Appendix A

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07/11/2023
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Appellate Courts

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
March 28, 2023 Session

STATE OF TENNESSEE v. LUIS ALEXIS BRICENO

Appeal from the Criminal Court for Knox County
No. 115160 Steven Wayne Sword, Judge

No. E2022-00414-CCA-R3-CD

Defendant, Luis Alexis Briceno, was convicted of alternative counts of driving under the influence of an intoxicant (second offense), driving on a revoked license, and violation of the financial responsibility law. The trial court imposed an effective sentence of eleven months, twenty-nine days, with seventy-five percent release eligibility, and service of fifty-nine days in confinement before release on probation. On appeal, Defendant argues that the Tennessee Administrative Office of the Courts erred by denying his request of funding for expert assistance; Rule 13 of the Tennessee Supreme Court is unconstitutional both on its face and as applied in his case; and the trial court erred by denying his motion to suppress the results of his breath test. After a thorough review of the record and the briefs and oral arguments of the parties, we affirm the judgments of the trial court.

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

JILL BARTEE AYERS, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., P.J., and KRISTI M. DAVIS, J., joined.

Tyler M. Caviness (on appeal), Knoxville, Tennessee; Tyler M. Caviness and Melissa DiRado, Assistant Public Defenders (at trial), Knoxville, Tennessee, for the appellant, Luis Alexis Briceno.

Jonathan Skrmetti, Attorney General and Reporter; Katherine C. Redding, Senior Assistant Attorney General; Charme Allen, District Attorney General; and Greg Eshbaugh and Oscar Butler, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION
Factual and Procedural Background

Request for Expert Funding and Suppression Hearing

Defendant filed a motion to suppress the results of his breath test on October 16, 2020, asserting that he did not voluntarily and intelligently consent to the test. He also argued that the State violated his due process rights by refusing to allow him to consult with an attorney before performing the breath test. On November 4, 2020, Defendant filed an *ex parte* motion requesting funding to hire a forensic psychologist, Sidney Alexander, Ph.D. He asserted that he had "undiagnosed anxiety issues that are highly relevant to his defense at trial and to the issues raised in his pre-trial motions to suppress." Defendant further asserted that his "alleged confusion when interacting with law enforcement and his performance on field sobriety tests could be explained by his mental state at the time." He said that he experienced panic attacks and that he was experiencing symptoms of a panic attack "during the time frame of his arrest." Defendant asserted that he was very anxious "when interacting with law enforcement officers and also believed that he did not have a choice to provide a breath sample for testing or not." He further argued that an "investigation and development" into his mental state was "highly relevant" to the admissibility of the breath sample and his statements at trial.

The trial court granted Defendant's request for expert funding that day; however, Defendant's counsel received notice by email from the assistant general counsel of the Administrative Office of the Courts ("AOC") that funding had been denied because Defendant had not established a particularized need for the services. On November 9, 2020, Defendant filed a motion to continue his motions hearing and trial because he needed additional time to obtain expert funding. The motion was granted by the trial court. On March 11, 2021, defense counsel emailed assistant general counsel at the AOC and advised that Defendant wished to appeal the denial of the request for expert funding. He also submitted an affidavit from Dr. Alexander stating that generally, someone suffering from anxiety or panic disorder "experiences stressors more intensely than someone without those disorders." Dr. Alexander further opined:

> If [Defendant] has an anxiety or panic disorder, interacting with law enforcement officers could trigger an acute stress response resulting in symptoms of [Defendant's] condition – or conditions – more severe. It is possible [Defendant] could experience a strong fight or flight response in that situation, which could result in several behaviors, including shutting down or acquiescing to law enforcement in an effort to remove himself from the situation.

A suppression hearing was held on April 12, 2021. Defendant did not present any expert testimony at the hearing, and there is nothing in the record to suggest that he sought a continuance to appeal the denial of expert funding.

At the onset of the suppression hearing, the State requested that Defendant's motion to suppress the results of his breath test be denied as untimely. The trial court acknowledged that the motion was not timely filed but denied the State's request because the officer was present to testify, and the motion was "pretty basic."

Officer Hayden Cochran of the Knoxville Police Department ("KPD") testified that at approximately 6:12 a.m. on May 9, 2018, he and KPD Sergeant Colin McLeod responded to a call of an unconscious driver, later identified as Defendant, in the seat of a vehicle stopped at a traffic light at "Kingston Pike westbound and Morrell Road, who had sat through several light cycles and not moved." He said that EMTs had already arrived on the scene and performed a medical evaluation on Defendant. Officer Cochran testified that Defendant was calm and responsive, and he immediately noticed that Defendant had bloodshot, watery eyes, slurred speech, and the odor of alcohol coming from him. He performed a "Terry pat" on Defendant for safety reasons and did not find any weapons, contraband, or drug paraphernalia. Officer Cochran asked Defendant if he had consumed alcohol or any medications or if he had any medical conditions that would cause him to fall asleep. Defendant responded "no" to each of the questions. Officer Cochran also asked Defendant for his driver's license, but learned through dispatch that it had been revoked, which Defendant also admitted.[1] When asked why he was driving, Defendant responded that he was trying to get home.

