STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff/Appellee,

vs

File No. 89-5343-AR
HON. PHILIP E. RODGERS, JR.

JAMES ARTHUR FORREST,
Defendant/Appellant;

James L. Pappas (P42269)
Attorney for Plaintiff/Appellee

James M. Hunt (P24243)
Attorney for Defendant/Appellant

DECISION AND ORDER

Defendant/Appellant (Defendant) submits an Appeal from the District Court's January 17, 1989 denial of the Motion to Quash or Dismiss the Charge. This case has its origin in a complaint which was filed by employees of Dawn Donuts alleging Defendant was intoxicated and sleeping in his car in the parking lot. While other complaints had been made previously, the Defendant left before the police arrived. This incident occurred, then, during the late night hours of September 15, 1988. The State Police were called to the scene where they observed Defendant asleep behind the wheel with the engine off and the keys out of the ignition. The officers did not observe Defendant driving the vehicle. Accordingly, they contacted the prosecuting attorney for advice. Following that conversation, the Defendant was not immediately arrested. Instead, the Defendant was driven back to his hotel. Neither field sobriety tests nor chemical tests were administered to the Defendant. A warrant was issued four days later on September 19, 1988.

Defendant was subsequently tried on the charge resulting in a hung jury. Prior to the second jury trial, the court accepted the prosecution's motion to add the offense of impaired second and the second jury trial was set.

Defendant requested a copy of the transcript from the first trial. Counsel was informed that the tape of the proceedings was not available. The trial court denied Defendant's motion to dismiss. Defendant then plead guilty to driving while visibly impaired-first offense, reserving certain issues for appeal.

The issues on appeal are whether the trial court erred by denying the motion to dismiss due to arrest procedures that precluded the Defendant from obtaining exculpatory evidence, the unavailability of the trial transcript or by allowing the People to add the count of impaired second subsequent to the pretrial conference. The People assert that the actions of the trial court do not amount to reversible error or an abuse of discretion. The Court has reviewed the briefs submitted by the parties together with the hearing transcript on the motion to dismiss in making its determination on Defendant's appeal. For reasons that will be set forth ahead, the appeal is denied.

The first issue concerns the unavailability of blood alcohol test results occasioned by the four-day delay in Defendant's arrest. Defendant asserts the trial court erred by not dismissing the action due to the lack of chemical evidence and the failure to notify the Defendant of his chemical rights. Defendant maintains he is entitled to chemical testing under the statute for the purpose of preserving the evidence to be used later in his defense. However, neither the statutory language nor appellate precedent support the Defendant's assertion on these facts.

Under the statute, Defendant has a right to independent testing only after the officer requests a PBT. In, People v Einset, 158 Mich App 608, 612; 405 NW2d 123 (1987), the Court addressed the conditional nature of the right to an independent test under MCLA 257.625;a(5); MSA 9.2325(1)(5) as one of first impression. In construing the legislature's intent, the Court wrote as follows:

"The second sentence of subsection 5 provides that an accused entitled to obtain an independent test is one who takes a chemical test administered at the request of a police officer'. This language therefore makes the right to an independent test contingent upon submitting to the test requested by the officers."

See also, Broadwell v Secretary of State, 158 Mich App 681, 686; 405 NW2d 120 (1987); People v Dewey, 172 Mich App 367, 373; 431 NW2d 517 (1988) and People ex rel Scodeller v Clem 47 Mich App 517, 521; 209 NW2d 689 (1973).

While it is agreed that the police officers did not personally observe Defendant driving into or out of the parking lot in an intoxicated condition or under the influence of alcohol, the officers had reasonable cause to believe defendant had consumed

alcohol in a quantity sufficient to impair his ability to operate a motor vehicle, MCLA 257.625; MSA 9.2325, and that he had driven the car to its present location.

The officers, then, were within their statutory authority to preserve evidence and request field sobriety tests and a preliminary breath test (PBT), when they found defendant "in a serious state of intoxication" behind the wheel of his parked vehicle. [motion transcript p 14 ln 1-3]. The officers did not administer field sobriety tests or a preliminary breath test upon finding that Defendant's speech was "unintelligible" and that he "could hardly walk" [transcript p 14 ln 1-3]. Defendant, then, was neither advised of nor afforded the opportunity to exercise his chemical rights.

The officers, choosing to rely upon their limited personal observations as the only evidence of intoxication, then informed Defendant someone would have to drive him home or that he would have to sleep in the car, and that a warrant would be issued for his arrest. [transcript p 3 ln 24 through p 4 ln 12]. One may be arrested for and convicted of an alcohol related driving offense where the evidence of intoxication does not include either field sobriety tests or breathalyzer results. However, police officers and prosecuting attorneys rarely fail to pursue such evidence. The investigation and arrest procedure employed in this case was unusual and apparently occasioned by the circumstances in which Defendant was discovered. Although unusual, the procedure was not improper or illegal. The burden of persuasion lies with the People. If they choose to pursue a conviction without chemical evidence, then nothing in the current statutory scheme requires independent notification to the Defendant of chemical rights and due process has not been violated.

A review of the record indicates the presence of sufficient evidence and facts to support Defendant's arrest and plea-based conviction for impaired driving. See, e.g., People v Schinella, 160 Mich App 213; 407 NW2d 621 (1987); People v Pomeroy (Rehearing), 419 Mich 441; 355 NW2d 98 (1984) and People v Fulcher (Rehearing), 419 Mich 441; 355 NW2d 98 (1984). No relief may be afforded to Defendant on this issue.

The next issue on appeal is whether the trial court erred in denying Defendant's motion to dismiss based upon the unavailability of the transcript from the first trial. Defendant asserts he was denied meaningful information that would assess the likelihood of success at the second trial and that such a denial is a violation

of his right to procedural due process. Defendant concedes that the actions of the court reporter were not intentional and that the loss of the tape was the result of inadvertence.

The loss of the first trial transcript was not an intentional act done in bad faith or the result of improper conduct. The inadvertent loss of the trial transcript did not deny defendant due process of law. People v Tate, 134 Mich App 682; 352 NW2d 297 (1984). See also, People v Oliver, 111 Mich App 734; 314 NW2d 740 (1981). There being no violation of procedural due process, this aspect of Defendant's appeal is denied.

The last issue is whether there was error in permitting the prosecution to add a count of impaired second subsequent to the t~me of the pretrial conference. The amendment at issue is based upon Defendant's previous impaired driving conviction in 1983. For Defendant to establish a due process violation, the "defendant must affirmatively prove actual vindictiveness" on the part of the prosecution in adding the second count. United States v Goodwin, 457 US 368; 102 S Ct 2485; 73 L Ed 2d 74 (1982). Defendant has not shown such vindictiveness. Defendant's due process rights were not violated by the additional count of impaired second. The Defendant's appeal is denied. The decision of the trial court is affirmed.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge
Dated: 8/26/92