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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000051-DG

MICHAEL HARDIN APPELLANT

ON DISCRETIONARY REVIEW FROM NELSON CIRCUIT COURT
v. HONORABLE CHARLES SIMMS III, JUDGE
ACTION NO. 02-XX-00011

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON AND TAYLOR, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

JOHNSON, JUDGE: Michael Hardin was found guilty of driving under the influence, first offense,[2] (DUI) and failing to have rear license plate illuminated,[3] following a trial by jury in the Nelson District Court on December 16, 2002. After the

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

[2] KRS 189A.010(1)(b).

[3] KRS 186.170(1).

convictions were affirmed by the Nelson Circuit Court, this Court granted discretionary review. Having concluded that the trial court did not abuse its discretion by allowing lay opinion testimony from a Kentucky State Trooper regarding Hardin's performance of certain field sobriety tests and his state of intoxication, we affirm.

On January 17, 2002, Hardin was stopped by Kentucky State Police Trooper Scott Brown while driving on US Highway 62 in Nelson County, Kentucky. Trooper Brown testified at trial that he had observed Hardin leave the My Way Bar and Grill in Nelson County, and that the license plate on Hardin's vehicle was not illuminated. Trooper Brown followed Hardin for a short distance before activating his emergency lights and attempting to stop him. Hardin did not immediately stop his vehicle; instead, he continued driving for less than one-fourth of a mile before pulling into his own driveway and stopping the vehicle. Trooper Brown testified that Hardin exited his vehicle; and as Trooper Brown approached Hardin, he smelled the odor of alcohol on Hardin. Trooper Brown also testified that he observed that Hardin had blood-shot eyes and slurred speech. At this point, Trooper Brown asked Hardin to perform several field sobriety "tests".

First, Trooper Brown demonstrated the one-leg stand "test" to Hardin. He asked Hardin to hold one of his feet six

inches from the ground while counting from 1,001 to 1,030. Trooper Brown stated that Hardin "failed" the "test" because he began the "test" before all the instructions had been given, he counted the number 1,014 two times, and he dropped his foot on count 1,016.

Trooper Brown then demonstrated the walk-and-turn "test" to Hardin. According to Trooper Brown, Hardin attempted the "test", but he could not follow the directions or walk in a straight line. Trooper Brown then placed Hardin under arrest for DUI and took him to the Nelson County Jail. At the jail, Hardin refused to take a breath test.

After the Nelson District Court found Hardin guilty of DUI and failing to have rear license plate illuminated, he appealed his convictions to the Nelson Circuit Court. His appeal was based upon his claim that the trial court erred in failing to conduct a "gatekeeping" hearing pursuant to Daubert v. Merrell Dow Pharmaceuticals, Inc.,[4] and Kumho Tire Co., Ltd. v. Carmichael,[5] prior to allowing Trooper Brown to testify regarding the field sobriety "tests", and that Trooper Brown should not have been allowed to testify that in his opinion Hardin was intoxicated at the time of his arrest. The circuit court affirmed Hardin's convictions in an opinion and order

[4] 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

[5] 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

entered on December 7, 2004. This Court granted discretionary review on February 14, 2005.

The one-leg stand and the walk-and-turn procedures are standard field sobriety "tests" that have been developed by the National Highway Traffic Safety Administration (NHTSA) for use by law enforcement officers as reliable and valid "tests" to determine driver intoxication or alcohol impairment.[6] These "tests" are summarized in the NHTSA student manual, which describes the "tests" and provides detailed instructions on how each "test" is to be administered and scored. The one-leg stand "test" is administered as follows: The driver is told to stand with his feet together and his arms at his sides. The driver is instructed not to begin the "test" until the officer tells him to start. To perform the "test", the driver must raise one of his legs approximately six inches from the ground with his toes pointed out. While holding this position, the driver must count out loud for 30 seconds by saying "one-one thousand, two-one thousand". The NHTSA student manual identifies four "standardized clues", including swaying while balancing, using arms for balance, hopping, and putting the foot down, and it further instructs the officer that "[i]f an individual shows two or more clues or fails to complete the ["test"] . . . there is a good chance the [blood alcohol content] is above 0.10."

