COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss

SUPREME JUDICIAL COURT
NO.

APPEALS COURT
NO. 2018-P-0989

COMMONWEALTH OF MASSACHUSETTS
Appellee

v.

JASON D. KLEGRAEFE
Defendant-Appellant

ON APPEAL FROM A JUDGMENT OF THE
TAUNTON DISTRICT COURT
AFFIRMED BY THE APPEALS COURT

DEFENDANT'S PETITION FOR FURTHER APPELLATE REVIEW

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April 6, 2020

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JASON D. KLEGRAEFE

DEFENDANT'S APPLICATION FOR FURTHER APPELLATE REVIEW

Now comes the defendant, JASON D. KLEGRAEFE, and respectfully applies, pursuant to Mass. R. App. P. 27.1, for leave to obtain further appellate review of the judgment in the Taunton District Court (J. Ziemian), in which he was convicted of driving while under the influence and negligent operation of a motor vehicle.

This application raises substantial issues affecting the interests of justice, which necessitates further appellate review of the case by this Court. The grounds for further appellate review are set forth in the accompanying memorandum.

Respectfully submitted
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By his attorney,

_____

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SUPREME JUDICIAL COURT
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COMMONWEALTH

v.

JASON D. KLEGRAEFE

DEFENDANT'S MEMORANDUM IN SUPPORT OF HIS APPLICATION FOR FURTHER APPELLATE REVIEW

PRIOR PROCEEDINGS

On or about September 9, 2017, a criminal complaint was issued in Taunton District Court, charging Mr. Jason Klegraefe with one count of operating under the influence of alcohol, in violation of G.L. c. 90 § 24, one count of negligent operation of a motor vehicle, in violation of G.L. c. 90 § 24, and a marked lane violation, in violation of G.L. c. 89 § 4A. (R. 1) .

On January 16, 2018, a jury trial commenced in Taunton District Court, Judge Robert Ziemian presiding. (Tr. 1). At the close of all evidence, the defendant made a Motion for Required Finding of Not Guilty which was denied. (Tr. 25).

During jury deliberations the jury came back with these questions:

1) Was there a breathalyzer test done?

2) If so, what was the result?

3) If not, why not?

4) Was there a failed test?

5) When he walked to the back of the cop car, was he stumbling?

6) What if one person doesn't agree with the rest?

7) Or if one person is undecided?

(Tr. 44, R. 7).

The judge responded:

> Let me answer it this way. You have heard all of the evidence, all of the, all of the evidence, testimony that you, that you heard. And obviously we talked about drawing inferences from the facts that you find, first, by facts, by inferences. But to answer the first question is you have heard all of the evidence. And I, and you must make your decision based on what you heard. That also includes the second part, which is when he walked to the back of the cop -- again, here, your collective memory controls as to what was said, how it was said, cross-examination. Again, it's your collective memory and your collective inferences you draw from all of the, what you heard that controls in this case. And I am prohibited from adding or answering that type of question. (Tr. 46).

At the conclusion of the trial, the jury found Mr. Klegraefe guilty of operating under the influence of alcohol and guilty of negligent operation of a motor vehicle. (Tr. 48). On the negligent operation charge, Mr. Klegraefe was sentenced to 18 months' probation. On the OUI charge, Mr. Klegraefe was sentenced to 18 months in the house of corrections, 150 days to serve, balance suspended for eighteen months, loss of license for eight years. (Tr.

58). On January 11, 2018 the defendant filed a Notice of Appeal. (R. 9). The case was entered in Appeals Court on July 6, 2018. (R. 10). On January 15, 2020, the Appeals Court (Wolohojian, Milkey, Shin, JJ.) took the appeal in the above-referenced case under advisement. On March 12, 2020 the Appeals Court released its decision, affirming the judgment. A copy of the Appeals Court decision is amended hereto.

The Defendant does not seek a rehearing in the Appeals Court.

