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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Siskiyou)

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL LAWRENCE MCNEALLEY,

Defendant and Appellant.

C066215

(Super. Ct. No.
MCYKCRTR 10-0401)

Defendant Michael Lawrence McNealley was convicted after a bifurcated jury trial of driving under the influence of alcohol, with a blood-alcohol percentage of .08 percent or higher, and having sustained three prior driving under the influence convictions within the previous 10 years. (Veh. Code, § 23152, subs. (a) & (b).) The trial court imposed and suspended a three-year prison term and placed defendant on probation for three years with the condition he spend one year in county jail.

Defendant appeals. He contends the trial court's rulings on his motion in limine regarding the reporting witness were in error and chilled his ability to mount a defense in violation of his due process rights. We affirm.

BACKGROUND

Because defendant's assignments of error relate to the trial court's in limine rulings, we set forth the evidence proffered by the parties at the time the rulings were made, not the evidence presented at trial. (*People v. Welch* (1999) 20 Cal.4th 701, 739 [in reviewing the trial court's ruling, we consider the facts that were before the court at the time of its ruling, not those produced at a later date]; *People v. Hernandez* (1999) 71 Cal.App.4th 417, 425 [same].)

On January 23, 2010, defendant was arrested for driving under the influence by California Highway Patrol (CHP) officer Jason Morton. Morton had been told by dispatch that a caller had reported to be on the lookout for a silver sport utility vehicle (SUV), driving erratically on US-97, with the last two numbers on the license plate possibly being 9-5. Morton proceeded to US-97 to look for the vehicle.

Morton saw a gray SUV with the last numbers on the license plate being 9-5-2. The driver of the vehicle was driving erratically, repeatedly driving onto and over the painted lane lines. The vehicle's registration tags were also expired.

Morton contacted defendant, who had been driving. There was also a female passenger in the car, who had a suspended driver's license. Morton conducted a field sobriety

investigation, after which he determined defendant was under the influence of alcohol. The two preliminary alcohol screens registered .148 and .141. The subsequent chemical breath test registered .12.

In May 2010, defendant's private investigator called a woman named Julia Blacketer. Blacketer said the passenger's brother told her that his sister, Leea, was driving the vehicle at the relevant time. Defendant asked Blacketer to talk to Leea and tell her to accept responsibility for her actions, which Blacketer did. Blacketer tried but Leea said she could not do what defendant was asking because she did not want to pick up another case for driving on a suspended license. Blacketer does not like Leea and told defendant Leea was not good for him, but defendant loves her.

In June 2010, the prosecutor's investigator spoke with the individual who had called to report the possible drunk driver -- Gabriel Trull. Trull stated he had been driving on US-97 when a silver SUV approached at a high speed. The vehicle swerved to the right just before it almost hit his vehicle and a large semitruck. It was too dark to see the person driving the silver SUV. After the near collision, Trull stopped at a rest stop. While there, he saw a man, who reeked of alcohol, leave the restroom and get in the driver's side of the same silver SUV that had nearly hit him. There was also a female passenger in that vehicle. He called CHP because he was concerned the driver was impaired and would cause a serious or fatal accident.

DISCUSSION

Prior to trial, the prosecutor successfully moved to exclude Blacketer's testimony as inadmissible hearsay. The trial court noted, however, that its ruling could change if the passenger were to testify. Defendant filed a motion in limine to exclude any testimony from Trull. Specifically, his motion sought to exclude Trull's testimony (based on asserted irrelevance and prejudice) and to require a pretrial, or *Evans*,¹ lineup if Trull were permitted to testify.

The trial court indicated that it tended to agree with the prosecutor's argument that the *Evans* motion was untimely, but that it wished to first address the relevance and admissibility issue. The trial court confirmed that there was no motion to suppress being brought or other challenge to the officer's reasons for looking for and following the SUV in question. It then excluded Trull's testimony, at least in the prosecution's case-in-chief, pursuant to Evidence Code section 352. The trial court emphasized that its ruling could change, depending on the defense case. Upon further inquiry from defendant as to what would or would not tend to change the admissibility, the court noted that, should the defense make a significant issue out of whether defendant was driving, who Trull saw get into the vehicle would be much more relevant. The trial court stated, however, that it was "not going to give . . . a preview of a

¹ *Evans v. Superior Court* (1974) 11 Cal.3d 617, 625 (*Evans*).

ruling" but only indicated how it saw the evidence could become more relevant.

