RENDERED: December 4, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002319-MR

GARY WARICK — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE CHARLES E. LOWE, JR., JUDGE
ACTION NO. 93-CR-000262

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART - REVERSING IN PART AND REMANDING
** ** ** ** **

BEFORE: COMBS, DYCHE AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE. Gary Warick (Warick) entered a conditional plea (RCr 8.09) to the offense of operating a motor vehicle while under the influence of alcohol, (DUI) third offense (KRS 189A.010). Warick was sentenced to twelve (12) months in the county jail. Said jail sentence was to run concurrently with time he was serving on an unrelated felony conviction. Warick entered his conditional plea subsequent to the trial court's adverse ruling to his motions to suppress, motion in limine and motion to set aside prior convictions. Having thoroughly

reviewed this matter, we affirm in part, reverse in part and remand for sentencing.

On October 13, 1993, the Pike Circuit Grand Jury returned an indictment against Warick alleging the following:

> On or about the 28th day of August, 1993, in Pike County, Kentucky, the above named Defendant committed the offense of operating a motor vehicle with alcohol concentration of or above 0.10 or while under the influence of alcohol or other substance which impaired his ability to operate a motor vehicle, after having previously been convicted of said offense on at least three occasions as a result of violations occurring: March 3, 1990; April 17, 1990 and May 25, 1990; all of said offenses occurring within five years of August 28, 1993; against the peace and dignity of the Commonwealth of Kentucky.

At the suppression hearing held the same day, but before the jury was sworn, Trooper Greg Roberts (Trooper Roberts) of the Kentucky State Police testified to the following events on the day Warick was arrested in this matter. On the afternoon of August 28, 1993, Trooper Roberts was dispatched to the scene of a three-vehicle automobile accident at the Island Creek Trailer Park in Pike County. Upon arrival he was informed by four people that a car had backed into two other unoccupied parked vehicles. They reported that the driver got out of the car and said he was going to call the police. The witnesses informed the driver that the police had already been notified, whereupon the driver said he was going to call an attorney and left the scene. Trooper Roberts was told that the driver was under the influence and described him as being shirtless but wearing worn blue pants with a reddish-orange bandanna in his rear pocket. Trooper Roberts drove around the area but could not locate the driver. He then

returned to the trailer park to complete his accident report. Upon his departure shortly thereafter, the trooper observed appellant, matching the description given, staggering along the highway. Appellant was approximately one mile from the scene of the accident when Trooper Roberts stopped him and administered two field sobriety tests which appellant failed. As a result of his observations of Warick, Trooper Roberts arrested him for DUI and transported Warick back to the trailer park where all four witnesses identified him as the operator of the vehicle that caused the accident.

In response to appellant's discovery motions, the Commonwealth filed in the record the certified court records regarding Warick's prior convictions for violations of KRS 189A.010 from Floyd and Johnson District Courts. Said certified records indicated that Warick had the following three dispositions for violation of KRS 189A.010: (1) He pled guilty in Floyd District Court on May 25, 1990 (case 90-T-1444); (2) He was tried in absentia and found guilty in Floyd District Court on May 10, 1990 (case 90-T-1092; (3) He pled guilty in Johnson District Court on July 3, 1990 (case 90-T-244).

After numerous continuances at the request of Warick, including his first attorney withdrawing from the case, the matter was finally scheduled for jury trial in August, 1997. On August 20, 1997 and August 25, 1997, Warick filed several pre-trial motions. The trial court denied appellant's two suppression motions concerning his arrest and witness identification. As to appellant's motion to set aside his prior

convictions so that they could not be used to enhance his punishment, the court sustained the motion as to one conviction (Floyd District Court case 90-T-1444) but denied it as to the other (Floyd District Court case 90-T-1092). Based upon the trial court's rulings on these matters, Warick entered his conditional plea of guilty to DUI third offense and this appeal followed.