At 6:16 a.m., Defendant consented to Officer Cochran's request for him to perform field sobriety tests. Officer Cochran then moved his patrol car in front of a line, so that the tests would be captured on camera, and he instructed Defendant to stand in front of the car. Defendant indicated that he was cold, and Officer Cochran directed another officer to retrieve a jacket from Defendant's truck. At one point, Defendant stated that Officer Cochran wanted him to walk a line that was not straight. After the completion of the tests, Officer Cochran concluded that Defendant was "not of sound mind and body to be able to operate a motor vehicle." He placed Defendant under arrest for driving under the influence of an intoxicant ("DUI") and advised him of his *Miranda* rights. Defendant then asked if he could have an attorney present at the scene. Officer Cochran testified: "I told him, no, that's not possible, but what it meant is that I would not ask him any questions from that point on." He advised Defendant of the implied consent law, and Defendant agreed to provide a breath sample. Defendant signed the implied consent form at 6:33 a.m. Because Office Cochran did not have a mobile breathalyzer, he transported Defendant to the KPD Safety Building to conduct the test, leaving the scene at 6:39 a.m. and arriving at 6:49 a.m.

[1] The videos from both Officer Cochran's and Sergeant McLeod's patrol cars were admitted as exhibits and played for the trial court.

Defendant performed the breathalyzer test at 7:02 a.m. The test revealed that Defendant's blood contained an alcohol content of 0.155 g/210L. Officer Cochran testified that it was approximately thirty minutes from the time that Defendant consented to provide a breath test until the time that the test was performed.

Defendant testified that he arrived at a friend's house at approximately 6:00 p.m. the evening before his arrest and drank a few beers. He went home later but could not sleep due to his anxiety and insomnia. Defendant testified that he had been diagnosed with anxiety at the age of seventeen and was prescribed Clonazepam. He was not taking Clonazepam at the time of his arrest nor was he receiving any mental health treatment. Defendant testified that he was trying to do exercises to help with his anxiety, but it did not help him. He said that his symptoms had worsened with age, and he was experiencing trouble breathing, thinking, and sleeping. Defendant testified that he also experienced his heart racing, and he would "get a paralyzed feeling and feeling overwhelmed" in times of stress.

Defendant testified that he left his house between 5:00 and 6:00 a.m. on the morning of May 9, 2018. He remembered getting tired and thinking that he needed to go home. Defendant testified that the next thing that he remembered was waking up to two EMTs standing outside his truck window, and he was "blocked in" with a car behind him. He said that he was tired and anxious at that point, and police officers arrived a few minutes later. Defendant testified that he got out of the vehicle at the EMTs' request, and the officers walked up and began asking him questions and for his driver's license. He said that he began thinking about being arrested for driving on a revoked license, and he began feeling symptoms of anxiety, and he was having trouble breathing and thinking. Defendant felt that he had no choice about being frisked, having his pockets searched, leaving or performing the field sobriety tests because he was "kind of trapped in the moment."

Defendant testified that prior to the field sobriety tests, he told the officer that the line to walk on was not straight, and the officer allowed him to pick another one. However, this did not make him feel less anxious or less stressed. He claimed that both of the lines were crooked. Defendant testified that the officers interrupted him several times which made Defendant feel as though what he said did not matter. He said that he began feeling symptoms of anxiety when he was handcuffed because he thought that he would lose his job and that his mother's truck would be "impounded." He described his anxiety as high at the time. Defendant testified that the officer advised him of his *Miranda* rights which Defendant understood to mean that he could remain silent and have an attorney present. Defendant then asked for an attorney at the scene. He said that he would have asked the attorney "how I should react with the officer, what I should do, what was going to happen." Defendant said that he had an attorney at the time, and if he had been unable to reach her, he would have used his phone to look up the number for another one. Defendant felt that he did not have any rights because the officer told him "no" when he asked for an attorney,

He said that the officer agreed not to ask him any more questions but then asked if he would consent to a blood or breath sample.

Defendant agreed that the officer read the implied consent form to him, but he could not focus on what was being said. He testified: "I thought I had no choice. I thought it was implied to consent to it. He said that he had questions about everything, which he would have asked an attorney. Defendant testified that he knew what it meant for an officer to request a search warrant but he did not know the process to obtain the warrant. He said that the officer informed him that he would lose his license and have an interlock device placed on his vehicle if he did not comply with implied consent law. Defendant testified that he would have asked an attorney about whether to consent to the breath test.

