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ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR10-749

	Opinion Delivered March 16, 2011
SHIRLEY A. TAYLOR APPELLANT	APPEAL FROM THE BRADLEY COUNTY CIRCUIT COURT [NO. CR-2009-73-1]
V.	
STATE OF ARKANSAS APPELLEE	HONORABLE SAM POPE, JUDGE
	AFFIRMED

DAVID M. GLOVER, Judge

Appellant, Shirley Taylor, was tried by a jury and found guilty of the offense of driving while intoxicated, second offense. As her sole point of appeal, she contends that the trial court erred in admitting her breathalyzer test results into evidence. We affirm.

Arkansas Code Annotated section 5-65-204(e) (Repl. 2005) provides:

> (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* <u>*precludes the admission*</u> of evidence relating to a chemical test taken at the direction of a law enforcement officer.

(Emphasis added.) When a defendant moves to exclude admission of a test pursuant to section 5-65-204(e)(3), the State bears the burden of proving by a preponderance of the evidence that the defendant was advised of her right to have an additional test performed and that she was assisted in obtaining a test. *Lampkin v. State*, 81 Ark. App. 434, 105 S.W.3d 363 (2003). Substantial compliance with the statutory provision about the advice that must be given is all that is required. *Id.*

Officer Robbie Ashcraft testified that she stopped appellant for running a stop sign on the night of July 2, 2009. She said that she could smell alcohol on appellant's breath and that she eventually took appellant back to the station where she gave appellant the "rights form" before administering a breathalyzer test. Ashcraft testified that she read the designated paragraphs to appellant; that appellant answered "yes" each time; that "she did seem to me to indicate that she understood what each of her rights were"; and that appellant initialed and signed the form. Appellant objected to the introduction of the rights form at her trial. She based her objection on Arkansas Code Annotated section 5-65-204(e), and argued:

> [this section] requires that a law enforcement officer shall advise the person in writing of his right, and that if a person chooses to have an additional test and if the person is found not guilty, the arresting officer of the incident will reimburse a person the costs of an additional test. And this right it's talking about is a right to an additional test. And it says that it shall be advised in writing. And I heard her testify that she read it to her. And that would be advising her orally. And unless they hand it to them and let them read it, I don't think they are complying with the statute.

After the State's response to the objection, the trial court asked specifically, "Is your objection that it was read rather than furnished in writing?" Counsel for appellant replied, "Yes, sir. . . . That was my objection." The trial court overruled the objection, reasoning that the officer was using a written form. When the State offered the results of the BAC test, appellant merely renewed the original objection, which was also overruled. The results of the BAC test showed that the first subject sample registered .081, and the second sample registered .080.

On cross-examination, the officer explained that before running the test, she asked appellant if she understood "all parts of these rights" and that appellant said she did; that she asked appellant, "Will you take the test?" and appellant said she would; that she asked appellant, "Do you want another test at your expense?" and appellant said, "No." The officer said that she did not read aloud to appellant the paragraph on the form that provides:

> If you take the test or tests requested by law enforcement, you may also, at your own expense, have a physician, registered nurse, lab technician, or other qualified person administer an additional breath, blood, or urine test. This department will assist you in obtaining such a test. Pursuant to Act 561 of 2001, if you choose to have an additional test, and are later found "Not Guilty" of violation of the Omnibus DWI Act, for this arrest, the arresting law enforcement agency will reimburse you for the cost of the additional test.

She further testified, however, that she did explain that part to appellant. The State rested.

Appellant testified that when she was stopped by the police officer, it had been thirty to forty minutes since she had had her last beer. She stated that she remembered going to the station and the officer reading her the rights form "the way [the officer] read it to the jury, and I remember telling her that I didn't need an additional test." She said that she was really

nervous and did not really understand that she had a right to an additional test: "I read all this beforehand and it really didn't dawn on me about taking another test. I had told her before I took the test that I didn't want another test. I did not think about it anymore."

On cross-examination, appellant acknowledged, "I knew that I could take another test, but after I took this breath test, I just forgot about it." She said that she was nervous because she needed money, she did not have any income coming in, and she had "never really had any tickets in [her] life."

Appellant acknowledges that the rights form she was given, and that she signed, contained the pertinent language from section 5-65-204(e), but she nevertheless argues that she was not properly advised of her rights under this section because the officer "advised [her] both verbally and in writing of everything concerning the implied consent law *except her rights to an additional test and to be reimbursed for the costs thereof* as contained in subdivisions (e)(1) and (e)(2) of § 5-65-204." (Emphasis in original.) That is, she argues that "[a]lthough Cpl. Ashcraft testified that she 'explained that part' of the Statement of Rights form dealing with the rights contained in subdivisions (e)(1) and (e)(2), it is obvious that Ms. Taylor was not given an opportunity to read it, and all of her rights apparently were not explained to her." She goes on to argue that she testified that she knew that she could take another test, but that she did not have any income coming in. "It is therefore obvious that Cpl. Ashcraft did not explain Ms. Taylor's right to reimbursement if she is found not guilty." Finally, she argues that reading various paragraphs from the rights form to the person to be tested and having him or her acknowledge only what was read, without going over the rights contained in subdivisions

(e)(1) and (e)(2) of § 5-65-204, defeats the basic purpose of the process, which is to advise the person to be tested of his or her right to an additional test and to be reimbursed for the costs of that test if he or she is found not guilty.

First, appellant has expanded her argument on appeal beyond the essence of her argument at trial: "Is your objection that it was read rather than furnished in writing?" Counsel for appellant replied: "Yes, sir. . . . That was my objection." Any argument concerning her lack of funds goes beyond that argument. While she testified at trial about a lack of funds, it cannot be fairly said that she made that assertion part of her objection to the introduction of the test results.

Second, with respect to the argument that *was* made at trial, it is clear that the rights form was furnished to appellant and that it was in writing. She even acknowledged in her testimony that she knew that she could take another test, but that after she took the breath test, she "just forgot about it." Substantial compliance with section 5-65-204 is what is required, *Lampkin*, *supra*, and we hold there was substantial compliance with the statute in the instant case.

Affirmed.

GLADWIN and WYNNE, JJ., agree.