RENDERED: August 8, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-1007-MR

BILLY RAY WATTS — APPELLANT

V.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE KELLEY R. ASBURY, JUDGE
ACTION NO. 95-CR-53

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION VACATING AND REMANDING

* * * * * * * *

BEFORE: EMBERTON, GUDGEL, and JOHNSON, Judges.

GUDGEL, JUDGE: This is an appeal from a judgment entered by the Boyd Circuit Court after appellant entered a conditional guilty plea to a fourth offense of driving a motor vehicle while under the influence of alcohol (DUI). Appellant contends that the trial court erred (1) by denying his motion to bifurcate the trial proceedings, (2) by failing to dismiss the charge against him, (3) by failing to suppress the evidence as to the blood test results, (4) by failing to suppress statements made to the investigating police officer, and (5) by failing to suppress the evidence as to his three prior convictions. We are constrained to agree with appellant's first contention. Hence, we vacate and remand the court's judgment for further proceedings.

Appellant was involved in a one-vehicle accident on June 17, 1994. The officer who responded to the scene was advised by witnesses that appellant was the vehicle's operator and that he had been taken to a particular named hospital. After a search, the officer located appellant in the lobby of a different hospital. The officer observed that appellant had glass in his hair as well as cuts and bruises, and that he smelled of alcohol. Appellant admitted that he was the vehicle's operator at the time of the accident, and he agreed to a blood test which ultimately showed that he had a blood alcohol concentration (BAC) of .25 percent. Appellant, who was cited but not arrested by the officer, was subsequently indicted for fourth-offense DUI. He eventually entered a conditional guilty plea to that charge, reserving "the right to appeal those issues raised in pre-trial [sic] motions pursuant to CR [sic] 8.09." This appeal followed.

First, appellant contends that the trial court erred by denying his request to bifurcate the trial and to exclude from the guilt phase any evidence as to his prior DUI convictions. We agree.

After appellant entered his guilty plea, the supreme court held in Commonwealth v. Ramsey, Ky., 920 S.W.2d 526 (1996), that evidence as to prior DUI convictions is not admissible during the prosecution's case-in-chief in a DUI subsequent offense prosecution. See KRS 189A.010(1). As we disagree with the Commonwealth's assertion that Ramsey may not be applied

retroactively, we are constrained to conclude that the trial court erred by denying appellant's pretrial bifurcation motion. Cf. Dedic v. Commonwealth, Ky., 920 S.W.2d 878 (1996); O'Bryan v. Commonwealth, Ky., 920 S.W.2d 529 (1996).

Next, appellant contends that the trial court erred by failing to dismiss the charge against him pursuant to Pence v. Commonwealth, Ky. App., 825 S.W.2d 282 (1991). We disagree.

Relying on Pence, supra, appellant asserts that the evidence was insufficient to show that his BAC exceeded .10 percent at the time of the accident. In contrast to the instant action, however, Pence was charged with DUI after he was found sitting behind the wheel of his parked vehicle in a truck stop parking lot. Pence's vehicle was blocked in place by another vehicle, and no evidence was introduced to show that the vehicle was running, that its engine was warm, or that its ignition key was turned on. Further, although Pence registered .26 percent on a breathalyzer, no evidence was adduced to show that it was more likely that he "drove to the truck stop while intoxicated than that he got intoxicated after his arrival," or to show whether the initial complaint involved DUI rather than mere public drunkenness. Id. at 283. Hence, the court held that the evidence was insufficient to prove beyond a reasonable doubt that Pence operated his vehicle while intoxicated. See also Wells v. Commonwealth, Ky. App., 709 S.W.2d 847 (1986). Here, by contrast, appellant admitted to the investigating officer that he was driving the vehicle at the time of the accident and that he

did not consume any alcohol after the accident. It follows that there is no merit to appellant's contention that pursuant to Pence, the evidence was so inadequate as to require the dismissal of the charge against him.

Next, appellant contends that the trial court erred by failing to suppress, on any one of several grounds, the evidence as to the blood test results. We disagree.

We are not persuaded by appellant's multiple arguments regarding either the admissibility of "per se" evidence of intoxication, or the admissibility of the evidence as to his BAC level some two and one-half hours after the accident. This is especially true since appellant admitted that he consumed no alcohol after the accident. See Commonwealth v. Wirth, Ky., 936 S.W.2d 78 (1996). However, certainly nothing would prevent appellant from introducing evidence during a trial to prove that the Commonwealth's evidence was unreliable. Id.

We also are not persuaded by appellant's several arguments as to the court's failure to grant his pretrial motion to suppress the evidence regarding the blood test results. The Uniform Citation form shows that the state trooper spoke with appellant at the hospital, and that the trooper "advised him of implied consent and he agreed to have a blood test performed." Although the implied consent statute may not have been applicable at the time appellant consented because he was neither under arrest nor in police custody, appellant certainly faced the loss of his driver's license pursuant to KRS 189A.105 if he failed to

consent to the requested blood test. See KRS 189A.103, formerly KRS 186.565(1). See also Cook v. Commonwealth, Ky., 826 S.W.2d 329 (1992). Given the absence of anything in the record to show that appellant's "mental or physical condition was such that he was unable to give his permission to allow the police to obtain a blood sample," or that he was "confused or tricked into giving his blood sample," we cannot say that the court erred by denying his motion to suppress the blood test results on the ground that the blood sample was involuntarily provided. Cook, supra at 331.

Further, we are not persuaded by appellant's assertion that the court erred by failing to find that the blood test results were inadmissible because the blood sample's chain of custody was broken by the passage of several days between its mailing and its receipt by the testing facility. The record simply contains nothing to controvert the Commonwealth's assertion that it will prove at a trial that the chain of custody was complete and unbroken. Thus, it is clear that the court did not err by denying appellant's pretrial motion to suppress the results of the blood test.

Next, appellant contends that the trial court erred by failing to suppress the statements he made to the investigating police officer at the hospital. However, as appellant was not in custody when the statements were made and the record contains nothing to indicate either that he was pressured into speaking with the officer or that his freedom was restricted in any way, he was not entitled to be advised of his Miranda rights before

making the statements. See Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984); California v. Beheler, 463 U.S. 1121, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983); Brown v. Commonwealth, Ky., 780 S.W.2d 627 (1989), cert. denied, 110 S.Ct. 1825 (1990); Farler v. Commonwealth, Ky. App., 880 S.W.2d 882 (1994). Thus, the court did not err by failing to suppress his statements on this ground.

Finally, appellant contends that the trial court erred by failing to suppress the evidence as to his three prior convictions. However, as noted by the Commonwealth and demonstrated by the record, appellant specifically waived this issue before entering his conditional guilty plea. Therefore, this issue need not be addressed further.

The court's judgment is vacated and this case is remanded for further proceedings consistent with the views expressed in this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael J. Curtis
Ashland, KY

BRIEF FOR APPELLEE:

A.B. Chandler III
Attorney General

Courtney A. Jones
Assistant Attorney General
Frankfort, KY