On cross-examination, Defendant testified that his attorney was one who had represented him on a previous DUI that was committed on November 18, 2016. At that time, he was also placed under arrest for that offense, advised on the implied consent law, and submitted to a breath test. However, Defendant claimed that he did not understand the implied consent law at that time either. He was convicted of that offense June 8, 2017. Defendant agreed that he never told the officers in the present case that he was suffering from anxiety, could not think, or was having trouble breathing or understanding things because he did not think that it mattered. Defendant further testified that he was good at hiding his anxiety.

Upon questioning by the trial court, Defendant said that he told the EMTs who arrived on the scene that he was fine. He never told them that he had anxiety, his heart was racing, his chest was tight, or that he was about to faint, and they did not take his blood pressure.

The trial court found that Defendant's statements and answers to the officers' questions about where he had been and what he was doing "seemed confused." The court also credited Officer Cochran's testimony that he smelled a strong odor of alcohol coming from Defendant and that Defendant had "bloodshot/watery eyes, and his speech was slurred." Concerning the field sobriety tests conducted by Officer Cochran, the trial court pointed out:

> The first [field sobriety test] occurred at 6:19 approximately 7 minutes after the officers arrived. [Defendant] was aware enough to state that he did not think the line was completely straight enough for the walk and turn. He elected to use the other turn lane line as his guide. The court finds that this supports a finding that [Defendant] was not overwhelmed by the situation, as he stated during his testimony. The court does not find [Defendant] credible in his testimony that he was so anxious and stressed that he did not think he had any choice but to consent to the field sobriety tests. Nor

> does the court find [Defendant] credible when he testified that the officers made him feel like he didn't have any rights.
>
> The encounter between [Defendant] and the officers was cordial throughout. In fact, when he was placed in the cruiser after being arrested and asked about the disposition of his car, [Defendant] said, "Thank you for your cooperation." Contrary to [Defendant's] declaration, the court finds that [Defendant] demonstrated a calm demeanor. He showed concern for his rights and asked appropriate questions about his options. As stated above, he even exercised his option to use a different line for the walk and turn after he expressed concerns about the first line. Furthermore, the record reflects that [Defendant] had recently experienced a DUI arrest and prosecution in Knox County where he was represented by counsel. Also, his driver's license was revoked after being convicted of DUI by consent. The court finds that the defendant had an understanding of what was occurring at the scene beyond that of many other citizens and was not overwhelmed by the circumstances.

The trial court found that when asked if he had any health issues that would affect his ability to complete the field sobriety tests, Defendant said that he had been having "heel problems for a couple of weeks." The court found that "this is another example of [Defendant's] ability to understand what was happening and have the wherewithal to take steps to protect his interests."

The trial court noted that Officer Cochran read Defendant his *Miranda* rights, and Defendant immediately asked if he could have an attorney at the scene. Officer Cochran denied Defendant's request but said that he would not ask Defendant any further questions if he wanted an attorney. The trial court found that Officer Cochran read the implied consent form to Defendant at 6:31 a.m., and Defendant consented to the breath test, signed the form, and mentioned that he might have acid reflux. The court said that "this statement shows, again, that [Defendant] understood the gravity of the situation and had enough understanding that he was sharing potential concerns that might unfairly and negatively affect his test results." The trial court pointed out that the officer and Defendant arrived at KPD for the breath test at 6:49 p.m., entered the building at 6:56 p.m., and that Defendant was cooperative throughout the tests.

As relevant to the issue raised on appeal concerning the suppression of the results of the breath test, the trial court concluded that Defendant was advised of his *Miranda* rights and did not make an "unequivocal request for counsel, but rather an inquiry about the timing of counsel's availability[.]" However, the officer treated this as a request for counsel. The court pointed out that Defendant consented to provide a breath test after being advised of the implied consent law as outlined in the implied consent form. The trial court

further concluded that the "officers did not seize [Defendant's] blood or test his breath without consent. The defendant, who had been arrested before for DUI, voluntarily consented to take the breath test. He was made aware of the consequences for refusal and made his decision." Finally, the trial court found that defendant's due process rights were not offended by the officers' behavior, which was reasonable throughout.

Trial

State's Proof

At approximately 6:00 a.m. on May 9, 2018, Harrison Slatery was driving through the intersection of Kingston Pike and Morrell Road when he saw a truck at the intersection traveling west that failed to move through the traffic signal.[2] Mr. Harrison honked his horn several times as he traveled east through the light and past the vehicle. He looked in his rearview mirror and noticed that the truck had not moved, so he made a U-turn and pulled in behind the vehicle to check on the driver. Mr. Harrison walked up to the truck, looked into the driver's side window, and saw Defendant "kind of hunched over." Mr. Harrison then called 911 and waited for emergency personnel to arrive.

Sergeant Colin McLeod of the KPD was the first officer to arrive on the scene and saw Defendant sitting in the truck, still stopped at the intersection, and being checked by EMTs. Defendant quickly exited his vehicle as Sergeant McLeod approached, and the officer "observed an odor of an alcoholic beverage on his person." Defendant also had bloodshot, watery eyes and "mumbled, slurred speech." At that point, KPD Officer Hayden Cochran arrived and took over as lead officer for the investigation. The video from Sergeant McLeod's patrol was admitted into evidence and played for the jury.