STATEMENT OF POINTS WITH RESPECT TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT

Further appellate review is appropriate in this case because the trial court misinterpreted this Court's decision in Wolfe to mean that a judge may *never* have discretion to give a Downs instruction, even in the face of a jury who is clearly contemplating the absence of breathalyzer evidence. This is a case about balancing two equally important constitutional rights at trial. Trial judges have taken Wolfe to mean they can *never* instruct on breathalyzer evidence absent a request from the defendant. However once a jury comes back with questions, as here, the Wolfe concern of protecting a defendant's right against self-incrimination by not introducing the absence of evidence to the jury is moot. The questions show the jury has already turned their attention to this missing evidence and are potentially

speculating on why it is absent, so issue turns to protecting a defendant's constitutional right to a fair trial and a Downs instruction is warranted.

Here, the judge's failure to specifically instruct in the face of numerous jury questions on the issue, was error. Given his reinforcement of inferences in the face of these questions, a substantial risk of miscarriage of justice was created and the defendant's right to a fair trial was violated. The defendant was denied due process of law because the jury was not properly instructed and its verdict was tainted by the improper speculation and guessing on evidence not before them.

Further, without clarification from this Court, the district courts, which see hundreds of OUI cases a year, will continue to sacrifice a defendants' constitutional right to a fair trial in the guise of protecting a defendant's right against self-incrimination.

ARGUMENTS

According to Wolfe, a trial judge should refrain from giving a jury instruction specifically mentioning the absence of breath alcohol or other alcohol-test evidence absent a request by the defendant. Comm. v. Wolfe, 478 Mass. 142, 149-150 (2017). The rationale is that the judge, by instructing on this evidence, will turn the jury's attention to it and induce

speculation, in violation of the defendant's right against self-incrimination. Id.

However, that concern of inducing speculation is moot once a jury indicates through questions, that they have indeed turned their attention to this missing evidence. At that point the constitutional concern shifts to the Defendant's right to a fair trial and, in the interest of protecting that right, this Court should rule that a specific jury instruction is then necessary. Id. Alternatively, once the jury came back with numerous questions on breathalyzer evidence, the Defendant argues that Wolfe required the judge to then give a specific instruction. Wolfe, 478 Mass. at 142.

In the case at bar, the lack of an instruction coupled with the reinforcement of inferences, created a substantial risk of miscarriage of justice. The defendant's right to a fair trial was violated. This court should clarify Wolfe and hold that once a jury is clearly speculating on missing breathalyzer evidence, a specific Downs type instruction is necessary, or at minimum within the discretion of the trial judge to give in order to protect a defendant's right to a fair trial under the Sixth Amendment to the United States Constitution and Article 12 of the Declaration of Rights of the Massachusetts Constitution. U.S.C.A. Const. Amend. 6. M.G.L.A. Const.

Amend. Art. 12. Further, without this improper speculation on missing evidence, there was insufficient evidence to sustain the guilty verdicts.

a. To protect a defendant's right to a fair trial, a specific instruction is necessary when a jury clearly shows that they are engaging in impermissible speculation on the absence of breathalyzer evidence to reach their verdict.

"When jurors find facts, not from a fair consideration of the evidence, but rather based upon bewilderment as to why no evidence of breathalyzer test was introduced, confidence in trial by jury....incrementally dissipates." Wolfe, 478 Mass. at 151 (Lowy dissenting). In this case, the jury was very focused on the absence of the breathalyzer evidence, as evident by its numerous questions.[1] Without guidance from the judge, the jury likely relied "upon their common knowledge and engaged in improper speculation." Id. In the interest of protecting a defendant's right to a fair trial, a Downs type instruction is necessary to ensure the jury does not engage in impermissible speculation on missing evidence to reach their verdict. Wolfe, 478 Mass. at 150.

OUI cases are plentiful in the trial courts and this case presents an opportunity to provide much needed guidance on when a Downs type

[1] The breathalyzer test was the subject of four of the seven questions from this jury during deliberation and included the questions: Was there a breathalyzer test done? If so, what was the results? If not, why not? Was there a failed test?

instruction is still warranted to protect a defendant's right to a fair trial. This guidance will not go against the finding in Wolfe but will complement it. This is a case about protecting the defendant's right to a fair trial by having a properly instructed jury. Wolfe is a case about protecting the defendant's right against self-incrimination. Id. Wolfe was concerned with protecting the defendant's right against self-incrimination by not *introducing* evidence that might invite speculation into the jury deliberations. The Supreme Judicial Court likely did not intend to completely limit a judge's ability to instruct on speculative evidence because in essence that would protect the defendant's right against self-incrimination at the cost of protecting a defendant's right to a fair trial. A proper balance of those important interests would be to allow a limiting instruction pre-deliberation only at the defendant's request, but once speculation is obviously occurring, as here, allow a specific instruction not to speculate on missing test evidence. Id.

