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Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001879-MR
AND
NO. 2002-CA-001957-MR

STANLEY M. BILLINGSLEY — APPELLANT

AND

GARY TILLEY — REAL PARTY IN INTEREST

v.

APPEALS FROM CARROLL CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 02-CI-00063

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BARBER, SCHRODER, AND VANMETER, JUDGES.

VANMETER, JUDGE: This is an appeal by a judge of the Carroll District Court from a writ of prohibition entered by the Carroll Circuit Court. The writ prohibited the district judge, appellant, Stanley M. Billingsley, from enforcing an order

suppressing the introduction of the Breathalyzer ("BA") test performed on the real party in interest, Gary Tilley. For the reasons stated hereafter, we affirm.

On August 11, 2001, Tilley was arrested for driving under the influence (DUI) in Carroll County, Kentucky. Tilley was transported to the Carroll County Jail where he received a BA test on the Intoxilyzer 5000 with the simulator attachment, which tested 0.181. On February 8, 2002, Tilley moved to suppress the BA test results because the arresting officer failed to follow the directions for the simulator, specifically, whether the simulator's hoses were warm and whether the simulator's paddle properly turned. Upon the conclusion of the suppression hearing, appellant held that the arresting officer did not abide by the standard operating procedures for the Intoxilyzer 5000 and therefore, the machine was not in proper working order on the testing day as required by *Owens v. Commonwealth*, Ky., 487 S.W.2d 897 (1972).[1]

As a result, appellee, the Commonwealth of Kentucky, filed for a writ prohibiting appellant from enforcing the suppression order. On August 21, 2002, the Carroll Circuit Court entered a writ of prohibition holding: (1) according to *Commonwealth v. Williams*, Ky. App., 995 S.W.2d 400 (1999) and *Tipton v. Commonwealth*, Ky. App., 770 S.W.2d 239 (1989), it had

[1] Overruled by *Commonwealth v. Roberts*, Ky., 122 S.W.3d 524, 528 (2003).

jurisdiction; and (2) based on *Commonwealth v. Davis*, Ky., 25 S.W.3d 106 (2000), the arresting officer's failure to check the simulator's hoses for warmth and to determine whether its paddle properly turned go to the weight of the evidence, rather than to its admissibility. This appeal followed.

Appellant contends the circuit court erred in granting a writ of prohibition under *Williams*, 995 S.W.2d 400 and *Tipton* 770 S.W.2d 239, arguing that those decisions contradict the court's holding in *Eaton v. Commonwealth*, Ky., 562 S.W.2d 637 (1978), and in allowing the BA test results into evidence arguing that the circuit court ignored the foundation requirements in *Owens*, 487 S.W.2d 897. In addition, appellant argues the Court of Justice denied him due process of law by failing to provide him funding for legal counsel to proceed on this appeal. Similarly, the Real Party in Interest, Gary Tilley ("Tilley"), argues that the circuit court erred in granting the writ of prohibition since the Commonwealth would encounter neither great injustice nor irreparable harm by suppressing the evidence; and in failing to follow the standards in *Owens*.

As to the circuit court's jurisdiction to issue a writ of prohibition, in *Tipton*, we found that a party seeking relief from interlocutory district court rulings, procedurally, may

obtain circuit court review through CR 81 and KRS 23A.080(2).[2] 770 S.W.2d at 241. Specifically, in *Tipton* we held:

> While we are persuaded that the Commonwealth cannot properly get the review it sought and obtained [through KRS 22A.020(2)[3] or KRS 23A.080(1)[4]], we equally believe some vehicle for review of such interlocutory district court rulings should be available. Otherwise, the Commonwealth may be forced to trial without vital evidence or with some other significant prejudice to its case, as shown herein.
>
> In our opinion, review of district court rulings is available through an original proceeding for relief in the nature of mandamus or prohibition in the appellate court, herein the circuit court. *See* SCR 1.040(6). CR 81 allows the old remedy by writs of mandamus and prohibition to be obtained by an original action in the appropriate court. This is not an immediate and direct interlocutory appeal to the appellate court but an original action. Procedurally, review is granted, thereby comporting with KRS 23A.080(2) which says, "The circuit court may issue *all* writs necessary in *aid* of its *appellate jurisdiction* . . . ."

