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State v. Diaz Respondent's Brief Dckt. 43870

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	No. 43870
Plaintiff-Respondent,)	
)	Ada County Case No.
v.)	CR-2015-7608
)	
AMANDA LUCY BELLE DIAZ,)	
)	
Defendant-Appellant.)	
)	
)	
)	

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA**

**HONORABLE DEBORAH A. BAIL
District Judge**

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STATEMENT OF THE CASE

Nature Of The Case

Amanda Lucy Belle Diaz appeals from the judgment entered upon her conviction for felony driving under the influence. For the first time on appeal, Diaz complains that an officer impermissibly commented on her exercise of her Fourth Amendment right against unreasonable searches and seizures by explaining that Diaz opted for a urinalysis rather than a blood draw, and a different officer impermissibly opined that, based on his drug evaluation of Diaz, he concluded she was driving under the influence of several narcotics.

Statement Of Facts And Course Of Proceedings

Corporal Terry Hodges initiated a traffic stop on Diaz's vehicle after someone reported that she may have been driving under the influence. (Trial Tr., p.158, L.23 – p.161, L.12.) When Corporal Hodges made contact with Diaz, Diaz admitted she was "currently suspended." (Trial Tr., p.162, Ls.5-9.) Diaz was also behaving "very erratic[ally]." (Trial Tr., p.162, Ls.10-21.) Officer Dustin Moe arrived on scene shortly after the stop was initiated. (Trial Tr., p.162, L.22 – p.163, L.5.) Officer Moe "took over the traffic stop" "at that point" based on Corporal Hodges' belief that Diaz was under the influence. (Trial Tr., p.163, Ls.17-22.) Officer Moe performed field sobriety tests on Diaz, which indicated Diaz was impaired, but not by alcohol. (Trial Tr., p.179, L.1 – p.195, L.21.) As a result, Officer Moe arrested Diaz for "suspicion of DUI." (Trial Tr., p.195, Ls.18-21.)

After a breath alcohol test confirmed Diaz was not under the influence of alcohol, Officer Moe determined a drug recognition evaluation (“DRE”) was needed. (Trial Tr., p.196, L.10 – p.198, L.5.) Officer Morgan Carter conducted the DRE. (Trial Tr., p.198, Ls.10-23.) The results of the DRE indicated Diaz was under the influence of “CNS depressants, CNS stimulants, and narcotic analgesics.” (Trial Tr., p.276, L.14 – p.277, L.5.) A subsequent urinalysis confirmed the presence of methamphetamines, opiates, amphetamines, Methadone and Oxycodone in Diaz’s system. (Trial Tr., p.337, L.7 – p.338, L.20; Exhibit 3.)

The state charged Diaz with felony driving under the influence and misdemeanor driving without privileges. (R., pp.6-7, 14-15, 19, 29-30.) The state also alleged Diaz is a persistent violator.¹ (R., pp.52-53.) The jury found Diaz guilty of driving under the influence and driving without privileges, and Diaz admitted the felony enhancement for driving under the influence, and admitted the persistent violator enhancement. (R., pp.123-124; Trial Tr., p.394, L.19 – p.400, L.15.) The court imposed a unified 15-year sentence, with three years fixed, for felony driving under the influence, but retained jurisdiction.² (R., pp.125-127.) Diaz timely appealed. (R., pp.130-132.)

¹ Diaz was on probation at the time she was arrested in this case. (See R., p.57.)

² The court imposed a concurrent 90-day jail sentence for driving without privileges. (R., p.126.)

ISSUE

Diaz states the issue on appeal as:

Whether Officer Moe and Officer Carter offered improper testimony which constitutes prosecutorial misconduct?

(Appellant's Brief, p.6.)

The state rephrases the issue as:

Has Diaz failed to carry her burden of showing fundamental error with respect to her unpreserved claims that her rights were violated when an officer testified that Diaz opted for a urinalysis instead of a blood draw, and another officer testified that, based on a drug recognition evaluation, he concluded Diaz was driving under the influence of several narcotics?

