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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001690-DG

WHITNEY BRIDGERS — APPELLANT

ON DISCRETIONARY REVIEW
FROM SPENCER CIRCUIT COURT
v. HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NO. 01-XX-00001

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON[1] AND WINE, JUDGES; MILLER,[2] SPECIAL JUDGE.

JOHNSON, JUDGE: Whitney Bridgers was found guilty of driving under the influence (DUI), first offense[3], and possession of drug paraphernalia, first offense[4], following a trial by jury in the Spencer District Court on October 30, 2001. After these

[1] Judge Rick A. Johnson completed this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

[2] Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

[3] Kentucky Revised Statutes (KRS) 189A.010.

[4] KRS 218A.500(2). Bridgers does not challenge his conviction for this offense on appeal. Rather, he only alleges error in regard to his conviction for DUI.

convictions were affirmed by the Spencer Circuit Court on May 18, 2005, this Court granted discretionary review. Having concluded that the district court did not commit reversible error, we affirm.

The facts of this matter are not in dispute. On October 25, 2000, Trooper Phil Crumpton with the Kentucky State Police observed a vehicle being driven by Bridgers on Kentucky Highway 55 approximately four miles north of Taylorsville, Spencer County, Kentucky. Trooper Crumpton testified that he observed the vehicle cross the centerline of the highway two times and cross the fog line two times. After making those observations, Trooper Crumpton activated his emergency equipment and stopped the vehicle.

After stopping the vehicle, Trooper Crumpton administered four field sobriety tests: the one-leg stand, the walk-and-turn, the horizontal gaze nystagmus (HGN) and the preliminary breath test.[5] As a result of Bridgers's performance on the field sobriety tests, he was charged with DUI, first offense, and placed under arrest by Trooper Crumpton. After placing Bridgers under arrest, Trooper Crumpton discovered a substance on Bridgers's person that appeared to be marijuana and an item that appeared to be a marijuana pipe. As a result of

[5] The results of the preliminary breath test were suppressed by the trial court pursuant to Bridgers's pre-trial motion and are not in issue in this appeal.

that discovery, Bridgers was additionally charged with possession of marijuana[6] and possession of drug paraphernalia. Following the arrest, Trooper Crumpton took Bridgers to the Taylorsville Police Department and administered a breath test on the Intoxilyzer 5000EN. The result showed Bridgers to have a blood alcohol content of 0.129.

This matter was tried before a jury by the Taylor District Court on October 30, 2001. Bridgers was convicted of DUI, first offense, as well as possession of drug paraphernalia, first offense. Bridgers subsequently appealed his convictions to the Spencer Circuit Court which affirmed the trial court's judgment by an opinion and order entered on May 18, 2005. Bridgers filed a motion to alter, amend, or vacate the decision of the circuit court which was denied by an opinion and order entered on July 8, 2005. This Court granted Bridgers's motion for discretionary review on October 17, 2005.

In his first issue on appeal, Bridgers asserts that the trial court erred by failing to suppress all evidence concerning the field sobriety tests on the basis that such evidence was technical in nature and therefore subject to the trial court's gate-keeping function established by the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals,

[6] KRS 218A.1422. The possession of marijuana charge was dismissed by the trial court prior to the trial of this matter.

Inc.[7] In Daubert and Kumho, the United States Supreme Court held that scientific or technical evidence should not be admitted unless it is shown to be scientifically reliable and that the trial court acts as a "gate-keeper" in making the determination as to whether the evidence is reliable. Bridgers argues that such a determination must be made by the trial court before evidence of field sobriety tests can be admitted in a DUI prosecution.[8]

Bridgers relies upon the case of United States v. Horn,[9] which held that evidence of field sobriety test were not admissible to prove a specific blood alcohol content and that a police officer who administered the tests could only testify regarding his observations of how a person performed on the tests. The officer could not, however, testify that the tests were objective indicators of a person's intoxication. The officer was permitted to give lay opinion testimony based on his experience that a person he observed was driving under the influence. Bridgers contends that unless the testing is properly qualified pursuant to Daubert and its progeny it is

[7] 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); see also Kumho Tire Co. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) and Mitchell v. Commonwealth, 908 S.W.2d 100 (Ky. 1995); Kentucky Rules of Evidence (KRE) 702.

[8] In his brief, Bridgers states that the HGN test is not at issue in this case. As such, we are only concerned with the admissibility of the walk and turn test and the one legged stand test.

[9] 185 F.Supp.2d 530 (D.MD. 2002).

improper for the officer administering the tests to testify that the subject "passed or failed" the "tests." On appeal, the trial court's decision regarding the admission of evidence will not be disturbed absent a showing that the trial court abused its discretion.[10] If the decision is arbitrary, unreasonable, unfair or unsupported by sound legal principles it is an abuse of discretion.[11]

In the case at bar, the trial court held that the Commonwealth did not have to produce evidence that field sobriety testing was scientifically reliable. However, the Commonwealth was required to make a showing that the tests were properly carried out by Trooper Crumpton. As such, the trial court viewed the videotape of Bridgers performing the tests that was made from the camera mounted on the inside of Trooper Crumpton's police cruiser. Bridgers objected that the walk and turn test was improperly carried out because the ground where Bridgers was required to perform the test was not level. The trial court held that Bridgers could address that objection through cross examination of Trooper Crumpton as well as in argument to the jury and held the test to be admissible. As for the walk and turn test, Bridgers made no objection to how it was

[10] Mitchell, 908 S.W.2d at 102.