Id. (emphasis original). Here, upon suppression of Tilley's BA test result, the Commonwealth was unable to seek relief from either KRS 22A.020(2), which gives the court of appeals jurisdiction over interlocutory orders from the circuit court, or from KRS 23A.080(1), in which a "final" action of the

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[2] CR 81 states: "Relief heretofore available by the remedies of mandamus, prohibition . . . may be obtained by original action in the appropriate court." KRS 23A.080(2) states: "The Circuit Court may issue all writs necessary in aid of its appellate jurisdiction . . . ."

[3] KRS 22A.020(2) states: "The Court of Appeals has jurisdiction to review interlocutory orders of the Circuit Court in civil cases . . . ."

[4] KRS 23A.080(1) states: "A direct appeal may be taken from District Court to Circuit Court from any final action of the District Court."

district court is required before it can directly appeal to the circuit court.[5] Therefore, "the circuit court is without jurisdiction to take an interlocutory 'appeal' from district court as the proper method of procedure is through an original action seeking a writ of mandamus or prohibition" by CR 81 and KRS 23A.080(2). Thus, the circuit court herein acted within its jurisdiction. *Williams*, 995 S.W.2d at 403. *See also Tipton*, 770 S.W.2d at 242.

Even so, appellant argues that the circuit court's decision contradicts *Eaton*, which found that the exclusion of evidence "does not permit an appellate court to disturb the discretionary ruling of a trial court" and a writ of prohibition "is an extraordinary remedy available only in certain narrowly defined circumstances. It is not available to control the discretionary acts of a trial court within its jurisdiction." 562 S.W.2d at 638-639. Moreover, appellant contends that we exceeded our appellate authority by creating "a new rule of law" in *Williams* and *Tipton*. Thus, appellant is essentially requesting that this court overturn our previous holdings.

However, the facts of the instant case and those in *Williams* and *Tipton* are readily distinguishable from those in

[5] In *Lexington Herald-Leader Co. v. Beard*, Ky., 690 S.W.2d 374, 376 (1984), the court held: "The test for determining the appealable character of an order of the trial court is whether '. . . the order grants or denies the ultimate relief sought in the action or requires further steps to be taken in order that parties' rights may be finally determined.'" (quoting *Evans Elkhorn Coal Co. v. Ousley,* Ky., 388 S.W.2d 130, 130-31 (1965)).

Eaton. In *Eaton*, the Commonwealth appealed a discretionary ruling of the circuit court, as the trial court, pursuant to KRS 22A.020(4), which allows an appeal *from the circuit court to the court of appeals*. However, in the instant case, the Commonwealth sought a writ of prohibition by an original action *from the district court to the circuit court* since "an appeal is available only in the instance of a final ruling from district court" through KRS 23A.080(1). *Williams*, 995 S.W.2d at 403.[6] Given the procedural differences between the matter herein and *Eaton*, we are not willing to disturb our previous holdings.

Next, appellant argues the circuit court erroneously relied on dicta from *Tipton*, 770 S.W.2d at 241, which is cited in *Williams*, 995 S.W.2d at 403, stating "we equally believe some vehicle for review of such interlocutory district court rulings **should be** available" and "**[i]n our opinion**, review of district court rulings is available through an original proceeding for relief in the nature of mandamus or prohibition in the appellate court, herein the circuit court." However, we find that "should be" and "in our opinion" are not dicta since the statements addressed a subject which was "'necessary to the determination of the issues raised by the record and considered by the