Officer Cochran arrived on the scene, and the EMTs advised him that Defendant had no medical issues. He, too, noticed that Defendant had a smell of alcohol coming from his breath and person, and Defendant had bloodshot, watery eyes, and mumbled, slurred speech. Defendant initially told Officer Cochran that he was "coming from home and going home." He later said that he was "coming from Taco Bell and going home[.]" Officer Cochran checked Defendant's driver's license and learned that it had been revoked. He also performed a "pat-down" search for weapons, and asked if Defendant would consent to field sobriety tests. Defendant agreed but told Officer Cochran that he had been having a problem with his heel for approximately two weeks that might impede his performance.

Defendant first attempted the walk-and-turn test but failed to maintain his balance by stepping out of position. He also turned improperly and raised his arms more than six

[2] At the time of trial, Defendant's request for expert funding was still pending with the AOC. There is nothing in the record to show that Defendant sought a continuance.

inches from his side. Defendant next attempted the one-leg stand. He swayed during the test, raised his arms for balance more than six inches above his side, and he put his foot down. After the field sobriety tests, Officer Cochran concluded that Defendant was under the influence of alcohol and took him into custody. He also advised Defendant of his *Miranda* rights and read the implied consent form to him. Defendant signed the form and agreed to provide a breath sample. He also told Officer Cochran that he had acid reflux. Officer Cochran did not have a portable breathalyzer at the time, so he transported Defendant to the KPD headquarters. Officer Cochran located Officer Eric Parks who was certified to operate the breathalyzer machine and accompanied him and Defendant to the breathalyzer room.

Officer Parks observed Defendant for twenty minutes prior to performing the breathalyzer test. Defendant did not drink or smoke anything, and he did not regurgitate or belch. Officer Parks also checked Defendant's mouth for foreign matter and did not see anything. He administered the breathalyzer test to Defendant at 7:02 a.m., and the test results showed that Defendant's blood contained an alcohol content of 0.155g/210L.

Defendant's Proof

Defendant testified that he was neither intoxicated at the time of the offenses in this case nor impaired in any way by any substance. He said that he had been to a friend's house on the evening of May 8, 2018, the day before his arrest, and ate pizza and drank five twelve-ounce cans of beer. Defendant testified that he had not taken any medications. He said that he arrived back home sometime between 11:30 and midnight. Defendant testified that he went to bed but had trouble sleeping until approximately 5:00 a.m. on May 9, 2018. He explained that he struggled with insomnia and anxiety, which caused racing thoughts, elevated heart rate, and trouble speaking. Defendant testified that he had been diagnosed with anxiety at the age of 17 and had been prescribed a couple of medications. He had been attempting to manage his condition for the last couple of years without medication. Defendant said that social situations worsened his anxiety.

Defendant testified that he left his apartment between 5:00 and 6:00 a.m. on the morning of his arrest to get some food. He agreed that he did not have a driver's license at the time, and the vehicle was not insured. Defendant claimed that he did not feel intoxicated when he left his apartment. He said that he sat inside his truck and ate his breakfast and then planned to drive back home. Defendant testified that he became extremely tired as he was driving and fell asleep at the traffic light. He said that he woke up to "flashing lights, and ambulance[,] and a couple of EMTs" standing outside of his vehicle.

Defendant told everyone that he was fine and got out of the truck once police arrived. He said that it was "pretty nerve-racking" when an officer told him to remove his hands from his pockets. An officer then searched him and patted him down. Defendant

said that the officers' questions made him feel like a "bad guy" and that he was "highly anxious." He also said that an officer interrupted him each time that he tried to speak. Defendant testified: "I felt like I had to keep quiet and just do what they said." He said that he agreed to the field sobriety tests because he felt that he had no choice. Defendant testified that Officer Cochran asked if he had any problems with his legs or feet, and Defendant told him about a heel problem that had been ongoing for two weeks. Defendant noted that his heel was very painful at the time and he felt that affected his performance on the tests.

Defendant testified that the implied consent form was read to him, and he agreed to take a breathalyzer test. He also told Officer Cochran that he had acid reflux. However, Defendant testified that no officer asked him if he had acid reflux that morning either at the scene or in the breathalyzer room, although he had acid reflux after eating breakfast. He said that while in the breathalyzer room, Officer Parks and the other officers were talking amongst themselves. Defendant testified that no one mentioned the twenty-minute observation period or made sure that he did not belch, and no one checked his mouth before the test.

On cross-examination, Defendant admitted that he never told the officers that he was anxious or nervous or that he had been suffering from insomnia. He further said that he did not have anything to drink or smoke before the breath test, and he did not regurgitate. However, Defendant thought that he might have leftover food stuck in his mouth from breakfast. He agreed that he blew multiple times into the breathalyzer machine.

