

RENDERED: OCTOBER 7, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001230-MR

BRYAN KEITH HILL

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE, V, JUDGE
ACTION NO. 09-CR-00399

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, NICKELL AND WINE, JUDGES.

NICKELL, JUDGE: Bryan Keith Hill appeals as a matter of right from his conviction and sentence following a jury trial in the Campbell Circuit Court. For the following reasons, we affirm.

On July 4, 2009, Sergeant Brian Messer of the Cold Springs Police Department observed a vehicle driving erratically. Sgt. Messer activated his emergency equipment and effectuated a routine traffic stop. Sgt. Messer

approached the vehicle and asked the driver, Hill, for his drivers' license and the vehicle's registration. Hill informed the officer that his license was suspended. Officer Nick Love arrived on the scene a short time later. After some discussion, it was decided that Officer Love would conduct field sobriety tests on Hill to determine if he was intoxicated.

Officer Love conducted what he referred to as "in-car" sobriety tests. Based on his observations, Officer Love asked Hill to exit the vehicle. Hill refused and fled the scene. After a short pursuit, Hill crashed his vehicle into a guardrail and was quickly apprehended and arrested. Officer Love transported Hill to a nearby police station and administered a breath alcohol test using the station's Intoxilyzer 5000 breathalyzer test machine. The testing equipment indicated Hill's blood-alcohol content was 0.175. Hill was subsequently indicted by a Campbell County Grand Jury on charges of wanton endangerment in the first degree,¹ fleeing or evading police in the first degree,² operating a motor vehicle on a suspended license,³ receiving stolen property under \$500.00,⁴ and being a persistent felony offender in the first degree (PFO I).⁵

A jury trial was convened on February 17-18, 2010, following which Hill was convicted of fleeing or evading police, operating a motor vehicle on a

¹ Kentucky Revised Statutes (KRS) 508.060, a Class D felony.

² KRS 520.095, a Class D felony.

³ KRS 186.620, a Class B misdemeanor.

⁴ KRS 514.110, a Class A misdemeanor.

⁵ KRS 532.080.

suspended license and receiving stolen property.⁶ The jury sentenced him to an aggregate term of five years' imprisonment. Hill was subsequently found to be a PFO I and his sentence was enhanced to fifteen years. This appeal followed.

The sole issue raised in this appeal is whether the trial court erred in allowing Officer Love to testify regarding the testing and maintenance of the Intoxilyzer 5000 machine. Hill contends that since those tasks were performed by Kentucky State Police (KSP) lab technicians, Officer Love should not have been allowed to "read the record that someone else wrote." We discern no error.

At the trial of this matter, the Commonwealth, in seeking to lay a foundation to prove the reliability of the breath test machine, elicited testimony from Officer Love that a technician from the KSP lab performed all of the calibration and maintenance tests at the location where the machine was housed and recorded the findings of those tests in a log book kept with the machine. Officer Love produced the log book from the machine he used to test Hill. Over Hill's objection, Officer Love testified the machine had been tested on July 1 and August 4, 2009, and that the tests revealed the machine was functioning properly. Officer Love tested Hill just after midnight on July 5, 2009.

Relying on the holding in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), Hill contends allowing Officer Love to testify that the Intoxilyzer 5000 was functioning properly based on someone else's testing

⁶ Although the jury convicted Hill on the wanton endangerment charge, the Commonwealth moved the trial court to dismiss that count of the indictment to eliminate any possible double jeopardy issues based on the holding in *Brown v. Commonwealth*, 297 S.W.3d 557 (Ky. 2009).

of the machine violated his right to confront and cross-examine witnesses against him. He alleges the lab technician's report was testimonial in nature and that since he had no prior opportunity to cross-examine the lab technician and the lab technician was unavailable at trial, his Constitutional rights were violated.

The precise argument Hill raises was decided by the Supreme Court of Kentucky in *Commonwealth v. Walther*, 189 S.W.3d 570 (Ky. 2006). In *Walther*, the Supreme Court considered whether the notes of a maintenance technician reflecting the results of maintenance and calibration testing were “testimonial.”

Every jurisdiction but one that has considered this issue since *Crawford* has concluded that maintenance and performance test records of breath-analysis instruments are not testimonial, thus their admissibility is not governed by *Crawford*. *Bohsancurt v. Eisenberg*, 212 Ariz. 182, 129 P.3d 471, 480 (Ct. App. 2006); *Rackoff v. State*, 275 Ga.App. 737, 621 S.E.2d 841, 845 (2005); *Napier v. State*, 827 N.E.2d 565, 569 (Ind. Ct. App. 2005); *State v. Carter*, 326 Mont. 427, 114 P.3d 1001, 1007 (2005); *State v. Godshalk*, 381 N.J.Super. 326, 885 A.2d 969, 973 (Law Div. 2005); *Green v. DeMarco*, 11 Misc.3d 451, 462–63, 812 N.Y.S.2d 772, 780–81 (N.Y. Sup. Ct. 2005); *State v. Norman*, 203 Or.App. 1, 125 P.3d 15, 18–19 (2005); *Luginbyhl v. Commonwealth*, 46 Va.App. 460, 618 S.E.2d 347, 354–55 (2005); *contra Shiver v. State*, 900 So.2d 615, 618 (Fla. Dist. Ct. App. 2005).

We have no difficulty aligning our jurisdiction with this substantial majority. [The lab technician] did not make the notations in question for the purpose of proving Respondent's guilt. *Napier*, 827 N.E.2d at 569. He did not accuse Respondent of any wrongdoing. *Luginbyhl*, 618 S.E.2d at 354. A properly operating breathalyzer instrument could just as well prove innocence as guilt.

Thus, [the lab technician] was not “bear[ing] testimony” against Respondent. *Crawford*, 541 U.S. at 51, 124 S.Ct. at 1364. His notations pertained only to whether certain tests were performed, the results of those tests, and whether the machine should continue in use or be referred to the manufacturer for repairs. The notations were made for quality control purposes and were used at trial only to establish one of the foundational requirements for admission of Respondent’s breath-test result. *Carter*, 114 P.3d at 1005–06. [The lab technician] probably knows when he prepares his maintenance and test records that the information contained therein might be used at a trial (though probably not which trials). However, the fact that the records have an incidental use in court as evidence of the reliability of the machine during a particular time frame does not alter the fact that the records have a primary business purpose that would exist, *i.e.*, to assure compliance with 500 KAR 8:020 § 2, even in the absence of this litigation. *Green*, 11 Misc.3d 451, 462–63, 812 N.Y.S.2d at 780–81.

Id. at 575.

Thus, it is clear that *Crawford* has no application to the case at bar and Hill’s reliance thereon is misplaced, as is his reliance on subsequent federal authorities interpreting and applying *Crawford*. The trial court did not err in allowing Officer Love to testify as to the results of the maintenance and calibration testing.

For the foregoing reasons, the judgment of the Campbell Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

J. Brandon Pigg
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky