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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000753-MR

LAFE WARD, JR. APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 06-CR-00001

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; NICKELL, JUDGE; GRAVES, SENIOR JUDGE.

COMBS, CHIEF JUDGE: Lafe "Dee" Ward, Jr., appeals from a final judgment and sentence of imprisonment entered by the Pike Circuit Court. Ward was found guilty of second-degree manslaughter and was sentenced to ten-years' imprisonment. After our review, we affirm.

On January 10, 2006, Ward, who is an attorney, was travelling home from his office in Williamson, West Virginia, in his Lincoln Aviator SUV. He ran a red light at an intersection on U.S. 119 and collided with the driver's side of a Toyota Camry being driven by Benita Dixon. At the time of the impact, the Camry had a green light and had entered the intersection in Ward's line of travel. There were no skid marks or other signs of stopping before or after the point of the crash. Ward's SUV travelled more than 500 feet before coming to a stop on the shoulder of the road. Lisa Bryant, who was a passenger in the Camry, was injured in the collision. Dixon suffered multiple traumatic injuries and died en route to the hospital approximately one hour after the accident. Ward was found slumped over his steering wheel with his air-bag deployed. Witnesses indicated that although he was somewhat disoriented, he was concerned that he had hit someone with his vehicle. He also stated that he needed to speak to his wife and get home for dinner.

Ward failed a field-sobriety test administered by a Kentucky State Police (KSP) trooper, and he was placed under arrest for driving under the influence. After receiving his *Miranda*[1] rights, Ward told the police that he thought that the light was green – although he acknowledged that all other evidence indicated that it was red. Ward also admitted that he had imbibed two mixed alcoholic beverages at his office before he left work. The field-sobriety test and interview, which were recorded by video, were played for the jury.

[1] *Miranda v. Arizona*, 384 U.S.436, 86 S.Ct. 1602, 16. L.Ed.2d 694 (1996).

KSP troopers also found two prescription bottles (one containing Darvocet) on Ward's person. Although the label on the bottle recited that it had just been filled with 90 pills, it contained only 85 ½ pills. A subsequent blood test indicated that Ward had a blood-alcohol level of .13. A screen of Ward's blood and urine revealed the presence of Valium, Darvocet, Ambien, Paxil, Inderal, and hydrocodone in his system.

Evidence later presented at trial disclosed that Ward had been to two drug stores to purchase prescription medications immediately before the accident. He had first visited a CVS pharmacy where he picked up prescriptions for Darvocet (a narcotic) and Ambien (a hypnotic that induces sleep). According to the pharmacist, the Darvocet prescription contained 90 pills; the pills were counted three times for accuracy, and none of the pills was cut in half. The pharmacist also testified that Darvocet and alcohol could be mixed only with extreme caution since both have sedative effects. A warning label on each of the prescription bottles advised that the drugs should not be taken while driving or operating machinery.

Ward then drove to the pharmacy at a Food City grocery store where he picked up prescriptions for Inderal (a blood pressure medication), Paxil (an anti-depressant), and another prescription for Ambien. The pharmacist who filled these prescriptions testified that they were prescribed by a physician other than the one who had prescribed the drugs from the CVS pharmacy. The pharmacist indicated that if she had known that Ward had just picked up another Ambien prescription from another pharmacy, she would not have filled the second prescription for

Ambien. According to an eyewitness in a car behind him, Ward drove to the end of the Food City parking lot and stopped for sometime between 45 and 60 seconds before pulling out into traffic. The accident occurred shortly afterward.

On January 11, 2006, the Pike County Grand Jury returned a single-count indictment that charged Ward with first-degree wanton murder, a capital offense, pursuant to Kentucky Revised Statutes (KRS) 507.020. Ward appeared in court with counsel on January 18, 2006, and entered a plea of not guilty to the charge. Following a competency hearing on March 15, 2006, Ward was declared competent to stand trial.

Prior to trial, Ward filed a motion to quash the indictment and to dismiss the charges of wanton murder and second-degree manslaughter.[2] Chief among his supporting arguments was a contention that the statute under which he had been charged, KRS 507.020(1)(b), was void for vagueness because it failed to put the public on fair notice of what conduct constitutes capital murder and wanton murder. The Commonwealth argued in response that the Supreme Court had recently rejected a similar challenge in *Brown v. Commonwealth*, 174 S.W.3d 421 (Ky. 2005). The trial court reserved ruling on Ward's motion until the conclusion of the Commonwealth's proof at trial. At that point, the trial court denied the motion along with Ward's motion for a directed verdict.

