

RENDERED: OCTOBER 21, 2005; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-002132-MR

BARNEY SUTTON; HON. REBECCA S. WARD,
JUDGE, BULLITT DISTRICT COURT

APPELLANTS

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
ACTION NO. 04-CI-00901

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: GUIDUGLI AND MINTON, JUDGES; ROSENBLUM, SENIOR JUDGE.¹

ROSENBLUM, SENIOR JUDGE: Barney Sutton (Sutton) brings this appeal from an order of the Bullitt Circuit Court, entered October 11, 2004, which granted the Commonwealth's writ of prohibition, directing the Bullitt District Court to conduct a suppression hearing on the admissibility of the Commonwealth's breathalyzer test in Commonwealth v. Barney Sutton (Bullitt

¹ Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

District Court Number 03-T-06491). Based upon the facts of this case, the circuit court erred by granting the Commonwealth's petition. Hence, we reverse and remand.

This case arises from Sutton's arrest and charge of driving under the influence on September 18, 2003.²

As the case proceeded, on April 30, 2004, the parties entered into an agreed order stipulating to the following facts with regard to the blood test requested by Sutton:

1. The selection of Hardin Memorial Hospital to draw the blood of Defendant and perform an alcohol blood analysis was made solely by an agent of the Commonwealth, following the request by the Defendant for a blood test;
2. There is an inadequate chain of custody for admission of the test results of the blood drawn and tested at Hardin Memorial Hospital, due to a failure of the records of Hardin Memorial Hospital to identify said person and to the inability of all potential agents of Hardin Memorial Hospital who could have drawn the sample to recall under oath who drew the blood from the Defendant.

Several days later, based on the above stipulation that an agent of the Commonwealth solely selected the place to

² In contravention of Kentucky Rules of Civil Procedure 76.12(4)(c)(iv) and (v), and (d)(iii) and (iv), the parties fail to cite appropriately to the record on appeal regarding their statements and arguments detailing the arrest and subsequent hearings before the district and circuit courts. This may be due to the omission from the record on appeal of any trial court record on the arrest and any video or transcription of the hearings before the district and circuit courts. We will not, therefore, address the facts of the arrest, except for this limited statement which is stated by both parties in their briefs. Furthermore, as to the omitted hearings, when the complete record is not before the appellate court, we must assume that the omitted record supports the decision of the trial court. Commonwealth v. Thompson, 697 S.W.2d 143, 145 (Ky. 1985).

administer the blood test requested by Sutton, Sutton asked the district court to dismiss the charges arguing that the Commonwealth violated Kentucky Revised Statutes (KRS) 189A.103(7)³ which requires that the defendant be given his choice as to who administers tests independent of those administered at the direction of the police.⁴

On June 17, 2004, the district court orally suppressed Sutton's blood test and the Commonwealth's breathalyzer test.⁵

Thereafter, on August 19, 2004, the district court followed its oral ruling with a written order.⁶ In its order,

³ KRS 189A.103(7): After the person has submitted to all alcohol concentration tests and substance tests requested by the officer, the person tested shall be permitted to have a person listed in subsection (6) of this section of his own choosing administer a test or tests in addition to any tests administered at the direction of the peace officer. Tests conducted under this section shall be conducted within a reasonable length of time. Provided, however, the nonavailability of the person chosen to administer a test or tests in addition to those administered at the direction of the peace officer within a reasonable time shall not be grounds for rendering inadmissible as evidence the results of the test or tests administered at the direction of the peace officer.

⁴ Presumably because the second stipulation admitted to the blood test's inadmissibility, Sutton additionally argued against its suppression as a Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) violation. The district court dismissed this argument, and the circuit court agreed with the district court.

⁵ Although the hearing at which this ruling was made is not part of the record on appeal, the district court makes reference to this ruling in its August 19, 2004, order.

⁶ Twice before the district court issued its written order, the Commonwealth asked for reconsideration of the ruling which suppressed the breathalyzer test. In its written order, the court concluded that although Sutton waived any late filing by the Commonwealth, it did not have jurisdiction to reconsider its oral order because the Commonwealth's motion was made outside the ten day limit of Kentucky Rules of Civil Procedure (CR) 59.05. In granting the writ of prohibition, the circuit court concluded that the district court was not precluded from reconsideration given that no trial judgment was at issue and thus CR 59.05 was not applicable. Sutton conceded

the court made the following findings relevant to the issue before this Court:

The Court believes that the first stipulation of fact by the parties is dispositive of the issue before the Court. The stipulation states that the selection of Hardin Memorial Hospital as a location for the independent blood test was made *solely* (emphasis added) by an agent of the Commonwealth. . . .

Among the changes made in the Driving Under the Influence statutory scheme in 2000 by the Kentucky General Assembly, was a provision set forth in KRS 189A.103(7)
. . . .

It is apparent from the parties' stipulation that the test at Hardin Memorial Hospital did not meet the criteria for an independent test and that therefore there has been a violation of KRS 189A.103(7).