Appellant first argues that the trial court erred by not setting aside his prior DUI conviction (case 90-T-1092) in which he was tried and convicted in absentia. We agree. Appellant alleges that the record in that case does not show that he was afforded notice of the trial date. The Commonwealth's position, on the other hand, is that appellant waived his right to be present during the trial of the charged offense when he failed to appear. The certification of court records regarding this case (90-T-1092) from Floyd County indicates that the date of violation was April 27, 1990. The citing officer listed on the uniform citation that the court date (arraignment) was scheduled for April 19, 1990, at 10:00 a.m. in the Floyd District Court. However, the post-arrest complaint also states that Warick was admitted to the hospital and that this fact prevented the physical arrest of appellant. There is nothing in the certified record as to the court proceedings scheduled for April 19, 1990. The next docket notation is from May 3, 1990, which indicates that the defendant (Warick) was not present in court at that time but that a trial date was set for May 10, 1990. On May

10, 1990, appellant was again not present in court, but was tried in absentia on the DUI charges and found guilty.

Rules of Criminal Procedure (RCr) 8.28(4) in effect in May, 1990 states:

> In prosecutions for misdemeanors the court may permit arraignment, plea, trial and imposition of sentence in the defendant's absence.

This rule was amended effective October 1, 1994, to read:

> (4) In prosecutions for misdemeanors or violations the court may permit arraignment, plea, trial and imposition of sentence in the defendant's absence. However, no plea of guilty to a violation of KRS 189A or KRS 218A may be entered in the defendant's absence, unless the defendant first executes a written waiver of his or her right to be present.

The Commonwealth relies upon Burns v. Commonwealth, Ky. App., 655 S.W.2d 497 (1983), and contends that where the Commonwealth proves the defendant knew of the trial date, an inference may be drawn that the absence was intentional, knowing and voluntary and consequently waived. The Commonwealth then contends that once it has met this burden, the burden then shifts to the defendant to prove that his absence was not intentional, knowing and voluntary and consequently not waived. To best understand Burns on this issue, one needs to review the exact language of the case:

> RCr 8.28(4) provides for trial in absentia of a misdemeanant. However, the constitutions of the Commonwealth and the United States provide him with protection to the extent that he can't be tried in his absence unless that absence is voluntary and

> therefore a waiver of his right to be present. Ky. Const. Art. XIII, § 12 (1891); U.S. Const. Amend. XIV; Butcher v. Commonwealth, Ky., 276 S.W.2d 437 (1955); McKinney v. Commonwealth, Ky., 474 S.W.2d 384 (1971).
>
> This rule is qualified in cases where the Commonwealth proves the defendant knew of the trial date, as here, and did not appear. An inference then may be indulged that the absence was intentional, knowing and voluntary and consequently waived. Then the defendant not only has the right but also the burden of going forward with proof that his absence was not intentional, knowing and voluntary, and was consequently not waived. McKinney v. Commonwealth, supra. But, the waiver resulting from the indulged inference can only be determined from consideration of all the circumstances that show the waiver so clear and unequivocal as to indicate conscious intent to be absent. Powell v. Commonwealth, Ky., 346 S.W.2d 731 (1961).

Burns, 655 S.W.2d at 498 (emphasis added). It should also be noted that Burns reversed and remanded a case in which the defendant had been tried in absentia on facts of notice much clearer and stronger than those presented in this case.

Both parties cite Tipton v. Commonwealth, Ky. App., 770 S.W.2d 239 (1989). Appellant argues that Tipton supports his position in that a guilty plea in absentia cannot be used for enhancement purposes, unless the plea complies with all elements of Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). The Commonwealth distinguishes Tipton from this case in that Tipton deals with a DUI conviction obtained in absentia by entry of a guilty plea through the defendant's counsel, whereas, in the present case appellant's conviction was obtained by trial in absentia without a guilty plea. In Tipton the Court

specifically held that a guilty plea must comply with Boykin, supra:

> This panel of the Court is of the opinion that a plea of guilty taken from someone other than the defendant does not comply with Boykin, supra. This is so, even in the light of RCr 8.28(4) permitting pleas in absentia. RCr 8.28(4) is discretionary, and we consider it an abuse of discretion to accept a plea of guilty in absentia for any offense, such as driving under the influence, for which an enhanced penalty may be imposed for subsequent convictions. The mandates of Boykin overshadow the procedural latitude that misdemeanors are granted in RCr 8.28(4). Reasoning that Boykin applies, then if a first offense DUI was pled under RCr 8.28(4), as herein, the Commonwealth could never properly get a conviction of a defendant with a second offense under KRS 189A.010(2)(b). We do not believe that a rule of procedure can frustrate a criminal statute in that manner. The district court ruled properly on this point.

