RENDERED: OCTOBER 17, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000094-DG

LARRY MCCREARY — APPELLANT

DISCRETIONARY REVIEW
FROM SIMPSON CIRCUIT COURT
v. HONORABLE WILLIAM R. HARRIS, JUDGE
ACTION NO. 06-XX-00001

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: ACREE AND CLAYTON, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

ACREE, JUDGE: Larry McCreary appeals from an opinion of the Simpson Circuit Court affirming his conviction in the district court for being in physical control of a motor vehicle while under the influence of alcohol, in violation of

[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

KRS 189A.010(1). We accepted discretionary review in order to address McCreary's argument that his conviction was improper under the standard articulated by this Court in *Wells v. Commonwealth*, 709 S.W.2d 847 (Ky.App. 1986). Having carefully considered the facts of this case and the language of our prior decisions addressing this issue, we conclude that the circuit court erred in affirming the conviction.

Officer Justin Toth of the Franklin Police Department gave testimony regarding his arrest of McCreary. According to Officer Toth, he was conducting a routine patrol when he spotted a car parked in the dark beside an empty building which formerly housed a restaurant. Officer Toth was concerned for the driver's safety because it was a chilly January night. He was also aware that the empty restaurant building had been the target of vandals since the establishment closed. Consequently, he pulled in behind the vehicle and activated his blue lights.

Officer Toth found McCreary sitting in the driver's seat with the engine turned off and the keys in his front pocket. He noted that McCreary had some difficulty lowering the window and observed two half-empty bottles of wine in the backseat. McCreary appeared to have been drinking and refused to attempt any field sobriety tests, although he was twice asked to do so. Officer Toth arrested McCreary and transported him to the jail where McCreary refused a breathalyzer test. McCreary was charged with being in physical control of a motor vehicle while under the influence of alcohol, his third violation of KRS 189A.010(1).

At trial, he moved for a directed verdict, arguing that the evidence did not establish his intent to exert physical control over the vehicle. McCreary also tendered a proposed jury instruction defining physical control. The trial court overruled his motions for directed verdict and refused to instruct the jury on McCreary's proposed definition of physical control. The jury in McCreary's first trial was unable to reach a verdict. On retrial, he was convicted and sentenced to six months in jail and a fine of $750.00. McCreary first appealed to the Simpson Circuit Court which affirmed the conviction. Subsequently, we accepted discretionary review of McCreary's conviction.

On appeal, McCreary argues that KRS 189A.010 is unconstitutionally vague, and that the trial court erred in denying his motions for suppression, directed verdict, and a jury instruction defining physical control. We have examined all of these claims of error. However, our decision turns on the trial court's denial of McCreary's motion for a directed verdict. We find the remaining grounds for reversal to be moot or otherwise without merit.

KRS 189A.010(1)(b) prohibits driving under the influence, defined as follows:

> (1) A person shall not operate or be in physical control of a motor vehicle anywhere in this state:
> . . .
> (b) While under the influence of alcohol[.]

McCreary contends that the evidence, taken in a light most favorable to the Commonwealth, was not sufficient to convict him of the charge that he was in

physical control of a motor vehicle while under the influence of alcohol. We agree.

Circumstantial evidence can be considered in determining whether an individual charged with DUI was in physical control of a motor vehicle. *Blades v. Commonwealth*, 957 S.W.2d 246, 249-50 (Ky. 1997). *Wells v. Commonwealth*, 709 S.W.2d 847 (Ky.App. 1986), set out several factors a court should consider in making that determination:

> (1) whether or not the person in the vehicle was asleep or awake; (2) whether or not the motor was running; (3) the location of the vehicle and all of the circumstances bearing on how the vehicle arrived at that location; and (4) the intent of the person behind the wheel. (citation omitted).

Wells at 849. In *Wells*, decided under an earlier version of the statute, the defendant was arrested for DUI after he was found asleep behind the wheel of a van located in a motel parking lot. The van was parked, the keys were in the ignition, and the engine was running. The transmission was in neutral and the emergency brake engaged. There was alcohol and an empty container in the van. Field sobriety and breathalyzer tests indicated Wells had more than the legally permissible blood alcohol concentration for operating a motor vehicle. Nevertheless, this Court found there was insufficient evidence that Wells had operated his vehicle while he was intoxicated.