[6] Without holding specifically that writs of prohibition are not permitted for evidentiary rulings, in *Williams*, 995 S.W.2d 400, we remanded the circuit court's dismissal of the Commonwealth's writ prohibiting the district court from suppressing the defendant's BA test since the circuit court's holding was not consistent with the principles in *Tipton*, 770 S.W.2d 239.

court.'" *Brown v. Diversified Decorative Plastics, LLC*, Ky. App., 103 S.W.3d 108, 111 (2003) (quoting *Utterback's Adm'r v. Quick*, 230 Ky. 333, 19 S.W.2d 980, 983 (1929)). Clearly, as set forth above, the distinctions between KRS 22A.020 and KRS 23A.080 were matters necessary for review by the court in *Tipton*, 770 S.W.2d at 241.

Next, appellant and Tilley argue the circuit court erred by ignoring the foundation requirements for admitting the BA test result as set forth in *Owens*, 487 S.W.2d at 900.[7] *See Marcum v. Commonwealth*, Ky., 483 S.W.2d 122 (1972). However, the Kentucky Supreme Court recently modified the foundation requirements for admitting a BA test and overruled *Owens* and *Marcum* in *Commonwealth v. Roberts*, Ky., 122 S.W.3d 524, 528 (2003). The Court's holding, according to relevant cases,[8] statutes[9] and administrative regulations,[10] was that the foundation requirements for admission of a breath test are as follows:

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[7] Specifically, *Owens* held: "It is generally held that the prosecution has the burden of proving tests such as the breathalyzer were correctly administered. As a minimum this proof must show that the operator was properly trained and certified to operate the machine and that the machine was in proper working order and that the test was administered according to standard operating procedures." 487 S.W.2d at 900.

[8] *See Commonwealth v. Wirth*, Ky., 936 S.W.2d 78 (1996); *Marcum*, 483 S.W.2d 122; *Owens*, 487 S.W.2d 897.

[9] *See* KRS 189A.103(3)(a); KRS 189A.103(4).

[10] *See* 500 KAR 8:020(2); 500 KAR 8:030(2).

> 1) That the machine was properly checked and in proper working order at the time of conducting the test.
> 2) That the test consist of the steps and the sequence set forth in 500 KAR 8:030(2).
> 3) That the certified operator have continuous control of the person by present sense impression for at least twenty minutes prior to the test and that during the twenty minute period the subject did not have oral or nasal intake of substances which will affect the test.
> 4) That the test be given by an operator who is properly trained and certified to operate the machine.
> 5) That the test was performed in accordance with standard operating procedures.

Roberts, 122 S.W.2d at 528. Here, appellant specifically argues that the circuit court failed to find that the BA test was performed in accordance with standard operating procedures since the arresting officer failed to follow the directions for using the simulator attachment issued by the Justice Cabinet.[11] Appellant contends that because the manufacturer of the Intoxilyzer 5000 has not issued instructions for the simulator attachment, the Justice Cabinet's direction list should be considered the "standard operating instructions" requirement as found in *Roberts*, 122 S.W.3d at 528.[12] *See* KRS 189A.103(3)(a); KRS 189A.103(4); and 500 KAR 8:030(2).

[11] The directions for use of the simulator component of the Intoxilyzer 5000 state: "Step 1: Push start test button (green) if display not on; verify date and time. Step 2: Record screen time on test ticket for start of observation period. Step 3: Check alcohol simulator to ensure lights are on, and paddle is moving. Step 4: Check tubing and assure warm hoses . . . ."

[12] Appellant cites *Owens*, 487 S.W.2d 897, as authority; however, this requirement is stated the same in *Roberts*, 122 S.W.3d at 528.