[11] Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).

performed presumably because Trooper Crumpton testified that Bridgers passed the test.

We agree with the trial court that the Commonwealth was not required to make a showing that the field sobriety testing was scientifically reliable. This Court has previously held that evidence of field sobriety testing is admissible[12] and that officers observing a defendant's driving and physical condition may offer both lay and expert opinion testimony that a defendant was intoxicated.[13] As such, we find no abuse of discretion in the trial court's admission of the evidence and testimony.

Next, Bridgers' asserts that the trial court erred in allowing the introduction of his breath test results on the basis that the Commonwealth failed to prove the Intoxilyzer 5000EN was properly working. At trial, Trooper Crumpton testified that the Intoxilyzer 5000EN machine was working properly when he administered the breath test to Bridgers. Trooper Crumpton further testified regarding the print out from the machine and went over each line for the jury. The Commonwealth did not, however, offer any evidence concerning the machine's maintenance records.

[12] Kidd v. Commonwealth, 146 S.W.3d 400, 402 (Ky.App. 2004).

[13] Commonwealth v. Rhodes, 949 S.W.2d 621, 623 (Ky.App. 1996).

At the time of the trial of this matter, the foundation requirements for the introduction of breath test results were set forth by our Supreme Court in Wirth v. Commonwealth[14]. The Wirth decision examined prior holdings of the Court in Marcum v. Commonwealth[15] and Owens v. Commonwealth[16] both of which had held breath tests results to be admissible solely on the basis of testimony of the operator of the machine. While noting that "[t]he standard set forth in Marcum and Owens remains the principal foundation requirement," Wirth stated that the additional requirements found in KRS 189A.103(3)(a), KRS 189A.103(4) and 500 KAR[17] 8:020(2) could be "satisfied by means of business or public records showing compliance with the additional requirements."[18]

After the trial of the case sub judice, our Supreme Court revisited its holding in Wirth as a result of confusion that appeared to have resulted in the courts in applying that decision dealing with the foundation requirements for the breath test.[19] While noting that Wirth did not overrule Marcum and Owens, our Supreme Court clarified its holding that the

[14] 936 S.W.2d 78 (Ky. 1996).

[15] 483 S.W.2d 122 (Ky. 1972).

[16] 487 S.W.2d 897 (Ky. 1972).

[17] Kentucky Administrative Regulations.

[18] 936 S.W.2d at 82.

[19] Commonwealth v. Roberts, 122 S.W.3d 524, 526 (Ky. 2003).

Commonwealth could "satisfy the foundation requirements for introducing a breath test by relying solely on the testimony of the operator so long as the documentary evidence, i.e. the service records of the machine and the test ticket produced at the time of the test, are properly admitted."[20] The Court overruled Marcum and Owens to the extent those decisions differed with the new foundation requirements.

At the trial of this matter, the Commonwealth relied upon the testimony of the operator of the machine, Trooper Crumpton and properly admitted the test ticket produced after Bridgers was given the test. However, the service records of the machine were not introduced. Although it was error for the trial court to admit the results of the breath test in this matter under the Roberts holding, we believe such error to have been harmless in light of the other testimony indicating Bridgers was intoxicated. Further, we do not believe the trial court abused its discretion in admitting the test results solely on the basis of Trooper Crumpton's testimony due to the confusion which existed at the time regarding the proper foundation necessary to introduce a breath test.

Bridgers also argues that the trial court erred by failing to direct a verdict in his favor on the basis that the Commonwealth did not introduce any evidence to show that the

[20] Id. at 528.

breath test was "scientifically reliable" and failed to introduce evidence showing what the breath test actually measures. We disagree with Bridgers' assertion that proving the breath test to be scientifically reliable is an essential element that must be proven by the Commonwealth in order to obtain a DUI conviction.

> "In fact, breath testing for intoxication has been in existence for a long time and has been used in a variety of prosecutions. While breath testing may not be flawless, it has been to have sufficient reliability to be admissible in evidence and to sustain a conviction."[21]

Bridgers does not cite any authority in support of his argument that the Commonwealth must introduce evidence and prove what the breath test actually measures, and we decline his invitation to require that the Commonwealth elicit testimony that the breath test measures grams of alcohol per 210 liters of breath. Such testimony has no bearing on whether the test was properly administered or whether the machine was properly working at the time the test was administered and would only serve to confuse the jury regarding the science of the test.

Finally, Bridgers asserts that he was entitled to a directed verdict on the basis that the Commonwealth failed to introduce any evidence to prove that the breath test was

[21] Wirth, 936 S.W.2d at 83 (citing Morgan v. Shirley, 958 F.2d 662 (6th Cir. 1992).

administered within two hours of when Bridgers last operated a motor vehicle. We disagree. The Commonwealth introduced into evidence the video tape of Trooper Crumpton stopping Bridgers' vehicle and then placing him under arrest. The video showed the time and date of the stop and arrest. The Commonwealth then introduced the test ticket produced from Bridgers' breath test which was also marked with the time and date of the test. In considering a directed verdict motion, the court must consider all the evidence in light most favorable to the Commonwealth and draw all fair and reasonable inferences from the evidence in favor of the Commonwealth.[22] "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict."[23] Considering the evidence as a whole, particularly the video tap and test ticket, we do not believe it to be unreasonable for a jury to find that the breath test was administered within two hours of when Bridgers last operated a motor vehicle.

Based upon the forgoing, the decision of the Spencer Circuit Court affirming the judgment of the Spencer District Court is affirmed.

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[22] Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

[23] Id. (citing Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983)).

ALL CONCUR.

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