ARGUMENT

Diaz Has Failed To Show Fundamental Error With Respect To Her Unpreserved Claims Of Prosecutorial Misconduct

A. Introduction

At trial, Officer Moe testified, “There was discussion of whether she would submit to a blood draw having Meridian Fire and Paramedics come take a blood sample from her. She did not consent to that, but did agree to provide a sample at the jail.” (Trial Tr., p.201, Ls.11-18.) For the first time on appeal, Diaz argues the prosecutor committed misconduct by eliciting this testimony from Officer Moe, claiming the testimony “was a gratuitous and prejudicial comment on [her] decision to exercise her Fourth Amendment rights.” (Appellant’s Brief, p.8 (footnote omitted).)

Officer Carter also testified at trial. His testimony included his opinion that Diaz was driving under the influence of several narcotics. (Trial Tr., p.276, L.21 – p.277, L.5.) For the first time on appeal, Diaz contends this testimony exceeded the scope of what is a permissible expert opinion. (Appellant’s Brief, pp.11-14.)

Diaz’s arguments fail. Application of the law to the facts of this case shows Diaz has failed to carry her burden of establishing any error, much less fundamental error, entitling her to reversal of her conviction.

B. Standard Of Review

A claim of error unpreserved for appellate review by a timely objection may only be considered on appeal if it “constitutes fundamental error.” State v.

Johnson, 149 Idaho 259, 265, 233 P.3d 190, 196 (Ct. App. 2010). In the absence of an objection “the appellate court’s authority to remedy that error is strictly circumscribed to cases where the error results in the defendant being deprived of his or her Fourteenth Amendment due process right to a fair trial in a fair tribunal.” State v. Perry, 150 Idaho 209, 224, 245 P.3d 961, 976 (2010). Review without objection will not lie unless (1) the defendant demonstrates that “one or more of the defendant’s unwaived constitutional rights were violated”; (2) the constitutional error is “clear or obvious” on the record, “without the need for any additional information” including information “as to whether the failure to object was a tactical decision”; and (3) the “defendant must demonstrate that the error affected the defendant’s substantial rights,” generally by showing a reasonable probability that the error “affected the outcome of the trial court proceedings.” Id. at 226, 245 P.3d at 978.

C. Diaz Has Failed To Carry Her Burden Of Demonstrating Fundamental Error In Relation To Her Unpreserved Claims Of Prosecutorial Misconduct

1. Officer Moe’s Unobjected-to Testimony That Diaz Opted For A Urinalysis Instead Of A Blood Draw Did Not Violate Any Of Diaz’s Constitutional Rights

During the direct examination of Officer Moe, the prosecutor asked whether, as part of the DRE, there is “an attempt to get some sort of fluid sample for testing.” (Trial Tr., p.200, Ls.16-21.) Officer Moe answered, “Yes, either a urine sample or a blood sample,” and explained that, “[w]ithin the City of Meridian, more often than not, [they] try to collect a urine sample.” (Trial Tr., p.200, Ls.22-24.) Officer Moe further testified that, because Diaz is female, a

male officer could not collect a urine sample from her, and there was no female officer available at the time. (Trial Tr., p.200, L.25 – p.201, L.10.) The prosecutor then asked if there was “further discussion with Ms. Diaz about things at that point,” and Officer Moe responded: “There was. There was discussion of whether she would submit to a blood draw having Meridian Fire and Paramedics come take a blood sample from her. She did not consent to that, but did agree to provide a sample at the jail.” (Trial Tr., p.201, Ls.11-18.)

Unsurprisingly, Diaz did not object to the foregoing testimony. (See Trial Tr., p.201.) Nevertheless, Diaz claims on appeal that Officer Moe’s testimony was fundamental error because, she argues, it was an impermissible comment on her invocation of her Fourth Amendment rights. (Appellant’s Brief, p.8.) This argument is without merit and fails on all three prongs of the fundamental error test.

