RENDERED: AUGUST 11, 2017; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000601-DG

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

DISCRETIONARY REVIEW GRANTED
FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA GOODWINE, JUDGE
ACTION NO. 14-XX-00026

JAMES E. RIKER, JR. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, D. LAMBERT AND THOMPSON, JUDGES.

COMBS, JUDGE: This case involves an evidentiary issue arising from an arrest of the appellee for driving under the influence (DUI). As there appears to be an issue of first impression, we granted Discretionary Review of the Fayette Circuit Court's Opinion and Order, which reversed the District Court's denial of a Motion to Suppress intoxilyzer results and remanded. The Circuit Court concluded that the

excessively high cost of an independent blood test at University of Kentucky Medical Center effectively precluded the Appellee, James E. Riker, Jr. (Riker), from obtaining the statutorily mandated test that potentially might result in producing in exculpatory evidence. The circuit court held that the excessive cost of the blood test constituted a denial of due process. After our review, we affirm.

On August 4, 2014, Riker was arrested for DUI after he hit a parked car in Lexington, Kentucky. The Circuit Court's Opinion and Order provides a concise summary of the underlying facts:

> When Officer Steele came on the scene, he detected an odor of alcohol on Riker. The Officer asked Riker to submit to a portable breath test (PBT), which Riker did and the PBT reflected the presence of alcohol. Riker was arrested for Driving Under the Influence [DUI] and taken to the Fayette County Detention Center [FCDC].
>
> [There], Officer Steele indicated that he read the implied consent warning to Riker and asked him to take the intoxilyzer test at the conclusion of the twenty minute observation period. Riker was cooperative and complied the Officer's request and took the breath test. The intoxilyzer result measured over the *per se* limit of intoxication. The Officer read the remaining portion of the implied consent card and asked Riker if he wished to obtain a blood test at the University of Kentucky Medical Center (UKMC). Riker orally indicated that he wanted a blood test and signed the portion of the implied consent card requesting that his blood alcohol be tested. UKMC and Good Samaritan Hospital, a branch of UKMC, are the only options for a DUI suspect to obtain blood evidence. Both entities charge $450.00 pre-paid fee for the blood test.

Officer Steele asked Riker how much money he had with him. Riker responded that he had over $100.00 but that he did not possess a credit card.

Officer Steele did not believe that would be enough money, but he was not sure of the exact cost of the test. He drove Riker to the hospital and took him to the receptionist desk to discuss payment. The circuit court summarized as follows:

> The Officer testified that the cost of obtaining blood evidence was conveyed by the receptionist to Riker. Next Riker told Officer Steele, "No, take me back to jail." **The Officer indicated that he felt the cost was the reason that Riker declined to obtain blood evidence from UKMC.**
>
> Officer Steele testified that during his employment, he had witnessed persons who were in need of medical treatment and that Riker did not appear to be in need of emergency medical treatment. Steele further testified that Riker did not receive medical treatment when he was taken back to FCDC. **Officer Steele also acknowledged that the blood result could have been lower than the intoxilyzer-breath test results.**
>
> [Riker] … filed … affidavits of several UKMC employees … instead of [their] physically appearing in court. According to the affidavits, UKMC, a state agency, will not provide a citizen suspected of DUI with an independent blood-evidence test unless he or she prepays $450.00. UKMC bills its own University police officers $15.00 for the same blood evidence test which the Officer does not have to pay at the time the test is conducted. [Riker] makes the point that UKMC charges persons suspected of DUI 300% more than it does its own officer for potentially exculpatory evidence. Additionally, it should be noted that affidavits from medical providers in neighboring counties filed into the record below show that DUI suspects in Carroll County are charged $61.00 and in Woodford County they are charged $78.75.
>
> UKMC's explanation of the $450 charge is that the DUI suspects must be assessed by a triage nurse to ensure that a medical emergency is not present. The representative stated that itemized fees were 1) $30.00

> for the venipuncture; 2) $175.00 to perform the serum alcohol test; and 3) $245.00 for an ED Level A visit to be assessed by a triage nurse.

(Citations to record omitted; bold-face emphases added).

On September 10, 2014, Riker filed a Motion to Suppress Intoxilyzer Results and Motion for Dismissal. The matter was heard on October 2, 2014. Although the District Court was "not happy" about what U of K was charging and was bothered that police officers were charged a lot less than individual citizens, it concluded that the officer did everything required under the law and overruled Riker's Motions. Riker subsequently entered a conditional guilty plea and filed Notice of Appeal to the Circuit Court.

