NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2006 KA 1544

STATE OF LOUISIANA

VERSUS

RUSSELL HUBER, JR.

Judgment Rendered: February 9, 2007

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Case No. 379843

The Honorable William J. Burris, Judge Presiding

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BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

GAIDRY, J.

The defendant, Russell Huber, Jr., was charged by bill of information with one count of third-offense operating a vehicle while intoxicated (DWI), a violation of La. R.S. 14:98, and initially pleaded not guilty. The predicate offenses set forth were a January 17, 2001 guilty plea to DWI, under 22nd Judicial District Court docket #328185; and a November 4, 2003 guilty plea to DWI, under 22nd Judicial District Court docket #362107. The defense moved to suppress evidence to be used against defendant. Following a hearing, the trial court granted the motion to suppress with regard to any inculpatory statements, but denied the motion with regard to the results of the chemical test for intoxication. Thereafter, defendant entered a guilty plea pursuant to *State v. Crosby*, 338 So.2d 584 (La. 1976), reserving his right to challenge the denial of the motion to suppress. Defendant was sentenced to three years at hard labor, suspended with the exception of 30 days, without benefit of probation, parole, or suspension of sentence; three years active supervised probation, with conditions; a $2,000 fine; and subject to the other provisions of La. R.S. 14:98(D). He now appeals, designating one assignment of error. We affirm the conviction and sentence, for the following reasons.

ASSIGNMENT OF ERROR

Defendant contends it was error for the trial court to deny the motion to suppress the breath test results where the arresting officers admitted that they denied defendant his right to contact counsel until after the breath test and booking.

FACTS

Due to defendant's guilty plea, there was no trial testimony concerning the facts in this matter. At the *Boykin* hearing, the state and the defense

stipulated that a factual basis existed for the plea. Testimony at the suppression hearing indicated on April 7, 2004, Causeway Bridge Police stopped defendant for speeding. The police officer conducting the stop detected a strong odor of alcohol coming from defendant's breath and person. Additionally, defendant was swaying as he was standing. Defendant refused to undergo field sobriety tests, but after being advised of his rights agreed to submit two breath samples for testing. Both samples showed defendant's blood alcohol level was .146.

MOTION TO SUPPRESS

In his sole assignment of error, defendant argues that the police officers' failure to follow the provisions of La. R.S. 32:661(C)(1) and La. R.S. 32:666(A) requires suppression of the breath test results in accord with *State v. Alcazar*, 00-0536 (La. 5/15/01), 784 So.2d 1276.

Louisiana Revised Statutes 32:661, in pertinent part, provides:

> A. (1) Any person, regardless of age, who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent, subject to the provisions of R.S. 32:662, to a chemical test or tests of his blood, breath, urine, or other bodily substance for the purpose of determining the alcoholic content of his blood, . . . if arrested for any offense arising out of acts alleged to have been committed while the person was driving ... a motor vehicle while believed to be under the influence of alcoholic beverages . . . .
>
> . . .
>
> C. (1) When a law enforcement officer requests that a person submit to a chemical test as provided for above, he shall first read to the person a standardized form approved by the Department of Public Safety and Corrections. The department is authorized to use such language in the form as it, in its sole discretion, deems proper, provided that the form does inform the person of the following:
>
> (a) His constitutional rights under *Miranda v. Arizona*.[1]

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[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

(b) That his driving privileges can be suspended for refusing to submit to the chemical test.

(c) That his driving privileges can be suspended if he submits to the chemical test and such test results show a blood alcohol level of 0.08 percent or above or, if he is under the age of twenty-one years, a blood alcohol level of 0.02 percent or above.

(d) That his driving privileges can be suspended if he submits to the chemical test and the test results show a positive reading indicating the presence of any controlled dangerous substance listed in R.S. 40:964.

(e) The name and employing agency of all law enforcement officers involved in the stop, detention, investigation, or arrest of the person.

(f) That refusal to submit to a chemical test after an arrest for an offense of driving while intoxicated if he has refused to submit to such test on two previous and separate occasions of any previous such violation is a crime under the provisions of R.S. 14:98.2 and the penalties for such crime are the same as the penalties for first conviction of driving while intoxicated.