Diaz contends Officer Moe’s “comment about [her] refusal to submit to a blood draw was a gratuitous and prejudicial comment on [her] decision to exercise her Fourth Amendment rights,” and, “[t]herefore,” she claims, she has demonstrated a clear violation of an “unwaived constitutional right[].” (Appellant’s Brief, p.8 (footnote omitted).) Diaz’s argument ignores the reality that she, in fact, waived the constitutional right she claims was violated. That Diaz waived her Fourth Amendment rights is apparent from the entirety of Officer Moe’s statement, which was that Diaz opted for a urine sample as opposed to a blood draw. (Trial Tr., p.201, Ls.14-18.) Diaz cannot demonstrate constitutional error by ignoring the context of the statement she challenges. What is clear in

the record is that Diaz waived her Fourth Amendment rights in relation to the testing performed. Her argument that the opposite is true fails.

Diaz has also failed to meet her burden under the third prong of the fundamental error test. Under prong three, Diaz must “demonstrate that the error affected [her] substantial rights” by showing a reasonable probability that the error “affected the outcome of the trial court proceedings.” Perry, 150 Idaho at 226, 245 P.3d at 978. Diaz claims “[t]here was such a possibility in this case.” (Appellant’s Brief, p.9.) In support of this argument, Diaz first asserts that “[t]he only purpose Officer Moe’s improper testimony could serve was to infer a consciousness of guilt” because the jury “had already heard [she] had consented to take a breathalyzer, which had come back negative,” and “had heard that she had also agreed to provide a urine sample.” (Appellant’s Brief, p.9.) Diaz then reasons:

[W]ith Officer Moe’s improper comment, the jury now heard that, despite her cooperation and her trying to show her innocence on those other tests, Ms. Diaz nevertheless refused to submit to a blood draw. Thus, the jurors could have inferred she did not want officers to test her blood because it would show she was presently under the influence of some drug.

(Appellant’s Brief, p.9.) Setting aside the argument that Diaz was “trying to show her innocence,” as opposed to complying with her Fourth Amendment probation waiver (see R., p.57), Diaz’s argument again ignores the actual context of Officer Moe’s testimony, which was that Diaz elected to provide a urine sample at the jail, rather than a blood sample to Meridian Fire and Paramedics. There was no implication, or inference that could be drawn, that Diaz did not want to subject

herself to testing “because it would show she was presently under the influence of some drug,” because she, in fact, subjected herself to testing.

Diaz attempts to bolster her argument on the third prong, by contending that the alleged “infer[ence]” of “consciousness of guilt” “is important because the State’s case otherwise hinged on the DRE and the hospital test results showing she was impaired” even though, she claims, “there were serious questions as to whether either of those evaluations actually showed that.” (Appellant’s Brief, p.9.) This argument fails. Diaz failed the DRE, and the lab results confirmed why she did. This evidence, coupled with the reported driving pattern, the officers’ observations of Diaz’s erratic behavior, the fact that Diaz passed out while in the patrol car after she was arrested (Trial Tr., p.203, L.21 – p.204, L.12), and Diaz’s own statements to law enforcement about the medications that were prescribed to her (Trial Tr., p.175, L.25 – p.177, L.5), easily defeat any claim by Diaz that the jury would not have convicted her of driving under the influence absent some speculative inference that she demonstrated “consciousness of guilt” by agreeing to a urinalysis instead of a blood draw.

Diaz has failed to carry her burden of establishing fundamental error in relation to Officer Moe’s testimony because, contrary to Diaz’s assertions, the complained of testimony did not clearly violate her constitutional rights, nor is there any reasonable probability that it affected the outcome of the trial. See Perry, 150 Idaho at 226, 245 P.3d at 978.