[6] The following information regarding field sobriety "tests" is taken from United States v. Horn, 185 F.Supp.2d 530, 537-38 (D.Md. 2002).

The walk-and-turn "test" requires the driver to place his feet in the heel-to-toe position on a straight line, which can either be a line painted on the roadway or an imaginary line. The driver is then instructed to place his right foot on the line ahead of the left foot, with the heel of the right foot against the toe of the left foot. The driver is told to keep his arms down at his sides and to stand in this position until he is told to start the "test". Once he begins the "test", the driver must take nine, heel-to-toe steps down the line, turn around in the manner instructed by the officer,[7] and then take nine, heel-to-toe steps back to the starting point. The driver must keep his hands at his sides while walking, look at his feet, and count each step out loud. The driver is also told not to stop until the "test" is completed. There are eight "standardized clues" that the officer must observe, including (1) the inability to keep balance while listening to the instructions, (2) starting the "test" before the instructions are finished, (3) stopping to steady one's self, (4) failing to touch heel-to-toe, (5) stepping off the line, (6) using arms for balance, (7) turning incorrectly, and (8) taking an incorrect number of steps. The manual states that "if the suspect exhibits two or more distinct clues on this test or fails to

[7] In this case, Trooper Brown demonstrated to Hardin that he was to make a three-step turn. As Trooper Brown testified, in some cases a five or six-step turn can be demonstrated.

complete it, classify the suspect's [blood alcohol content] as above 0.10."

Hardin claims Trooper Brown's opinion testimony concerning the field sobriety "tests" constituted "expert testimony" and before being ruled admissible should have been qualified through a Daubert hearing. Accordingly, we must determine whether testimony concerning procedures such as the one-leg stand and the walk-and-turn constitutes lay opinion that is rationally based upon the perception of the witness and is helpful to a clear understanding of a fact in issue, or whether such testimony constitutes expert opinion in the form of scientific, technical, or other specialized knowledge which requires a Daubert hearing to qualify the witness as an expert witness.

KRE 701, concerning opinion testimony of lay witnesses, provides as follows:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are:
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> (a) Rationally based on the perception of the witness; and
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> (b) Helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

KRE 702, concerning testimony by experts, provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier

> of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Since this is an issue of first impression in Kentucky, we will examine case law from other jurisdictions. In 1996 the District Court of Appeals of Florida in State v. Meador,[8] characterized the one-leg stand and walk-and-turn procedures as "psychomotor exercises" and a police officer's observations about a defendant's performance was held admissible as lay opinion testimony, rather than as expert opinion testimony. In 2001 an opinion from the Court of Appeals of Hawaii in State v. Ferrer,[9] held that a police officer may testify as to his observations concerning a defendant's performance on psychomotor field sobriety tests, and based upon such observations may give a lay opinion as to whether the defendant was intoxicated when arrested, but may not testify that in his opinion the defendant "failed" the field sobriety tests.[10]

[8] 674 So.2d 826, 831 (Fl.Dist.Ct.App. 1996).

[9] 23 P.3d 744, 760-65 (Haw.Ct.App. 2001).

[10] The Court in State v. Taylor, 694 A.2d 907, 911 (Me. 1997) stated "that the HGN test relies on scientific principles to a greater extent than other common field sobriety tests such as the walk and turn [and] the one-leg stand[.]" Additionally, Ferrer specifically excluded from the category of standard field sobriety tests the horizontal glaze nystagmus (HGN) test because of its determination that the test was scientific in nature. However, because the trial court refused to allow any testimony from Trooper Brown on Hardin's performance on the HGN, the admissibility of the HGN test will not be considered in this appeal.

