

CASE NAME: People v. Floyd (Illinois Appellate Court, 2014 IL App (2d) 120507, Filed March 28, 2014)

FACTS:

On June 16, 2011, the defendant was in the parking lot at the Dolphin Cove Family Aquatic Center in Carpentersville. At approximately 7:30 p.m., defendant made a 911 call via the OnStar system in her vehicle. She told the 911 operator that she had a “violent boyfriend” who wanted to hit and rob her. Defendant can be heard on the recording telling a man that she had been “drinking since I’ve been here.” She then told the operator that a man who made her perform oral sex on him was sitting in her vehicle and that “he needs to get the [expletive] out of my car.” Officer David Rowley was dispatched to the Dolphin Cove parking lot. Upon arriving, he observed the defendant and a man arguing outside of a vehicle. Because Rowley believed that defendant was intoxicated, he told her not to drive. At that point, defendant and the man went separate ways, and Rowley left the scene.

Thereafter, Mike Eschenbach, the manager of Dolphin Cove, noticed that defendant was back inside her vehicle. Defendant was alone, sitting in the passenger seat, and listening to loud music. Eschenbach observed a man approach defendant’s vehicle, and the man then “tossed something at the vehicle, gave it a light shake, and walked away.” Eschenbach left the Dolphin Cove parking lot at approximately 8:30 p.m.

At around 8:50 p.m., Don Azerela, the building supervisor, witnessed a man approach the defendant’s vehicle. About a minute later, Azerela heard the man pounding on her vehicle and saw the vehicle shake. Azerela moved closer to the parking lot and was joined by Scott McManus. As the man was shaking the vehicle, Azerela and McManus witnessed the vehicle’s brake lights come on and heard the engine start. A chase ensued and McManus called 911. Azerela estimated that the vehicle reached a speed of 25 miles per hour during the chase. When the man ran toward a gas station, defendant’s vehicle turned back and returned to its original parking space. The police arrived about a minute later.

Officer Robert Drews arrived at the scene and observed skid marks leading to the parked vehicle. The key was in the ignition, but the engine was not running, and defendant appeared to be sleeping in the driver’s seat. Drews knocked on the window, and when defendant opened the vehicle’s door, Drews could smell a “moderate” odor of alcohol. According to Drews, the defendant’s speech was “good,” and her eyes were not bloodshot or glassy. Defendant told Drews that she had not been driving, because she was too drunk to drive. Drews advised defendant that she needed to perform sobriety tests, but defendant refused and began to walk away. Drews attempted to arrest defendant, but she resisted; Drews and his partner effected the arrest and placed her into the squad vehicle. A tow truck subsequently towed defendant’s vehicle.

At the police station, she agreed to perform field sobriety tests. The defendant passed a one-legged-stand test but failed a walk-and-turn test. Drews also tested the defendant’s eyes for the presence of HGN. The test looks for three clues per eye: (1) the lack of a smooth pursuit as a stimulus is moved from directly ahead of the subject to the subject’s periphery; (2) the

presence of a “distinct nystagmus at maximum deviation” when the stimulus is held as far out to the periphery as the eye can follow; and (3) the onset of nystagmus before the eye has rotated 45 degrees as it follows the stimulus toward the periphery. The maximum number of clues that can be detected is six, with three clues for each eye. Drews determined that four clues were present and concluded that she was under the influence of alcohol.

All three tests were performed in the police station’s booking area. The booking area contained video recording devices in the booking room, the sally port, and the hallway leading to the booking room.

Law enforcement officers administered a breath test to defendant at 10:30 p.m., which registered her BAC at 0.069. At trial, the State produced John Wetstein, a forensic toxicologist, as an expert witness. Wetstein testified that, after conducting a retrograde extrapolation calculation, he determined that defendant’s BAC at 9:10 p.m. was between 0.082 and 0.095.

