dangers of confusing and misleading the jury.

The reasonableness of the trial court's concern over confusion of the jury is illustrated by appellant's offer of proof, which reads:

> Defense counsel: The testimony that we would've elicited, we believe, is that we would've asked [the arresting officer], did he read the DIC form to them? Did he explain to them that he could apply for a search warrant to that?
>
> Based on his testimony that he is a licensed attorney in the State of Texas,[6] that he knew what steps would be necessary in the form of providing an affidavit to a neutral magistrate, that -- excuse me, that that magistrate could have granted him the search warrant, and, at that point in time, they could've taken her and obtained a legally admissible blood draw.
>
> I would ask him if -- even if he did believe, in good faith at the time, he had the right to take that blood draw, as a licensed attorney, is he aware of the Court of Criminal Appeals decision that such was not -- has been ruled unconstitutional, and as a licensed attorney, is he aware of any case law that allows illegally obtained evidence to be presented to the jury.
>
> That under 38.23 of the Texas Code of Criminal Procedure, as well as Articles 1, Sections 9 and 10 of the Texas Constitution, and the Fourth Amendment to the United States Constitution, it prohibits unreasonable searches and seizures.
>
> The Courts of -- the Texas [Court of Criminal Appeals], as well as The United States Supreme Court has determined that those are unreasonable searches and/or seizures and are prohibited to even be taken before the jury.
>
> I would say that it is the rough equivalent to an officer in good faith -- in faith, thinking that they had exigent circumstances to kick a door down,

[6] The arresting officer testified he is "licensed as an attorney here in Texas."

> and a court finding that what they said was unconstitutional for them to say, "You didn't get a search warrant, did you, to be able to search the house?" And them say, "Well, we kicked the door in and we found dope, but, yeah, some court said it was illegal."
>
> The Court: Okay. Anything else?
>
> Defense Counsel: No, Your Honor.

As is apparent, the offer of proof extended substantially beyond the fact the arresting officer did not seek a warrant for a blood draw. Through the proffer, appellant sought to ask the officer of his awareness of the court decisions restricting the admissibility of the results of warrantless blood draws, and whether the officer was "aware of any case law that allows illegally obtained evidence to be presented to the jury." As noted, the results of the warrantless draw had been excluded from evidence by agreement. Appellant's proffer did not simply reflect a danger of opening the door to inadmissible and confusing evidence, the proffer itself contained inadmissible and confusing evidence.

As an additional reason supporting the court's denial of appellant's request, we note the precept that a trial court presented with a proffer of evidence containing both admissible and inadmissible statements may properly exclude all the statements if its proponent fails to segregate and specifically offer only that which is admissible. *Willover v. State,* 70 S.W.3d 841, 847 (Tex. Crim. App. 2002); *see Whitaker v. State,* 286 S.W.3d 355, 369 (Tex. Crim. App. 2009) (also stating proposition). Even if, contrary to our conclusion, the trial court erred by excluding some of appellant's proffer, the arresting officer's awareness of court rulings regarding the admissibility of evidence that the parties had agreed to exclude rather clearly was irrelevant. Appellant's failure

to segregate the arguably admissible from the clearly inadmissible evidence is fatal to her challenge to the court's ruling excluding all the proffer.

Refusal to Strike Venire Member

Via appellant's second issue, she argues the trial court erred when it refused to disqualify a venire member who had pled guilty to misdemeanor theft and successfully completed deferred adjudication. Counsel strenuously argued at trial that the man's guilty plea to a crime of moral turpitude rendered him disqualified from jury service. The trial court nevertheless denied counsel's challenge for cause.

Article 35.19 of the Code of Criminal Procedure provides for absolute disqualification of a juror who (1) has been convicted of theft or any felony; (2) is under indictment or other legal accusation for theft or any felony; or (3) is insane. *See* TEX. CODE CRIM. PROC. ANN. art. 35.19; *see also* TEX. CODE CRIM. PROC. ANN. art. 35.16(a) (list of absolute disqualifiers). A juror on deferred adjudication is "under indictment." *Abrams v. State,* No. 14-95-01367-CR, 1997 Tex. App. LEXIS 6038, at *9, (Tex. App.—Houston [14th Dist.] Nov. 20, 1997, pet. ref'd.) (mem. op., not designated for publication) (citing *State v. Holloway,* 886 S.W.2d 482, 483 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd)). However, the contested juror here had completed his community service term and was no longer under the order of deferred adjudication.

Appellant acknowledges the statement of the Court of Criminal Appeals in *Davis v. State*, 968 S.W.2d 368, 370 (Tex. Crim. App. 1998), in which the court stated, "A defendant who has been discharged from deferred adjudication community supervision is immediately eligible to serve on a jury . . . ." The court relied in part on language in

article 42.12, section 5(c) of the Code of Criminal Procedure to the effect that a defendant discharged from deferred adjudication "may not be deemed [to have] a conviction for the purposes of disqualifications or disabilities imposed by law for conviction of an offense." *Id.* at 370 (quoting § 5(c)). *See* 43A George E. Dix & John M. Schmolesky, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE, § 47:6 (3d ed. 2011) (a person on deferred adjudication community supervision is not convicted of an offense; one who has successfully completed a term of deferred adjudication is discharged from the criminal justice system without ever having been convicted).

The statement that a discharged defendant is "immediately eligible to serve on a jury" appears in a general discussion of deferred adjudication and the consequences of a defendant's successful completion without adjudication. *Id.* at 369-70. Appellant argues the statement is dicta; the State's brief acknowledges the statement is not an express holding. Appellant criticizes the reasoning behind the statement in *Davis*, and points to differences in the language of section 5(c) and that of comparable provisions of other statutes. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5(c) (deferred adjudication; community supervision). *Compare* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 20 (reduction or termination of community supervision).[7]

Appellant asserts we should not consider *Davis* binding authority, and contends reasons of policy argue that a guilty plea resulting in a deferred adjudication, even a completed deferred adjudication, should disqualify the person for jury service. We do not find appellant's contentions so persuasive as to cause us to disregard the clear

[7] *See* TEX. CODE CRIM. PROC. ANN. art. 42.12 (repealed by Acts 2015, 84th Leg., ch. 770 (H.B. 2299) § 3.01, effective January 1, 2017); now codified as TEX. CODE CRIM. PROC. ANN. art. 42A (West Supp. 2016).

statement in *Davis*. We will be guided by the statement in this case, and find the potential juror challenged by appellant was not disqualified by virtue of a completed and discharged deferred adjudication. The court did not err by denying appellant's challenge for cause. Her second issue is overruled.

Conclusion

Having overruled each of appellant's issues, we affirm the judgment of the trial court.

James T. Campbell
Justice

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