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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000080-DG

COMMONWEALTH OF KENTUCKY

APPELLANT

ON DISCRETIONARY REVIEW FROM
CLINTON CIRCUIT COURT
v. HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 09-XX-00002

CHRISTOPHER LYNN BILBREY

APPELLEE

OPINION
REVERSING

** ** * ** * **

BEFORE: ACREE, DIXON AND KELLER, JUDGES.

ACREE, JUDGE: The question to be decided in this matter is whether the Clinton District Court erred by entering an order denying appellee Christopher Bilbrey's motion to suppress evidence acquired following his arrest for driving under the influence. The Clinton Circuit Court reversed the district court's order, concluding that the Commonwealth failed to prove that Bilbrey operated or was in physical

control of a motor vehicle while under the influence of alcohol. We find no error in the district court's order. Accordingly, we reverse the Clinton Circuit Court and reinstate the Clinton District Court's order denying Bilbrey's motion to suppress.

I. Facts and procedure

At the suppression hearing, Clinton County Deputy Jim Guffey testified concerning Bilbrey's arrest. According to Deputy Guffey, on June 13, 2008, at approximately 6:45 p.m., a concerned citizen called 911 and reported that a truck was driving down the center of the road on Kentucky Highway 127, and had almost run at least two other vehicles off the road. The citizen provided the 911 dispatcher with the truck's license plate number and described the truck as a black Chevrolet. The citizen explained that the truck had pulled over in the gravel area next to the Spring Creek Bridge and was attempting to turn around. The 911 dispatcher notified the Clinton County Sheriff's Department. Deputy Guffey responded.

At 6:54 p.m., approximately nine minutes after the citizen called 911, Deputy Guffey located a black truck at the Spring Creek Bridge. The truck matched the description and license plate number provided by the citizen. Deputy Guffey approached the truck and observed Bilbrey slumped over in the driver's seat with his head down. Bilbrey appeared asleep. Deputy Guffey noticed an open beer can, which was half full, between Bilbrey's legs. Bilbrey was alone in the truck. The truck's engine was running and its "daytime" lights, or parking lights, were on.

Deputy Guffey yelled loudly and knocked multiple times on the truck's window before Bilbrey responded. As Bilbrey exited the truck, he was unsteady on his feet and appeared dazed. Deputy Guffey detected a strong odor of alcohol emanating from the truck. Consequently, Deputy Guffey attempted to administer a HGN field sobriety test, but Bilbrey stated he was "too drunk" to perform the balancing test. Deputy Guffey then administered a Preliminary Breath Test (PBT). Bilbrey failed the test. At this point, Deputy Guffey arrested Bilbrey for driving under the influence and transported him to the Clinton County jail. At the jail, Deputy Guffey requested that Bilbrey take an intoxilyzer test. Bilbrey refused.

Thereafter, Bilbrey filed a motion to suppress his arrest and evidence relating to his arrest on the grounds that Deputy Guffey arrested Bilbrey without probable cause because Bilbrey had not been in control of or operating his truck while intoxicated. The district court conducted an evidentiary hearing on August 26, 2008. Following the hearing, the district court denied Bilbrey's motion, determining sufficient evidence existed to conclude that Bilbrey was operating or in physical control of his motor vehicle while intoxicated pursuant to KRS 189A.010(1).

On August 5, 2009, a jury found Bilbrey guilty of both operating a motor vehicle while under the influence of alcohol and possession of an open alcoholic beverage in a motor vehicle. Bilbrey filed a motion for a directed verdict and a motion for judgment notwithstanding the verdict on the same grounds as his motion to suppress. The district court denied Bilbrey's motions.

Bilbrey appealed the district court's denial of his motion to suppress, motion for directed verdict, and motion for judgment notwithstanding the verdict to the Clinton Circuit Court. The circuit court reversed the district court's order denying Bilbrey's motion to suppress, holding that the Commonwealth had failed to satisfy its burden regarding whether Bilbrey had operated or been in control of a motor vehicle while under the influence. Shortly thereafter, the Commonwealth petitioned this Court for discretionary review, which we granted.

