

**IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA**

COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

MAY 15 2008

MICHAEL S. RICHIE  
CLERK

BILL NEAL ROBISON, II, )  
)  
Appellant, )  
)  
v. )  
)  
THE STATE OF OKLAHOMA, )  
)  
Appellee. )

NOT FOR PUBLICATION

Case No. F 2006-443

**SUMMARY OPINION**

Bill Neal Robison, II, was convicted of causing an accident involving great bodily injury while driving under the influence of alcohol in violation of 47 O.S.2001, 11-904(B)(1), in the District Court of Oklahoma County, Case No. CF-2003-5234, before the Honorable Ray C. Elliott, District Judge. The jury assessed the maximum punishment, five (5) years imprisonment and a \$5000 fine; the trial court sentenced accordingly.

Robison has perfected an appeal of the District Court's Judgment and Sentence raising the following propositions of error:

1. It was prejudicial error for the trial court to deny Appellant's motion to suppress the results of the emergency room blood test.
2. Defense counsel failed to provide constitutionally effective representation.

After thorough consideration of Robison's propositions of error and the entire record before us on appeal, including the original record, transcripts, exhibits, and briefs, we have determined that the error alleged in proposition

one has merit, which requires this Court to reverse the Judgment and Sentence and remand the case to the district court for a new trial.

In proposition one Robison claims that the results of lab testing on blood taken from him for medical purposes was inadmissible in his trial; we agree and find that counsel properly preserved this issue for review.

In *Yell v. State*, 1993 OK CR 34, ¶ 10, 856 P.2d 996, 997, this Court held that only chemical tests approved and outlined in §§ 752-759 of Title 47 may be used to quantify alcohol levels.<sup>1</sup> Here, the treating physician testified that the results of the hospital blood test showed a alcohol level of 180, which indicated, to him, a level of twice the legal limit. However, there was no testimony that this test was a test outlined by statute and approved by the Board of Tests for Alcohol and Drug Influence. See 47 O.S.Supp.2007, § 759. We find that the admission of this test result, and the doctor's attempt to quantify the test result was in error.<sup>2</sup>

We further find that the result of this test provided significant evidence in this case, so that we cannot say that the admission of this test was harmless

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<sup>1</sup> See also *Allen v. State*, 1978 OK CR 122, ¶ 6, 585 P.2d 1390, 1391 (holding that a failure to follow § 752 renders a blood test inadmissible); *Weatherford v. State*, 1976 OK CR 107, ¶ 9, 549 P.2d 1221, 1223 (reasoning "the purpose of § 752 is to insure that blood alcohol tests are administered in a safe and reliable manner and that the blood be withdrawn properly to insure the trustworthiness of the analysis when it is offered as evidence.")

<sup>2</sup> Furthermore, in addition to not being an approved test, the State wholly failed to show that the results of this test were reliable because they failed to show an adequate chain of custody and failed to show that the testing procedure was "grounded in the methods and procedures of science[.]. . . derived by the scientific method. . . [and] supported by appropriate validation. . . ." See *Taylor v. State*, 1995 OK CR 10, ¶ 17, 889 P.2d 319, 329-30, quoting *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S.579, 590, 113 S.Ct. 2786, 2795, 125 L.Ed.2d 469 (1993).

beyond a reasonable doubt, thus we order that Robison be granted a new trial.

See *Yell*, 1993 OK CR 34, ¶ 12, 856 P.2d at 997.<sup>3</sup>

### **DECISION**

The Judgment and Sentence of the District Court shall be **REVERSED** and this case shall **REMANDED** for a **NEW TRIAL**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2008), the MANDATE is ORDERED issued upon the delivery and filing of this decision.

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#### **OPINION BY: LEWIS, J.**

**LUMPKIN, P.J.:** Dissent  
**C. JOHNSON, V.P.J.:** Concur  
**CHAPEL, J.:** Concur  
**A. JOHNSON, J.:** Concur in Results

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<sup>3</sup> As we are reversing Robison's conviction and sentence and ordering a new trial, Robison's ineffective assistance of counsel claim becomes moot.

**LUMPKIN, PRESIDING JUDGE: DISSENT**

In *Yell v. State*, 1993 OK CR 34, 856 P.2d 996, the Court determined opinion evidence regarding the quantitative level of blood alcohol content which was derived from the HGN test was inadmissible since it was not a test generally accepted in the scientific community and it was not evidence derived from a chemical test. In this case the Court is evaluating the use of the results of a chemical test performed in a hospital lab as a part of medical treatment. There is no issue of consent presented. Therefore, the question is whether the results of this chemical test from the hospital lab are competent evidence. I agree the provisions of 47 O.S. 2001, § 759(B) require that tests

shall have been performed in compliance with the rules and regulations adopted by the Board of Tests for Alcohol and Drug Influence and by an individual possessing a valid permit issued by the Board for that purpose.

However, 47 O.S.2001, § 757, provides

the provisions of Sections 751 through 761 of this title do not limit the introduction of any other competent evidence bearing on the question of whether the person was under the influence of alcohol or any other intoxicating substance, or the combined influence of alcohol and any other intoxicating substance.

I believe the results of a chemical test, performed in a hospital laboratory, and used for the diagnosis and treatment of a medical condition is just the type of evidence that Section 757 anticipates as "other competent evidence". If the test is reliable enough for physicians to use when making life and death decisions in the treatment of patients, then it is certainly competent evidence to support

the conviction for driving under the influence of intoxicating substances. I would affirm the judgment and sentence.