On March 29, 2016, the Fayette Circuit Court entered an Opinion and Order reversing and remanding, stating in relevant part, as follows:

> The issue before this Court is whether Riker was denied his right to due process because of the exceedingly high cost of a statutorily mandated and potentially exculpatory test. The parties do not dispute that Officer Steele performed all that is asked of the law enforcement in such situations under KRS[1] 189A.103(7). Riker complied with all requested tests as a prerequisite to being offered an independent blood test and Officer Steele transported Riker to UKMC to obtain an independent test.
>
> KRS 189A.103(7) states as follows [in relevant part]:
>
> After the person has submitted to all alcohol concentration tests and substance tests requested by the officer, the person tested **shall be permitted** to have a person listed in subsection (6) of this section of his or her own choosing

[1] Kentucky Revised Statutes.

> administer a test or tests in addition to any tests administered at the direction of the peace officer.

[Emphasis added.]

> The Commonwealth argues that Riker was provided an opportunity to obtain a blood test and that the Officer strictly complied with all statutory requirements:
>
> > KRS 189A.105(4) states:
> >
> > Immediately following the administration of the final test requested by the officer, the person shall again be informed of his right to have a test or tests of his blood performed by a person of his choosing described in KRS 189A.103 within a reasonable time of his arrest at the expense of the person arrested. He shall then be asked "Do you want such a test?" The officer shall make reasonable efforts to provide transportation to the tests.

The Circuit Court concluded that Riker's due process rights were violated and that he was effectively deprived of his statutorily prescribed right to an independent blood test due to the cost of the test; the court also noted that the hospital charging the exorbitant rate is a state-owned facility. The court explained as follows:

> It is not clear if the UKMC has created an exorbitant price to deliberately deny DUI suspects a blood test[;] however, it is a clear demarcation between a "have" with the means of paying a $450 fee for the blood test on the spot and a large portion of DUI suspects who are "have nots". There should be a consistent response from the courts in suppressing evidence that cannot be challenged based upon a due process violation.
>
> This Court takes judicial notice … that the UKMC is a teaching and testing facility which enjoys governmental immunity. It is an arm of the state

> government and it will not provide its citizens suspected of DUI with a reasonably priced independent blood test that the legislature and the Kentucky courts have pronounced is a statutorily mandated right. … Riker did not choose to go to UKMC, he chose to exercise his statutory right to an independent blood test. Circumstances beyond his control were that UKMC and Good Samaritan, a branch of UKMC, were the only options to obtain such a test. UKMC is a state facility and enjoys governmental immunity from suit. The Commonwealth makes the argument that UKMC's pricing is beyond their control, however, UKMC cannot claim that they are a branch of the state for governmental immunity from suit and then argue they are a private entity that can set a price for this test as they wish. Their practice of charging a DUI suspect $450 at the time of presentment for an independent blood test was effectively a bar to Riker obtaining potentially exculpatory evidence. Riker was not allowed an opportunity to challenge the results of the intoxilyzer test and this bar to his rights rises to the level of a due process violation.

The Circuit Court reversed the Fayette District Court's denial of Riker's Motion to Suppress and remanded with instruction that "[t]he evidence of the intoxilyzer should be suppressed because [Riker] was denied the opportunity to challenge the results."

On May 2, 2016, the Commonwealth filed a Motion for Discretionary Review, which this Court granted by Order entered August 12, 2016.

On appeal, the Commonwealth contends: (1) that an independent blood test is a statutory privilege, not a constitutional right; (2) that UKMC's fee for blood tests does not violate the statutory right to an independent blood test nor does it act as a bar to exculpatory evidence; (3) that the establishment of mandatory fees or fee range for independent blood test must come from the

legislature; and (4) that UKMC is not a state actor for purpose of independent blood test.

The facts are essentially undisputed in the case before us. Our review of the lower court's application of the law to those facts is *de novo.*

> An appellate court's standard of review of the trial court's decision on a motion to suppress requires that we first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. Based on those findings of fact, we must then conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law.

(footnotes omitted). *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. App. 2002).

We address the Commonwealth's final argument first. The Commonwealth contends that UKMC's fee for independent blood tests cannot be construed as state action despite UKMC's status as a state agency. It reasons that if a private hospital were to charge the same fee, it would not be a violation of a DUI suspect's due process rights; therefore, the Circuit Court's ruling is arbitrary.

