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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001609-DG

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

ON DISCRETIONARY REVIEW
FROM MARION CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 01-XX-00002

HAROLD EDWIN PULLIAM III — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER, HUDDLESTON, AND MILLER, JUDGES.

MILLER, JUDGE: The Commonwealth of Kentucky brings this matter on discretionary review from a July 2, 2001 Opinion and Order of the Marion Circuit Court. We affirm.

On December 17, 2000, Harold Edwin Pulliam III was charged with driving under the influence (DUI) of intoxicants in violation of Kentucky Revised Statutes (KRS) 189A.010(1)(a). Pulliam registered .085 upon an Intoxilyer (breath) test. His case was duly docketed in the Marion District Court.

In the district court, the Commonwealth filed a motion *in limine* to prohibit introduction of evidence showing that Pulliam was not under the influence of alcohol. The Commonwealth

sought to exclude, *inter alia*, evidence of field sobriety tests. The Commonwealth argued that the field sobriety tests were simply irrelevant to an offense under KRS 189A.010(1)(a), which is sometimes referred to as the *per se* DUI statute. See Commonwealth v. Wirth, Ky., 936 S.W.2d 78 (1996).

The district court ultimately granted the Commonwealth's motion. The court recognized that field sobriety tests have long been used to prove or disprove that an accused was driving under the influence; however, the court reasoned that impaired driving is not at issue under the *per se* DUI statute and, perforce, such evidence is irrelevant. Consequently, Pulliam entered a conditional plea of guilty, thereby reserving the right to appeal the district court's evidentiary ruling. Ky. R. Crim. P. 8.09.

Pulliam appealed to the circuit court. On July 2, 2001, the circuit court entered an Opinion and Order Reversing and Remanding. Therein, the circuit court concluded as follows:

> The Commonwealth asserts that the defense should not be allowed to introduce evidence to show that the Defendant was not under the influence because that issue becomes irrelevant as a breath-alcohol content of .10 or greater itself becomes the crime. While there is merit in this contention that the alcohol level itself becomes the crime, the breathylizer result is still subject to impeaching evidence. If the Commonwealth's argument were to be successful, then the results of a breathylizer test would be the only relevant evidence in a *per se* DUI prosecution. The only defense of the accused would be expert testimony to refute the results of the machine. An individual would be prohibited from introducing evidence that may be exculpatory and may impeach the reliability

> of the machine. This Court feels that evidence concerning field sobriety tests and any other exculpatory evidence which may show the Defendant was not under the influence would be relevant evidence to challenge the breathylizer results. The jury would be able to give this evidence the proper weight in deciding whether the results of the machine are accurate. To prevent the Defendant from introducing exculpatory evidence would cause a denial of an accused's constitutional rights.

The Commonwealth then filed a motion for discretionary review with the Court of Appeals. Ky. R. Civ. P. 76.20. On October 4, 2001, this Court entered an order granting review. This appeal follows.

The issue presented for our consideration is the relevancy of evidence in a prosecution under the *per se* DUI statute (KRS 189A.010(1)(a)).

Relevant evidence is defined by Ky. R. Evid. 401:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

It has been observed that evidence is relevant which "renders a material ultimate fact more probable or less probable than it would be without the item." Ford Motor Company v. Fulkerson, Ky., 812 S.W.2d 119, 127 (1991). Stated differently, evidence that tends to prove or disprove an element of a criminal offense is "of consequence to the determination of the action" and, thus, relevant. See Springer v. Commonwealth, Ky., 998 S.W.2d 439, 449 (1999).

Our *per se* DUI statute requires proof of only two elements or material ultimate facts: (1) that a person was

operating or in control of a motor vehicle, and (2) said person had an alcohol concentration of .08 or more.[1] A violation of the statute is said to occur:

> [W]hen a person operates or is in physical control of a motor vehicle while the alcohol concentration in his blood or breath is .10 or greater. This is usually referred to as the "*per se*" statute and requires proof only of .10 or more alcohol concentration without regard to its effects on motor vehicle operation. (Citation omitted).