2. Officer Carter's Unobjected-to Testimony That It Was His Opinion That Diaz Was Impaired On CNS Depressants, CNS Stimulants, And Narcotic Analgesics While Diaz Was Driving Did Not Violate Any Of Diaz's Constitutional Rights

Officer Carter, who performed the DRE on Diaz, testified, in relevant part:

. . . I came to the determination that [Diaz] was impaired while she operating that vehicle. And just under the DRE status is a drug defined as any substance that when taken into the human body can impair the ability of a person who can operate a vehicle safely. You know, I felt operating the vehicle at that time at [sic] the stop, she was impaired. I came to the conclusion she was impaired on CNS depressants, CNS stimulants and narcotic analgesics.

(Trial Tr., p.276, L.21 – p.277, L.5.)

Diaz claims, for the first time on appeal, that the foregoing testimony was fundamental error. (Appellant's Brief, pp.11-15.) More specifically, Diaz argues that, although "an expert can, based on his observations of a person's performance on tests such as those given during a DRE, give an opinion that the person was under the influence of drugs," he cannot offer an opinion that the person was impaired while driving. (Appellant's Brief, p.11.) In short, Diaz claims Officer Carter offered improper "opinion testimony" by opining that Diaz was impaired while driving, as opposed to opining that Diaz was impaired after driving. (Appellant's Brief, p.12.) This argument is necessarily based on the permissible scope of opinion testimony under the Idaho Rules of Evidence. (See I.R.E. 702.) Because Diaz's claim is based on an alleged violation of the Idaho Rules of Evidence, she cannot satisfy the requirements of showing fundamental error due to a violation of an unwaived constitutional right. State v. Norton, 151 Idaho 176, 182, 254 P.3d 77, 83 (Ct. App. 2011) ("This Court will not entertain attempts to characterize alleged evidentiary errors, to which no

objection was made at trial, as a due process violation of the right to a fair trial in a fair tribunal.”).

Even if Diaz could properly characterize her complaint about Officer Carter’s testimony as one of constitutional magnitude, compare State v. Ellington, 151 Idaho 53, 66-67, 253 P.3d 727, 740-741 (2011),³ Diaz has not met her burden of showing the failure to object was not a tactical decision, or her burden of showing a reasonable probability that the alleged error “affected the outcome of the trial court proceedings.” Perry, 150 Idaho at 226, 245 P.3d at 978. This is true for the same reasons Diaz has not met her burden of showing prejudice with respect to Officer Moe’s challenged testimony. Specifically, regardless of Officer Carter’s opinion that Diaz was driving while under the influence, Diaz concedes Officer Carter could testify to his opinion that Diaz was “impaired on CNS depressants, CNS stimulants and narcotic analgesics” after she was arrested on suspicion of driving under the influence (Appellant’s Brief, p.11), and Officer Moe had already testified that he arrested Diaz “for suspicion of DUI” (Trial Tr., p.195, Ls.18-20). This testimony in conjunction with the evidence of Diaz’s driving pattern, her erratic behavior, the fact that Diaz passed out while in the patrol car after she was arrested, the lab results showing the presence of several drugs in Diaz’s system, and Diaz’s own statements to law enforcement about the medications that were prescribed to her (Trial Tr., p.175,

³ In Ellington, the Court concluded that an officer’s testimony that the defendant acted intentionally was inadmissible under I.R.E. 702. 151 Idaho at 65-66, 253 P.3d at 739-740. The Court further stated that, if the challenge to the officer’s testimony would have been raised as a claim of prosecutorial misconduct, it would have found the “conduct was improper.” Id. at 67, 253 P.3d at 741.

L.25 – p.177, L.5), support the conclusion that there is no reasonable probability of a different verdict in this case. Diaz has failed to carry her burden of establishing fundamental error in relation to Officer Carter’s testimony.

CONCLUSION

The state respectfully requests that this Court affirm the judgment entered upon Diaz’s convictions for driving without privileges and felony driving under the influence.

DATED this 8th day of May, 2017.

/s/ Jessica M. Lorello
JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 8th day of May, 2017, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

BRIAN R. DICKSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Jessica M. Lorello
JESSICA M. LORELLO
Deputy Attorney General

JML/dd