The trial lasted for three days, and the jury was instructed on wanton murder (KRS 507.020) as well as its lesser-included offenses of second-degree

[2] Although he was indicted under KRS 507.020, the murder statute, Ward also sought dismissal of second-degree manslaughter (KRS 507.040) as a lesser-included offense of that statute.

manslaughter (KRS 502.040) and reckless homicide (KRS 507.050). It found Ward guilty of second-degree manslaughter and recommended that he be sentenced to ten-years' imprisonment. On April 3, 2007, the trial court entered a judgment and sentence consistent with the jury's decision and recommendation. This appeal followed.

Ward first argues that the trial court erred by denying his motion to quash his indictment and to dismiss the charges against him. He contends that KRS 507.020(1)(b) and 501.020 (and – in the alternative – KRS 507.040 and 501.020) are unconstitutional because they are void for vagueness when they are read in conjunction with one another. A considerable portion of Ward's argument challenges the constitutionality of KRS 507.020(1)(b), the wanton murder statute. However, since he was not convicted of wanton murder, that issue is moot. As any analysis of the wanton murder statute would be speculative or academic in nature, a discussion is not warranted. *See Dillingham v. Commonwealth*, 249 S.W.2d 827, 828 (Ky. 1952).

Ward also challenges the constitutionality of KRS 507.040(1), which provides that a person is guilty of second-degree manslaughter when he wantonly causes a death that results from a person's operation of a motor vehicle:

> A person is guilty of manslaughter in the second degree when he wantonly causes the death of another person **including** but not limited to, situations where the death results from the person's:
> (a) **Operation of a motor vehicle** .... (Emphases added.)

Ward based his void-for-vagueness argument on the definition of *wantonly* as set forth at KRS 501.020(3):

> A person acts wantonly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. *A person who creates such a risk* ***but is unaware thereof solely by reason of voluntary intoxication*** *also acts wantonly with respect thereto.*

(Italics and emphasis added).

Ward particularly challenges the italicized portion of this provision pertaining to voluntary intoxication. He argues that a person's lack of awareness as posing a risk of harm to another cannot serve as a proper predicate for criminal liability. He reasons that a person cannot be on notice of that which he cannot perceive – **even if** the reason for his lack of awareness is due to his own voluntary intoxication. Therefore, a statutory decree imposing such liability must be unconstitutional as unduly vague and illogical.

Statutes enacted by the General Assembly are presumed to be constitutional. "The issue of whether a statute is unconstitutional is a question of law subject to de novo review." *Wilfong v. Commonwealth*, 175 S.W.3d 84, 91 (Ky.App. 2004). In considering the constitutionality of a statute, we must draw all fair and reasonable inferences in favor of the statute's validity. *Posey v. Commonwealth*, 185 S.W.3d 170, 175 (Ky. 2006). "[T]he violation of the

Constitution must be clear, complete and unmistakable in order to find the law unconstitutional." *Kentucky Indus. Utility Customers, Inc. v. Kentucky Utilities Co.*, 983 S.W.2d 493, 499 (Ky. 1998).

The void-for-vagueness doctrine is based on the requirement that a statute be sufficiently definite for a person of ordinary intelligence to be able to understand that certain conduct is prohibited. *Buckley v. Valeo*, 424 U.S. 1, 77, 96 S.Ct. 612, 662, 46 L.Ed.2d 659 (1976); *Wilfong*, 175 S.W.3d at 95. A statute must also be worded in such a manner that it does not encourage arbitrary or discriminatory enforcement. *Wilfong*, 175 S.W.3d at 95. A statute is considered vague if "men of common intelligence must necessarily guess at its meaning." *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Our Supreme Court has stated the test of vagueness to be "whether a person disposed to obey the law could determine with reasonable certainty whether contemplated conduct would amount to a violation." *Commonwealth v. Foley*, 798 S.W.2d 947 (Ky. 1990) overruled on other grounds by *Martin v. Commonwealth*, 96 S.W.3d 38 (Ky. 2003).

> In reviewing a vagueness challenge, the essential inquiry is whether the statute describes the forbidden conduct sufficiently so that persons of common intelligence disposed to obey the law can understand its meaning and application.

Wilfong, 175 S.W.3d at 96.

