RENDERED: NOVEMBER 2, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000046-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 05-CI-009368

HON. SEAN DELAHANTY, JUDGE,
JEFFERSON DISTRICT COURT, AND
JUAN LOPEZ CORDOVA, REAL PARTY IN INTEREST — APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: MOORE AND THOMPSON, JUDGES; HENRY,[1] SENIOR JUDGE.

MOORE, JUDGE: In this present case, the Commonwealth appeals from an opinion and order of the Jefferson Circuit Court in which the circuit court denied the Commonwealth's Petition for Writ of Prohibition and/or Mandamus. On appeal, the Commonwealth argues that the circuit court erred by misconstruing the Jefferson District Court's decision which was the subject of the Commonwealth's petition. Addressing the

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

merits of its petition, the Commonwealth argues that the district court erred when it determined that Kentucky Revised Statutes (KRS) 189A.103 and 189A.105, which set forth the implied consent rule, require that the implied consent be presented in a meaningful way to non-English speaking drivers suspected of operating a motor vehicle under the influence of alcohol, and these statutes require law enforcement to do more than merely read the implied consent in English to such suspects. Finding that the circuit court failed to address the merits of the Commonwealth's petition, we vacate the circuit court's opinion and order and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

On the night of June 22, 2005, Officer William Shingleton of the Louisville Metro Police Department was investigating a shooting. While investigating at an apartment complex, the officer noticed a truck driven by Juan Lopez Cordova in the complex's parking lot. Cordova was operating the truck erratically. Officer Shingleton approached Cordova's vehicle and ordered Cordova to cease speaking in both English and Spanish. Cordova then exited his vehicle, fled a short distance and attempted to hide by a dumpster. Once the officer caught Cordova, he placed Cordova in handcuffs and noticed that Cordova had a strong odor of alcohol about his person and had bloodshot eyes. In response to the officer's questions, Cordova admitted to drinking two beers.[2] Because Cordova was in handcuffs, the officer did not administer any field sobriety tests. The officer arrested Cordova and charged him with Operating a Motor Vehicle Under the

[2] Officer Shingleton never stated whether Cordova spoke English or Spanish when he responded to the officer's questions.

Influence of Alcohol (DUI), KRS 189A.010, Reckless Driving, KRS 189.290 and No Operator's License, KRS 186.410.

After being arrested, Cordova was transported to the Louisville Metropolitan Department of Corrections (Metro Corrections). While there, Officer Thomas Woods, a breath test technician for Metro Corrections, read the implied consent form to Cordova in English and gave a written Spanish translation of the implied consent to Cordova for him to read. The officer asked Cordova if he "comprende," and Cordova answered affirmatively. However, Cordova did not sign the Spanish translation, giving no indication that he, in fact, had read it. Afterwards, Officer Woods asked Cordova, in Spanish, if Cordova would submit to the breath test, but Cordova refused.

On September 1, 2005, the district court held an evidentiary hearing in Cordova's case. At the hearing, both Officer Shingleton and Officer Woods testified to the facts set forth *supra*. After the officers testified at the hearing, the district court mused that in the normal course of events when an English speaker has been arrested for DUI, the implied consent is read to the suspect. However, the district court commented that if the suspect is a non-English speaker, then the breath test technician will present a copy of the implied consent in the suspect's language, presumably Spanish, for the suspect to read, and will presume that the suspect has read it. Then the technician will ask if the suspect "comprende." The district court speculated that just because the implied consent has been presented in such a manner does not mean that it was presented in a meaningful fashion.

The Commonwealth argued that KRS 189A.103 and 189A.105 do not require law enforcement agents to present the implied consent to a Spanish speaker in Spanish. According to the Commonwealth, these statutes only require law enforcement agents to present the implied consent in English.

