

SUPREME COURT No. 22-0624
POLK COUNTY CASE No. OWOM090721

**IN THE
SUPREME COURT OF IOWA**

STATE OF IOWA

Plaintiff-Appellee,

v.

BITA AMISI

Defendant-Appellant.

*ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HON. CELENE GOGERTY DISTRICT COURT JUDGE*

**APPLICATION FOR FURTHER REVIEW OF THE
COURT OF APPEALS OF IOWA FROM AN OPINION FILED FEBRUARY 8, 2023**

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PROOF OF SERVICE

On February 28, 2023, I served this brief on all other parties by EDMS to their respective counsel.

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CERTIFICATE OF FILING

I certify that I did file this proof brief with the Clerk of the Iowa Supreme Court by EDMS on February 28, 2023.

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QUESTIONS PRESENTED FOR REVIEW

The question presented for review are:

1. Whether officer bodycam footage showing the defendant consenting to a preliminary breath test, and then cutting to the defendant's arrest for OWI – signaling to the jury that the defendant failed the test – violates Iowa Code section 321J.5(2), as well as Iowa Rule of Evidence 5.403.

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STATEMENT SUPPORTING FURTHER VIEW

The district court's admission of the video depicting the defendant consenting to the preliminary breath test is in conflict with a decision of this court, including *State v. Deshaw*, 404 N.W. 2d 156, 158 (Iowa 1987). Additionally, the admission of the video presents an issue of broad public importance that this Court should determine. *See Iowa R. App. P. 6.1103(b)(1), (4)*.

STATEMENT OF THE CASE

This appeal stems from Bitu Amisi's jury convictions for OWI 3rd offense, in violation of Iowa Code section 321J.2(c), a class D felony; and Eluding, in violation of Iowa Code section 321.279(1)(a), a serious misdemeanor. On further review, he challenges the admission of an edited body cam video that improperly implied to the jury that Amisi failed the preliminary breath test.

STATEMENT OF FACTS

On August 24, 2021, Bitu Amisi was charged by criminal complaint with one count of operating while under the influence (second offense). The subsequent trial information charged Amisi with two counts: (1) Operating while intoxicated (third offense), a class D felony; and (2) Eluding, a serious misdemeanor. (App. 11). Amisi's native language is Swahili, and he was appointed an interpreter on August 24, 2021. (App. 9). An interpreter was used throughout all proceedings, including the jury trial.

Only two witnesses testified at trial. Officer Perez testified that, while on routine patrol, he observed a vehicle swerving. He activated his emergency lights, later activated his sirens, and the vehicle eventually came to a stop in a parking lot. (Trial Tr. v. 2 at 11-14). Officer Perez ordered the driver, Bita Amisi, out of the vehicle, and observed “unsteady balance; bloodshot, watery eyes; and alcohol on his breath,” although he could not identify the type of alcohol. (Trial Tr. v. 2 at 17, 20). Amisi was placed into custody and a second officer arrived to conduct an impairment investigation. Officer Chadwick similarly claimed to observe bloodshot, watery eyes, and scent of alcohol. (Trial Tr. v. 2 at 31). He began to administer field sobriety tests. Amisi declined to participate in the horizontal gaze nystagmus test, but he did perform the walk-and-turn test and the one-leg stand. (Trial Tr. v. 2 at 32, 37, 39). Officer Chadwick testified that Amisi failed both tests. Amisi consented to a preliminary breath test. He was then transported to the Des Moines Police Station, where he declined to submit to the Datamaster breath test. (Trial Tr. v. 2 at 42-43). Videos from the officers’ dash and body cameras were entered into evidence. (Ex. 1-5).

Amisi was found guilty of both operating and intoxicated and eluding. (App. 39). Amisi elected to have a separate trial on whether he had two qualifying OWI convictions that would enhance his sentence. On February 1, 2022, a jury found that Amisi was the same individual who had twice been convicted of OWI.

(App. 41). Amisi did not file a motion for new trial. Amisi was sentenced to a period of incarceration not to exceed five years for OWI 3rd, and to a period of one year for eluding, which were to be run consecutively. (App. 41).

On appeal, Amisi challenged sufficiency of the evidence on both counts, and also asserted that the district court erred in allowing the State to introduce a prejudicial video showing the officers' request for a preliminary breath test. The Court of Appeals found there was substantial evidence to confirm the convictions, and that the video was not inadmissible because it did not directly refer to the results of the breath test. The Court further found that the video was not more prejudicial than probative. (Slip Op. at 5-6).