Wirth, 936 S.W.2d at 80. We must emphasize that whether an individual is under the influence of intoxicants becomes immaterial under the *per se* DUI statute.[2] Id.

In King v. Commonwealth, Ky. App., 875 S.W.2d 902 (1993) the Court, in *dicta*, expounded upon the elements comprising the *per se* DUI statute and the evidence relevant to prove such elements:

> KRS 189A.010(1)(a) creates a criminal offense for operating a motor vehicle while having an alcohol concentration of .10 or above, regardless of available evidence that the accused is not under the influence of alcohol. This is commonly referred to as "per se under the influence." With this reading in evidence, the Commonwealth doesn't need to go further, nor can the defense introduce evidence to show the defendant was not under the influence. That issue becomes

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[1]We observe that Kentucky Revised Statutes 189A.010(1)(a) was amended to lower the minimum legal level of alcohol concentration from .10 to .08 effective October 1, 2000.

[2]A distinction must be drawn between a material fact and an evidentiary fact. A material fact (*factum probandum*) is that which proves or disproves the proposition at issue. An evidentiary fact (*factum probans*) is, *inter alia*, that which proves or disproves a material fact. See R. Lawson, The Kentucky Evidence Law Handbook, § 2.05 (3d ed. 1993); 29 Am. Jur. 2d Evidence § 304 (1994).

> irrelevant as the content of .10 or more in and of itself, becomes the crime, unlike in *Allen v. Commonwealth*, Ky. App., 817 S.W.2d 458 (1991). As such, the .10 alcohol concentration becomes an element of the crime, not merely evidence of a DUI. (Emphasis added).

The Court in King recognized that the "issue" of whether the accused is driving "under the influence of alcohol" is immaterial to a *per se* DUI offense; instead, the Court identified the material issue or element as the alcohol concentration of .10 or above. Because the issue of being under the influence was immaterial, the Court naturally viewed evidence of sobriety as irrelevant. Simply put, evidence of alcohol intoxication is irrelevant if offered **solely** to prove or disprove that the accused was driving under the influence. We do not, however, think King stands for the proposition that evidence concerning alcohol intoxication[3] is never relevant to a prosecution under the *per se* DUI statute. We do not interpret King so broadly. Under certain circumstances, we conclude such evidence is, indeed, relevant.

At trial, an accused could charge that the blood or breath alcohol concentration test must have been in error because he was only slightly intoxicated or not intoxicated at all. To support this position, he could seek to introduce evidence concerning alcohol intoxication. For example, an accused could offer proof that he suffers a severe alcohol allergy, thus

[3]In this opinion, we use the phrase "evidence concerning alcohol intoxication" to encompass proof of the accused's degree of intoxication or complete lack of intoxication.

preventing him from consuming alcohol, or he could offer proof that he only consumed a single alcoholic beverage a considerable time before administration of the alcohol concentration test. Clearly, the evidence in the above examples would tend to impugn the results of a blood or breath alcohol concentration test. An impugned test result is relevant evidence because it makes less probable a material element of the *per se* DUI offense — whether the accused's alcohol concentration was, in fact, .08 or above. Cf. Fulkerson, 812 S.W.2d at 119.

Succinctly stated, we are of the opinion that evidence concerning alcohol intoxication can constitute circumstantial proof challenging the accuracy of breath and blood alcohol concentration tests. Cf. Springer, 998 S.W.2d at 439, and Dillingham v. Commonwealth, Ky., 995 S.W.2d 377 (1999). If offered to impugn the results of a blood or breath alcohol concentration test, we hold that evidence concerning alcohol intoxication is relevant to a prosecution under the *per se* DUI statute.

In the matter at hand, we are of the opinion that the district court erred by granting the Commonwealth's motion to prohibit introduction of evidence tending to show Pulliam was not under the influence of alcohol. We, thus, agree with the holding of the circuit court.

For the foregoing reasons, the Opinion and Order of the Marion Circuit Court is affirmed.

ALL CONCUR.

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