We are persuaded that KRS 507.040(1) and KRS 501.020(3), when read together, make it abundantly clear to a person of ordinary intelligence that

when one drives an automobile while voluntarily intoxicated and causes a death, he has violated the law and will be subject to prosecution for second-degree manslaughter. There is nothing vague or ambiguous about the language. The statutes plainly warn that a person who creates "a substantial and unjustifiable risk" that he may cause the death of another by driving a motor vehicle while voluntarily intoxicated assumes the risk of criminal liability when he knowingly becomes intoxicated. If he then drives a car in that voluntarily induced state, he is criminally liable for all consequences that ensue – regardless of his lack of knowledge, awareness, or intent due to his intoxicated state. Criminal liability is based on the intentional, knowing, and voluntary act of intoxication, which may then set in motion a series of unintended tragedies. That person will be subject to prosecution for second-degree manslaughter **even if he is unaware of the risk** that he poses. We hold that these statutes provide ample notice that voluntary intoxication can lead to conduct that is considered "wanton" under our penal code. *See McGuire v. Commonwealth*, 885 S.W.2d 931, 934 (Ky. 1994); *Caretenders, Inc. v. Commonwealth*, 821 S.W.2d 83, 87 (Ky. 1991).

Additionally, these statutes are not worded in such a manner as to encourage arbitrary or discriminatory application. Law enforcement officials are given clear standards of what type of conduct is considered to be wanton. *Voluntary intoxication* is defined in KRS 501.010(4) as follows:

> "Voluntary intoxication" means intoxication caused by substances which the defendant knowingly introduces into his body, the tendency of which to cause intoxication

> he knows or ought to know, unless he introduces them pursuant to medical advice or under such duress as would afford a defense to a charge of crime.

Such definitional sections may – and indeed must – be considered in a void-for-vagueness analysis. *See Payne v. Commonwealth*, 623 S.W.2d 867, 871 (Ky. 1981); *Cutrer v. Commonwealth*, 697 S.W.2d 156, 158 (Ky.App. 1985). Although the consequences are severe, the statutory definitions are clear beyond dispute, refuting Ward's argument as to vagueness.

Ward also argues that the statutory provisions at issue are unconstitutional because they are overbroad. The overbreadth doctrine "generally involves a claim that in an effort to control proscribable conduct, a statute impermissibly reaches constitutionally permissible conduct." *Wilfong*, 175 S.W.3d at 96. A statute cannot be invalidated for overbreadth unless it affects a "substantial number of impermissible applications." *Id.* Ward has failed to indicate any constitutionally permissible conduct that might be affected by the statutes. He also has failed to set forth the "substantial number of impermissible applications" that is implicated by those statutes. Therefore, we are not persuaded that his analysis has established overbreadth.

Ward next argues that the trial court erred by allowing a police officer to testify about the capacity of people to drive with a .13 blood-alcohol content. He objects because the officer did not personally observe Ward at the scene of the accident and that he was not offered or accepted as an expert witness by the court. We review a trial court's evidentiary rulings under an abuse-of-discretion standard.

Goodyear Tire & Rubber Co. v. Thompson, 11 S.W.3d 575 (Ky. 2000). A court commits an abuse of discretion when its decision is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Farmland Mut. Ins. Co. v. Johnson*, 36 S.W.3d 368, 378 (Ky. 2000).

On the second day of trial, the Commonwealth called as a witness Detective Eddie Crum, a nineteen-year veteran of the Kentucky State Police. Crum testified that during his first twelve years with KSP, he worked as a road trooper. On numerous occasions, he arrested people for drunken driving and conducted breath and blood tests for alcohol. He also testified that he had extensive training as an accident reconstructionist. Crum was then asked about his experience with intoxicated drivers and how alcohol affects a person's ability to perceive and react while driving. Ward objected to this question. Counsel exchanged arguments out of the presence of the jury, and the trial court overruled Ward's objection. Crum was then allowed to testify that he had observed people who had tested at a .13 blood-alcohol content level during the course of his employment as a KSP trooper and that he believed that a .13 rating generally impaired a person's ability to operate a motor vehicle safely. As correctly noted above, Crum had not been present at the scene of the accident involving Ward.

Ward argues that Crum's testimony should not have been allowed into evidence because he was not presented to the trial court as an expert witness pursuant to Kentucky Rules of Evidence (KRE) 702 and because the court failed to

make any findings of fact concerning his qualifications to render the expert opinions to which he testified.