ARGUMENT

I. THE COURT ERRED IN ALLOWING THE STATE TO INTRODUCE AN EDITED, PREJUDICIAL VIDEO OF THE PRELIMINARY BREATH TEST

Preservation of Error

Amisi preserved error by objecting to Exhibit 4, which was overruled. (Trial Tr. v. 1 at 14, 17)

Standard of Review

The district court's ruling rested on its interpretation of relevant statutes; specifically, Iowa Code section 321J.5(2). Therefore, review is for correction of errors of law. *State v. Sanders*, 623 N.W.2d 858 (Iowa 2001); *see also State v.*

Kaufman, No. 08-0880, 2009 Iowa App. LEXIS 268 (Iowa Ct. App. April 8, 2009).

Merits

The results of a preliminary breath test are inadmissible. *See* Iowa Code § 321J.5(2). Testimony that the result of a preliminary breath test indicated presence of alcohol constitutes reversible error. *State v. Deshaw*, 404 N.W. 2d 156, 158 (Iowa 1987). In *Deshaw*, this Court acknowledged the unreliability and resulting prejudice from preliminary breath tests.

Additionally, Iowa Rule of Evidence 5.403 provides that “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by danger of . . . unfair prejudice, confusing the issues, misleading the jury...”. “Unfairly prejudicial evidence” is evidence that “appeals to the jury’s sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions of the case.” *State v. Martin*, 704 N.W.2d 665, 671 (Iowa 2005) (citations omitted).

The district court erred in allowing the State to introduce an edited video from Officer Chadwick’s body cam. The edited footage showed Amisi agreeing to the PBT, then, following the test, cut straight to Amisi being arrested. (Trial Tr. v. 1 at 15; Ex. 4). The State’s edited video was a backdoor way of informing the jury

that Amisi failed the PBT, as it depicted him being immediately arrested after taking it. To compound the error, during Officer Chadwick's direct examination as Exhibit 4 was being played for the jury, he explained that Amisi consented to the preliminary breath test and, following the test, was placed under arrest. (Trial Tr. v. 2 at 41). In *Deshaw*, testimony that the breath test showed a positive result violated the statute, which had been enacted to guard against the test's unreliability.

Deshaw at 158.

Section 321J.5(2) prohibits the PBT "results" from being shown to the jury, which necessarily includes not just the numerical value, but also whether the defendant passed or failed the test. The Court of Appeals focused on the fact that the video did not explicitly state the result of the test. Yet, the undeniable inference from the video is that Amisi failed the test, which is exactly the type of unreliable information that section 321J.5(2) was designed to protect against.

In addition to violating section 321J.5(2), the edited video was far more prejudicial than probative in violation of Iowa Rule of Evidence 5.403, as well as misleading to the jury. It is well established that preliminary breath tests are unreliable. *See, e.g., State v. Albrecht*, 657 N.W.2d 474 (Iowa 2003). Video footage of Amisi consenting to the PBT had little to no probative value. The Court of Appeals found probative value in the video depicting Amisi's speech and physical manifestations. (Slip Op. at 6). Yet, Amisi is not asking that the entire

video be excluded – only the portions showing his consent to the PBT. There was no relevancy to Amisi consenting to the test. This is especially true since English was not Amisi’s first language, and he required the use of an interpreter throughout the criminal proceedings.

But by keeping his consent to the PBT in the video, and then by cutting immediately to his arrest, it clearly signaled to the jury that Amisi failed the PBT. This was incredibly prejudicial. Moreover, it improperly bolstered the officer’s credibility. Here, Amisi declined to take the Datamaster breath test, and, as such, the verdict heavily relied on officer testimony. Further, the implied PBT failure led the jury to surmise that Amisi declined the Datamaster because he had failed the PBT. All of this leads to a violation of Amisi’s rights to a fair and impartial trial in violation of both article I, section 9 and 10 of the Iowa Constitution, as well as the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

For all of these reasons, the erroneous admission of Exhibit 4 warrants a new trial.

CONCLUSION

For the reasons articulated herein, Bita Amisi requests this Court grant him a new trial.

REQUEST FOR ORAL ARGUMENT

Counsel for Appellant requests to be heard in oral argument.

COST CERTIFICATE

I hereby certify that the costs of printing this brief was \$0 because it was electronically submitted.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

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