II. Standard of review

In reviewing a trial court's ruling on a suppression motion after an evidentiary hearing, the appellate court applies a bifurcated test. *Commonwealth v. Marshall*, 319 S.W.3d 352, 357 (Ky. 2010). First, the appellate court reviews the trial court's factual findings under a clearly erroneous standard. *Id.* If the trial court's factual findings are supported by substantial evidence, they are not clearly erroneous and are conclusive. *Id.*; *see also* Kentucky Rules of Criminal Procedure (RCr) 9.78. Second, "the appellate court conducts a *de novo* review to determine whether the trial court's decision is correct as a matter of law." *King v. Commonwealth*, 302 S.W.3d 649, 653 (Ky. 2010).

III. Analysis

We must first determine whether the district court's factual findings are supported by substantial evidence. Deputy Guffey was the sole witness. His testimony was clear, concise, and thorough. There is no reason to doubt the veracity of his testimony. In its order denying Bilbrey's motion to suppress, the

district court adopted Deputy Guffey's testimony. Thus, we conclude that the district court's findings of fact were supported by substantial evidence, and are therefore conclusive.

Next, we undergo a *de novo* review of the law as applied to those facts.

KRS 189A.010(1) provides, in pertinent part:

(1) No person shall operate or be in physical control of a motor vehicle anywhere in this state:

...

(b) While under the influence of alcohol.

A district court may grant a motion to suppress evidence resulting from an arrest that lacked probable cause. *Wilson v. Commonwealth*, 37 S.W.3d 745, 748 (Ky. 2001). "Probable cause must exist and be known by the arresting officer at the time of the arrest." *White v. Commonwealth*, 132 S.W.3d 877, 883 (Ky. App. 2003). Probable cause exists if the arresting officer has a reasonable belief, in view of all the evidence, that there was a "fair probability" that the defendant was operating or in physical control of the motor vehicle while under the influence of alcohol. *Id.*; see also *Eldred v. Commonwealth*, 906 S.W.2d 694, 705 (Ky. 1994), *abrogated on other grounds by Commonwealth v. Barroso*, 122 S.W.3d 544 (Ky. 2003).

In analyzing whether probable cause exists when the query is whether the defendant was operating or in physical control of a motor vehicle while intoxicated, the court considers several factors:

- (1) Whether or not the person in the vehicle was asleep or awake;
- (2) whether or not the motor was running;
- (3) the location of the vehicle and all of the circumstances bearing on how the vehicle arrived at that location; and
- (4) the intent of the person behind the wheel.

Wells v. Commonwealth, 709 S.W.2d 847, 849 (Ky. App. 1986) (citation omitted).

This Court has clarified that, in conducting its analysis, the appellate court must not examine the *Wells* factors in a vacuum, but instead must consider the totality of the circumstances. *White*, 132 S.W.3d at 883-84. Additionally, the appellate court may consider circumstantial evidence in determining whether the defendant was operating or in physical control of a motor vehicle. *Blades v. Commonwealth*, 957 S.W.2d 246, 250 (Ky. 1997).

In *Wells v. Commonwealth*, 709 S.W.2d 847 (Ky. App. 1986), rendered under a former version of KRS 189A.010, a police officer found Wells asleep in the driver's seat of his van. The van was parked in a parking lot outside a hotel. Wells was alone in the van, the keys were in the ignition, and the motor was running. The van's parking brake was engaged. The police officer discovered a case of beer in the van, with three or four cans missing and one can empty. The police officer concluded Wells was under the influence of alcohol because he was unsteady on his feet, and he failed sobriety and breathalyzer tests. The Court determined, however, that there was insufficient evidence to prove that Wells had operated his vehicle while intoxicated because there was no evidence to indicate that Wells had driven his vehicle to its current location while intoxicated or that he intended to operate his vehicle. *Wells*, 709 S.W.2d at 850. Instead, the court could

infer that Wells started drinking after he parked his vehicle in the hotel parking lot.

Id.

By contrast, in *White v. Commonwealth*, 132 S.W.3d 877 (Ky. App. 2003), this Court upheld the trial court's finding of probable cause to charge White with driving under the influence. A Kentucky State Police trooper received notice from the 911 dispatch center that a truck was stopped in the roadway. Upon arrival, the trooper found White's truck leaning against a guardrail with the truck's rear section in the road. Additionally, a neighbor at the scene informed the trooper that White had walked to the neighbor's house to call his wife for help. The trooper found evidence of alcohol in White's truck. White failed several field sobriety tests and the trooper determined White was intoxicated. This Court concluded that, based on the totality of the circumstances, "the trial court correctly made a finding of probable cause to charge [White] with driving while intoxicated."

