

RENDERED: August 21, 1998; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

No. 97-CA-001022-MR

ROBIN MOSS

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT  
HONORABLE STEPHEN M. SHEWMAKER, JUDGE  
ACTION NO. 96-CR-00105

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING AND REMANDING WITH DIRECTIONS

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BEFORE: GUDGEL, CHIEF JUDGE; ABRAMSON, and JOHNSON, Judges.

JOHNSON, JUDGE: Robin Moss (Moss) appeals from a final judgment entered on April 22, 1997, in the Boyle Circuit Court, convicting him of driving under the influence (DUI), fourth offense, (Kentucky Revised Statutes (KRS) 189A.010), and operating a motor

vehicle (OMV) while his license was suspended or revoked for DUI, (KRS 189A.090(1)).<sup>1</sup> We affirm and remand.

The charges against Moss related to conduct which was alleged to have occurred before noon on November 16, 1996. He was indicted on December 20, 1996, on the DUI charge and a charge of OMV, third or subsequent offense, (KRS 189A.090(2)(c)). Prior to the trial on March 10, 1997, the OMV charge was amended to a first offense, a Class B misdemeanor. During its case-in-chief, the Commonwealth offered the testimony of two witnesses, Deputy James Wilcher (Deputy Wilcher) of the Boyle County Sheriff's office, and Robin Parks (Parks). Deputy Wilcher's testimony can be summarized as follows: On November 16, 1996, Deputy Wilcher was dispatched to look for a blue vehicle being operated by a person possibly under the influence of intoxicants. Deputy Wilcher observed a blue car drive to the gas pumps at Mr. Miser's, a convenient-type store in Perryville. At that time, Moss, who was known to Deputy Wilcher, was riding in the front passenger seat of the vehicle. Deputy Wilcher did not know the identity of the driver. Since Deputy Wilcher was looking for a blue pick-up truck and not the blue automobile in which Moss was riding, he left Mr. Miser's. However, after learning that he was to look for a blue automobile, he returned a short while later.

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<sup>1</sup>The final judgment erroneously states that the jury found Moss guilty of OMV, third offense. The jury was not instructed to find, nor did it find, Moss guilty of a subsequent offense of OMV. This is an obvious clerical error that should be corrected on remand.

As Deputy Wilcher approached Mr. Miser's, he saw the car being driven away from the pumps, but he was too far away to determine who was driving. The driver parked the car at the edge of the parking lot and then got out of the car. When Deputy Wilcher pulled into the parking lot, he blocked the car and checked the license plate to determine if it was the vehicle he had been dispatched to locate. At that time, Moss was sitting in the back seat and was wearing clothes similar to those worn by the person Deputy Wilcher had moments before observed exiting the driver's seat of the car. The man Deputy Wilcher had originally seen driving the car to Mr. Miser's was sitting in the front passenger seat.

Deputy Wilcher had both men get out of the vehicle. There were opened and unopened beer cans in the car. The man with Moss, Edward Junior Howard (Howard), told Deputy Wilcher that he was the owner of the car. Moss told Deputy Wilcher that at Howard's request he had driven the car the 50 to 75 feet distance from the gasoline pumps to the parking spot. He asked Deputy Wilcher not to arrest him for DUI as he would be sent to prison, and suggested that his conduct warranted an arrest for public intoxication. Deputy Wilcher gave both men field sobriety tests. After they failed the tests, Deputy Wilcher arrested both Moss and Howard and took them to the county jail in Danville.

Parks, an employee of the Danville Police Department, testified that she performed a breathalyzer test on Moss which resulted in a reading of 0.155%.

The Commonwealth closed its case. Moss moved the trial court for a directed verdict based solely on the grounds there was insufficient evidence to establish Moss as being the driver of the vehicle.<sup>2</sup> The motion was denied.

Moss testified in his own defense. He told the jury that he and Howard had been driving around for about an hour and that he had consumed three or four beers. He testified that the car was owned by Howard, and that Howard was the only one who had driven the car that morning. He stated that when they arrived at Mr. Miser's, Howard pumped the gasoline while he went inside to pay for the gas and to buy cigarettes. He explained that when he came out of Mr. Miser's, he could not get the front passenger door to open so he went around the car and sat in the back seat behind the driver.<sup>3</sup> He acknowledged telling Deputy Wilcher that he drove the car after getting gas, but told the jury he lied to the deputy because he was nervous. He further admitted asking Deputy Wilcher to charge him with public intoxication instead of

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<sup>2</sup>The Commonwealth had not presented any evidence bearing on the OMV charge.

<sup>3</sup>The appellant's brief contains the following statements: "When [Moss] tried to get back into the passenger side he could not get the door open. [Moss] then opened the driver's side door and crawled into the back seat behind the driver." The inference from these statements is that the automobile only had two doors and that Moss had to go around the car and open the driver's door to get in. However, Moss testified that the vehicle had four doors. Thus, the obvious question is, if Moss could not get the front passenger door open and he was going to get into the back seat, why would he not enter the back seat from the back door on the passenger side, instead of going around to the driver's side?

DUI and stating to the deputy that he was afraid of going to prison.

