

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff/Appellee,

v
DAVID J. SEGER,
Defendant/Appellant.

File No. 94-2841-AR
HONORABLE THOMAS G. POWER

Charles H. Koop (P27290)
Attorney for Plaintiff/Appellee

Stephen B. Graham (P14261)
Attorney for Defendant/Appellant

DECISION AND ORDER

This matter comes before the Court on appeal from the Antrim County District Court. The parties have filed briefs and on October 10, 1994, the Appellant had oral argument with both counsel responding to questions from the bench. The Appellant was given fourteen days in which to file a response to Appellee's brief. Appellant's response has now been received and reviewed.

The Defendant was arrested on or about July 31, 1993 in the Village of Mancelona and was charged with Operating a Motor Vehicle Under the Influence of Liquor (OUIL) or Operating a Motor Vehicle while Having a Blood Alcohol Content in Excess of .10% (UBAL). He was arrested on suspicion of drunk driving by two officers, Roderick L. Vesey and Reserve Officer Kate Hughey. Officer Vesey, unaccompanied by other officers, administered two breath tests to the Appellant, one test at 3:43 a.m. and the other at 3:57 a.m. Both tests indicated a blood alcohol content of .11%. The case was tried to a jury in February, 1994. Both Appellant's brief and Appellee's brief indicate the Defendant was convicted of Operating a Motor Vehicle with an Unlawful Blood Alcohol level. Appellant's brief at p 1, and Appellee's brief at p 9.

The Defendant appeals raising two issues: First, that the People failed to establish a sufficient and proper observation by Officer Vesey of the Appellant prior to administering the breath tests so that the test results should not have been submitted to the jury. Second, that the trial judge gave an instruction, sue sponte and without disclosing it to the attorneys prior to the instruction being given, that the jury should not attach any significance to the fact that Officer Hughey was not produced as a

witness at the trial.

Administrative rules govern the administration of breath alcohol tests. R325.2655. *People v Willis*, 180 Mich App 31 (1989) holds that this rule must be complied with in the administration of a breath alcohol test if the results are to be admitted into evidence. R325.2655(1)(e) states:

(e) A person may be administered a breath alcohol analysis on an evidential breath alcohol test instrument only after being observed for 15 minutes by the operator before collection of the breath sample, during which period the person shall not have smoked, regurgitated, or placed anything in his or her mouth, except for the mouthpiece associated with the performance of the test. (Emphasis added).

The first breath test was administered at 3:43 a.m. The testimony indicated that Officer Vesey, who was the only officer present during the administration of the breath test, read the Defendant his chemical test rights commencing at 3:28 a.m., finishing that task at 3:30 a.m., and received permission from the Appellant to administer the test at 3:33 a.m. Ten minutes later, the test was administered. During that time Officer Vesey made the breath test instrument ready to administer the test. Throughout this time, Officer Vesey was in the same room with the Defendant and was intermittently or sporadically viewing him. The issue is whether such intermittent or sporadic viewing, while accomplishing other tasks in the immediate presence of the Defendant, constitutes observation for purposes of the quoted rule.

The Court has not found, and neither party's brief points to, any authority on what exactly is meant by the word "observe" in Rule 5(1)(e). By examining the wording of Rule 5(1)(e), however, we can get some idea of what is meant by "observe." During that 15-minute period, "the person shall not have smoked, regurgitated, or placed anything in his or her mouth, except for the mouthpiece associated with the performance of the test." That indicates the purpose of the observation is to assure that the person taking the test has not "smoked, regurgitated, or placed anything in his or her mouth."

Like all preliminary questions concerning the admissibility of evidence, the question of whether Officer Vesey's contact with the

Appellant during the 15 minutes prior to the 3:43 a.m. test was adequate observation to detect whether the person smoked, regurgitated or placed anything in his or her mouth is left to the Court. MRE 104(A). Judge Morse admitted the breath test results stating:

"The intensity of the observation certainly is something that the jury will want to consider. However, *People v Willis*, does not require fifteen minute uninterrupted eye contact, only observation. The jury has heard the testimony. I do not find that it is such that the foundation for a fifteen minute observation has not been met and therefore, I overrule the objection." Trial Transcript, vol II, P 34.

This Court agrees that uninterrupted eye contact with the Defendant for 15 minutes prior to administering the test is not required by the administrative rule or the *Willis* case. Whether the officers' contact with the Defendant is adequate observation to detect smoking, regurgitation or placing anything in the suspect's mouth is a fact question to be determined by the trial court. This Court's review of the transcript of Officer Vesey's testimony about the giving of the breath tests to the Appellant, at pp 25-35, vol II of the Trial Transcript, convinces this Court that Judge Morse's conclusion and ruling on this point was correct.

As to the breath test administered at 3:57 a.m., that was only 14 minutes after the 3:43 a.m. breath test. However, the Appellant was under observation by Officer Vesey before and during the 3:43 a.m. breath test, and it is proposed that that period can be "tacked" to the 14 minutes from 3:43 a.m. to 3:57 a.m. Absent any authority indicating that this cannot be done, the Court sees no reason why this observation cannot "count" toward the 15 minutes of observation required by Rule 5(1)(e). The results of the 3:57 a.m. breath test were properly admitted by the trial court.

Defendant also objects to a jury instruction given by the trial court on its own initiative and without advising counsel of the instruction prior to its being given.

At the trial, Reserve Officer Hughey was not produced to testify. In closing argument, Defendant's attorney argued that the jury should hold Officer Hughey's absence against the prosecution in deciding whether the People had carried their burden of proof.

The Court gave the following instruction:

The prosecutor had no duty to produce Officer Hughey. You should attach no significance to the fact that that officer was not produced at trial.

While the parties have submitted arguments as to the correctness and propriety of this jury instruction, this Court fails to see how the instruction affected Defendant adversely. Officer Hughey's testimony would have described the Defendant's conduct before and during apprehension at the scene. She was not present during the administration of the breath tests. Consequently, her testimony could only have applied to the question of whether the Defendant was or was not under the influence of liquor when he was operating a motor vehicle. Her testimony could not assist in determining whether the Defendant was operating with an unlawful blood alcohol level, a fact which the jury found was established by the two alcohol breath tests which were admitted into evidence and were discussed earlier. The Defendant was not convicted of operating a motor vehicle under the influence of liquor. Giving the instruction about the significance of Officer Hughey's absence from the trial, in response to defense counsel's closing argument that Officer Hughey could have been there to testify about the Defendant's demeanor, conduct and driving, could not have affected the result of the trial because the Defendant was never convicted of driving under the influence. Since the instruction had no effect on the outcome, it would be harmless error, if it was error at all.

The Appellant's conviction is affirmed.

IT IS SO ORDERED.

HONORABLE THOMAS G. POWER
Circuit Court Judge
Dated: 10/25/94