It is important that we clarify that the simulator component is an optional attachment in which Kentucky uses as a connection to the Intoxilyzer 5000.[13] Despite appellant's argument that the Justice Cabinet's list of directions should be considered the "standard operating procedures," our legislature has yet to promulgate universal instructions for the simulator attachment nor has the Justice Cabinet issued the direction list outside of its training manual; thus, we are not willing to do so ourselves. Therefore, based on *Commonwealth v. Davis*, Ky., 25 S.W.3d 106 (2000), we find that any failures in following the Justice Cabinet's directions for using the simulator attachment go to the weight of the evidence, rather than its admissibility.

In *Davis*, the district court suppressed a BA test after the machine had registered out of the tolerance reading on the calibration component therefore not satisfying the standards in *Owens*. Finding that the trial court erred by suppressing the evidence, the Kentucky Supreme Court held:

> The Intoxilyzer test results should be admitted into evidence, and **any problems with the simulator component of the device should go to the weight of such evidence, rather than its admissibility**, when the calibration unit and

[13] Phillip Lively, employed by the Intoxilyzer manufacturer, testifying at the suppression hearing stated: "The simulator is a totally separate piece of equipment from the intoxilyzer itself. The intoxilyzer basically, in its purest form, is to take an air sample which contains alcohol, calculate the concentration of alcohol which is in that air sample and render a result . . . We manufacture and provide the hoses at the request of the State of Kentucky. **The hoses are not a standard piece of equipment that we provide with all intoxilyzers . . . we do not therefore have any specific operational requirements nor mandates that even a heated hose be used**."

> testing unit are in proper working order on the testing date.

Davis, 25 S.W.3d at 108-09 (emphasis added). Likewise, relying on *Davis*, the circuit court held in the present case:

> It is this Court's conclusion that the failures [of the arresting officer] in the present case go to the weight of the evidence rather than the admissibility of the BA evidence. This conclusion is based on a careful reading of the transcript of the testimony of Mr. Phillip Lively, the expert called by the District Court in this case. His testimony clearly was that the failure to check these items in the present case were issues of form over substance and would not significantly affect the reading or functioning of the BA. His testimony was that, only under the most extreme case facts, which do not exist in this case, would there be any possibility of an adverse effect on the proper functioning of the BA.

Finding no evidence in the record to the contrary, we conclude that the Intoxilyzer 5000 was in proper working order on the date of testing Tilley and the foundation requirements set forth in *Roberts*, 122 S.W.3d at 528, were satisfied. Problems with the simulator attachment run to the weight of the evidence, rather than its admissibility.

Nonetheless, Tilley argues that by suppressing the BA test the Commonwealth would not be subjected to great injustice and irreparable harm since it may continue to prosecute the case as an under the influence case rather than a *per se* case. We disagree.

Given that the issue presented is one of law, our review of the appropriateness of the writ of prohibition is not confined to an abuse of discretion inquiry standard. *Kentucky Labor Cabinet v. Graham*, Ky., 43 S.W.3d 247, 251 (2001). In *Tipton*, we stated that a writ of prohibition should be granted only upon a showing that:

> (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no adequate remedy by appeal, or (2) the lower court is about to act incorrectly, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury would result. The issuance of the writ is only under exceptional circumstances in order to prevent a miscarriage of justice.
>
> Reasoning laterally, we are also of the opinion that "in aid of its appellate jurisdiction," as found in KRS 23A.080(2), the circuit court inherently has the power to issue such writs, as the same was determined in *Francis v. Taylor*, Ky., 593 S.W.2d 514 (1980), for the Court of Appeals when it issues a writ of mandamus.

770 S.W.2d at 241-42 (citations omitted). *See also Southeastern United Medigroup, Inc. v. Hughes*, Ky., 952 S.W.2d 195, 199 (1997). It follows that the Commonwealth would experience great injustice and irreparable injury if the BA test were suppressed given that any problems with the simulator attachment do not affect the reliability of the Intoxilyzer 5000 machine itself[14]

[14] Phillip Lively, testifying at the suppression hearing, stated: "There are a number of committees that look at some of the operational aspects of the instrumentation. One being the National Safety Council Committee on Alcohol

and even if it did, those problems would adhere to the weight of the evidence; thus, the circuit court did not err.

