

RENDERED: August 2, 1996; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 95-CA-0184-MR

PAUL CARNES

APPELLANT

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 93-CR-155

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

* * * * *

BEFORE: DYCHE, JOHNSON and KNOPF, Judges.

KNOPF, JUDGE: This is an appeal from a judgment of conviction in Knox Circuit Court for driving under the influence, fourth offense, pursuant to KRS 189A.010. Based on recent decisions by the Supreme Court of Kentucky, we vacate, and remand for a new trial.

The appellant, Paul Carnes, was indicted on the charges of driving under the influence (DUI), fourth offense; and operating a motor vehicle on a license suspended or revoked for DUI, third offense. The appellant filed several pre-trial motions: a motion to dismiss for lack of evidence that he was operating the motor vehicle; a motion in limine to exclude

evidence of his prior DUI convictions during the guilt phase of the trial; and a motion to voir dire the potential jurors regarding their ability to consider the entire range of penalties. The trial court denied all of the motions. Thereafter, the appellant entered a plea of guilty on the charges. The appellant entered the plea conditionally pursuant to RCr 8.09 reserving the right to appeal the trial court's denial of his pre-trial motions.

The appellant first argues that the trial court erred in denying his motion to dismiss for lack of evidence that he was "operating" a motor vehicle within the meaning of KRS 189A.010(1). The evidence before the court was that on August 9, 1993, the arresting officer had a report of a car wrecked in a ditch. He found the appellant behind the wheel of the car with the engine running. No one else was in the vehicle. When the officer asked the appellant what happened, the appellant said he got stuck in the ditch. The appellant appeared intoxicated, and he failed several sobriety tests. His subsequent breath test reading was .292.

While the appellant concedes that he was intoxicated, he contends that the evidence was insufficient to prove that he was operating the motor vehicle. Admittedly, the evidence on this point was wholly circumstantial. However, there are a number of factors which have been used in determining whether a person operated or was in actual control of a motor vehicle including: (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, Ky., 709 S.W.2d 847, 849 (1986).

The evidence is sufficient to support the charge if the circumstances of the defendant's arrest would reasonably support the inference that the vehicle was subject to the defendant's control. Newman v. Stinson, Ky., 489 S.W.2d 826, 828 (1972). On the other hand, the evidence is not sufficient to support the "operating" element of the charge of DUI if the circumstances only make the existence of the element of the offense slightly more probable than they would be without the evidence. Pence v. Commonwealth, Ky. App., 825 S.W.2d 282, 284 (1992). In the instant case, the appellant was found alone behind the wheel of the vehicle with the engine running. The fact that it was in a ditch indicates that it had been driven there by someone. Although there was testimony to the contrary, we conclude that the evidence presented was sufficient to support a reasonable inference that the appellant was operating or was in physical control of a motor vehicle within the meaning of KRS 189A.010. Consequently, we agree with the trial court there was an issue of fact for the jury to decide.

The appellant next asserts that the trial court erred in denying his motion to exclude evidence of his prior DUI convictions during the Commonwealth's case-in-chief. The Supreme Court of Kentucky recently addressed this issue in three (3) cases: Commonwealth v. Ramsey, Ky., 920 S.W.2d 526 (1996);

O'Bryan v. Commonwealth, Ky., 920 S.W.2d 529 (1996); and Dedic v. Commonwealth, Ky., 920 S.W.2d 878 (1996). The Supreme Court noted that the elements for the offense of driving under the influence are wholly contained in KRS 189A.010(1). On the other hand, the penalties are delineated in subsection (4), with the severity of punishment increasing with the number of prior violations of subsection (1). Ramsey, 920 S.W.2d at 528. The Supreme Court held that evidence of prior convictions is not essential to the Commonwealth's case-in-chief in the prosecution of a DUI charge introduction of the prior convictions is unduly prejudicial to the defendant. Consequently, prior DUI convictions shall not be introduced during the guilt phase of a DUI trial, but are only admissible during the penalty phase. Id. at 529.

As a result of these decisions, the appellant's conviction for DUI, fourth offense, must be vacated and remanded. At a subsequent trial of this action, if the jury reaches a guilty verdict, the circuit court has authority to conduct a penalty phase pursuant to KRS 532.055, in which the prior convictions may be introduced and the appropriate sentence determined, following proper instructions to the jury. Id. at 528.

The appellant also asserts that the trial court erred in refusing to allow him to voir dire the potential jurors on their ability to impose the entire range of penalties. In Shields v. Commonwealth, Ky., 812 S.W.2d 152, 153 (1991), the Supreme Court held that in order to be qualified to sit as a

juror in a criminal case, a member of the venire must be able to consider any permissible punishment. If the juror cannot, then a challenge for cause is appropriate. Consequently, the trial court erred in refusing to allow the appellant to question potential jurors on this question. Id. Therefore, the error would require the sentence to be set aside. Anderson v. Commonwealth, Ky., 864 S.W.2d 909, 911 (1993).

Since the appellant entered a conditional guilty plea before the case went to a jury, we cannot find that he was prejudiced by the trial court's ruling. However, at a subsequent trial of this action, he should be permitted to ask reasonable questions to the venire regarding their openness to the entire range of penalties. As we are remanding this case, there is no reason to address the issue of whether the trial court abused its discretion in denying the appellant's motion for a continuance.

Accordingly, we vacate the judgment of conviction and remand for disposition consistent with this opinion.

ALL CONCUR.

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