

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER TODD KUIPER,

Defendant-Appellant.

UNPUBLISHED

August 17, 1999

No. 207683

Kent Circuit Court

LC No. 97-004157 FH

Before: Sawyer, P.J., and Holbrook, Jr., and W. E. Collette*, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions of operating a motor vehicle while under the influence of intoxicating liquor or while having a blood alcohol content of 0.10 percent or more, third offense, (OUIL/UBAL-3rd), MCL 257.625; MSA 9.2325, driving with a suspended driver's license, second offense, MCL 257.904(1)(c); MSA 9.2604(1)(c), and resisting and opposing a police officer, MCL 750.479; MSA 28.747. We reverse defendant's OUIL/UBAL-3rd conviction but affirm defendant's other convictions. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was arrested while driving in the City of Wyoming. He was taken to a police station in Wyoming, where the arresting officer advised defendant of his chemical test rights under MCL 257.625a(6)(b); MSA 9.2325(1)(6)(b). Defendant then voluntarily submitted to a breathalyzer test. The two samples taken indicated a blood alcohol content of 0.16 percent. A subsequent breathalyzer test performed by the same officer on the same machine indicated a blood alcohol level of 0.15 percent. Defendant's request to be taken to a hospital for a blood test was denied.

The issue on appeal concerns whether defendant was properly provided "a reasonable opportunity" to have an independent chemical test administered by "a person of his . . . own choosing." MCL 257.625a(6)(d); MSA 9.2325(1)(6)(d).¹ Here, the trial court reasoned that defendant's initial request for a blood test was unreasonable because defendant had asked to go to a hospital located approximately fifty miles away in the City of Kalamazoo. The trial court further reasoned that the police

* Circuit judge, sitting on the Court of Appeals by assignment.

did not have to honor defendant's subsequent request for a blood test at a hospital in Grand Rapids because that request was made after defendant had already accepted the arresting officer's offer to administer a second breathalyzer test at the police station. According to the trial court, once the police administered the second breathalyzer test, they had no obligation to allow any further testing.

On appeal, defendant contends that the second police-administered breathalyzer test did not diminish his right to an independent chemical test. We agree. We review the trial court's decision on this issue for clear error. *People v Prelesnik*, 219 Mich App 173, 178; 555 NW2d 505 (1996). The purpose of affording an accused a reasonable opportunity to obtain an independent chemical test by a person of his or her own choosing is to ensure that scientific blood alcohol content evidence is not at the sole disposal of the prosecution. *Prelesnik, supra* at 180. Simply performing an additional police-administered breathalyzer test leaves the gathering of scientific evidence at the disposal of the defendant's adversary. Moreover, since no changes in testing methods, equipment, or personnel are involved, such repeat testing by the police is not likely to provide the accused with the kind of evidence that could be useful for assessing the reliability of the prosecution's scientific evidence.

The remedy for this type of interference with a defendant's chemical test rights is dismissal of the drunken driving charges in question. See, e.g., *People v Underwood*, 153 Mich App 598, 599: 396 NW2d 443 (1986). Accordingly, defendant's OUIL/UBAL-3rd conviction is reversed, but defendant's other convictions in this case are affirmed. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Donald E. Holbrook, Jr.

/s/ William E. Collette

¹ Defendant does not challenge on appeal his convictions of driving with a suspended driver's license or resisting and obstructing a police officer.