ANALYSIS

I. Denial of Funding for Expert Assistance

Defendant argues that his right to due process was violated by the AOC's denial of his request for expert funding and that the trial court erred by denying his motion for new trial based on the denial of funding. The State responds that Defendant has waived this issue by "abandoning his funding request and proceeding to the suppression hearing and trial without an expert witness."

The Compulsory Process Clause of the Sixth Amendment conveys a right to present a defense, including a right to present witnesses for the defense, and is a "'fundamental element of due process of law.'" *Ferensic v. Birkett*, 501 F.3d 469, 475 (8th Cir. 2007) (quoting *Taylor v. Illinois*, 484 U.S. 400, 409 (1988)). "[W]hen a State brings its judicial power to bear against an indigent defendant in a criminal proceeding, it must take steps to insure that the accused has a fair opportunity to present his defense." *State v. Barnett*, 909 S.W.2d 423, 426 (Tenn. 1995) (citing *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985)). The assistance provided to an indigent defendant need not equal that "his wealthier counterpart might buy," but it must amount to the "'basic tools of an adequate defense or appeal.'" *Id.*

(quoting *Ake*, 470 U.S. at 77). In considering the right of the accused to State assistance in presenting a defense, the court should balance:

> (1)the private interest affected by the action of the State; (2) the governmental interest affected if the safeguard is provided; and (3) the probable value of the additional or substitute procedural safeguards that are sought, weighed against the risk of erroneous deprivation of the affected interest if those safeguards are not provided.

Id. (citing *Ake*, 470 U.S. at 77). The defendant's interest in liberty is "'almost uniquely compelling'" and weighs heavily. *Id.* at 426-27 (quoting *Ake*, 470 U.S. at 77). By contrast, the State's interest in mitigating a fiscal burden is less substantial. *Id.* at 427 (citing *Ake*, 470 U.S. at 77). Due process requires that an indigent defendant be given a meaningful opportunity to defend his liberty. *Id.* at 428.

Pursuant to Tennessee Supreme Court Rule 13, section 5(b): "[T]he court, in an ex parte hearing, may in its discretion determine that investigative or expert services or other similar services are necessary to ensure that the constitutional rights of the defendant are properly protected." *See also* T.C.A. § 40-14-207(b) (authorizing funding for expert services to an indigent defendant pursuant to the supreme court rules). Section 5 (a)(1) states:

> In the trial and direct appeal of all criminal cases in which the defendant is entitled to appointed counsel, in the trial and appeals of post-conviction proceedings in capital cases involving indigent petitioners, and in juvenile transfer proceedings, the court, in an ex parte hearing, may in its discretion determine that investigative or expert services or other similar services are necessary to ensure that the constitutional rights of the defendant are properly protected.

"Funding shall be authorized only if, after conducting a hearing on the motion, the court determines that there is a particularized need for the requested services." Tenn. Sup. Ct. R. 13 § 5(c)(1). In a criminal case, a particularized need "is established when a defendant shows by reference to the particular facts and circumstances that the requested services relate to a matter that, considering the inculpatory evidence, is likely to be a significant issue in the defense at trial and that the requested services are necessary to protect the defendant's right to a fair trial." *Id.* § 5(c)(2) (citing *Barnett*, 909 S.W.2d at 423). The supreme court has adopted a two-pronged test to determine whether a defendant has established a "particularized need" for expert services: "(1) the defendant must show that he or she 'will be deprived of a fair trial without the expert assistance'; and (2) the defendant must show that 'there is a reasonable likelihood that [the assistance] will

materially assist [him or her] in the preparation of [the] case.'" *State v. Scott*, 33 S.W.3d 746, 753 (Tenn. 2000) (quoting *Barnett*, 909 S.W.2d at 430).

"Once services are authorized by the court in which the case is pending, the order and any attachment must be submitted in writing to the [AOC Director] for prior approval." Tenn. Sup. Ct. R. 13 § 5(c)(4). If the prior approval of the funding request is denied by the AOC Director, the claim shall be transmitted to the Chief Justice for disposition and prior approval. Tenn. Sup. Ct. R. 13, § 5(e)(5). "The determination of the [C]hief [J]ustice shall be final." *Id.*

In this case, while the trial court granted Defendant's request for expert funding, it was initially denied by general counsel for the AOC on the basis that Defendant had not established a particularized need for the services. Defendant indicated that he wished to appeal the denial of the request for expert funding, but as pointed out by the State, he failed to respond appropriately. After his request for expert funding was initially denied, Defendant sought and was granted a continuance of his suppression hearing and trial in order to obtain expert funding by other means; however, there is nothing in the record to show what additional steps, if any, were taken to obtain the funding.

