IN THE COURT OF APPEALS OF THE STATE OF ALASKA

SANDRA D. REESE, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12191 Trial Court No. 3PA-14-2420 CR MEMORANDUM OPINION No. 6499 — July 26, 2017

Appeal from the District Court, Third Judicial District, Palmer, William L. Estelle, Judge.

Appearances: Paul E. Malin, under contract with the Public Defender Agency, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Eric A. Senta, Assistant District Attorney, Palmer, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge MANNHEIMER.

Sandra D. Reese appeals her conviction for driving under the influence as defined in AS 28.35.030(a)(1) and (a)(2) — *i.e.*, driving while impaired by alcohol, and

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

driving when a breath test conducted within four hours showed that her blood alcohol content was .08 percent or greater. (Reese's blood alcohol reading was .142 percent.)

After the breath test was performed, Reese chose to assert her right to an independent blood test, and a sample of her blood was drawn for this purpose — but Reese's attorney chose not to test this blood sample.

No evidence was presented at Reese's trial about this blood sample, or about Reese's failure to have it tested. However, the subject did come up outside the presence of the jury.

During the prosecutor's examination of the state trooper who arrested Reese and who conducted the breath test, the prosecutor asked a series of questions about the circumstances in which the trooper would conduct a blood test of a DUI arrestee rather than a breath test. The defense attorney objected that the prosecutor's questions had no relevance to Reese's case.

Although the defense attorney's objection was seemingly well-taken, the trial judge overruled the objection and allowed the prosecutor to examine the trooper on this subject — although the judge promised the defense attorney that he would have the opportunity to cross-examine the trooper on this point.

During the defense attorney's ensuing cross examination of the trooper, the defense attorney likewise asked a series of irrelevant questions about the circumstances in which the trooper would conduct a blood test rather than a breath test. Then the defense attorney asked whether, in such instances, the trooper would personally perform the test of the arrestee's blood. The trooper answered that he was not a phlebotomist or a nurse, and that he would not test the blood himself.

Immediately after the trooper gave this answer, the prosecutor asked for a bench conference. Outside the jury's hearing, the prosecutor argued that the defense attorney, through his questioning of the trooper, was getting "dangerously close" to

opening the door to evidence that, in Reese's case, a sample of her blood had been drawn at her request, and she had chosen not to test this blood sample.

The defense attorney responded that he had already made his point — "which is [that] even when they don't do the [breath] test, they still do [an] evaluation of something from the defendant, blood usually, to see that there's an impairing substance."

The prosecutor then reiterated that he thought the defense attorney's questions were "getting really close" to the point where evidence of Reese's blood sample, and her failure to test this blood sample, would be admissible. The trial judge interjected, "We don't want to go there with the jury."

Reese's defense attorney then changed course and declared that he had *not* yet made his point — "which is just basically that [the blood] would be analyzed by an expert in the lab. That's it." The defense attorney indicated that he would be done with his cross examination once the trooper answered that question.

In response, the prosecutor stated that if the defense attorney asked his proposed final question, the prosecutor would then ask the trooper if Reese had requested that a sample of her blood be drawn.

The defense replied that he was willing to supplement his question by clarifying for the jury that his questions were only relevant to DUI cases that did not involve the ingestion of alcohol — but the prosecutor was not satisfied. He again declared that the defense attorney's proposed question would "open the door" to evidence of Reese's blood sample, and the fact that she had refrained from testing it.

At this point in the bench conference, the judge's remarks become mainly indiscernible. However, it appears that the judge ultimately agreed with the prosecutor that the door would be opened to evidence of Reese's blood sample if the defense

attorney asked his proposed final question to the trooper — a question to clarify that any analysis of a blood sample would be performed by a laboratory technician.

Following this ruling, the defense attorney announced that he had no further questions for the trooper.

Now, on appeal, Reese contends that the judge's ruling constituted an improper restriction on her attorney's cross examination of the trooper. We reject this claim for several reasons.

First, the judge did not restrict the defense attorney's cross examination of the trooper. Instead, the judge ruled that *if* the defense attorney asked his proposed question, this would open the door to rebuttal evidence about Reese's blood sample and the fact that Reese had chosen not to test it.

In these circumstances, if a defense attorney wishes to preserve a challenge to a judge's ruling for purposes of appeal, the attorney must ask the proposed question or otherwise make an adequate record of what evidence would be generated by the proposed question and the State's response. *See State v. Wickham*, 796 P.2d 1354, 1358 (Alaska 1990); *Williams v. State*, 214 P.3d 391, 392-93 (Alaska App. 2009); *Sam v. State*, 842 P.2d 596, 598-99 (Alaska App. 1992).

Second, the record shows that *all* of the prosecutor's and defense attorney's questions about blood samples and blood testing (the questions we described earlier) had essentially no relevance to Reese's case. As the defense attorney expressly conceded during the bench conference, all the questions he was asking (and all the related questions that the prosecutor had asked earlier) were relevant only to cases where a motorist is prosecuted for DUI based on impairment stemming from some substance *other than alcohol*. All of these questions were irrelevant to Reese's case because Reese was tried and convicted based solely on her consumption of alcohol.

Third, when we turn specifically to the question that the defense attorney refrained from asking the trooper — a question to clarify that when blood is drawn from a DUI arrestee, the blood sample is tested by a technician in a laboratory — we note that the trooper had essentially already answered this question.

Just before the prosecutor interrupted the defense attorney's examination to seek a bench conference, the defense attorney (without objection) asked the trooper whether, when a DUI arrestee's blood is drawn, the trooper will personally perform the test of the blood sample. The trooper had answered no, this would be done by an expert:

> *Defense Attorney*: And the blood tests — you wouldn't do the blood tests yourself, would you?
>
> *Trooper Gault*: I'm not a medical — I'm not a phlebotomist or a nurse or ...
>
> *Defense Attorney*: So the blood would be sent off to an expert to analyze in a lab, right?
>
> *Trooper Gault*: Do you mean I won't [draw] the blood myself, or I don't test it [myself]?
>
> *Defense Attorney*: You don't test it yourself?
>
> *Trooper Gault*: No. I don't test it myself.

In short, the claim of error was not preserved, and any error in the trial judge's ruling was clearly harmless. Accordingly, the judgement of the district court is AFFIRMED.