The district court rejected the Commonwealth's argument. The district court reasoned that if the statutes required the presentation of the implied consent, then it must be presented in a meaningful way. The police cannot merely present the implied consent to a non-English speaker in English. The district court stated that while the Commonwealth can argue that non-English speakers have previously given their consent by driving on the highways of Kentucky, non-English speakers are not aware of that fact because they do not speak English. According to the district court, this results in English speakers and non-English speakers being treated differently. The district court opined if the Commonwealth is going to hold non-English speaking defendants accountable in the same manner as English speaking defendants, better protocols must be developed for dealing with non-English speaking defendants, and the implied consent must be presented to non-English speaking defendants in a manner that is closer to how it is presented to English speaking defendants.

The Commonwealth argued that it is well-settled in the Commonwealth that a driver is deemed to have given his consent to submit to a blood alcohol test by the simple act of driving on Kentucky's highways. Simply because the police are required to

later remind a driver of his consent by reading the implied consent to the driver does not negate the fact that the driver has previously given consent.

The district court conceded this point but noted that the General Assembly requires presentation of the implied consent. Subsequently, the district court held that Cordova did not knowingly and intelligently refuse to take the breath test and excluded any evidence of his refusal from being used at trial.

In response, the Commonwealth filed a petition for writ of prohibition and/or mandamus with the Jefferson Circuit Court seeking an order prohibiting the district court from enforcing its decision to exclude the evidence of Cordova's refusal. The Commonwealth argued that KRS 189A.103 and 189A.105 only require the police to read the implied consent to a non-English speaking defendant in English. According to the Commonwealth, the statutes do not require the police to ensure that a defendant has understood the implied consent, and the statutes do not require the police to present the implied consent in every language that might be spoken by a driver on the highways in Kentucky.

The Commonwealth averred that, according to KRS 189A.103(2), a driver who is dead, unconscious or in a state that renders him incapable of refusing will be deemed to have not withdrawn his implied consent to submit to a blood alcohol test. The Commonwealth argued that Cordova falls into this last category by virtue of not understanding English and that he was incapable of refusing just like a dead or unconscious person.

In the alternative, the Commonwealth argued that if Cordova was entitled to have the implied consent read to him in Spanish, then suppression of his refusal was still not required. The Commonwealth argued that, if it violates a statute, exclusion is not required, absent a constitutional violation, unless the statute specifically mandates exclusion. *Little v. Commonwealth*, 438 S.W.2d 527 (Ky. 1968). The Commonwealth further argues that neither KRS 189A.103 nor 189A.105 mandates exclusion of evidence for violations of the implied consent and that no constitutional right was implicated.

The Jefferson Circuit Court determined that the proceeding before the district court was a judicial review, pursuant to KRS 189A.220, of the pretrial suspension of Cordova's operator's license. Holding that the Commonwealth had an adequate remedy by way of appeal and that it was not entitled to the extraordinary relief afforded by a writ of prohibition, the circuit court denied the Commonwealth's petition. After the Jefferson Circuit Court denied the Commonwealth's petition, the Commonwealth filed this appeal as a matter of right.

II. STANDARD OF REVIEW

A petition for writ of prohibition will only be granted if the petitioner establishes that

> 1) the lower court is proceeding or is about to proceed *outside its jurisdiction* and there is *no adequate remedy by appeal,* or
> 2) the lower court is about to act incorrectly, although *within its jurisdiction,* and there exists *no adequate remedy by appeal or otherwise and great injustice and irreparable injury would result*.

Hoskins v. Maricle, 150 S.W.3d 1, 6 (Ky. 2004). The Supreme Court of Kentucky has ruled that the decision to grant or deny a petition falls within the discretion of the court in which it was filed. *Id*. at 5. Thus, we will not disturb the court's decision regarding a writ of prohibition absent an abuse of discretion. A trial court has abused its discretion if its decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles. *Jaroszewski v. Flege,* 204 S.W.3d 148, 150 (Ky. App. 2006).