In the notable federal case of Horn, the United States District Court in Maryland discussed the one-leg stand procedure and walk-and-turn procedure and characterized them as "standardized procedures police officers use to enable them to observe a suspect's coordination, balance, concentration, speech, ability to follow instructions, mood and general physical condition – all of which are visual cues that laypersons, using ordinary experience, associate with reaching opinions about whether someone has been drinking."[11] The Horn Court concluded that because these procedures "involve only observations of the suspect's performance . . . they are not couched in science and technology if used for that purpose."[12]

In 2004 the Supreme Court of Ohio in State v. Schmitt,[13] held "that a law enforcement officer may testify at trial regarding any observations made during a defendant's performance of nonscientific standardized field sobriety tests[,]" which include the one-leg stand and walk-and-turn. The Schmitt Court further stated as follows:

> The manner in which defendant performs these tests may easily reveal to the average lay person whether the individual is intoxicated. We see no reason to treat an officer's testimony regarding the

[11] Id. at 558.

[12] Horn, 185 F.Supp.2d at 555.

[13] 801 N.E.2d 446, 450 (Ohio 2004).

> defendant's performance on a nonscientific field sobriety test any differently from his testimony addressing other indicia of intoxication, such as slurred speech, bloodshot eyes, and odor of alcohol.[14]

In 2005 the Court of Appeals of Ohio in State v. Robinson,[15] characterized the one-leg stand and walk-and-turn as "psychomotor coordination tests" and stated that they are "nonscientific field sobriety tests." The Robinson Court further stated that "admissibility of these tests is not dependent upon fulfillment of [the evidentiary rules'] requirements for scientific evidence. . . . This type of test is within a juror's common understanding."

Recently in Plouff v. State,[16] the Court of Appeals of Texas stated that its rules of evidence, which are similar to Kentucky's rules and also based upon the Federal Rules of Evidence, allow both lay and expert witnesses to offer opinion testimony concerning intoxication. "Texas courts have held that, because an officer's testimony about a suspect's coordination, balance, and any mental agility problems exhibited during the one-leg stand and walk-and-turn tests are observations grounded in common knowledge, the officer's testimony based on these observations is considered lay witness opinion testimony[.]"

[14] Id. at 450.

[15] 828 N.E.2d 1050, 1058 (Ohio.Ct.App. 2005).

[16] 192 S.W.3d 213, 223 (Tex.App. 2006).

Having concluded that the one-leg stand and walk-and-turn procedures are correctly categorized as standard field sobriety procedures which are not grounded in scientific terms, we hold that any testimony regarding these types of procedures is within a layperson's common understanding, and a law enforcement officer should be allowed to testify as to his observations of a defendant when performing these procedures. Thus, we reject Hardin's contention that the trial court erred by not conducting a "gatekeeping" hearing pursuant to Daubert before allowing Trooper Brown to testify regarding his observations of Hardin during his performance of the standardized procedures, even though Trooper Brown had specialized knowledge to conduct the procedures.[17] Accordingly, the trial court did not err in overruling Hardin's objections to Trooper Brown's testimony in this regard.

We must also determine whether Trooper Brown should have been allowed to use certain terms such as "test," and "fail," when testifying as to his opinion regarding Hardin's performance during the standard field sobriety procedures. Hardin relies upon Horn which addressed this issue as follows:

> While the psychomotor [field sobriety tests] are admissible, we agree with

[17] Trooper Brown testified that he had taken a one-week instruction, which was approximately 40 hours, on field sobriety tests as part of his training to become a Kentucky State Police Trooper. He further stated that he was required to take tests to show his ability to conduct the field sobriety tests and that he administered field sobriety tests in accordance with his training.

