Cite as 2011 Ark. App. 403

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR11-101

RODNEY K. JONES APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** June 1, 2011 APPEAL FROM THE CHICOT COUNTY CIRCUIT COURT [NO. CR2010-63-1] HONORABLE SAMUEL B. POPE, JUDGE AFFIRMED

JOSEPHINE LINKER HART, Judge

Rodney K. Jones appeals his conviction for driving while intoxicated, for which he received a thirty-day jail sentence and $655 in fines and assessed costs. He argues that the trial court erred in rejecting his proffered jury instruction. We affirm.

Because Jones does not challenge the sufficiency of the evidence, only a brief recitation of the facts is necessary. On the evening of January 31, 2009, the Arkansas State Police set up a sobriety checkpoint on Highways 65 and 208 in Dermott. As Jones approached the checkpoint, he abruptly stopped. He backed up and made a ninety-degree turn down a side road. Trooper Mitch Grant ran to his car and began following Jones's vehicle. While following Jones, Trooper Grant observed Jones cross over the fog line and drive slightly onto the grass alongside the side of the road. Jones pulled back onto the roadway and turned down a dead-end

road; shortly thereafter, he stopped his vehicle. Trooper Grant activated his blue lights and conducted an investigation. He noted an odor of intoxicants coming from Jones. Jones admitted that he pulled onto the dead-end road because he missed his driveway. Trooper Grant administered a preliminary breath test, then turned the investigation over to Trooper Clayton Moss.

Trooper Moss testified that Jones's eyes were red and watery. He too detected the smell of alcohol on Jones. Jones admitted that he had been drinking. Trooper Moss administered several field-sobriety tests, which Jones did not pass. He arrested Jones. He transported Jones to Lake Village and administered a breath test. Jones recorded test results of .101, .097, and .097. When he questioned Jones about drinking and driving and running from a checkpoint, Jones replied, "I'm guilty as charged."

At Jones's trial, his counsel argued, as he does on appeal, that the model jury instruction, AMI Crim. 2d 6501, which we shall generally refer to as the model instruction, did not accurately reflect the amended version of Arkansas Code Annotated section 5-65-103.[1] He

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[1] § 5-65-103. Intoxication, blood alcohol content--Unlawful acts

(a) It is unlawful and punishable as provided in this act for any person who is intoxicated to operate or be in actual physical control of a motor vehicle.

(b) It is unlawful and punishable as provided in this act for any person to operate or be in actual physical control of a motor vehicle if at that time the alcohol concentration in the person's breath or blood was eight-hundredths (0.08) or more based upon the definition of breath, blood, and urine concentration in § 5-65-204.

Prior to the 2001 amendment in question, section 5-65-103(b) stated,

proffered the following jury instruction:

> Rodney K. Jones is charged with the offense of driving while intoxicated. To sustain this charge, the State must prove beyond a reasonable doubt that Rodney K. Jones:
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> While intoxicated, operated or was in actual physical control of a motor vehicle; or
>
> Operated or was in actual physical control of a motor vehicle while the alcohol concentration in his breath was eight-hundreths (0.08) or more based upon grams of alcohol per two hundred ten liters (210) of breath.
>
> Definitions: "Intoxicated" — Intoxicated means influenced or affected by the ingestion of alcohol, a controlled substance, any intoxicant, or any combination thereof, to such a degree that the driver's reactions, motor skills, and judgment are substantially altered and the driver, therefore, constitutes a clear and substantial danger of physical injury or death to himself and other motorists or pedestrians.

The trial court, however, rejected Jones's proffered instruction and instead gave the model instruction. The model instruction as given at trial reads as follows:

> Rodney Jones is charged with the offense of driving while intoxicated. To sustain this charge, the State must prove beyond a reasonable doubt that Rodney Jones, the Defendant, [w]hile intoxicated, operated or was in actual physical control of a motor vehicle; or, that he operated or was in actual physical control of a motor vehicle while the alcohol concentration in his breath was eight-hundredths, that's .08, or more as determined by a chemical test of his breath. There are certain definitions within this or under this: Alcohol concentration means grams of alcohol per two hundred ten liters of breath. Chemical test — A chemical test is one that analyzes a person's breath for determining the alcohol content in the blood or breath. The test and the methods by which it is performed must be approved by the Arkansas State Department of Health, or the test must be made by the State Crime Laboratory or be given by a person possessing a valid permit to administer it. Intoxicated - Intoxicated means influenced or affected by the ingestion of Alcohol, a controlled substance, any intoxicant, or any combination thereof, to such a degree that the driver's reaction, motor skills, and judgment are substantially altered and the driver, therefore, constitutes a clear and

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It is unlawful and punishable as provided in this act for any person to operate or be in actual physical control of a motor vehicle if at that time *there was one tenth of one percent (0.10%) or more by weight of alcohol in the person's blood as determined by a chemical test of the person's blood, urine, breath, or other bodily substance.* [Emphasis supplied.]

> substantial danger of physical injury or death to himself and other motorists or pedestrians.

On appeal, Jones argues that the trial court erred in refusing to give his proffered instruction and instead giving the model instruction, because the model instruction fails to adequately address the 2001 amendment to Arkansas Code Annotated section 5-65-103. He notes that the amendment did not just lower the presumptive intoxication threshold of the percentage of alcohol concentration from .10 to .08, it also removed the phrase "as determined by a chemical test." Jones contends that retaining the "chemical test" reference in the model instruction placed "too much emphasis" on the testing, essentially binding the jury to find his guilt beyond a reasonable doubt based on the results of the test. We find this argument unpersuasive.