The defendant does not dispute the Wolfe rule nor purport that the judge should have instructed the jury here before deliberations. Id. Though once a jury has signaled, as here, that they are speculating and there is danger that they will make inferences around this missing evidence, the

issue becomes how to protect the defendant's right to a fair trial and a specific jury instruction is necessary.

Without clarification from this Court, the trial courts will continue to interpret Wolfe to mean they can *never* give an instruction absent a defendant's request, but this interpretation greatly limits their role as protector of the right to a fair trial by jury.[2] A judge should provide instruction when faced with a jury who is clearly engaging in improper speculation and should not be bound to do so only if a defendant requests it.[3] This Court should instruct that once a jury is considering the absence of breathalyzer evidence, a judge should properly instruct to prevent verdicts that rest on improper speculation and improper inferences. Wolfe, 478 Mass. at 148 fn. 10.

It was error here to refuse to instruct the jury and the cumulative effect of this error, the lack of overwhelming evidence, and the potential misleading direction on inferences resulted in a substantial risk of miscarriage of justice because there is "serious doubt whether the result of

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[2] The judge here told the jury "I am prohibited from answering that question." (Tr. 46).

[3] To hold otherwise would create a heightened risk when faced with a pro se client who would likely not be aware of his need to request such instruction. The defendant acknowledges this is not pertinent to his case but important in the discussion of the issue in general.

the trial might have been different had the error not been made." Comm. v. LeFave, 430 Mass. 169, 174 (1999).

b. Once the jury came back with numerous questions regarding the breathalyzer test, Wolfe required the judge to give a specific instruction.

The Appeals Court agreed with the Defendant that the jury had turned its attention to the missing breathalyzer evidence but incorrectly concluded that this did not mean they assumed the defendant had declined to take the test, let alone that they were inclined to draw a negative inference from his having done so. App. Ct. Decision p.2. This rational goes against this Court's finding in Wolfe, which is based on not introducing the absence of breathalyzer evidence to a jury because they may very likely, given the common knowledge on those tests, make negative inferences about this missing evidence in violation of the Defendant's right against self-incrimination.

Once it became obvious from the jury's very specific deliberation questions that they were considering the absence of breathalyzer evidence as part of the decision making in this case, a Downs instruction became necessary. Comm. v. Downs, 53 Mass. App. Ct. 195 (2001). Wolfe is clear that an instruction should be given in cases where a Defendant requests it *or* a "rare set of facts ...specifically directs the jury's attention to the absence of alcohol-test evidence." Wolfe, 478 Mass. at 150 (emphasis added). The

numerous and specific jury questions here undoubtedly showed that the facts of this case had led this jury's attention to the absence of this evidence and a clarifying instruction was necessary to protect the defendant's right to a fair trial. Comm. v. Bradley, 93 Mass. App. Ct. 1119 (2018) (unpublished) (judge explained that she generally gives a Downs instruction only in response to a note from the jury inquiring about a breathalyzer). Once a jury is focused on the missing test evidence, an instruction is necessary to protect the defendant's right to a fair trial. See discussion Supra p. 10-13.

Like Wolfe, evidence of impairment was far from overwhelming here and the defendant offered a plausible explanation for the slight infraction in his driving.[4] Wolfe, 478 Mass. at 150. (Tr. 8). The jury's questions showed the jury wanted to factor in the absence of this commonly known testing to make inferences about guilt absent other clear evidence to establish it. There is wide-spread public information and common knowledge about breathalyzer testing. See Downs, 53 Mass. App. Ct. at 195. This jury, faced with minimal evidence, turned their attention to the absence of this evidence as a basis for inferring guilt.[5]

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[4] The road was very curvy and the slight driving infraction, which was the only infraction, occurred on a sharp curve in the road. (Tr. 8).

