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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001016-DG

CHRISTOPHER TODD PEMBERTON — APPELLANT

v.

DISCRETIONARY REVIEW
FROM MERCER CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 07-XX-00002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND STUMBO, JUDGES; BUCKINGHAM, SENIOR JUDGE.[1]

BUCKINGHAM, SENIOR JUDGE: Christopher Todd Pemberton entered a conditional guilty plea in the Mercer District Court to one count of driving under the influence (DUI) in violation of Kentucky Revised States (KRS)

[1] Senior Judge David C. Buckingham 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.

189A.010(1)(c). The sole issue on appeal is whether the district court correctly denied Pemberton's motion to suppress the results of a urine test. The Mercer Circuit Court affirmed the denial of Pemberton's motion, and we likewise affirm.

Pemberton was stopped by police on December 28, 2004. The officer testified at the suppression hearing that he smelled the strong odor of alcohol as he approached the vehicle. The officer also testified that Pemberton had glassy red eyes and that he failed a series of field sobriety tests. Pemberton was arrested and transported to a hospital where blood and urine samples were taken. His blood alcohol concentration was measured at .07 percent. A test of his urine revealed the presence of cannabinoid metabolites that are a by-product of the active ingredient in marijuana.

Pemberton was charged with DUI in violation of KRS 189A.010(1)(c). That statute prohibits the operation or physical control of a motor vehicle while under the influence of "any other substance or combination of substances which impairs one's driving ability."

Pemberton moved the district court to suppress the results of the urinalysis on the grounds that they were irrelevant under Kentucky Rules of Evidence (KRE) 401 and KRE 702. The district court denied the motion, and Pemberton entered a conditional guilty plea to the offense. He appealed to the circuit court, and the circuit court affirmed. We granted discretionary review.

The standard for review in this matter is whether the trial court abused its discretion in allowing the admissibility of the urinalysis results. *See Smith v.*

Commonwealth, 181 S.W.3d 53, 59 (Ky.App. 2005). The test to determine an abuse of discretion is "whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English,* 993 S.W.2d 941, 945 (Ky. 1999).

D.W. Eversole, the chemist with the Kentucky State Police Forensic Lab, testified that the presence of cannabinoid metabolites at the level tested indicated ingestion of marijuana sometime within 36 hours before the sample was taken. Eversole was unable to state when within that 36-hour period Pemberton had ingested marijuana or whether Pemberton was intoxicated from using marijuana at the time he was driving.

Pemberton argued to the district court that because the expert witness could neither identify when within the 36-hour time frame the marijuana had been ingested nor could indicate whether Pemberton was intoxicated from the use of marijuana, the evidence was not sufficiently relevant to be admitted. Pemberton supported his argument with unrebutted evidence that when marijuana is ingested, the effects appear within seconds or minutes, reach maximum effect within 10 to 30 minutes, and subside within two to six hours.[2] He argued that unless the Commonwealth could produce other evidence of when he may have ingested marijuana, the evidence that he consumed marijuana within 36 hours of being stopped while driving is not relevant. He raised the same arguments before the circuit court and raises them again before this court.

[2] The evidence was an article from the journal "Courtroom Technology" that was entered into the record without objection during the cross-examination of Eversole at the suppression hearing.

Relevancy is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable then it would be without the evidence." Kentucky Rules of Evidence (KRE) 401. KRE 702 states that "[i]f 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."

Quoting from Robert G. Lawson, *The Kentucky Evidence Law Handbook*, Sec. 205[3], at 80 (4th ed., LEXIS 2003), quoting Edward W. Cleary, *McCormick on Evidence* 542-43 (3rd ed. 1984), the Kentucky Supreme Court stated in *Parsons v. Commonwealth,* 144 S.W.3d 775 (Ky. 2004), as follows:

> An item of evidence, being but a single link in the chain of proof, need not prove conclusively the proposition for which it is offered. It need not even make that proposition appear more probable than not. . . . It is enough if the item could reasonably show that a fact is slightly more probable than it would appear without that evidence. . . .

Id. at 781.[3]

The fact that Pemberton ingested marijuana within 36 hours of driving is a useful fact in the determination of whether or not he was driving while impaired. The weight to be assigned to that evidence is a matter for the trier of fact to determine.

[3] In *Parsons*, the court upheld the admissibility of the results of a urinalysis that revealed the presence of cocaine and marijuana in a prosecution of a person charged with DUI and second-degree assault. *Id*.