We review a trial court's decision regarding whether to give a proffered jury instruction for an abuse of discretion. *Clark v. State*, 374 Ark. 292, 287 S.W.3d 567 (2008). Generally, a party is entitled to a jury instruction when it is a correct statement of the law and when there is some basis in the evidence to support giving the instruction. *Id.* However, a non-AMI Criminal instruction should be given only when the trial judge finds that the model instruction does not state the law or does not contain a needed instruction on the subject. *Id.* The supreme court has stated that just because an appellant's proffered instructions contain correct statements of the law, it does not mean that it was error for the trial court to refuse to give them. *Id.*

From the outset, it is worth emphasizing that much of the proffered instruction and the model instruction are identical. Both state the burden of proof and the conduct proscribed by

section 5-65-103, i.e., to operate or be in actual physical control of a motor vehicle while intoxicated or when one has an alcohol level of 0.08. Both instructions also define how the alcohol concentration is derived—"grams of alcohol per two hundred ten liters of breath." The only significant difference between the two instructions is with regard to the model instruction's reference to a chemical test and a definition thereof.

We agree with Jones that the phrase "chemical test" was excised from section 5-65-103 by the 2001 amendment. However, we do not agree that eliminating that phrase also eliminated any reference to how the blood-alcohol content was to be determined. As noted previously when we quoted section 5-65-103(b), that section incorporates by reference section 5-65-204.[2] That sections concerns "chemical analysis," not chemical testing. However, we

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[2] § 5-65-204. Validity of chemical analysis–Approved methods

(a)(1) "Alcohol concentration" means either:
(A) Grams of alcohol per one hundred milliliters (100 ml) or one hundred cubic centimeters (100 cc) of blood; or
(B) Grams of alcohol per two hundred ten liters (210 l) of breath.
(2) The alcohol concentration of other bodily substances is based upon grams of alcohol per one hundred milliliters (100 ml) or one hundred cubic centimeters (100 cc) of blood, the same being percent weight per volume or percent alcohol concentration.
(b)(1)(A) A chemical analyses made to determine the presence and amount of alcohol of a person's blood, urine, or breath to be considered valid under the provisions of this act shall be performed according to a method approved by the Division of Health of the Department of Health and Human Services or by an individual possessing a valid permit issued by the division for this purpose.
(B) The division may:
(i) Approve satisfactory techniques or methods for the chemical analysis;
(ii) Ascertain the qualifications and competence of an individual to conduct the chemical analysis; and
(iii) Issue a permit that is subject to termination or revocation at the discretion of the division.
(2) However, a method of chemical analysis of a person's blood, urine, or other bodily substance made by the State Crime Laboratory for determining the presence of one (1) or

cannot say that the differences in the wording are in any way misleading to the jury. Chemical analysis is accomplished through chemical testing. The plain wording of the statutory scheme indicates that the legislature intended to establish the alcohol concentration by approved tests, which the model instruction references. As noted, the proffered instruction omits any reference

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more controlled substances or any intoxicant is exempt from approval by the division or the State Board of Health.
(c) To be considered valid under the provisions of this section, a chemical analysis of a person's blood, urine, breath, or other bodily substance for determining the alcohol content of the blood or breath shall be performed according to a method approved by the board.
(d)(1) When a person submits to a blood test at the request of a law enforcement officer under a provision of this section, blood may be drawn by a physician or a person acting under the direction and supervision of a physician.
(2) The limitation in subdivision (d)(1) of this section does not apply to the taking of a breath or urine specimen.
(3)(A) No person, institution, or office in this state that withdraws blood for the purpose of determining alcohol or controlled substance content of the blood at the request of a law enforcement officer under a provision of this chapter shall be held liable for violating any criminal law of this state in connection with the withdrawing of the blood.
(B) No physician, institution, or person acting under the direction or supervision of a physician shall be held liable in tort for the withdrawal of the blood unless the person is negligent in connection with the withdrawal of the blood or the blood is taken over the objections of the subject.
(e)(1) The person tested may have a physician or a qualified technician, registered nurse, or other qualified person of his or her own choice administer a complete chemical test in addition to any chemical test administered at the direction of a law enforcement officer.
(2) The law enforcement officer shall advise the person in writing of the right provided in subdivision (e)(1) of this section and that if the person chooses to have an additional chemical test and the person is found not guilty, the arresting law enforcement agency shall reimburse the person for the cost of the additional chemical test.
(3) The refusal or failure of a law enforcement officer to advise a person of the right provided in subdivision (e)(1) of this section and to permit and assist the person to obtain a chemical test under subdivision (e)(1) of this section precludes the admission of evidence relating to a chemical test taken at the direction of a law enforcement officer.
(f) Upon the request of the person who submits to a chemical test at the request of a law enforcement officer, full information concerning the chemical test shall be made available to the person or to his or her attorney.

to testing or analysis. Accordingly, the proffered instruction is a somewhat incomplete statement of the law. We hold that it was not an abuse of discretion for the trial court to reject the proffered instruction and give the model instruction.

Affirmed.

GLADWIN and ABRAMSON, JJ., agree.