White, 132 S.W.3d at 884.

With the above standards in mind, we turn to the case at hand to determine if the district court correctly applied the facts as a matter of law.

The first of the enumerated factors in *Wells* asks whether the defendant was asleep or awake. 709 S.W.2d at 850. In the case *sub judice*, Deputy Guffey testified that, when he arrived at the scene, Bilbrey was slumped over in the driver's seat and appeared asleep. Thus, the first factor has not been met. This Court has noted, however, that when "a sleeping person behind the steering wheel of a motionless car" was found to be operating or in control of the vehicle,

additional circumstances existed “that showed the person had in fact operated the vehicle.” *Wells*, 709 S.W.2d at 849. Such additional circumstances are present in this case.

The second factor is whether the vehicle’s engine was running. Deputy Guffey testified that, when he arrived at the Spring Creek Bridge, Bilbrey’s truck was running and it had on its “daytime” lights. The second factor has been satisfied.

Third, the Court must examine the vehicle’s location and all of the circumstances reasonably evidencing how the vehicle arrived there. Deputy Guffey testified that a concerned citizen called 911 at approximately 6:45 p.m. reporting Bilbrey’s erratic driving and claiming that Bilbrey had pulled over in a gravel area next to the Spring Creek Bridge. At 6:54 p.m., Deputy Guffey arrived at the Spring Creek Bridge and located Bilbrey’s truck. It is undisputed that Bilbrey was alone in the truck when Deputy Guffey arrived, and that Bilbrey had one half-empty can of beer in his possession. Additionally, Deputy Guffey detected a strong odor of alcohol emanating from the truck, and observed that Bilbrey was unsteady on his feet and appeared dazed. Only nine minutes had elapsed between the citizen’s emergency call and Deputy Guffey’s arrival at the scene. It is improbable that in the nine minutes Bilbrey was parked at the Spring Creek Bridge he consumed so much alcohol that he was unable to perform or failed multiple standard field sobriety tests. It is also unreasonable to conclude that Bilbrey achieved his advanced stage of intoxication by drinking a half can of beer.

It logically follows that Bilbrey became intoxicated prior to driving his truck to the Spring Creek Bridge. Thus, it was reasonable for Deputy Guffey to believe that Bilbrey drove his truck to the Spring Creek Bridge while under the influence of alcohol, and to conclude probable cause existed.

The final factor requires us to consider the intent of the person behind the wheel. Deputy Guffey testified that the 911 caller reported that a black truck was driving erratically down the highway, had almost run two other vehicles off the road, and had pulled over by the Spring Creek Bridge and was attempting to turn around. Deputy Guffey located the truck matching the description and license plate number provided by the caller, in the location indicated by the caller. Similar to the defendant in *White*, Bilbrey was the only person in the vehicle and no other persons were in the vicinity, eliminating the possibility that another person was previously driving the vehicle.

In *Wells*, the Court held that there was insufficient evidence to establish that Wells had operated his vehicle while intoxicated because there was no evidence to indicate that Wells had driven his vehicle to its current location while intoxicated or that he intended to operate his vehicle. 709 S.W.2d at 850. In this case, it is unnecessary for us to speculate whether Bilbrey intended to drive his vehicle because the circumstances observed by Deputy Guffey supported the reasonable inference that Bilbrey, and no one else, drove his truck to the Spring Creek Bridge and, further, that Bilbrey was intoxicated when he did so. This amounted to probable cause. *Wells* is distinguishable. |

Considering the four factors enumerated in *Wells*, in the context of the totality of the circumstances, the evidence plainly establishes that Deputy Guffey had a reasonable belief that Bilbrey had operated his truck while intoxicated.

IV. Conclusion

The Clinton District Court properly denied Bilbrey's motion to suppress because there was substantial evidence to support the district court's findings of fact and the district court properly applied the law to those facts.

For the reasons stated herein, we reverse the Clinton Circuit Court's order, and reinstate the Clinton District Court's order denying Bilbrey's motion to suppress.

ALL CONCUR.

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