Affirmed and Majority and Concurring Opinions filed September 16, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-97-01278-CR

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BROOKS BRAZDA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 2
Harris County, Texas
Trial Court Cause No. 97-25062

M A J O R I T Y O P I N I O N

Brooks Brazda appeals his conviction by a jury for misdemeanor driving while intoxicated (DWI). The trial court assessed his punishment at 30 days confinement in the county jail, probated for one year, and a $500.00 fine. In a single point of error, appellant contends that the trial court abused its discretion by allowing a police officer to testify as to appellant's alcohol tolerance as a reason for passing a field sobriety test. We affirm.

On June 13, 1997, Officer Follis (Follis) stopped appellant for speeding and running a red light. Officer Follis approached appellant's vehicle and smelled a strong odor of alcohol

coming from the vehicle. Thinking appellant might be intoxicated, Officer Follis signaled for Sergeant Morton (Morton) to come to the scene to assist. Sergeant Morton was a member of the DWI task force, with certification in standard field sobriety tests for drug and alcohol identification. Morton was also an intoxilyzer operator and an instructor at the DWI school.

Morton smelled alcohol on appellant and noticed that his speech was slurred. Morton administered field sobriety tests to determine if appellant was intoxicated. Morton administered the HGN (horizontal gaze nystagmus) test, the Rhomberg test (tilting head backwards for thirty seconds, then observe if subject sways), the "walk and turn" test (walking nine steps on a straight line, heel-to-toe; then turn and walk nine steps on the line, heel-to-toe), and the "one leg stand" test (with arms at side, subject stands on both feet, then lifts one foot of the ground six inches for thirty seconds). Appellant failed all the tests except the "one leg stand" test. Appellant was taken to the central station where he refused to take a breath test.

In his sole point of error, appellant contends the trial court abused its discretion in admitting, over objection, Morton's testimony concerning alcohol tolerance as a reason for passing the "one leg stand" test. Appellant argues that the testimony about alcohol tolerance was speculation and that it did not aid the jury in understanding a fact in issue.

After Morton testified as to the manner of giving the field sobriety tests, and appellant's performance on them, the State asked Morton if he had an opinion as to why people can fail the HGN test and pass the "one leg stand" test. Appellant's counsel objected that such an answer would be "irrelevant with regard to other people," and the trial court overruled the objection. The objectionable portions of the question/answer exchange between Morton and trial counsels are, in pertinent part:

> STATE: With regard to observing people who got six clues on the HGN test and no clues on another test, have you come to an opinion about why those people or have you been able to reconcile those two results?

MORTON: Yes. And we learned about this in our training, especially in the drug expert school. We go heavily into what's called tolerance. It's a person's ability to build up a tolerance to a certain drug that they've been taking over a length of time.

* * * * * * * * * *

STATE: When you say you can develop a tolerance in what you've noted based on your experience, your training in school, are people able to develop a tolerance mentally and physically?

MORTON: No. Tolerance only deals with the physical aspects of a person's ability to be able to perform these tests. You cannot build what's called mental tolerance.

STATE: And why is that?

MORTON: Well, your judgment is going to be just as impaired whether you consume that portion – that amount of alcohol or any other substance all the time or not. It's still going to affect your judgment and your mental faculties just the same. Physically, you might be able to mask some of that, you might be able to physically be able to compensate for that because you're used to that dose.

STATE: Sergeant Morton, how did you reconcile the results with regard to this defendant, the fact that he got six clues on the HGN, he performed very poorly on the Rhomberg, yet he was able to do the one leg stand?

APPELLANT'S COUNSEL: Your Honor, I object to that question and the answer because it is speculation, it implies that this officer knows something of the defendant and he doesn't.

THE COURT: Overruled. You can answer that question.

> MORTON: Based upon the amount of alcohol the defendant had built a tolerance to the amount that he had consumed.

Morton stated that appellant was intoxicated, and he believed that "he lost the normal use of both his mental and physical faculties."

Rule 702, Texas Rules of Evidence, provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

TEX. R. EVID. 702.

Under rule 702, the trial court, before admitting expert testimony, must be satisfied that three conditions are met: (1) that the witness qualifies as an expert by reason of his knowledge, skill, experience training, or education; (2) that the subject matter of the testimony is an appropriate one for expert testimony; and (3) that admitting the expert testimony will actually assist the factfinder in deciding the case. *Alvarado v. State*, 912 S.W.2d 199, 215-16 (Tex.Crim.App. 1995). The trial court's decision may not be disturbed on appeal absent an abuse of discretion. *Id.*

Sergeant Morton had extensive training and experience in DWI cases. His qualifications were: (1) he was certified to administer field sobriety tests, after attending a forty-hour school; (2) he was a certified intoxilyzer operator; (3) he attended drug recognition and identification school; (4) he was an instructor for drug recognition and identification school, and the DWI school; and (5) he had personally investigated "thousands" of DWI cases.

Appellant argues that Morton's stating appellant was alcohol tolerant was the same as stating appellant had a blood-alcohol concentration (BAC) of at least 0.10. Appellant asserts

that a "false correlation was thereby created for the sole purpose of misleading the jury into discounting the validity of the field sobriety tests and rely instead upon the subjective HGN and one officer's opinion." Appellant cites *Emerson v. State,* 880 S.W.2d 759, 769 (Tex.Crim.App.1994) as authority for this proposition. On this point, *Emerson* held: "[A] witness qualified as an expert on the administration and technique of the HGN test may testify concerning a defendant's performance on the HGN test, but may not correlate the defendant's performance on the HGN test to a precise BAC." *Id.* We fail to see how Morton's testimony in anyway suggested that appellant had a BAC of .10, but didn't show it because of his tolerance level. *Emerson* does not apply here.

In order to prove a person is intoxicated within the meaning of the law, the State had to prove that appellant did not have the normal use of his physical or mental faculties by reason of the introduction of alcohol. TEX. PEN. CODE ANN. § 49.01(2)(A) (Vernon 1994 & Supp. 1999). Morton stated that three of the tests proved appellant was intoxicated, and passing the one leg stand did not disprove this fact. Morton stated part of his training was recognizing that alcohol tolerant persons may pass some part of the physical field sobriety tests. We find that Morton's statement concerning appellant's alcohol tolerance was merely an opinion, and it was relevant to show that appellant did not have the normal use of his physical and mental faculties. *See Fernandez v. State,* 915 S.W.2d 572, 576-77 (Tex.App.–San Antonio 1996, no pet.) (expert testimony that a person is impaired at an alcohol concentration of .08 or more, was only an opinion that a person loses use of their mental and physical faculties at an alcohol concentration of .08 and above); *Adams v. State,* 808 S.W.2d 250, 252 (Tex.App.–Houston[1st Dist.] 1991, no pet.) (chemist's testimony that anyone with a BAC of .08 or more was intoxicated did not implicate the legal presumption of intoxication of .10, but the testimony was relevant to show that appellant did not have the normal use of his faculties).

In summation, we find that Morton's testimony concerning alcohol tolerance was admissible expert testimony because: (1) Morton was an expert by reason of his knowledge, skill, experience, training, and education; (2) that the subject matter of the testimony was an

appropriate one for expert testimony because lay persons were not qualified to the best possible degree to interpret field sobriety tests; and (3) Morton's expert testimony actually assisted the jury in appellant's case in determining his guilt or innocence. *Alvarado,* 912 S.W.2d at 216. We hold that the trial court did not abuse its discretion in admitting Morton's testimony concerning appellant's alcohol tolerance because his opinion reflected on appellant's loss of his mental or physical faculties. *Fernandez,* 915 S.W.2d at 576-77. We overrule appellant's sole point of error and affirm the judgment of the trial court.

/s/ Maurice Amidei
Justice

Judgment rendered and Opinion filed September 16, 1999.

Panel consists of Justices Amidei, Edelman and Wittig.

Do Not Publish — TEX. R. APP. P. 47.3(b).

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C ON C U R R I N G O P I N I O N

The majority well sets outs the pertinent facts and the general applicability of TEX. R. EVID. 702. Appellant properly objected "speculative" to the State's inquiry regarding how this particular defendant could do the one leg stand but not perform well on the HGN and Rhomberg. The how or why of one individual, on one particular occasion, passing one aspect of a battery of sobriety tests and flunking other parts calls for pure conjecture. This expert was not shown to be qualified in physiology or otherwise, which would be necessary to elucidate the alcohol tolerances vel non of this individual. In order to be properly qualified, an expert

must possess special knowledge as to the very matter on which he or she gives an opinion. *See Broders v. Heise*, 924 S.W. 2d 148, 153 (TEX.1996). I am reminded of the student who gets all F's in every course except religion. Or a patient has four classic signs of cancer while maintaining a normal white count. There are no doubt some experts who could properly opine the answers to our hypotheticals. Officer Morton however, was not shown to be qualified to answer the trial question or the latter illustrations. Notwithstanding the erroneously admitted evidence, the error was harmless. Accordingly, I concur in the result.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed September 16, 1999.

Panel consists of Justices Amidei, Edelman and Wittig.

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