Additionally, Defendant waited four months after the initial denial of his funding request by the AOC to request an appeal to the AOC Director and Chief Justice, which was one month before his motions hearing and two months before trial was set. Finally, Defendant then proceeded to the suppression hearing and trial without filing an additional request for a continuance pending resolution of his appeal of the AOC's denial of his request for funding.

Therefore, we agree with the State that Defendant has waived this issue because he proceeded with the suppression hearing and trial without resolution of his appeal to the AOC and without the services of an expert. Relief on appeal is typically not available when a party is "responsible for an error" or has "failed to take whatever action was reasonably available to prevent or nullify the harmful effect of any error." *See* Tenn. R. App. P. 36(a). Defendant is not entitled to relief on this issue.

II. Constitutional Challenge to Tenn. Sup. Ct. R. 13

Defendant contends that Rule 13 of the Tennessee Supreme Court is unconstitutional both on its face and as applied in his case. In the alternative, he further argues that the trial court erred by partially granting the State's request to quash his subpoena issued to the AOC assistant general counsel concerning the denial of his request for expert funding. The State asserts that Defendant is not entitled to relief because this court lacks jurisdiction to consider the constitutional challenge to Rule 13, and he has waived his claim concerning the motion to quash the subpoena.

We agree with the State that we are without authority to decide Defendant's constitutional challenge to Tenn. Sup. Ct. R. 13. Our supreme court has held that inferior courts do not have the authority to invalidate a supreme court rule. *See Petition of Gant*, 937 S.W.2d 842, 846 (Tenn. 1996); *Petition of Tenn. Bar Ass'n*, 539 S.W.2d 805, 807 (Tenn. 1976); *Barger v. Brock*, 535 S.W.2d 337, 342 (Tenn. 1976); *see also Long v. Bd. of Prof'l Responsibility*, 435 S.W.3d 174, 184 (Tenn. 2014) ("Under Tennessee law, only the Tennessee Supreme Court may determine the facial validity of its rules."). "Rather, the Supreme Court, as the promulgator of the rule, is the rule's primary arbiter." *Petition of Gant*, 937 S.W.2d at 846 (citing *Allen v. McWilliams*, 715 S.W.2d 28 (Tenn.1986)). Defendant, therefore, is not entitled to relief. We note however, that the issue of expert funding is currently pending in our supreme court. *See* Order, *Jessie Dotson v. State*, No. W2019-01059-SC-R11-PD (Tenn. Oct. 25, 2022).

As to Defendant's claim that the trial court erred in partially granting the State's motion to quash the subpoena issued to the AOC general counsel, we agree with the State that this issue is waived, but for different reasons than those advanced by the State. After filing his motion for new trial, Defendant had a subpoena issued to AOC assistant general counsel to provide testimony and documents at the hearing concerning the denial of his request for expert funding. In response, the State filed a motion to quash the subpoena as to requested communications between assistant general counsel, the AOC Director, the Chief Justice of the Supreme Court, and any representative of the Chief Justice, asserting that any such communications were confidential and privileged. The trial court granted the State's motion in part, ordering assistant general counsel to provide an affidavit setting forth the date the AOC director denied Defendant's expert funding request; the date of defendant's appeal request; the date the appeal was forwarded to the Chief Justice, if submitted; the status of Defendant's appeal on the trial date; and the final disposition of the appeal. The trial court concluded that all other information requested by the subpoena was either privileged or irrelevant. Assistant general counsel filed an affidavit as ordered by the trial court.

The State argues that Defendant has waived this issue because he failed to identify this claim as an issue for review in his appellate brief in the statement of the issues pursuant to Tenn. R. App. P. 27(a)(4). However, this claim is raised as subsection D of Defendant's Issue II in the statement of the issues. The State further argues that this issue is waived because the subpoena issued to assistant general counsel was not included in the record on appeal. While this court granted Defendant's motion to supplement the appellate record with a copy of the subpoena and the notice of denial of funding, only the notice and attachment were included in the record. However, because the trial court's order on this issue quotes the information requested in the subpoena, we find that the record is sufficient for us to review this issue without the subpoena.

In any event, we conclude that this issue waived because, as previously discussed above, Defendant proceeded with the suppression hearing and trial without resolution of

his appeal to the AOC and without the services of an expert. Therefore, assistant general counsel's testimony at the motion for new trial was not relevant. Relief on appeal is typically not available when a party is "responsible for an error" or has "failed to take whatever action was reasonably available to prevent or nullify the harmful effect of any error." *See* Tenn. R. App. P. 36(a). Defendant is not entitled to relief on this issue.

III. Denial of Motion to Suppress

Defendant argues that the trial court abused its discretion in denying his motion to suppress the results of his breath test because the State was required to prove an exception to the warrant requirement since his breath test was too remote in time from his arrest to be considered incident to arrest; the State did not establish that his consent to the "warrantless breath test was unequivocal, specific, intelligently given, and uncontaminated by duress or coercion[;]" and that his inability to consult with counsel prior to administration of the blood test violated due process. The State asserts that the State was not required to obtain a warrant for the breath test, and Defendant never asked to consult with an attorney prior to performing the test.