Riker responds that UKMC would assuredly invoke *Withers v. University of Kentucky*, 939 S.W.2d 340 (Ky. 1997), to shield it from liability had Riker been injured as the result of a negligently performed venipuncture – if he had he been able to afford the test. In *Withers,* our Supreme Court clearly established that UKMC enjoys governmental immunity:

> [A]ppellants contend[ed] that in a major aspect, the University of Kentucky Medical Center is nothing more than a hospital which is in full competition with and performs the same function as private hospitals. As such,

> they argue that in this respect, the University should be stripped of its immunity.
>
> The answer to this contention is simple. The operation of a hospital is essential to the teaching and research function of the medical school. Medical school accreditation standards require comprehensive education and training and without a hospital, such would be impossible. Medical students and those in allied health sciences must have access to a sufficient number of patients in a variety of settings to insure proper training in all areas of medicine. Such is essential to the mandate of KRS 164.125(1)(c).

Id. at 343; *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 887 (Ky. 2009) ("[N]otwithstanding … that [UKMC] competes with private hospitals, its essential role in the teaching mission of the University of Kentucky College of Medicine rendered its activities governmental."). Riker's point is well taken. We agree with the astute observation of the circuit court: "UKMC cannot claim that they are a branch of the state for governmental immunity from suit and then argue they are a private entity that can set a price for this test as they wish."

The Commonwealth argues that an independent blood test is a statutory right -- not a constitutional one – and that UKMC's fee does not violate that right or act as a bar to exculpatory evidence. The Commonwealth claims that the right to an independent blood test was classified as a statutory right in *Commonwealth v. Long,* 118 S.W.3d 178 (Ky. App. 2003). It cites *Beach v. Commonwealth,* 927 S.W.2d 826 (Ky. 1996), for the proposition that "[e]xclusion of evidence for violating the provisions of the implied consent statute is not

mandated absent an explicit statutory directive. Evidence should not be excluded for violation of the statute's provisions where no constitutional right is involved."

Id. at 828. In *Beach,* the sole issue there was "whether it was proper for the police to take a blood test instead of first conducting a breathalyzer test." *Id.* at 826-27. The Court held that the implied consent statute did not require a police officer to first offer DUI suspect a breathalyzer test.

By contrast, in *Long,* the sole issue was whether Long was deprived of her right to proceed under KRS 189A.103 because the arresting officer would not allow her to telephone her roommate to bring money to pay for the independent blood test. Although Long had sufficient funds to pay for the test, she had left her purse in the car when taken into custody, and her roommate had driven the car home. After the district court denied Long's motion to suppress, she entered a conditional guilty plea and appealed to the circuit court, which reversed and dismissed with prejudice. This Court affirmed the circuit court and explained as follows:

> In construing the statutory scheme of KRS Chapter 189A, we believe the plain meaning and unambiguous intent expressed by our legislature is that once an individual has submitted to the state's breath, blood or urine test to determine his or her alcohol concentration, that individual has a statutory right to have an independent test by a person of his or her own choosing within a reasonable time of the arrest at the individual's own expense. Moreover, our legislature makes provisions to insure that individuals who have been arrested for driving under the influence know that they

> have this right by mandating that the police inform them of their right at least two different times. In order to give effect to this right, the statute requires some minimal police allowance and assistance. Considering the totality of the circumstances in this case, we believe the police officer denied Long of her right to obtain an independent test because of a failure to make a reasonable effort to accommodate her right.
>
> [T]he individual does not have the liberty of arranging for the test himself, so the statute makes at least one provision for police assistance, which is police transportation to the independent testing facility. However, that the statute does not provide for a phone call to obtain the necessary funds should not foreclose that individual's right. **Indeed, to hold as such would render meaningless the requirement of the statute that the individual be given the opportunity to obtain an independent chemical analysis of his blood** . . . .

Id. at 183 (bold-face emphasis added).

A panel of this Court recently discussed *Long* in an unpublished decision, *Sanders v. Commonwealth,* 2015-CA-001249-DG, 2016 WL 7410726, at *3 (Ky. App. Dec. 22, 2016). *Sanders* involved a motion to suppress a dashboard camera video of failed field sobriety tests, which the police chief had released to the news media shortly after Sanders's arrest. The district court denied the motion to suppress. Sanders filed a conditional guilty plea and appealed to the circuit court, which affirmed the district court.

The circuit court found that the release of the video to the media violated KRS 189A.100(2) -- but that the violation was only statutory and that Sanders suffered no violation of his constitutional rights so as to trigger the exclusionary rule. This Court affirmed, citing *Beach* for the proposition that

evidence should not be excluded for the violation of provisions of a statute **where no constitutional right is involved.** Although Sanders argued that the reasoning in *Long* should apply, this Court explained that *Long*:

> involved the production of relevant evidence of intoxication under the implied consent statute, KRS 189A.103, on behalf of both the Commonwealth and a criminal defendant. …[whereas] the improper release of the video did not hinder or otherwise affect the production of relevant evidence in the case. *Long* is, thus, distinguished on that basis. *Id.* at *3.