Lastly, appellant contends that the Court of Justice denied him due process of law by failing to provide him funding for legal counsel and requests an award of $1.00, which should be drawn on the state treasury. However, given that neither the appellant nor this court could find authority supporting this argument, we are not willing to create a new rule holding otherwise.

Therefore, the circuit court's writ of prohibition is affirmed and the case is remanded to the district court for further proceedings consistent with this opinion.

BARBER, JUDGE, CONCURS.

SCHRODER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

SCHRODER, JUDGE, DISSENTING. "The proper procedure for appeals from district court is governed by KRS 23A.080, and therein we see no corollary to KRS 22A.020(4) authorizing an interlocutory appeal by the Commonwealth." Tipton v. Commonwealth, Ky. App., 770 S.W.2d 239, 241 (1989). Tipton, like our case, involved a motion to suppress results from a Breathalyzer. Tipton couldn't be clearer. There is no statutory authority for interlocutory appeals of district court

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and Drugs. Their recommendation is that an external simulator be used, but they do not recommend either heating nor non-heated tubing."

rulings, only appeals of final orders or judgments. The Tipton Court recognized that "the legislature did not authorize interlocutory orders to be reviewable by direct appeal." Id. at 241. Nevertheless, the Court went on to opine that "some vehicle for review of such interlocutory district court rulings should be available." (Emphasis added.) Id. The Court went on to authorize original actions in circuit court. This decision is a direct contradiction of our Supreme Court in Eaton v. Commonwealth, Ky., 562 S.W.2d 637 (1978), also involving a pretrial motion to suppress and the Commonwealth's desire for an interlocutory appeal.[15] Finding no statutory authority, the Commonwealth sought a writ of prohibition. Our Supreme Court, our highest court, stated:

> The order of prohibition is an extraordinary remedy available only in certain narrowly defined circumstances. It is not available to control the discretionary acts of a trial court within its jurisdiction. In this case the trial court was ruling upon the admissibility of evidence. That was a matter clearly within his jurisdiction. The fact that his ruling may have been erroneous does not remove the jurisdictional basis for his action. The court many years ago stated:
>
> "No question is better settled in this jurisdiction than that the writ of prohibition will not lie to restrain an inferior court from acting within its jurisdiction, however erroneous its action may be; and this is true although the party

[15] This was from a circuit court decision, before interlocutory appeals from circuit court were authorized.

> seeking the writ is without right of appeal."

Id. at 638. (Citations omitted.) See also, Commonwealth v. Williams, Ky. App., 995 S.W.2d 400 (1999), which flies in the face of Eaton. Eaton, 562 S.W.2d at 639, also discussed the significance of the fact that no remedy was available to the Commonwealth and the alleged improper exclusion of evidence could result in a dismissal of the Commonwealth's case. The Supreme Court responded:

> this possibility does not permit an appellate court to disturb the discretionary ruling of a trial court acting within its jurisdiction. The United States Supreme Court has said:
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> "Nor are the considerations against appealability made less compelling as to orders granting motions to suppress, by the fact that the Government has no later right to appeal when and if the loss of evidence forces dismissal of its case." Dibella v. U.S., 369 U.S. 121, 82 S. Ct. 654, 7 L. Ed. 2d 614 (1962).

Eaton at 639.

Our Supreme Court, and the United States Supreme Court, recognized some cases will be dismissed. Why can't the Court of Appeals? The General Assembly can correct the situation if it is of the opinion that there should be a district court/circuit court corollary to KRS 22A.020(4), which was enacted in 1976 (H.B. 432). For these reasons, I would dismiss the appeal, realizing the other issues become moot.

BRIEF FOR APPELLANT JUDGE STANLEY M. BILLINGSLEY:

Judge Stanley M. Billingsley
Carroll District Court
Carrollton, Kentucky

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