The jury found the defendant guilty of aggravated DUI and resisting arrest. Based on two prior burglary convictions, the trial court sentenced her as a Class X offender to the minimum of six years’ imprisonment. Defendant appeals her DUI conviction but not her resisting arrest conviction.

ISSUE:

Did the trial court err in admitting expert testimony regarding the "retrograde extrapolation" calculation as it applied to this defendant?

HOLDING:

Yes. A retrograde extrapolation calculation based on a single breath test, and when many of the factors necessary to determine whether the defendant was in the elimination phase are unknown, is insufficient to provide a reliable calculation and invites the jury to determine guilt on an improper basis. Based on the specific circumstances presented in this case, we believe that the prejudicial effect of the retrograde extrapolation calculation substantially outweighed its probative value and that the trial court abused its discretion in admitting it.

With respect to the retrograde extrapolation’s probative value, we recognize that Wetstein’s calculation would be relevant to whether defendant’s BAC was at or above 0.08. Nonetheless, the inherent unreliability of Wetstein’s calculation is reflected in his own testimony. Specifically, Wetstein testified that determining whether a person was in the elimination phase was a “complicated question.” Wetstein testified that different circumstances could affect whether someone was in the elimination phase, such as when the person started and stopped drinking; a person’s eating and drinking habits; how much and what food had been consumed; and the type of alcohol consumed. Wetstein acknowledged that he did not recall when defendant started and stopped drinking. He testified that, if other relevant information on whether defendant was in the elimination phase were available, he would have factored it into his calculation. However, Wetstein’s testimony is devoid of any indication that he considered any other information to determine whether defendant was in the elimination phase. Instead, Wetstein admitted that his “big assumption” was that defendant was eliminating alcohol when law enforcement officers administered the breath test, and he admitted that if his assumption were wrong “the extrapolation [would not] be valid.” Thus,

because Wetstein's calculation was premised on the assumption that defendant was in the elimination phase, without consideration of other relevant factors and without additional breath tests, we find the probative value of his testimony to be significantly diminished. See *Armstrong*, 267 P.3d at 783.

Conversely, the risk of unfair prejudice from Wetstein's calculation was substantial. Illinois courts have defined "unfair prejudice" as an "undue tendency to suggest decision on an improper basis, commonly an emotional one, such as sympathy, hatred, contempt, or horror." *People v. Barnes*, 2013 IL App (1st) 112873, ¶ 44 (quoting *People v. Eyles*, 133 Ill. 2d 173, 218 (1989), quoting Michael H. Graham, Cleary and Graham's Handbook of Illinois Evidence § 403.1 (4th ed. 1984)). In this case, we find the reasoning in *Armstrong* applicable. The introduction of Wetstein's retrograde extrapolation calculation, when many necessary factors were unknown and when only one breath test was administered, invited the jury to convict her due to a reaction to a supposedly high BAC rather than proof beyond a reasonable doubt that defendant was driving under the influence. See *Armstrong*, 267 P.3d at 781.

In sum, because the State's expert witness acknowledged that he was unaware of many of the factors necessary to determine whether defendant was in the elimination phase, and because the police conducted only one BAC test, we find the extrapolation calculation to be inherently unreliable. In addition, because the extrapolation evidence invited the jury to convict defendant on the basis of a supposedly high BAC, the potential for prejudice from admitting that evidence was high. Because the prejudicial effect of the extrapolation substantially outweighed the probative value, the trial court abused its discretion in admitting the evidence. See generally *McKown*, 236 Ill. 2d at 314 (noting that the admissibility of scientific evidence is subject to the balancing of probative value and the risk of unfair prejudice). Further, given the conflicting nature of the other testimony at trial, including that defendant passed some field sobriety tests while failing others, the trial court's admission of the extrapolation evidence was not harmless. See *id.* at 311 (rejecting a harmless error argument).

For the foregoing reasons, we reverse the judgment of the circuit court of Kane County and remand for a new trial.

Reversed and remanded.