Our Supreme Court has granted trial courts wide latitude in assessing the reliability of an expert and in deciding whether special briefing or a *Daubert* hearing is necessary. *Dixon v. Commonwealth*, 149 S.W.3d 426, 430 (Ky. 2004). "Thus, formal *Daubert* hearings are not always required." *Id.*; *see also, e.g., Mondie v. Commonwealth*, 158 S.W.3d 203, 212 (Ky. 2005); *Hyatt v. Commonwealth*, 72 S.W.3d 566, 575 (Ky. 2002). Nonetheless, we note that:

> [e]ssential fairness in a trial requires that the trial court carefully scrutinize the qualifications and the testimony of the officer before permitting his opinion testimony to be submitted to a jury.

Mondie, 158 S.W.3d at 212-13, quoting *Alexander v. Swearer*, 642 S.W.2d 896, 897 (Ky. 1982).

Expert opinions from police officers based upon their training and experience are frequently admitted almost as a matter of routine. *See id.*; *see also Martin v. Commonwealth*, 170 S.W.3d 374, 382-83 (Ky. 2005); *Allgeier v. Commonwealth*, 915 S.W.2d 745, 746-47 (Ky. 1996); *Sargent v. Commonwealth*, 813 S.W.2d 801, 802 (Ky. 1991); *Kroth v. Commonwealth*, 737 S.W.2d 680, 681 (Ky. 1987); *Evans v. Commonwealth*, 116 S.W.3d 503, 509-10 (Ky.App. 2003). These opinions are deemed to be distinguishable "from the more extensive and complex knowledge required for testimony by traditional experts, such as accident reconstructionists and forensic pathologists." *Allgeier*, 915 S.W.2d at 747.

Moreover, where proffered testimony does not require applying "any theories, processes, or methods of novel or controversial origin," a witness's "actual experience and long observation" are sufficient to qualify him as an expert in the relevant subject area. *Kurtz v. Commonwealth*, 172 S.W.3d 409, 413 (Ky. 2005). Police officers enjoy wide acceptance as expert witnesses based on their professional experience and training alone.

The trial court in this case required the Commonwealth to lay a proper foundation before allowing Crum to give his opinion. As noted above, Crum testified as to his extensive experience in testing and dealing with suspected drunken drivers as a state trooper. "The reliability of proffered expert testimony is a preliminary question of fact reserved for the trial court and accordingly, a trial court's reliability ruling in this area is reviewed for clear error." *Kurtz*, 172 S.W.3d at 412. Although the court did not make specific findings of fact with respect to the reliability of Crum's testimony, substantial evidence supported its ruling. Therefore, we are not persuaded that the court clearly erred in finding Crum's opinion to be reliable. *See Miller v. Eldridge*, 146 S.W.3d 909, 917 (Ky. 2004).

Our Supreme Court has recognized that police officers may render opinions regarding the general relationship between a blood-alcohol percentage and a person's level of intoxication -- even when an officer has not personally observed the defendant in question. *See Jewell v. Commonwealth*, 549 S.W.2d

807, 812 (Ky. 1977), *overruled on other grounds by Payne v. Commonwealth*, 623 S.W.2d 867 (Ky. 1981). In *Jewell*, the Court held that a police officer:

> who had administered blood-alcohol examinations on many occasions ... qualified as an expert in his own right, and it was within his special competence to relate the percentages to degrees of drunkenness based on his personal observation of other persons he had tested.

Id. Thus, the testimony given by Crum has been established as the type that would assist a trier of fact. The trial court did not abuse its discretion in allowing it into evidence. *See Miller*, 146 S.W.3d at 915.

Ward also argues that the trial court abused its discretion by allowing Crum's testimony to come into evidence because the probative value of that testimony was substantially outweighed by the danger of undue prejudice. We disagree. "Undue prejudice" generally refers to two possible risks that might occur when evidence is introduced:

> (1) risk of an emotional response that inflames passions, generates sympathy, or arouses hostility; and (2) risk that the evidence will be used for an improper purpose.

Dixon, 149 S.W.3d at 431, quoting Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 2.10[4][b], at 88 (4th ed. LexisNexis 2003). Neither risk is involved here. There was nothing about Crum's testimony that would tend to generate a risk of an emotional response. Moreover, nothing about it created a risk that it would be used for an improper purpose. Therefore, the trial court did not abuse its discretion in concluding that the probative value of Crum's testimony was not compromised or outweighed by a likelihood of producing a prejudicial impact.

Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999). Ward's remaining arguments in this respect are equally unpersuasive.

