

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001133-MR

DAVID BARNETT

APPELLANT

v. APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 01-CI-00118

COMMONWEALTH OF KENTUCKY AND DON THOMAS,
JUDGE, 58TH JUDICIAL DISTRICT

APPELLEES

AND

NO. 2001-CA-001134-MR

JARED D. HILL

APPELLANT

v. APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 01-CI-00119

COMMONWEALTH OF KENTUCKY AND DON THOMAS,
JUDGE, 58TH JUDICIAL DISTRICT

APPELLEES

AND

NO. 2001-CA-001135-MR

DOYLE ESTES

APPELLANT

v. APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 01-CI-00120

COMMONWEALTH OF KENTUCKY AND DON THOMAS,
JUDGE, 58TH JUDICIAL DISTRICT APPELLEES

AND NO. 2001-CA-001136-MR

C. C. WOOTEN APPELLANT

v. APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 01-CI-00121

COMMONWEALTH OF KENTUCKY AND DON THOMAS,
JUDGE, 58TH JUDICIAL DISTRICT APPELLEES

AND NO. 2001-CA-001137-MR

SONJA KIRBY APPELLANT

v. APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 01-CI-00188

COMMONWEALTH OF KENTUCKY AND DON THOMAS,
JUDGE, 58TH JUDICIAL DISTRICT APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: EMBERTON, CHIEF JUDGE; DYCHE AND MILLER, JUDGES.

EMBERTON, CHIEF JUDGE: This is a consolidated appeal of five cases arising from the appellants' arrests for first offense, driving under the influence of alcohol. Subsequent to each arrest, each appellant was read an "implied consent" warning in

accordance with KRS¹ 189A.105. Specifically they were informed that refusal to submit to testing and the subsequent conviction of violating KRS 189A.010, will subject the offender to a mandatory minimum jail sentence twice as long as that imposed if the driver submits to the test. All the appellants in this appeal submitted to tests and argue that the results are not admissible at their trials.

The precise issue now raised was recently addressed in Commonwealth v. Hernandez-Gonzalez,² where the court phrased the question as follows:

Is the Implied Consent Warning read to the Defendant and contained in KRS 189A.105 defective on its face; and, if so does the defect unconstitutionally coerce the Defendant into submitting to a blood alcohol test under KRS 189A.103, in violation of Defendant's right to due process of law under both the Federal and Kentucky Constitutions?

In reaching the conclusion that although the implied consent warning set forth in KRS 189A.105 may be defective, it does not violate a constitutional right. The court explained as follows:

The present warning, as set forth in KRS 189A.105(2)(a), informs a person of the potential consequences of refusing a test for blood alcohol concentration. The penalty for refusal varies and is dependent upon the penalty that would otherwise be imposed. The statutory language does not state that a defendant will, in all cases, be sentenced to mandatory jail time if he refuses the test, but rather informs the defendant that if he refuses to consent to the breath test, and if there is mandatory jail time for the

¹ Kentucky Revised Statutes.

² 72 S.W.3d 914 (2002).

underlying offense, then he will be sentenced to twice that amount of jail time. Through the use of the language, "will be subject to a mandatory minimum jail sentence which is twice as long as the mandatory minimum jail sentence imposed if he submits to the tests . . .," the implied consent warning makes it clear that the penalty for refusal is conditioned upon whether conviction of the underlying offense would result in a mandatory minimum jail sentence had the defendant not refused to submit to the test.

The implied consent warning in KRS 189A.105 is defective as applied to those suspected drunk drivers not necessarily subject to minimum jail time; however, this defect does not rise to a violation of a constitutional right. Although the officer did not correctly educate Respondent in this case on the consequences of refusal, the warning neither offered implicit assurances that Respondent would not be subject to jail if he consented to the test, nor guaranteed jail time if he refused. It merely informed him of the possibility of additional jail time should such be mandated for the underlying DUI offense. Furthermore, as consent is implied by law, one cannot claim coercion in consenting to a test. While the statutory warning may be inaccurate in some circumstances, the duty to submit to testing is foremost under the statutory scheme. Thus, the implied consent warning contained in KRS 189A.105 is not so defective as to prejudice, as a matter of law, a suspected drunk driver's decision-making process since there is no constitutional right to refuse to submit to a test to determine blood alcohol concentration.³

The issue in these cases has been resolved by our highest court. The results of the alcohol concentration tests in the present cases are admissible at the trials of the respective appellants.

ALL CONCUR.

³ Id. at 917-18.

BRIEF FOR APPELLANTS:

NO BRIEF FILED FOR APPELLEES.

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