The following testimony elicited from Moss on cross-examination forms the basis for this appeal:

Q. Do you have a driver's license?

A. No, sir.

Q. Had your license been suspended?

A. Yes, sir.

Q. Had they been suspended for drunk driving?

A. Yes, sir.

There was no objection to any of these questions. Immediately after this exchange between the Commonwealth's Attorney and Moss, the defense rested its case. In chambers, Moss' counsel moved for a mistrial and argued: "The jury now knows, if it didn't suspect before, that [Moss] has a prior D.U.I. conviction. That was not necessary." The trial court denied the motion stating, "I think it's part of the evidence to support the separate charge of operating a motor vehicle with a suspended license. . . ."

The jury found Moss guilty on both charges and fixed his punishment on the OMV charge at 90 days to serve and a fine of \$250. During the sentencing phase on the felony DUI, the jury heard evidence that Moss had been convicted of DUI on three previous occasions during the last five years. It found Moss guilty of DUI, fourth or subsequent offense and recommended a

sentence of five years. On April 22, 1997, Moss was sentenced by the Boyle Circuit Court in accordance with the jury's recommendation.

In this appeal, Moss contends that he was "substantially prejudiced" when the prosecutor was "allowed" to cross-examine him regarding a previous DUI conviction during the guilt phase of the trial. Moss argues the questioning offended both the mandate of Commonwealth v. Ramsey, Ky., 920 S.W.2d 526 (1996), and Kentucky Rules of Evidence (KRE) 404(b). Moss argues that he preserved the error for review by moving for a mistrial at the close of the case. However, we agree with the Commonwealth that Moss' failure to make a contemporaneous objection has resulted in the waiver of any error. Kentucky Rules of Criminal Procedure (RCr) 9.22; and Bell v. Commonwealth, Ky. 473 S.W.2d 820, 821 (1971).

Even if the alleged error were properly preserved for our review, we find no error warranting reversal of the judgment. The trial court is vested with broad discretion in ruling on a motion for a mistrial. See Jones v. Commonwealth, Ky. App., 662 S.W.2d 483, 484 (1983), Adkins v. Commonwealth, Ky. App., 647 S.W.2d 502, 505 (1982). The decision to grant such a motion is appropriate only where the circumstances reveal "'a manifest necessity for such an action or an urgent or real necessity.'" Skaggs v. Commonwealth, Ky., 694 S.W.2d 672, 678 (1989), cert. denied, 476 U.S. 1130, 106 S. Ct. 1998, 90 L. Ed. 2d 678 (1986) (quoting Wiley v. Commonwealth, Ky. App., 575 S.W.2d 166

(1979). "It is universally agreed that a mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice." Gould v. Charlton Co., Inc., Ky., 929 S.W.2d 734, 738 (1996).

We agree with Moss that Ramsey holds that "previous DUI convictions are not admissible during the guilt phase of a trial when offered to enhance the penalty." 920 S.W.2d at 529. However, the alleged prejudicial testimony elicited from Moss was not sought to enhance any penalty, but, as the trial court found, was relevant and necessary to satisfy one of the elements of KRS 189A.090(1).<sup>4</sup> In order to obtain a conviction on the OMV charge, the Commonwealth was required to prove that Moss was driving while his license was revoked or suspended because of a DUI conviction. For this reason, Moss' arguments pertaining to KRE 404(b) and his contention that the proof of the reason for the license's suspension could wait until the penalty phase, are flawed.

Clearly, the only way to comply with the dictates of Ramsey, and allow the Commonwealth to prove all the essential elements of an OMV offense pursuant to KRS 189A.010, is to sever the trial of the DUI charge from the OMV charge. RCr 9.16; see Hubbard v. Commonwealth, Ky., 633 S.W.2d 67 (1982) (defendant

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<sup>4</sup>This statute reads: "No person shall operate a motor vehicle while his license is revoked or suspended for violation of KRS 189A.010. . . ."

charged with several crimes, including possession of a handgun by a convicted felon, entitled to have handgun charge severed from trial on other charges to prevent prejudice from "jury's knowledge of previous convictions"). However, Moss did not ask for such relief. Having failed to request a severance of the charges, having failed to move for a directed verdict on the OMV charge at the close of the Commonwealth's case-in-chief, having failed to object to the questions propounded by the Commonwealth's Attorney, and having failed to request an admonition, in short, having failed to take any steps that could have eliminated or defused the risk of prejudice, Moss would have us hold that the trial court abused its discretion in denying his motion for a mistrial.

As recognized by Moss' counsel at the time he moved for a mistrial, it was apparent from other trial testimony that this was not Moss' first exposure to criminal sanctions for driving while intoxicated. Moss admitted telling Deputy Wilcher that a DUI conviction would result in him going to prison. Furthermore, the evidence of Moss' guilt was substantial. Under these circumstances, we can find no "manifest injustice" warranting a mistrial and thus no abuse of discretion on the part of the trial court.

Accordingly, the judgment of the Boyle Circuit Court is affirmed and the matter is remanded with directions to correct the judgment to conform to the jury's verdict.



ALL CONCUR.

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