We review a trial court's ruling on a motion to suppress by affording the prevailing party the "strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from that evidence." *State v. Keith*, 978 S.W.2d 861, 864 (Tenn. 1998); *State v. Martin*, 505 S.W.3d 492, 500 (Tenn. 2016). The trial court's findings of fact in a suppression hearing are upheld unless the evidence preponderates against them. *Martin*, 505 S.W.3d at 500; *Keith*, 978 S.W.2d at 864. The application of the law to the facts found by the trial court is a question of law and is reviewed on appeal de novo. *State v. Clayton*, 535 S.W.3d 829, 846 (Tenn. 2017); *see also State v. Hawkins*, 519 S.W.3d 1, 32-33 (Tenn. 2017); *State v. Willis*, 496 S.W.3d 653, 686 (Tenn. 2016); *State v. Climer*, 400 S.W.3d 537, 556 (Tenn. 2013).

Initially, as pointed out by the State, the officer was not required to obtain a warrant before Defendant performed the breath test. Both the Fourth Amendment to the United States Constitution and article I, section 7 of the Tennessee Constitution protect citizens from unreasonable searches and seizures. U.S. Const. amend. IV; Tenn. Const. art. 1, § 7. It is well established that Article 1, section 7 is identical in intent and purpose to the Fourth Amendment. *State v. Reynolds,* 504 S.W.3d 283, 312–13 (Tenn. 2016); *State v. McCormick*, 494 S.W.3d 673, 683–84 (Tenn. 2016). The United States Supreme Court has concluded "that the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving." *Birchfield v. North Dakota*, 579 U.S. 438, 474 (2016); *see also State v. Henry*, 539 S.W.3d 223, 236 n. 3 (Tenn. Crim. App. 2017) ("However, *Birchfield* makes it clear that if an officer has probable cause to believe that the motorist was driving while impaired, then the officer may simply arrest the motorist for that offense and conduct a breath test pursuant to the search-incident-to-arrest exception to the warrant requirement.").

Defendant contends that the breath test performed in his case was not incident to arrest because there was a significant delay between the time of his arrest and the test, and therefore, the officer was required to obtain a warrant. The record reflects that Defendant was arrested at 6:29 a.m., and he signed the implied consent form at 6:33 a.m. Officer Cochran then transported Defendant from the scene at 6:39 a.m., and they arrived at the KPD Safety Building at 6:49 a.m. Defendant performed the breath test at 7:02 p.m. We find that the delay in this case was not significant. Officer Cochran did not have a mobile breathalyzer in his patrol car and had no way to obtain Defendant's breath sample, other than to transport him to KPD headquarters for the test. This court has held that a proper blood alcohol test, "administered at a reasonable time after the defendant has been driving . . . constitutes circumstantial evidence upon which the trier of fact may, but is not required to convict the defendant of DUI." *State v. Greenwood*, 115 S.W.3d 527, 532-33 (Tenn. Crim. App. 2003). This court has repeatedly refused to set a bright line rule as to what constitutes 'a reasonable time after the defendant has been driving.'" *State v. Ralph*, 347 S.W.3d 710, 716 (Tenn. Crim. App. 2010) (quoting *Greenwood, id*.at 533); *see also, State v. Daniel Blake*, No. W2004-01253-CCA-R3-CD, 2005 WL 1467907 (Tenn. Crim. App. June 21, 2005). In *Ralph*, the 45-minute delay between the time that the defendant left his car and his arrest did not invalidate his breath test and was a consideration for the jury in determining the weight to be given to the test. We conclude that the delay of approximately thirty-three minutes between the time of Defendant's arrest and the testing in this case was not significant, and the officer was not required to obtain a warrant.

Next, Defendant contends that his consent to the breath test was not "constitutionally valid" due to his mental health concerns. He asserts that he felt coerced and that he did not have any choice but to consent to the testing. However, the record does not support Defendant's claims. Officer Cochran testified at the suppression hearing that after Defendant performed poorly on his field sobriety tests, he placed Defendant under arrest and advised him of his *Miranda* rights. He further advised Defendant of the implied consent law, and Defendant signed the implied consent form and agreed to provide a breath sample. The trial court in its order denying Defendant's suppression motion found that Officer Cochran's testimony was credible. Additionally, the trial court specifically found that "[D]efendant was not overwhelmed by the situation, as he stated during his testimony. The court further said:

> The court does not find [Defendant] credible in his testimony that he was so anxious and stressed that he did not think he had any choice but to consent to the field sobriety tests. Nor does the court find [Defendant] credible when he testified that the officers made him feel like he didn't have any rights.

The evidence does not preponderate against the trial court's findings as to this claim. Defendant did not present any proof at the suppression hearing, other than his own

testimony that his consent to the breath test was involuntary due to coercion and his mental health, and the trial court found such testimony not credible. "Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996).