The district court's determination was not arbitrary, unreasonable, unfair, or unsupported by sound legal principles. We find no abuse of discretion.

The order of the Mercer Circuit Court is affirmed.

STUMBO, JUDGE, CONCURS.

CAPERTON, JUDGE DISSENTS.

CAPERTON, JUDGE, DISSENTING: I believe that the admission into evidence of the urine test for cannabinoid metabolites, under the circumstances of this case, was erroneous and requires reversal.

First, I would like to distinguish *Kidd v. Commonwealth*, 146 S.W.3d 400 (Ky.App.2004). In *Kidd,* a jury verdict convicting the defendant of DUI was properly upheld by our Court where marijuana was the only intoxicating substance identified and the officer observed that the defendant had bloodshot and glassy eyes that would not react to light, along with slow and slurred speech.

Our Court recognized the necessary link between the presence of the cannabinoid metabolites evidencing marijuana usage and the physiological effects of marijuana exhibited by the defendant therein by stating, "[t]his evidence [referring to the glassy blood-shot eyes and slow and slurred speech] coupled with the evidence of marijuana in his urine, was sufficient to sustain the jury's verdict that Kidd was guilty of DUI (marijuana)." *Kidd* at 403.

Now, let's consider the facts before us. In the case sub judice there was evidence of alcohol intoxication, properly admissible into evidence to prove DUI. However, as to the evidence of marijuana, there was no evidence as to the

time of its usage by Pemberton. Indeed, usage could have occurred anytime within a 36-hour period preceding the stop. The undisputed evidence presented by Pemberton's expert was that the intoxicating effect of marijuana would last at most six hours. We must remember that the test of the urine was for whether or not "cannabinoid metabolites", a by-product of the active ingredient of marijuana, existed and not for the active ingredient itself. Thus, while the by-product was present, the active ingredient that would cause intoxication was not necessarily there. Further, as it was the urine which was tested, the substances therein had already passed through the body and thus give no indication as to what, if any, effect substances remaining in the blood may have had upon Pemberton.

The admission of the evidence at first glance seems properly embraced by the rules of evidence. However, a deeper analysis reveals otherwise. KRE 401 allows the admission of evidence that would make the existence of a relevant fact more or less probable. Is evidence of cannabinoid metabolites relevant? Likely so, although here, an issue certainly exists as to what, if any, intoxication effect metabolites have after they have already passed through the body. However, for our analysis, we will assume that it is relevant. Nevertheless, such relevance is necessarily based upon the time of introduction of marijuana into the body.

Now, consider the time factor. Would evidence of cannabinoid metabolites be relevant if the six-hour period following ingestion ended more than

six hours[4] before the traffic stop? No, as any intoxifying effect would obviously have ended before the traffic stop. Would evidence of cannabinoid metabolites be relevant if the six-hour period began less than six hours before the traffic stop? Certainly, because the expert testified the intoxicating effect could last for up to six hours. Thus, to allow introduction of the urine test into evidence would allow evidence before the jury that may or may not be relevant based upon the time the marijuana was introduced into the body, i.e. the beginning of the six-hour period.

The question of relevance is for the trial court. For the urine test to be relevant, the six-hour period must have begun not more than six hours before the traffic stop. The trial court could not make a finding as to *when* the six-hour period began because no evidence was presented thereon. Nor was there evidence[5] from which one could reasonably infer either recent usage of marijuana or that the marijuana had an intoxicating effect on Pemberton at the time of the traffic stop. Thus, although the urine test may or may not be relevant, there is no way to make that determination, in light of the lack of the aforementioned evidence. Therefore, in that the relevance of the urine test could not determined by the trial court, it should not have been admitted for consideration by the jury.

Based upon the foregoing analysis, I dissent.

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[4] The importance of the "six hours" is the uncontroverted expert testimony that the maximum effect of marijuana is for six hours from the time first introduced into the body.

[5] In the case sub judice, there was no evidence of recent usage of marijuana, such as drug paraphernalia or possession of the drug itself. Nor was there testimony of any synergistic effect resulting from the use of alcohol and marijuana within the 36 hours preceding the stop (the time period testified to by the expert). Lastly, there was no testimony that the officer observed one or more physiological body responses that are associated with marijuana and not alcohol, thereby evidencing intoxication from the usage of marijuana.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE

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