Tipton 770 S.W.2d at 242. In response to the Tipton ruling published in 1989, RCr 8.28(4) was amended in 1994 to specifically prohibit a guilty plea to a violation of KRS 189A in the defendant's absence unless a written waiver is provided.

The recently decided case of Donta v. Commonwealth, Ky. App., 858 S.W.2d 719 (1993), deals with trials in absentia pursuant to RCr 8.28(4). This case confirms the constitutionality of RCr 8.28(4) (see McKinney v. Commonwealth, Ky., 747 S.W.2d 384 (1971)), and the fact the Commonwealth has the burden of proving the defendant's absence from trial was intentional, knowing and voluntary.

We believe that in the case sub judice the Commonwealth has failed to meet its burden of showing that Warick knew of his trial date and was voluntarily absent. The trial court relied

upon the certification of record provided by the Commonwealth. This certification showed only that the citation provided an arraignment court date. However the defendant had been admitted to the hospital after an automobile accident according to the citation and there is nothing in the record which would indicate that Warick was physically or mentally capable of receiving the citation or of attending the court date two days later. Additionally, the certified record is completely lacking as to any appearance by Warick or any court action on the date of the first scheduled court appearance. The only information the certified record contains is the two court dates when Warick was not present. This being the only "evidence" in the record, we believe the Commonwealth failed in its burden of proving Warick's absence from trial was intentional, knowing and voluntary.

As to appellant's remaining two claims of error, we find no error and affirm the trial court's ruling on these matters. First, appellant moved to suppress all evidence resulting from his seizure by Trooper Roberts on the ground that he was illegally detained and arrested. We find no merit to this argument. Appellant was sufficiently described by four witnesses to the trooper who found appellant matching said description, staggering, approximately one mile from the accident scene within a relatively short period after the accident. The record clearly establishes evidence from which the trial court could find that Trooper Roberts relied upon specific and articulable facts that reasonably warranted the trooper to subject appellant to an

investigatory stop. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 898 (1968).

Appellant's last argument deals with the suppression of his identification by the witnesses to the accident at the trailer park. Warick contends that his constitutional rights were violated in that the identification process (the trooper bringing appellant back to the trailer park after his arrest) was unnecessarily suggestive and conducive to irreparable mistaken identification. The Commonwealth counters that the out-of-court identification procedure was not impermissibly suggestive, but even if it was the identification was reliable. Both parties cite Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) and Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), as the two cases determative on this issue. However, each party argues when the facts of this case are applied to the principles set forth in Stovall and Biggers a different result is reached. As to the claim that the confrontation conducted in that case was so unnecessarily suggestive and conducive to irreparable mistaken identification, the Stovall Court stated:

> The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned. [footnote omitted]. However, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it... .

Stovall, 18 L.Ed.2d at 1206.

The Biggers Court affirmed the "totality of the circumstances surrounding it(the identification)" standard and

set forth the factors to be considered in analyzing the reliability of the identification as follows:

> [T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Biggers, 74 L.Ed.2d at 411. The criteria set forth above were adopted as the standard in Kentucky in Wilson v. Commonwealth, Ky., 695 S.W.2d 854 (1985). Our Supreme Court stated in Wilson, at 857:

> When examining a pre-trial confrontation, this court must first determine whether the confrontation procedures employed by the police were "suggestive." If we conclude that they were suggestive, we must then assess the possibility that the witness would make an irreparable misidentification, based upon the totality to the circumstances and in light of the five factors enumerated in Biggers, supra.

In view of the "totality of circumstances" standard and the five factors test set out in Biggers, it is clear Warick's due process rights were not violated. The witnesses in this case observed an accident, saw and spoke to the driver of the vehicle who had caused the accident, observed him to be under the influence, gave a description to the trooper investigating the accident, and within an hour and a half they positively identified appellant as the driver who caused the accident. As such the trial court properly denied appellant's motion to suppress the out-of-court identification of appellant.

For the foregoing reasons, we affirm the conviction of appellant but reverse and remand for sentencing consistent with this opinion.

ALL CONCUR.

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