[5] The breathalyzer test was the subject of four of the seven questions from this jury during deliberation and included the questions: Was there a

Here the judge gave no guidance on the absence of breathalyzer evidence nor even a general instruction not to speculate on evidence not presented.[6] Instead he reiterated that this jury should decide the case on the evidence presented and their "collective inferences" referring back to his inference instruction in his final charge which told the jury that "in a chain of circumstantial evidence, it is not required that every one of your inferences and conclusions be inevitable, but it is required that each of them be reasonable." (Tr. 35). The jury here likely took his reinforcement of the use of inferences and concluded that, given their common knowledge on the standard use of breathalyzer testing in OUI stops, it was reasonable to infer that the defendant had refused this test because he was intoxicated. The reinforcement of inferences, coupled with the lack of a specific instruction not to speculate on the absence of this evidence, created a substantial risk of miscarriage of justice. The defendant's right to a fair trial was violated and a new trial is warranted.

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breathalyzer test done? If so, what was the results? If not, why not? Was there a failed test?

[6] The Wolfe decision did not directly deal with a situation of multiple breathalyzer evidence questions as here, but in the dicta, briefly mentions that at minimum, in the face of a question, a "do not speculate" instruction is warranted. Wolfe, 478 Mass. at 150, fn. 13.

This case represents an opportunity for this Court to clarify that under Wolfe, once it is made clear that a jury is undertaking improper speculation on the absence of breathalyzer evidence, absent a request from the defendant otherwise, a Downs type instruction is necessary to avoid jury verdicts that result from mere speculation and improper inferences from the absence of this commonly known test. Downs, 53 Mass. App. Ct. 195 (2001). To hold otherwise would stifle the judge's role in instructing juries to ensure a fair trial.[7]

c. The evidence was insufficient to sustain the guilty verdict of operating a motor vehicle under the influence and negligent operation of a motor vehicle.

At trial, the defendant made a timely motion for a required finding of not guilty on all charges at the close of the Commonwealth's case and at the close of all evidence. (Tr. 25). This motion was erroneously denied where there was insufficient evidence. Even in the light most favorable to the Commonwealth, the evidence here was insufficient to permit a rational trier of fact "to infer the existence of the essential elements of the crime charged." Comm. v. Latimore, 378 Mass. 671, 677 (1979); Jackson v. Virginia, 443 U.S. at 318-319. The bulk of evidence here actually

[7] The judge here told the jury "I am prohibited from answering that question." (Tr. 46).

demonstrated that the defendant was *not* impaired. There was no FST evidence, and only one slight driving infraction (a swerve on the curve of a road). The evidence of the defendant's ability to park, answer questions, produce his documents, exit the vehicle, and control his behavior clearly supports that he was not impaired. Without the improper speculation on the missing breathalyzer evidence, the evidence was insufficient to establish all elements of the crime charged.

CONCLUSION

For all of the foregoing reasons, the Appellant prays this Honorable Court to grant further appellate review.

Respectfully Submitted

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Dated: April 6, 2020

CERTIFICATION OF COUNSEL OF COMPLIANCE

Pursuant to Mass. R. App. P. 16 (k) and Mass. R. App. P. 27.1, I certify that, to the best of my knowledge, the above document complies with the rules of this Court pertaining to the filing of briefs and Petitions for Further Appellate Review.

_____
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CERTIFICATE OF SERVICE

APPEALS COURT
NO. 2018-P-0989

April 6, 2020

I, Meghan Oreste, counsel for the defendant herein, hereby certify that I served a copy of the foregoing application by e-mailing, directly and through the Tyler Technologies electronic service portal: Erica Sylvia, Office of the District Attorney/Bristol, 888 Purchase St., New Bedford, MA 02740.

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COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-989

COMMONWEALTH

vs.