Riker contends that whether the independent blood test is afforded due process protections appears to be a case of first impression in Kentucky. He argues that Kentucky should follow other jurisdictions which "have indicated under similar statutes that a DUI suspect holds due process rights to an independent blood test." Riker draws our attention to several cases: *MacLeod v. State,* 28 P.3d 943, 944 (Alaska Ct. App. 2001) (Under due process clause of Alaska Constitution, person arrested for DUI entitled to police assistance in obtaining an independent blood test. "If the State interferes with an arrestee's right to an independent chemical test, the arrestee is entitled to suppression of their breath test result."); *Mack v. Cruikshank*, 196 Ariz. 541, 546, 2 P.3d 100, 105 (Ct. App. 1999) (DUI suspect has due process right to obtain an independent test at own expense which derives from evanescent nature of scientific evidence that a person is under the influence of intoxicating liquor); *State v. Minkoff,* 2002 MT 29, 308 Mont. 248, 42 P.3d 223, 227 (District court erred in failing to dismiss charge where right to

independent blood test frustrated when arresting officer told Minkoff blood test would result in higher alcohol reading than breath test. Suppression of breath test and new trial would leave Minkoff unable to rebut field sobriety test evidence by an independent blood test.); and *Snyder v. State,* 930 P.2d 1274, 1277–78 (Alaska 1996) (Fundamental tenet of due process is that person accused of crime has right to attempt to obtain exculpatory evidence).

The Commonwealth contends that the cases from foreign jurisdictions are not applicable and should not be invoked because they focus on the actions of the police -- not the hospital. It argues that "Kentucky case law does not presently provide the due process right to independent blood tests, much less … to less expensive [ones]." However, Kentucky law does hold that "[i]t is crucial to a defendant's fundamental right to due process that he be allowed to develop and present any exculpatory evidence in his own defense…." *McGregor v. Hines*, 995 S.W.2d 384, 388 (Ky. 1999). Undoubtedly, the $450.00 fee that UKMC requires as prepayment for an independent blood test hinders that right for many.

We find the reasoning of *Little v. Streater*, 452 U.S. 1, 12, 101 S. Ct. 2202, 2208–09, 68 L. Ed. 2d 627 (1981) helpful. There, the issue was whether a "Connecticut statute which provides that in paternity actions the cost of blood grouping tests is to be borne by the party requesting them, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment when applied to deny such tests to indigent defendants." *Id.,* 452 U.S. at 3. The United States Supreme Court held that:

> Due process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S. 123, 162, 71 S.Ct. 624, 643, 95 L.Ed. 817 (1951) (concurring opinion). Rather, it is "flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972).
>
> . . . .
>
> Under Connecticut law, therefore, the defendant in a paternity suit is placed at a distinct disadvantage in that his testimony alone is insufficient to overcome the plaintiff's prima facie case. Among the most probative additional evidence the defendant might offer are the results of blood grouping tests, but if he is indigent, the State essentially denies him that reliable scientific proof by requiring that he bear its cost. . . . Yet not only is the State inextricably involved in paternity litigation such as this and responsible for an imbalance between the parties, it in effect forecloses what is potentially a conclusive means for an indigent defendant to surmount that disparity and exonerate himself. Such a practice is irreconcilable with the command of the Due Process Clause.

Little v. Streater, 452 U.S. 5, 12; *see Shaw v. Seward,* 689 S.W.2d 37, 40 (Ky. App. 1985) (Indigent putative father's due process rights violated by the court's refusal to provide blood test to him free of expense).

We conclude that the $450.00 prepayment which UKMC required as an immediate prerequisite for an independent blood test effectively foreclosed Riker from obtaining potentially exculpatory evidence. We agree with the reasoning of the circuit court that Riker was deprived of the opportunity to challenge the results of the intoxilyzer test in a meaningful fashion and that this

deprivation of a statutory right rises to the level of a constitutional violation of his right to due process – especially when considered in light of his right to obtain potentially exculpatory evidence.

The Commonwealth also argues that the establishment of a mandatory fee or fee range for independent blood tests must come from the Legislature. We agree with Riker that the argument misses the point. It was the **Legislature itself** that afforded him -- in mandatory language -- the right to a blood test.

We affirm the Opinion and Order of the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Carlos A. Ross
Lexington, Kentucky

BRIEF FOR APPELLEE:

John L. Tackett
Lexington, Kentucky