

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

LOREN JOSEPH GIER,)
Appellant,) NOT FOR PUBLICATION
v.) Case No. F-2013-691
THE STATE OF OKLAHOMA,)
Appellee.)

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

SEP 11 2014

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

A. JOHNSON, JUDGE:

Appellant Loren Joseph Gier was tried by jury in the District Court of Kay County, Case No. CF-2011-750, and convicted of Manslaughter in the First Degree, After Former Conviction of Two or More Felonies, in violation of 21 O.S.2011, § 711.¹ The jury set punishment at twenty years imprisonment. The Honorable D. W. Boyd, who presided at trial, sentenced Gier accordingly.² From this Judgment and Sentence Gier appeals, raising the following issues:

- (1) whether the trial court erred in admitting the results of his breathalyzer test; and
- (2) whether he was denied the effective assistance of counsel.

We find reversal is not required and affirm the Judgment and Sentence of the district court.

¹ Count 2 (Person Involved in Personal Injury Accident While Under the Influence of Alcohol or Intoxicating Liquor (Misdemeanor)) was dismissed before the case was submitted to the jury.

² Under 21 O.S.Supp.2011, § 13.1, Gier must serve 85% of the sentence imposed before he is eligible for parole.

1.

The Oklahoma Administrative Code (OAC) authorizes the use of two breathalyzer machines to ascertain a person's breath-alcohol content: the Intoxilyzer 5000 and the Intoxilyzer 8000. *See* OAC § 40:30-1-3(a) and (f). The OAC requires the Board of Tests for Alcohol and Drug Influence ("the Board") to promulgate maintenance and operating procedures for both machines. *See* OAC § 40:30-1-3(b), (e)(2), (g), and (j). Before the results of any breathalyzer test may be admitted at trial, the State must prove the defendant's test was conducted on a machine that complied with the Board's maintenance procedures using the Board's standard operating procedure. *See Westerman v. State*, 1974 OK CR 151, ¶ 11, 525 P.2d 1359, 1361.

Gier's test was conducted using an Intoxilyzer 8000. There are no published procedures in the OAC or in the Board's Actions, Declarations, and Resolutions governing maintenance of the Intoxilyzer 8000.³ Gier claims that, without any published rules, the State failed to meet its burden of showing the machine used to conduct his test had been maintained in compliance with the law and therefore the results should have been suppressed. The State insists that the Board has in fact promulgated maintenance procedures for the

³ In stark contrast, the Board has enacted detailed rules governing the maintenance of the Intoxilyzer 5000. *See* OAC § 40:30-1-3(e); *see also* Action No. 08-01 by the State Director of Tests for Alcohol and Drug Influence (available at <http://www.ok.gov/bot/documents/Action%2008-01.pdf>).

Intoxilyzer 8000, despite the absence of any published rules, and contends testimony is sufficient to establish the basis of those procedures.⁴

In *Westerman*, we held that witness testimony is sufficient to prove compliance with Board rules and regulations. *See Westerman*, 1974 OK CR 151, ¶ 11, 525 P.2d at 1361-62 (“[P]roof can be established without the necessity of calling the Supervisor who performed the required maintenance, if it can be shown through other testimony that there was compliance of all regulations.”); *see also Hames v. State*, 1991 OK CR 102, ¶ 14, 818 P.2d 904, 906 (“The testimony of officers as to the time and manner of the test can be sufficient proof of compliance [with operating procedures].”). In both cases, however, the actual written procedures were part of the record to compare with the actions taken. Because no written procedures were admitted in Gier’s case, we are required to decide whether testimony alone is sufficient to establish the existence of maintenance procedures required for valid breath test results on the Intoxilyzer 8000. We find that it is not.

The Administrative Procedures Act requires an agency, like the Board, to make all rules available for public inspection, including “any agency statement . . . of general applicability and future effect that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of

⁴ In an effort to meet its burden, the State presented a former employee of the Board, who conducted maintenance on the Intoxilyzers, including the machine used to conduct Gier’s test. He claimed the Board had prescribed maintenance procedures for the Intoxilyzer 8000, which were programmed into the software of each machine. He said he had a printed copy of the procedures when he worked for the Board, but since he was no longer employed there, he did not have a copy of the procedures or know where to obtain one.

the agency.” See 75 O.S.2011, §§ 302(A)(3) and 250.3(17). Internal policies or other actions that violate this requirement are “null, void, and unenforceable.” See 75 O.S.2011, § 302(E). Because there is no record of written maintenance procedures on the Intoxilyzer 8000 available for public inspection, we find that the procedures either do not exist or are null, void, and unenforceable. And without any rules, it is impossible to verify whether the Intoxilyzer 8000 used in Gier’s case had been maintained in accordance with those rules. For these reasons, the admission of Gier’s breathalyzer results was error.⁵

Nevertheless, the error does not require reversal. This Court reverses on a finding of evidentiary error only if “th[e] Court has ‘grave doubts’ that the outcome of the trial would have been materially affected had the error not occurred.” *Neloms v. State*, 2012 OK CR 7, ¶ 33, 274 P.3d 161, 169. Driving under the influence may be proven with blood or breath tests or with other evidence that the defendant was driving under the influence. See 47 O.S.2011, § 11-902(A). Two officers testified that Gier smelled like alcohol immediately after the fatal collision in this case. Gier displayed six of six indicators of intoxication during his horizontal gaze nystagmus test and six of eight indicators during his walk-and-turn test. According to the investigating officers, he could not understand instructions and was slow to respond. Because there was sufficient evidence to convict Gier notwithstanding the

⁵ Because we find that the admission of Gier’s breathalyzer results was error based on the State’s failure to prove that the machine used to conduct Gier’s test was properly maintained, Gier’s other claim concerning admissibility of the results – that the district court improperly considered hearsay evidence when making its evidentiary ruling – is moot.

results of his breathalyzer test, we have no grave doubts that the outcome of Gier's trial would have been different had the results been excluded. This claim is denied.

2.

We also reject Gier's claim that he was deprived of effective assistance of counsel based on defense counsel's failure to argue that the Board has not promulgated rules governing maintenance of the Intoxilyzer 8000. The record shows that defense counsel did in fact mention the lack of published maintenance procedures. Gier has not shown there is a reasonable probability that the outcome would have been any different had defense counsel argued the point more rigorously because of the compelling other evidence of intoxication unrelated to the breath test. See *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206, *cert. denied*, ___ U.S. ___, 134 S.Ct. 172, 187 L.Ed.2d 119 (2013); *Head v. State*, 2006 OK CR 44, ¶ 23, 146 P.3d 1141, 1148. This claim is denied.

DECISION

The Judgment and Sentence of the district court is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2014), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF KAY COUNTY
THE HONORABLE D. W. BOYD, DISTRICT JUDGE

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OPINION BY: A. JOHNSON, J.
LEWIS, P.J.: Concur in Results
SMITH, V.P.J.: Concur
LUMPKIN, J.: Concur in Part and Dissent in Part

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