Cite as 2023 Ark. App. 589

ARKANSAS COURT OF APPEALS

DIVISION I
No. CR-22-657

		Opinion Delivered December 13, 2023
GARY WAYNE JOHNSON	APPELLANT	APPEAL FROM THE LONOKE COUNTY CIRCUIT COURT [NO. 43CR-21-690]
V.		HONORABLE BARBARA ELMORE, JUDGE
STATE OF ARKANSAS	APPELLEE	AFFIRMED

CINDY GRACE THYER, Judge

This is an appeal from a DWI conviction after a bench trial. Appellant Gary Johnson contends that the Lonoke County Circuit Court erred in denying his motion to strike evidence of a breathalyzer test after the police allegedly failed to provide him with reasonable assistance in obtaining an additional test. We find no error and affirm.

On March 31, 2021, Arkansas State Police Trooper David Harrell cited Johnson with driving while intoxicated–first offense and parking on the highway after he was found parked on the right side of the interstate almost on the white line. Johnson was alone and passed out inside his vehicle. Trooper Harrell observed the keys in the ignition, an open can of beer in the cup holder, and a six pack of beer in the passenger's side floorboard. Johnson informed Trooper Harrell that he had been driving to Little Rock, had gotten tired, and had

pulled over. His car, however, was thirty miles outside of Little Rock and headed in the wrong direction. As they were talking, Trooper Harrell noticed the odor of intoxicants coming from inside the car, and Johnson admitted that he had consumed two drinks that day.

Because he suspected Johnson was intoxicated, Trooper Harrell administered a portable breath test. He then called for a tow truck and placed Johnson in the back of the police vehicle. While they were waiting for the tow truck to collect Johnson's vehicle, Trooper Harrell read Johnson his rights from the DWI rights form. This exchange was recorded on Trooper Harrell's in-car video. As part of the rights form, Johnson was advised that if he submitted to a chemical test requested by law enforcement, he was entitled to, at his own expense, have a physician, registered nurse, lab technician, or any other qualified person of his choice to administer an additional test, and if he was subsequently found not guilty of DWI, the costs of the additional testing would be reimbursed. After the tow truck arrived, Trooper Harrell transported Johnson to the Lonoke County Sheriff's Office.

At the station, Johnson signed and initialed the rights form, after which he was administered a breath test. His test revealed a BAC of 0.108. After he provided the first sample, Trooper Harrell advised him of his right to an additional test of his choosing. Johnson requested a second breath test, which resulted in inconclusive findings because Johnson failed to produce a sufficient breath sample.

Given his training and experience, the results of the breath test, and his interaction with Johnson—including the odor of intoxicants, the open can of beer , the admitted

drinking, and his sleeping behind the wheel—Trooper Harrell concluded that Johnson was impaired. As a result, Johnson was charged with DWI and parking on the highway.

At trial, Trooper Harrell testified to the foregoing.[1] When the State moved to introduce the first BAC report, it was admitted over Johnson's objection. Trooper Harrell then testified that he had informed Johnson of his right to a second test, that Johnson had elected to submit to another breath test, that the second test was performed, and that the results of the second test were inconclusive because Johnson failed to provide a sufficient sample on the second attempt. The results of the second breath test were then introduced without objection.

On cross-examination, Trooper Harrell testified that he advised Johnson that he could choose either a breath or blood or urine test as his second test. He admitted that Johnson's speech was not slurred, that he did not smell alcohol on Johnson's breath until he was speaking with Johnson, and that he found only one open bottle of beer and an unopened six-pack in the vehicle. Trooper Harrell stated he was unsure if the car was running but was sure that the keys were in the ignition at that time.

At the close of the State's case, Johnson moved for a directed verdict.[2] Counsel maintained that Johnson had not truly been given the opportunity to conduct an additional test because the machine had disallowed his second attempt due to the provision of an

[1]The State also introduced the 911 audio recordings (which were not offered for the truth of the matter asserted) and the in-car video recording into evidence.

[2]The court granted a directed verdict on the parking-on-the-highway charge.

insufficient sample. Yet, the reports revealed that the volume and length of the breath samples given were similar to the ones provided in the first test, and there was no evidence that Johnson had attempted to thwart the second test. He then argued that the officer had an obligation to provide him with a second test that registered a BAC and had not done so. Because a valid second test was not properly provided, the statute required that the BAC results from the first test be suppressed. Counsel then objected to the court's consideration of the BAC results as evidence of intoxication.

After maintaining that the first BAC was inadmissible, counsel argued during his motion for directed verdict that the DWI charge should be dismissed because there was insufficient evidence independent of the BAC to prove intoxication. The State responded that Johnson had been provided a second test and that the machine rejected Johnson's sample because it was insufficient. Because Trooper Harrell had provided him with a second test pursuant to the statute, the initial test results were admissible. However, even without the test results, the State claimed there was sufficient evidence to support a DWI conviction.

After hearing the arguments of counsel, the circuit court denied the directed-verdict motion.