III. ANALYSIS

On appeal, the Commonwealth argues that the circuit court misconstrued the district court's decision. The Commonwealth argues that the circuit court considered the hearing before the district court as a judicial review, pursuant to KRS 189A.220, of the pretrial suspension of Cordova's license. According to the Commonwealth, the district court's decision was not about a pretrial suspension of Cordova's operator's license because Cordova did not have a license to suspend in the first place. The Commonwealth states that, in its petition, it was complaining about the district court's decision to suppress the evidence regarding Cordova's refusal to submit to a breath test while he was at Metro Corrections. Additionally, the Commonwealth avers that, in its petition, it was requesting the circuit court for an order prohibiting the district court from enforcing its decision to exclude the evidence of Cordova's refusal. According to the Commonwealth, the record does not support the circuit court's mischaracterization of the present case as being about a pretrial license suspension.

In the Jefferson Circuit Court's opinion, it held that the proceeding before the district court was a judicial review, pursuant to KRS 189A.220, of the pretrial suspension of Cordova's license. According to the circuit court, the district court

> heard testimony from both the arresting officer and the Metro Corrections Officer who had informed Mr. Cordova of the law regarding implied consent in this Commonwealth. After testimony was offered, [the district court] found that the suspension of Mr. Cordova's license should be reinstated as he had not been advised of the implied consent law, a violation of KRS 189A.220(3). [The district court] based this decision upon the methods taken to inform Mr. Cordova who speaks Spanish.
>
> The Commonwealth has now brought this Petition. In the Petition, the Commonwealth refers to the hearing set forth above as a pretrial hearing based upon a motion to suppress evidence. Consequently, it is argued by the Commonwealth that a writ is necessary in order for it to proceed with a trial. This Court disagrees with the Commonwealth's position.
>
> To begin, a writ is an extraordinary remedy and not a substitute for the appellate process. Shumaker v. Paxton, 613 S.W.2d 130 (Ky. 1981). In the present action, the district court judge made a ruling pursuant to KRS 189A.220. The appropriate remedy would be to appeal that decision. The extraordinary measure of a writ is not warranted under these circumstances. Consequently, this Court will deny the Commonwealth's Petition for Writ of Prohibition and/or Mandamus.

According to the brief record before us, it appears that Cordova did not have an operator's license to suspend as he was charged with violating KRS 186.410. In addition, a review of the audio record of the September 1, 2005 hearing reveals that neither the Commonwealth nor Cordova treated the hearing as a judicial review of a pretrial license suspension. Both parties treated the proceeding as if it were a suppression

hearing regarding Cordova's refusal to submit to the breath test. Consequently, while the district court may have stated that the hearing was about a pretrial license suspension, it was, in actuality, a suppression hearing regarding Cordova's refusal.

After the district court suppressed the evidence of Cordova's refusal, the Commonwealth had two options: 1) to proceed to trial without this evidence, or 2) to seek review of the district court's decision. In 1986, the Supreme Court of Kentucky adopted the reasoning found in *South Dakota v. Neville,* 459 U.S. 553, 103 S. Ct. 916, 74 L. Ed. 2D 748 (1983) and held that the Commonwealth could use at trial the evidence of a defendant's refusal to submit to a blood alcohol test if the requirements of the implied consent had been met. *Commonwealth v. Hager,* 702 S.W.2d 431, 432 (Ky. 1986). Furthermore, if a DUI suspect refuses any test that is requested, "the fact of this refusal may be used against him in court as evidence of violating KRS 189A.010[.]" KRS 189A.105(2)(a)(1). Because it has been recognized that evidence of a person's refusal to submit to a blood alcohol test is highly relevant evidence that said person was intoxicated, the Commonwealth chose to file its petition in order for the circuit court to review the district court's decision. *See Cook v. Commonwealth,* 129 S.W.3d 351, 360 (Ky. 2004).

It is undisputed that the district court's decision to suppress the evidence of Cordova's refusal constituted an interlocutory order. According to KRS 23A.080(1), "[a] direct appeal may be taken from District Court to Circuit Court from any final action of the District Court." This statute, however, does not provide any means for pursuing an

interlocutory appeal from the district court to the circuit court. *Commonwealth v. Williams,* 995 S.W.2d 400, 402 (Ky. App. 1999). Thus, in this present case, the Commonwealth was prohibited from filing an appeal with the circuit court from the district court's decision.

