

RENDERED: November 22, 1996; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 95-CA-0631-DG

WAYNE A. WORKS

APPELLANT

v. ON DISCRETIONARY REVIEW FROM GRANT CIRCUIT COURT
HONORABLE CHARLES F. SATTERWHITE, JUDGE
ACTION NO. 94-XX-000017

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

* * * * *

BEFORE: WILHOIT, Chief Judge; EMBERTON and JOHNSTONE, Judges.
JOHNSTONE, JUDGE. Wayne Works appeals his conviction for driving under the influence, second offense, for which he was sentenced to 180 days in the Grant County Detention Center, as well as being required to pay a fine. He advances several arguments in support of his contention that the judgment convicting him of violating KRS 189A.011 must be overturned. Based upon recent decisions of the Kentucky Supreme Court, we agree and reverse the judgment of conviction and remand the case for a new trial.

Acting on a tip from a woman at the Grant County Fairgrounds, Trooper Russ Harvey approached appellant's vehicle while he was stopped in traffic leaving the fairgrounds. Trooper

Harvey proceeded to remove appellant from the truck and arrested him for driving under the influence. After appellant was transported to the Grant County Detention Center, he was asked to take a breathalyzer test and was told by Trooper Harvey that because he did not blow hard enough, he had refused the test. He then consented to being taken to the Grant County Hospital where blood was drawn for analysis approximately 1½ hours after appellant was first asked to remove himself from the motor vehicle.

The Grant District Court denied appellant's motion to suppress evidence recovered as a result of an alleged unlawful stop and to exclude the blood test results on the basis that they were unreliable.

Of the several issues advanced for reversal, the issue of primary concern relates to the introduction of a stipulation concerning appellant's prior conviction for DUI into evidence as part of the Commonwealth's case-in-chief and comment regarding the second offense during the prosecutor's closing remarks. The Supreme Court of Kentucky recently addressed this issue in three 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 and introduction of the prior convictions is unduly prejudicial to the defendant. Consequently, the 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 judgment convicting appellant must be reversed and the case remanded for a new trial. We therefore deem it appropriate to touch briefly on some of the other issues likely to recur in the retrial. The first matter concerns the denial of appellant's motion to suppress evidence gathered by the trooper and the results of the blood test. We find no error in the trial judge's decision on either point. With respect to the validity of the stop, Trooper Harvey had been approached by a woman who described appellant and his vehicle, advising the trooper that appellant had been drinking heavily and was about to leave the fairgrounds in an intoxicated state with two small children riding in his truck. Not only are we convinced of the propriety of the investigatory stop based on state and federal case law, but we are also firmly of the opinion that the officer would have been remiss in ignoring such a serious complaint. The Court in Commonwealth v. Hagan, Ky., 464 S.W.2d 261, 263 (1971), makes the propriety of the officer's action abundantly clear with its statement that, "We know of no reason why a peace officer should not be permitted to stop any vehicle on the highway at any time for any reasonable purpose."

Trooper Harvey's actions were for a reasonable purpose and were reasonable in scope. There was no error in refusing to suppress evidence obtained as a result of the stop.

Nor do we perceive any error in admitting evidence of a blood test administered approximately 1½ hours after the stop. Appellant was in custody the entire time and there is no reason to believe that he was more intoxicated at the time of the test than at the time of the stop. Likewise, appellant offers no evidence suggesting that the blood alcohol level increases with the passage of time. We find absolutely no basis for concluding that the test results were unreliable. Cf. Jewell v. Commonwealth, Ky., 549 S.W.2d 807 (1977).

Because the issues relating to jury selection are unlikely to recur upon retrial, we see no necessity for discussing them further.

The judgment of the Grant Circuit Court is reversed and the case remanded for a new trial consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

James L. Purcell
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