> defendants that any attempt to attach significance to defendants' performance on these exercises is beyond that attributable to any of the other observations of a defendant's conduct at the time of the arrest could be misleading to the jury and thus tip the scales so that the danger of unfair prejudice would outweigh its probative value. The likelihood of unfair prejudice does not outweigh the probative value as long as the witness[es] simply describe their observations. Reference to the exercises by using terms such as "test," "fail" or "points," however, creates a potential for enhancing the significance of the observations in relationship to the ultimate determination of impairment, as such terms give these layperson observations an aura of scientific validity. Therefore, such terms should be avoided to minimize the danger that the jury will attach greater significance to the results of the field sobriety exercises than to other lay observations of impairment.
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> . . . .
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> [W]hen testifying about the [standard field sobriety tests] a police officer must be limited to describing the procedure administered and the observations of how the defendant performed it, without resort to terms such as "test,"[FN] "standardized clues," "pass" or "fail," unless the government first has established a foundation that satisfies Rule 702 and the Daubert/Kumho Tire factors regarding the reliability and validity of the scientific or technical underpinnings of the NHTSA assertions that there are a stated number of clues that support an opinion that the suspect has "failed" the test.[18]

[18] "It would be preferable to refer to the standardized field sobriety tests as 'procedures,' rather than tests, as the use of the word test implies that there is an accepted method of determining whether the person performing it passed or failed, and this has not been shown in this case. . . . [T]he [one-leg stand and walk-and-turn] procedures have been referred to as field sobriety 'tests' for so many years, that it is likely that it will be

. . . .

> Just where the line should be drawn must be left to the discretion of the trial judge, but the officer's testimony under Rule 701 must not be allowed to creep from that of a layperson to that of an expert – and the line of demarcation is crossed if the opinion ceases to be based on observation and becomes one founded on scientific, specialized, or technological knowledge."[19]

Thus, while we agree in part with Hardin's argument, we cannot conclude that it was reversible error for the trial court to allow the use of the terms during this trial.

Finally, Hardin claims that the trial court erred by allowing Trooper Brown to express his opinion that Hardin was intoxicated, without having been qualified as an expert witness. In Commonwealth v. Rhodes,[20] this Court held that "the opinion testimony of the state trooper on the issue of intoxication was

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impossible to stop using this terminology altogether. Occasional reference to the . . . procedures as 'tests' should not alone be grounds for a mistrial in a jury case."

[19] Id. at 560. See also Meador, 674 So.2d at 832 (stating that "[w]hile the psychomotor tests are admissible, we agree with defendants that any attempt to attach significance to defendants' performance on these exercises beyond that attributable to any of the other observations of a defendant's conduct at the time of the arrest could be misleading to the jury and thus tip the scales so that the danger of unfair prejudice would outweigh its probative value"); and Ferrer, 23 P.3d 744 at 757 (stating that "[w]e disagree that [the officer] was precluded from testifying about Defendant's performance on the non-HGN [field sobriety tests], but we agree that [the officer] should not have been allowed to express his opinion as to whether Defendant passed or failed these tests").

[20] 949 S.W.2d 621 (Ky.App. 1996).

admissible."[21] Because Rhodes was decided before Kuhmo Tire, Hardin urges this Court to overrule Rhodes.

In the case before us, Trooper Brown observed Hardin leave the My Way Bar and Grill. While Hardin was not stopped for erratic driving behavior, he was stopped for a traffic violation. Trooper Brown testified that once Hardin got out of his vehicle he could smell the odor of alcohol and noticed that Hardin had slurred speech and blood-shot eyes. In addition to our previous holding that it was proper for Trooper Brown to provide testimony in the form of a lay opinion that Hardin's performance of the field sobriety procedures indicated that he was intoxicated, we also conclude that these additional common observations support Trooper Brown's lay opinion that Hardin was intoxicated. The trial court did not abuse its discretion in allowing Trooper Brown to give his lay opinion that Hardin was intoxicated based upon the common observations of slurred speech, blood-shot eyes, and the odor of alcohol.

Based upon the foregoing reasons, the opinion and order of the Nelson Circuit Court is affirmed.

ALL CONCUR.

[21] Id. at 623. (The trooper testified that he had observed Rhodes's driving behavior and had administered three field sobriety tests and a preliminary breath test, all of which Rhodes failed.)

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

John David Seay
Bardstown, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General
Frankfort, Kentucky

John Pottinger
Special Asst. Attorney General
Bardstown, Kentucky

ORAL ARGUMENT FOR APPELLEE:

John Pottinger
Special Asst. Attorney General
Bardstown, Kentucky