The trial court then revisited the *Evans* motion and said it was untimely but that it would agree to hold an Evidence Code section 402 hearing prior to any testimony to see what Trull remembers "if it comes to that." Defendant agreed to the procedure.

I

We emphasize, initially, that the trial court *granted* defendant's motion in limine to exclude the testimony of Trull. Nonetheless, defendant takes this appeal, essentially claiming the trial court's *comments* were "an abuse of discretion" and violated his due process rights. The claim is frivolous.

Defendant complains about the trial court's remarks that its ruling excluding Trull's testimony *could* change depending on the evidence presented by defendant such as evidence that he was not driving. He claims that the court would have been in error to admit the testimony, even under those circumstances, because Trull's testimony still would not have been relevant. Not only is this all theoretical, since Trull's testimony was never even *offered* at trial, he is simply wrong.

Defendant takes great pains to emphasize that Trull had yet to be asked to identify defendant as the man he saw getting into the driver's side of the vehicle at the rest stop. While such an identification would certainly be helpful to the prosecution, it was not necessary to render Trull's testimony relevant. Trull's testimony that a man got into the driver's side and a

woman was in the passenger seat of the vehicle that Morton ultimately encountered, tends in reason to establish that the man, not the woman, in that vehicle had been driving -- at least at the time Morton encountered them. And the man in that vehicle was defendant.

We also flatly reject defendant's contention that the trial court's comments, indicating it may revisit its ruling depending on evidence presented at trial, such as evidence concerning whether Morton actually saw defendant driving the vehicle, violated his due process rights by improperly forcing him to abandon his only viable defense. He argues he would have testified on his own behalf that he had not been driving but did not do so because Trull's testimony may have been permitted in rebuttal and Trull may have been able to identify him at trial. This, of course, is all speculation because none of it occurred.

Moreover, the application of the ordinary rules of evidence does not generally infringe impermissibly on a defendant's constitutional rights. (*People v. Boyette* (2002) 29 Cal.4th 381, 427-428.) Defendant, like other witnesses, is subject to impeachment with admissible evidence if he chooses to testify. And a defendant who does not testify cannot challenge a ruling admitting impeachment evidence. (*People v. Ledesma* (2006) 39 Cal.4th 641, 731; *People v. Collins* (1986) 42 Cal.3d 378, 383-388.)

II

Defendant also contends the trial court abused its discretion and denied him due process when it declined to order

Trull to participate in a pretrial *Evans* lineup. This contention is more frivolous than his last.

In a case where eyewitness identification is shown to be a material issue and there exists a reasonable likelihood of a mistaken identification which a lineup would tend to resolve, due process requires that an accused, upon timely request, be afforded a pretrial lineup for witnesses. (*Evans, supra*, 11 Cal.3d at p. 625; *People v. Farnam* (2002) 28 Cal.4th 107, 183-184.) The trial judge is vested with "broad discretion" in this realm, and the timeliness of such a request plays a big part in that discretion. (*Evans, supra*, 11 Cal.3d at pp. 625-626.) "Such motion should normally be made as soon after arrest or arraignment as practicable. . . . [M]otions which are not made until shortly before trial should, unless good cause is clearly demonstrated, be denied in most instances by reason of such delay." (*Id.* at p. 626.)

Here, the trial court noted defendant's *Evans* lineup request was untimely. Defendant filed the motion seven months after his arrest, six weeks after the investigator obtained Trull's statement, and on the day before trial. At the in limine hearing on defendant's motion, when the court remarked that he could have made the request "a long time ago," he responded, "I do understand that" and he provided no excuse for failing to bring the motion sooner. Under these circumstances, finding the request untimely is not an abuse of discretion.

More importantly, the trial court did not deny defendant's request.² And, furthermore, the issue is academic. Defendant requested an *Evans* lineup if Trull were to testify. Trull did not testify.

DISPOSITION

The judgment is affirmed.

NICHOLSON, J.

We concur:

RAYE, P. J.

MURRAY, J.

² Although the trial court stated that the request was untimely, it did not actually rule on defendant's *Evans* lineup request. It did, however, offer to hold an Evidence Code section 402 hearing in the event the prosecutor sought to offer Trull's testimony in rebuttal. Defendant agreed to this procedure.