Louisiana Revised Statutes 32:666, in pertinent part, provides:

A. (1)(a)(i) When a law enforcement officer has probable cause to believe that a person has violated R.S. 14:98, R.S. 14:98.1, or any other law or ordinance that prohibits operating a vehicle while intoxicated, that person may not refuse to submit to a chemical test if he has refused to submit to such test on two previous and separate occasions of any previous such violation or in any case wherein a fatality has occurred or a person has sustained serious bodily injury in a crash involving a motor vehicle, aircraft, watercraft, vessel, or other means of conveyance. . . . The law enforcement officer shall direct that a chemical test be conducted of a person's blood, urine, or other bodily substance, or perform a chemical test of such person's breath, for the purpose of determining the alcoholic content of his blood and the presence of any abused substance or controlled substance as set forth in R.S. 40:964 in his blood in such circumstances. . . .

. . .

(b) The law enforcement officer shall inform the person who is required to submit to such testing of the consequences of a refusal to submit to any testing as required by this Paragraph.

. . .

(2) In all cases other than those in Paragraph (1) of this Subsection, a person under arrest for a violation of R.S. 14:98,

R.S. 14:98.1, or other law or ordinance that prohibits operating a vehicle while intoxicated may refuse to submit to such chemical test, after being advised of the consequences of such refusal as provided for in R.S. 32:661(C), subject to the following:

(a) His license shall be seized under the circumstances provided in R.S. 32:667.

(b) If he is a resident without a license or permit to operate a motor vehicle in this state, the department shall deny the issuance of a license or permit to such person for a period of six months after the date of the alleged violation.

(c) Evidence of his refusal shall be admissible in any criminal action or proceeding arising out of acts alleged to have been committed while the person, regardless of age, was driving or in actual physical control of a motor vehicle upon the public highways of this state while under the influence of alcoholic beverages or any abused substance or controlled dangerous substance as set forth in R.S. 40:964. Additionally, evidence of his refusal shall be admissible in any criminal action or proceeding arising out of acts alleged to have been committed while the person under twenty-one years of age was driving or in actual physical control of a motor vehicle upon the public highways of this state after having consumed alcoholic beverages. However, such evidence shall not be admissible in a civil action or proceeding other than to suspend, revoke, or cancel his driving privileges.

(3) In all cases where a person is under arrest for a violation of R.S. 14:98, R.S. 14:98.1, or other law or ordinance that prohibits operating a vehicle while intoxicated who refuses to submit to a chemical test if he has refused to submit to a chemical test on two previous and separate occasions of any previous such violation shall be advised that the consequences of such refusal shall be subject to criminal penalties under the provisions of R.S. 14:98.2.

. . .

State v. Alcazar involved an arrest for driving while intoxicated. Neither a fatality nor serious bodily injury was involved. The defendant in that case was stopped after he made a right turn from the center lane of a three-lane highway. The police officer making the stop noticed the defendant's speech was slurred, he could not maintain his balance, and he smelled of alcohol. The defendant also performed poorly on field sobriety tests. Accordingly, the defendant was advised of his *Miranda* rights and arrested for driving while

intoxicated. The defendant was required to take an Intoxilyzer 5000 test at 3:20 a.m., but was not read his statutory right to refuse the test until 3:22 a.m. The test indicated the defendant's blood alcohol level was .167 percent. The defendant moved to suppress the blood alcohol test results, arguing the test was administered before he was read his statutory right to refuse the test. 00-0536 at p. 2, 784 So.2d at 1278.

The trial court in *Alcazar* held that the failure to follow the procedures of La. R.S. 32:666(A) rendered the test results inadmissible. The appellate court reversed, holding that there had been no violation of the defendant's right against self-incrimination because the arresting officer had probable cause to stop the defendant and had advised the defendant of his *Miranda* rights before administering the test. The Louisiana Supreme Court reversed the ruling of the appellate court, holding that La. R.S. 32:661(C)(1) and 32:666(A) constituted a legislatively-created exception to the rule of *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) (probable cause and exigent circumstances justified search for evidence in defendant's blood without a warrant), and allowed a defendant to refuse to allow the state to gather physical evidence against him. *Alcazar*, 00-0536 at pp. 6-8, 784 So.2d at 1280-82. Additionally, the Louisiana Supreme Court held exclusion of the test results, whether or not mandated in the statutes and whether or not the police conduct was intentional, was the only means to assure compliance with the specifically crafted legislative provision allowing a defendant to refuse the test. *Alcazar*, 00-0536 at pp. 8-9, 784 So.2d at 1282.