In arriving at this conclusion, the Court turns to the recent Kentucky case of Commonwealth v. Long, 118 S.W.3d 178 (Ky.App. 2003). In that case, the Court in finding a violation of the right to an independent test, stated, "we believe the plain meaning and unambiguous intent expressed by our legislature is that once an individual has submitted to the state's breath, blood or urine test to determine his or her alcohol concentration, that individual has a statutory right to have an independent test by a person of his or her own choosing within a reasonable time of the arrest at the individual's own expense." Long at p. 183.

this issue as well. We note, however, that this issue was not raised before us on appeal.

The Long court reviewed the holdings of several states. . . . The Court has reviewed these authorities and notes that they, like Long, which the Kentucky Court of Appeals affirmed, found that because an individual is in police custody during the period when he or she is entitled to an independent blood test, the statute requires some level of facilitation by the police to afford the individual a right to an independent test. In the case at bar, the stipulation is very plain that the selection of the location for the independent test was made solely by an agent of the Commonwealth, which in this Court's mind does not comport with the plain meaning of KRS 189A.103.

The Court is troubled by the Defendant's position that the only remedy in this matter to sanction the Commonwealth for the violation is dismissal of the charges. In a review of authorities . . . it appears that jurisdictions have imposed a variety of sanctions, including suppression of the Commonwealth's test. . . . The Court believes that this sanction is appropriate viewing the totality of the circumstances in this case which indicates a violation of a statutory right.

The Commonwealth thereafter petitioned the circuit court for a writ of prohibition to stop the district court from enforcing its order suppressing the Commonwealth's breathalyzer test results. It is important to note, however, that the Commonwealth misstated the facts before the circuit court. The Commonwealth argued that the district court misstated the parties' stipulation by adding "solely" before "by agent of the Commonwealth." This was actually a misstatement by the Commonwealth, because the district court's order was based on an

agreed order signed by both the Commonwealth and Sutton which contained the stipulations, and which included the word "solely."

According to the circuit court's order, a hearing was held on September 20, 2004, upon which the following findings and order were entered the next day:

The District Court based its order in this action on the two stipulations of fact made by the parties on April 30, 2004; specifically, that the selection of Hardin Memorial Hospital to draw the blood of the Defendant to perform an alcohol blood analysis was made solely by an agent of the Commonwealth. The parties stipulate that there was no suppression hearing held that resulted in the Court's oral order from the bench. Evidence was offered in the way of testimony of employees of Hardin Memorial Hospital with respect to the Defendant's motion to dismiss alleging a Brady violation on behalf of the Commonwealth.

The Court . . . finds that a suppression hearing should be held by the District Court with respect to paragraph 1 of the agreed order that states:

"The selection of Hardin Memorial Hospital to draw blood of Defendant and perform an alcohol blood analysis was made solely by an agent of the Commonwealth, following the request of the Defendant for a blood test."

In the event the Commonwealth is unable at the suppression hearing to provide evidence that the Defendant was not deprived of his right to have the tests conducted by a person of his own choosing in accordance with KRS 189A.103(7), the Commonwealth's blood analysis test should be suppressed.

Sutton's motion to make the circuit court's September 21, 2004, order final and appealable was granted and entered on October 11, 2004. This appeal followed.

Before us, Sutton argues that the circuit court erred in issuing the writ 1) without exceptional circumstances and 2) by setting aside the parties' stipulations of fact.

A writ of prohibition may be granted upon a showing that 1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or 2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted. Hoskins v. Maricle, 150 S.W.3d 1, 10 (Ky. 2004).

The Commonwealth conceded in its petition that the district court was acting within its jurisdiction in suppressing the breathalyzer test. The question before the circuit court, therefore, was whether the district court acted erroneously in doing so.

But while granting a writ of prohibition is ordinarily within the discretion of the court, because of the exceptional nature of a writ of prohibition, the court before whom the

petition is pending must first make a factual finding as a condition precedent that there is no adequate remedy by appeal or otherwise, and that without the writ there will be great injustice and irreparable injury. See Grange Mutual Insurance Company v. Trude, 151 S.W.3d 803, 809-10 (Ky. 2004). On appeal, this type of finding is reviewed for clear error. Id. Herein, the circuit court failed to make any factual finding as to these conditions precedent. As such, the circuit court's action in granting the writ must be reversed.

With regard to the findings made by the circuit court, based on the record before us, it is difficult to see how the circuit court could find error in the district court's conclusion that KRS 189A.103(7) was violated because the district court's factual findings were based on the stipulation agreed to by the parties that the selection of the Hardin Memorial Hospital to administer the blood test requested by Sutton was solely made by the police officer. The sanction for such a violation, suppression of the breathalyzer test, was well within the discretion of the district court.

For the foregoing reasons, we reverse the Bullitt Circuit Court and remand this matter for entry of an order denying the Commonwealth's petition for a writ of prohibition.

ALL CONCUR.

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