Ward finally argues that the trial court erred by failing to direct a verdict of "not guilty" as to the second-degree manslaughter charge. The standard for ruling on a motion for directed verdict is as follows:

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.
>
> On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). The evidence presented against the defendant must be of substance, and a directed verdict is warranted where the Commonwealth provides no more than a "mere scintilla" of evidence. *Id.* at 187-88.

A review of the record before us clearly reflects that the trial court did not err in denying Ward's motion for directed verdict. As noted above, KRS 507.040 provides that a person is guilty of second-degree manslaughter "when he wantonly causes the death of another person." KRS 507.040(1). It unequivocally includes situations in which death results from the person's operation of a motor

vehicle. KRS 507.040(1)(a). We have interpreted KRS 507.040(1) to mean that driving under the influence of intoxicants will almost always be considered wanton conduct. *See Keller v. Commonwealth*, 719 S.W.2d 5, 7 (Ky.App. 1986). Our Supreme Court has recognized that "driving under the influence [is] sufficient to prove the element of wanton conduct required in KRS 507.020(1)(b)," the wanton murder statute. *Walden v. Commonwealth*, 805 S.W.2d 102, 104 (Ky. 1991), overruled on other grounds by *Commonwealth v. Burge*, 947 S.W.2d 805 (Ky. 1996); *see also Hamilton v. Commonwealth*, 560 S.W.2d 539, 541 (Ky. 1978). The Court has also held that:

> ... evidence that a person charged with vehicular homicide had intoxicating drugs in his system when the homicide occurred is relevant to the issue of wantonness even without additional evidence of the degree of impairment caused by its presence.

Parson v. Commonwealth, 144 S.W.3d 775, 781 (Ky. 2004). Driving while intoxicated is virtually a *per se* predicate for liability under the wanton murder statute. Therefore, driving under the influence of alcohol and/or intoxicating drugs would undoubtedly serve to satisfy the lesser degree of wantonness for second-degree manslaughter in KRS 507.040(1).

The Commonwealth certainly produced more than a "mere scintilla" of evidence in support of its case -- specifically as to whether Ward was intoxicated at the time of the accident. To recapitulate, Ward ran a red light and collided with another vehicle without making any effort whatsoever to come to a stop. Immediately following the collision, after failing a field-sobriety test and

being arrested for driving under the influence, Ward acknowledged that he had consumed two mixed alcoholic beverages at the office before leaving to pick up his prescriptions. Subsequent tests revealed that he had a .13 blood-alcohol content as well as traces of multiple prescription drugs in his system at the time -- including Darvocet and Ambien. One of the pharmacists who testified at trial indicated that Darvocet and alcohol could be mixed only with extreme care because both substances have sedative effects. The prescription bottles for each drug also contained labels warning that they should not be taken while driving or operating machinery. There was at least some evidence introduced from which a jury could infer that Ward had taken four and one-half Darvocet tablets immediately after leaving the Food City pharmacy. The KSP trooper who conducted the field-sobriety test also testified as to why he believed Ward was impaired and why he believed that Ward had failed the test. From these numerous facts, a jury could reasonably find that Ward was intoxicated at the time of the accident and that driving in such a state and running a red light constituted wanton conduct. *See Walden*, 805 S.W.2d at 104; *Hamilton*, 560 S.W.2d at 541; *Keller*, 719 S.W.2d at 7.

We conclude that the trial court correctly permitted the case to proceed to a jury and that a reasonable jury could have found Ward guilty of second-degree manslaughter beyond a reasonable doubt. There was no error.

Accordingly, we affirm the judgment of the Pike Circuit Court.

NICKELL, JUDGE, CONCURS.

GRAVES, SENIOR JUDGE, CONCURS IN RESULT AND FILES SEPARATE OPINION.

GRAVES, SENIOR JUDGE, CONCURRING IN RESULT: I concur; however, I write separately to comment on the irregularity of the proceedings concerning the DUI charge.

Detective Eddie Crum, a 19-year veteran of the Kentucky State Police, was permitted to answer multiple questions presented by the prosecutor concerning anyone who registers .13 BAC (blood alcohol) and his fitness to "perceive and react" and to drive a car. This testimony was more prejudicial than probative because Appellant's degree of impairment was not within the personal knowledge of Detective Crum. It was only an opinion based on speculation.

It was error to admit abstract opinion evidence about DUI. Though initially charged with DUI, this charge is still pending. A DUI conviction is now precluded by double jeopardy. However, this error is harmless because other, sufficient evidence exists to sustain the conviction.

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