Finally, Defendant argues that his inability to consult with counsel prior to consenting to the breath test violated his right to due process. He acknowledges that our supreme court has addressed this issue and held that "a person arrested without a warrant on a reasonable suspicion of DUI does not have a due process right under the Tennessee Constitution to consult with an attorney before making the decision [to provide a breath test for alcohol levels]." *State v. Frasier*, 914, S.W.2d 467, 471 (Tenn. 1996).

In considering this claim, the trial court found:

> In this case, [Defendant] was advised of his *Miranda* rights. He did not make an unequivocal request for counsel. When told that he had the right to an attorney, he said, "Can I have my attorney here right now?" The officer told him that he couldn't have his attorney at the scene but that he wouldn't ask him any questions if he wanted an attorney. Although, the court finds that this was not an unequivocal request for counsel, but rather an inquiry about the timing of counsel's availability, the officer treated his statement as a request for counsel. More importantly, the defendant in this case consented to provide a breath test after being advised of the implied consent law as outlined in the implied consent form.
>
> The proliferation of cell phones in the last 24 years since *Frasier* was decided and the 24[-]hour availability of counsel, does not change the legal reasoning behind *Frasier*. Nor does the ruling in *Missouri v. McNeely*, 569 U.S. 141 (2013). The dissipation of alcohol in blood is still an issue that creates an exigency for timely testing. The officers did not seize his blood or test his breath without consent. [Defendant], who had been arrested before for DUI, voluntarily consented to take the breath test. He was made aware of the consequences for refusal and made his decision.
>
> This court does not have the authority to overrule the holding by the Tennessee Supreme Court. If the court did have that authority, it would not do so in this case. [Defendant's] due process rights were not offended by the officers' behavior, which were reasonable throughout.

Again, the record does not preponderate against the trial court's findings as to this claim.

> [I]ntermediate courts are not free to depart from the Tennessee Supreme Court's unequivocal holdings. "The Court of Appeals has no authority to overrule or modify Supreme Court's opinions." *Bloodworth v. Stuart*, 221 Tenn. 567, 572, 428 S.W.2d 786, 789 (Tenn. 1968) (citing *City of Memphis v. Overton*, 54 Tenn. App., 419, 392 S.W.2d 86 (Tenn. 1964)); *Barger v. Brock*, 535 S.W.2d 337, 341 (Tenn. 1976). As such, "[o]nce the Tennessee Supreme Court has addressed an issue, its decision regarding that issue is binding on the lower courts." *Morris v. Grusin*, No. W2009-00033-COA-R3-CV, 2009 WL 4931324, at *4 (Tenn. Ct. App. Dec. 22, 2009) (quoting *Davis v. Davis*, No. M2003-02312-COA-R3-CV, 2004 WL 2296507, at *6 (Tenn. Ct. App. Oct. 12, 2004)); *see also Thompson v. State*, 958 S.W.2d 156, 173 (Tenn. Crim. App. 1997) ("[I]t is a controlling principle that inferior courts must abide the orders, decrees and precedents of higher courts. The slightest deviation from this rigid rule would disrupt and destroy the sanctity of the judicial process.") (quoting *State v. Irick*, 906 S.W.2d 440, 443 (Tenn. 1995)); *Levitan v. Banniza*, 34 Tenn. App. 176, 185, 236 S.W.2d 90, 95 (Tenn. Ct. App. 1950) ("This court is bound by the decisions of the Supreme Court.")

O'Dneal v. Baptist Mem'l Hosp.-Tipton, 556 S.W.3d 759, 772-73 (Tenn. Ct. App. 2018).

We conclude that the trial court properly denied Defendant's motion to suppress the results of his breath test. Defendant is not entitled to relief on this issue.

CONCLUSION

After a thorough review, we affirm the judgments of the trial court.

_____

JILL BARTEE AYERS, JUDGE

Appendix B

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

STATE OF TENNESSEE v. LUIS ALEXIS BRICENO

Criminal Court for Knox County
No. 115160

No. E2022-00414-SC-R11-CD

ORDER

Upon consideration of the application for permission to appeal of Luis Alexis Briceno and the record before us, the application is denied.

PER CURIAM

Appendix C

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

STATE OF TENNESSEE v. LUIS ALEXIS BRICENO

Criminal Court for Knox County
No. 115160

No. E2022-00414-SC-RDM-CD

ORDER

The defendant, Luis Alexis Briceno, has filed a motion pursuant to Tennessee Code Annotated section 16-3-201(d)(1) and Tennessee Supreme Court Rule 48 asking this Court to assume jurisdiction over his case currently pending in the Court of Criminal Appeals. Upon due consideration, the Court finds that the motion is not well-taken and is hereby denied. Because the defendant has been declared indigent, costs associated with this motion are taxed to the State.

PER CURIAM