Johnson then testified in his own defense, providing the court with an explanation for his actions that day and denying that he was driving while intoxicated. As for the test, he stated that he knew he could request a second test and that he was responsible for paying for it; however, he claimed he wanted to do a blood test, not a breath test, but Trooper Harrell did not provide him with that option.

At the close of his testimony, defense counsel renewed his motion for directed verdict, which was denied.

In closing, defense counsel conceded that, with the admission of the BAC results, the State had likely met its burden of proof as to intoxication solely due to the presumption but argued that the court should find Johnson not guilty of DWI in light of Johnson's version of events. The State, in response, argued that Johnson's testimony was not credible and that there was overwhelming evidence to support the charges.

After hearing the arguments of counsel, the court found Johnson guilty of DWI (first offense) and sentenced him to one day in the county jail and ordered him to pay a $1,000 fine. Johnson has timely appealed his conviction.

On appeal, Johnson argues that the results of the first BAC exam should have been excluded (1) because Trooper Harrell failed to provide him of a test of his own choosing and (2) because Trooper Harrell failed to provide him with reasonable assistance in obtaining a valid sample. The statute in question requires an officer to advise a person of his right to an additional test and to provide him reasonable assistance in obtaining one. Trooper Hall did both.

Arkansas Code Annotated § 5-65-204(d) (Supp. 2023) establishes the right of a person tested for alcohol content at the direction of a law enforcement officer to have an additional test performed as follows:

> (d)(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 (d)(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 (d)(1) of this section and to permit and assist the person to obtain a chemical test under subdivision (d)(1) of this section precludes the admission of evidence relating to a chemical test taken at the direction of a law enforcement officer.

When a defendant moves to exclude admission of a test pursuant to § 5-65-204(d)(3), the State bears the burden of proving by a preponderance of the evidence that the defendant was advised of his right to have an additional test performed and that he was assisted in obtaining a test. *See Kay v. State*, 46 Ark. App. 82, 877 S.W.2d 957 (1994). Substantial compliance with the statutory provision about the advice that must be given is all that is required, *Hegler v. State*, 286 Ark. 215, 691 S.W.2d 129 (1985), and the officer must provide only such assistance in obtaining an additional test as is reasonable under the circumstances presented. *Williford v. State*, 284 Ark. 449, 683 S.W.2d 228 (1985); *Fiegel v. City of Cabot*, 27 Ark. App. 146, 767 S.W.2d 539 (1989). Whether the assistance provided was reasonable under the circumstances is ordinarily a question of fact for the circuit court to decide. *Fiegel*, *supra.* On appeal, the question to be decided is whether the circuit court's finding of reasonable assistance to obtain another test is clearly against the preponderance of the evidence. *Kay*, *supra.*

Johnson first claims that Trooper Harrell failed to inform him that he could request a blood test as his additional testing method; instead, he merely advised him of his right to additional testing. He bases this claim on the recording of Trooper Harrell advising him of his rights in the patrol car. However, at trial, Trooper Harrell testified that Johnson had been advised of his right to have an additional test taken by either breath or blood or urine and that Johnson chose the breath test. Trooper Harrell testified that he did so after Johnson had completed the first test at the station. Thus, there was sufficient evidence for the circuit court to find that Johnson was advised of his right to request a blood test. And to the extent the testimony and evidence can be viewed as conflicting, it was up to the circuit court to resolve the conflict.

Johnson next claims that Trooper Harrell failed to provide him with reasonable assistance in obtaining an additional test once the results of the second test registered invalid after he failed to produce a sufficient sample. Johnson asserts that Trooper Harrell had a duty to ensure that he obtained a valid second test and to provide him with proper instruction on how to provide a proper sample that would result in a valid reading, yet he failed to do either. His argument fails.

As stated above, an officer must provide only such assistance in obtaining an additional test as is reasonable under the circumstances presented. *Williford*, *supra*; *Fiegel*, *supra*. Whether the assistance provided was reasonable under the circumstances is ordinarily a question of fact for the circuit court to decide. *Fiegel*, *supra*.

Here, Trooper Harrell initially conducted a breath test on Johnson and obtained valid readings. He then provided another breath test on the same machine, but the results of the second test were invalid. Trooper Harrell stated he was unsure why the machine invalidated the results but surmised that Johnson had produced an insufficient breath sample. While there is no evidence that Johnson intentionally provided an insufficient sample, there was evidence that he had previously produced sufficient samples and, therefore, was aware of what was required. Johnson's failure to produce a sufficient sample does not render Trooper Harrell's assistance noncompliant with the statute. Trooper Harrell was required under the statute to reasonably assist Johnson in obtaining another test, and he did so. It was the circuit court's decision as to whether the assistance Trooper Harrell provided was reasonable under the circumstances. It decided it was, and its decision is not clearly erroneous.

Thus, for the foregoing reasons, we conclude that the court did not abuse its discretion in allowing the introduction of the first breath test.

Affirmed.

GLADWIN and MURPHY, JJ., agree.

Robert M. "Robby" Golden, for appellant.

Tim Griffin, Att'y Gen., by: *Christopher R. Warthen*, Ass't Att'y Gen., for appellee.