In the present case, the defense moved to suppress the evidence to be used against defendant, alleging the stop and seizure of defendant had been conducted in violation of his constitutional rights.

At the hearing on the motion, the state presented testimony from Causeway Bridge Police Officer Damon T. Mitchell. He testified that on April 7, 2004, he stopped a car driven by defendant. Defendant was driving 67 miles per hour in a 55 mile-per-hour speed zone. Speaking to defendant, Officer Mitchell detected a strong odor of alcohol coming from defendant's breath and person. Additionally, defendant swayed while standing. Defendant refused to take any field sobriety tests, but agreed to take the Intoxilyzer test. Officer Mitchell advised the defendant of his *Miranda* rights and defendant indicated he understood those rights. Defendant was then handcuffed and transported to the North Toll Plaza where he was advised of his rights relating to the chemical test for intoxication.[2] Officer Mitchell recalled that defendant asked Causeway Bridge Police Corporal Thea Andras if his driver's license would be suspended if he waited to consult an attorney. Officer Mitchell either was not present for or did not remember Corporal Andras's response. After being specifically advised of the right to refuse the Intoxilyzer test, defendant provided two breath samples for testing. Both samples indicated his blood alcohol level was .146.

Corporal Andras also testified at the suppression hearing. She testified that she advised defendant of his rights relating to the chemical test for intoxication and his *Miranda* rights. After reading defendant his *Miranda* rights, she also advised him, "Note, if you refuse the test until you can consult an attorney, your driver's license will still be suspended." Defendant asked if he could call an attorney, and Corporal Andras replied, "Not right now, when you get to the lock up, you can make a phone call."

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[2] Officer Mitchell identified State Exhibit #1 as the rights form relating to the chemical test for intoxication signed by defendant.

As previously noted, the trial court granted defendant's motion to suppress with regard to any inculpatory statements, but denied the motion to suppress with regard to the breath test results. The court concluded Officer Mitchell had probable cause to stop defendant's vehicle because he had exceeded the posted speed limit. The court also found there was reason to request that defendant take the chemical test for intoxication. The court noted the factual situation in this case closely resembled that of *State v. Broussard*, 517 So.2d 1000 (La. App. 3d Cir.), *writ denied*, 519 So.2d 105 (La. 1987).

State v. Broussard involved a conviction for DWI. 517 So.2d at 1001. The defendant's vehicle was stopped after the police observed the vehicle pull out of the parking lot of a lounge and cross the center line of a street twice in the course of traversing approximately 200 feet of roadway. The defendant in *Broussard* was given a field sobriety test, placed under arrest, and taken to the police station. He was advised of his *Miranda* rights, as well as the consequences of a refusal to take the chemical test that would be administered. The defendant requested to call an attorney and was given the opportunity to use a telephone. The defendant then called a friend who was not an attorney. Subsequently, the defendant again asked to call an attorney, but the police refused the request because the defendant had already been afforded an opportunity to call an attorney. Thereafter, the defendant submitted to an Intoxilyzer test, and his breath registered .13 grams percent blood alcohol. The trial court denied the defendant's motion to suppress the blood alcohol test results and his statements for violation of his constitutional right to consult an attorney. *Id.*

The appellate court in *Broussard* held any statements given by the defendant after he asked to call an attorney had to be suppressed. *Broussard*, 517 So.2d at 1002. As to the blood alcohol test results, however, the court

held while a defendant has a right to consult an attorney, he does not have the right to wait to take a blood alcohol test until after he has consulted an attorney. *Id.* The court in *Broussard* cited the following language from *State v. Spence*, 418 So.2d 583, 586-87 (La. 1982):

> The reason for this rule is obvious. The relevant point in time for measuring blood-alcohol content is immediately after the driver is stopped, because the blood-alcohol percentage decreases with the passage of time. Were the result otherwise, the driver could effectively defeat the state's efforts to conduct a prompt test by requesting that he be given the opportunity to consult a lawyer.

Based upon the foregoing, we conclude that the trial court's rulings on the motion to suppress were correct. In this case, defendant was specifically advised of his right to refuse the Intoxilyzer test before he submitted to that test. Accordingly, *Alcazar* is distinguishable. Defendant had no right to wait to take the Intoxilyzer test until after he had consulted an attorney. *See Spence*, 418 So.2d at 586-87.

The assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.