In *Tipton v. Commonwealth,* 770 S.W.2d 239, 241 (Ky. App. 1989), this Court held that the Commonwealth could not seek a direct appeal from the district court to the circuit court regarding an interlocutory order of the district court. However, the *Tipton* Court reasoned that

> some vehicle for review of such interlocutory district court rulings should be available. Otherwise, the Commonwealth may be forced to trial without vital evidence or with some other significant prejudice to its case, as shown herein.
>
> In our opinion, review of district court rulings is available through an original proceeding for relief in the nature of mandamus or prohibition in the appellate court, herein the circuit court. *See* SCR 1.040(6). [Kentucky Rules of Civil Procedure] 81 allows the old remedy by writs of mandamus and prohibition to be obtained by an original action in the appropriate court. This is not an immediate and direct interlocutory appeal to the appellate court but an original action. Procedurally, review is granted, thereby comporting with KRS 23A.080(2) which says, "The circuit court may issue *all* writs necessary in aid of its *appellate jurisdiction* . . . ." (Emphasis added.)
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> However, the standard of review is different. Under the direct and interlocutory appeal approach, the standard of review is whether the trial court's ruling is supported by findings that are of record, and whether such findings were clearly erroneous or the trial court abused its discretion.
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> The standard applied in original actions seeking mandamus or prohibition type relief is much different. To obtain relief in

> the nature of a writ of prohibition, a petitioner must show that: (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no adequate remedy by appeal, or (2) the lower court is about to act incorrectly, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury would result. The issuance of the writ is only under exceptional circumstances in order to prevent a miscarriage of justice. *See Murphy v. Thomas,* Ky., 296 S.W.2d 469 (1956); *Shumaker v. Paxton,* Ky., 613 S.W.2d 130 (1981); and *Graham v. Mills,* Ky., 694 S.W.2d 698 (1985).

Id. at 241-242.

In accordance with *Tipton* and its progeny, the Commonwealth properly filed a petition for writ of prohibition and/or mandamus seeking review of the district court's decision. However, the circuit court mischaracterized the lower court's decision[3] as dealing strictly with pretrial suspension, and, based on that mischaracterization, it ruled that the Commonwealth had an adequate remedy by appeal. By mischaracterizing the proceeding as a judicial review of the pretrial suspension of Cordova's license, the circuit court completely ignored the suppression issue and failed to address the merits of the Commonwealth's petition. We are mindful that the standard of review regarding such original actions is abuse of discretion. *Hoskins,* 150 S.W.3d at 6. However, by failing to

[3] Although this issue was not raised either before the circuit court or before us, we note that there is an inconsistency between the district court's oral pronouncement at the September 1, 2005 evidentiary hearing and the written order entered by the district court that memorialized its decision. According to the audio recording of the hearing, the district court held that the evidence of Cordova's refusal would be excluded at trial. However, in the district court's brief written order, the district court merely stated "Refusal [defendant] not advised of implied consent in a meaningful way[.]" Needless to say, a court's oral pronouncement is not an effective judgment until it has been reduced to writing. *Commonwealth v. Hicks,* 869 S.W.2d 35, 37 (Ky. 1994). Furthermore, where there is an inconsistency between a court's oral pronouncement and its subsequent written order, the written order will control. *Id*. at 38.

address the Commonwealth's claims, the circuit court acted arbitrarily; therefore, we conclude that it abused its discretion.

The Jefferson Circuit Court's opinion and order entered on November 28, 2005 is vacated, and this matter is remanded with instructions for the circuit court to reconsider the merits of the Commonwealth's petition.

Because we vacate the circuit court's opinion and order and remand the matter, we decline to address the Commonwealth's other arguments regarding the merits of its petition.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gregory D. Stumbo
Attorney General of Kentucky

David A. Sexton
Louisville, Kentucky

BRIEF FOR APPELLEE:

Brendan Joseph McLeod
Louisville, Kentucky