JASON D. KLEGRAEFE.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

In this direct appeal from his convictions of operating under the influence of alcohol (third offense), G. L. c. 90, § 24, and negligent operation of a motor vehicle, G. L. c. 90, § 24 (2) (a), the defendant argues that (1) the judge was required sua sponte to instruct the jury concerning the absence of evidence of a breathalyzer test, as in Commonwealth v. Downs, 53 Mass. App. Ct. 195 (2001), once the jury posed questions about it; and (2) the evidence of impairment and negligent operation was insufficient. We affirm.

In Commonwealth v. Wolfe, 478 Mass. 142 (2017), the Supreme Judicial Court held that a Downs instruction should not be given "absent a request by the defendant or some rare set of facts that specifically directs the jury's attention to the absence of alcohol-test evidence." Wolfe, supra at 150. Here, the

defendant never requested a Downs instruction, nor was there any evidence directing the jury's attention to the absence of a breathalyzer test. The trial judge, thus, correctly did not give a Downs-type instruction to the jury during the final charge.

The defendant argues, however, that such an instruction was required once the jury posed the following questions:

> "(1) Was there a breathal[y]zer test done?
> "If so, what w[ere] results?
> "If not why not?
> "Was there a failed test?"

Although the defendant is correct that these questions reveal that the jury had questions about whether there had been a breathalyzer test, contrary to the defendant's assertion, they do not indicate that the jury assumed the defendant had declined to take the test, let alone that they were inclined to draw a negative inference from his having done so. There is nothing to indicate that the jury had or would assume answers to their questions.

The necessity, scope, and character of a judge's supplemental jury instructions are within his or her discretion. Commonwealth v. Thomas, 21 Mass. App. Ct. 183, 186 (1985). "The proper response to a jury question must remain within the discretion of the trial judge, who has observed the evidence and the jury firsthand and can tailor supplemental instructions

accordingly." Commonwealth v. Waite, 422 Mass. 792, 807 n.11 (1996). Here, trial counsel and the prosecutor jointly recommended that the trial judge respond to the questions by instructing the jury that "they're limited to the evidence that they've heard and their recollection of the evidence controls." Consistent with the parties' joint recommendation, and without objection, the judge instructed the jury, "you have heard all of the evidence. And I, and you must make your decision based on what you heard."

Although the better course would have been for the judge "to simply reiterate the general instruction not to speculate about matters not in evidence," Wolfe, 478 Mass. at 150 n.13, there was no error in answering the jury's question as the judge did. Nor has the defendant shown a substantial risk of a miscarriage of justice arising from the difference between an instruction not to speculate and the instruction the judge gave, which was for the jurors to limit themselves to the evidence.[1] We note further the judge had earlier instructed the jurors that they were "not [to] engage in any guesswork about any unanswered questions that remain in your mind or to speculate about what any, quote, real facts were or might have been." "[T]he law

[1] For these same reasons, the defendant's argument that he was deprived of effective assistance of counsel because trial counsel did not object to the judge's response fails.

does not require repetition of the same thought at each turn," Commonwealth v. Peters, 372 Mass. 319, 324 (1977), and we presume that a jury follows all instructions given to it, Commonwealth v. Albert, 391 Mass. 853, 859 (1984).

We are also unpersuaded by the defendant's argument that the evidence of impairment and negligent operation was insufficient. Viewed through the required light of Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979), the evidence showed that the defendant, after coming around a corner unexpectedly, crossed the center double yellow line separating two lanes of travel going in opposite directions, and drove in the oncoming traffic lane towards a police car for several seconds. The double yellow line marking indicated that "[i]t's a road where it's not safe to be operating in the other lane." The officer observed the defendant's eyes to be bloodshot and glassy, a strong odor of alcohol emanated from the defendant, and his speech was slurred. The defendant admitted to having drunk three "nips" and a beer earlier. Based on his observations, the officer concluded that the defendant was intoxicated. Several closed nips of Southern Comfort and an empty bottle of vodka

were located in the defendant's car. The evidence was sufficient to sustain the convictions.

Judgments affirmed.

By the Court (Wolohojian, Milkey & Shin, JJ.[2]),

Joseph F. Stanton

Clerk

Entered: March 12, 2020.

[2] The panelists are listed in order of seniority.