Similarly, in *Harris v. Commonwealth*, 709 S.W.2d 846 (Ky.App. 1986), this Court reversed a DUI conviction based on evidence that the defendant

was found asleep behind the wheel of a car. Harris's vehicle was parked outside a McDonald's restaurant for over two hours when restaurant employees, seeing him slumped over the steering wheel, called the police. Upon arrival, the police had to awaken Harris. Harris was intoxicated. Although the vehicle's key was in the ignition and turned to the "on" position, the engine was not running. It was undisputed that two hours earlier, when he entered McDonald's and purchased food, Harris was not intoxicated. Relying on our decision in *Wells*, we found that the circumstances of Harris's arrest "do not show that he exercised any control over his truck while intoxicated in reaching its present location nor do they show that appellant was attempting to control the vehicle." *Harris*, 709 S.W.2d at 847.

The version of KRS 189A.010(1) in effect when *Wells* and *Harris* were rendered merely stated that "[n]o person shall operate a motor vehicle anywhere in this state while under the influence of alcohol or any other substance which may impair one's driving ability." In 1991, the Legislature amended the statute by adding language prohibiting the "physical control of a motor vehicle" while under the influence of alcohol. Since that time, Kentucky appellate courts have had several opportunities to reconsider the factors set forth in *Wells* in light of the statutory change. *Wells*' factors have not been abandoned or displaced and remain a useful tool in interpreting KRS 189A.010(1).

In *White v. Commonwealth*, 132 S.W.3d 877 (Ky.App. 2003), this Court recognized the continuing validity of *Wells* and *Harris*. We noted that when the question of whether a defendant operated or had physical control of a motor

vehicle while intoxicated is raised, the appellate courts examine the totality of the circumstances. *White*, 132 S.W.2d at 883. Consequently, we will do the same in evaluating McCreary's claim that he was not proven to be in physical control of his vehicle while intoxicated.

The first factor enumerated in *Wells* is whether the person in the driver's seat is asleep or awake, since as we previously noted, a person who is asleep can seldom be said to physically control a motor vehicle. *Wells*, 709 S.W.2d at 850. The testimony on this point is somewhat conflicting. Officer Toth described McCreary as propped up behind the steering wheel, leaning forward, but he did not believe he woke McCreary by activating his blue lights and knocking on the vehicle's window.[2] McCreary testified that after he began drinking, he decided to lock his car and sleep until he returned to a sober state. Hearing a noise behind him, he opened his eyes and saw the cruiser's blue lights. Considering this evidence in the light most favorable to the Commonwealth, we are unable to say the evidence established McCreary was asleep in his car at the moment Officer Toth encountered him.

The second factor is whether the vehicle's engine was running. Testimony on this issue is unequivocally favorable to McCreary. Both Officer Toth and McCreary told the jury that the vehicle was turned off with the keys in McCreary's pocket.

---

[2] Toth conceded that had McCreary been asleep in the back seat, he would not have believed the DUI law was violated.

The third factor we consider is the vehicle's location and any facts supporting reasonable inferences regarding the time and manner of its arrival there. Officer Toth testified that McCreary was parked on the west side of an empty restaurant building in the dark, bothering no one, and that he had no idea how long McCreary had been there. There were four bottles of wine in the vehicle with him, two unopened and two more than half empty. McCreary told Officer Toth he was in that parking lot because he wanted to sell some CB radios he had in his car.

McCreary testified that he arrived in the parking lot between 4:00 PM and 4:30 PM. He parked facing the highway and did not subsequently move. While McCreary was waiting to make a sale, he put his keys in his pocket and began to drink. He was not arrested until around 9:30 PM.

This case is similar to others in which we found the evidence insufficient to sustain a DUI conviction because the intoxicated person was not operating or in control of a motor vehicle. The defendant in *Wells* was asleep behind the wheel of a parked van with the engine running, the transmission in neutral and the emergency brake on. In *Harris*, the defendant had been parked in a McDonald's parking lot for two hours when he passed out in his truck, and the engine was not running. Like McCreary, both defendants had alcoholic beverages and/or alcohol containers in their vehicles with them, eliminating the ability of the jury to infer that any of the defendants *must* have become intoxicated before entering the vehicle.

Contrast these facts with the location and circumstances present in the cases in which DUI convictions were affirmed. In both *White* and *Blades*, a vehicle was found abandoned in the roadway. White's truck was resting in contact with the guardrail, and he had walked a short distance to the nearest house to call his wife who summoned a wrecker to the scene. Blades was found staggering along the roadway, a mile from his truck. His truck's engine was still running and the flashers were on. Further, there were no alcohol containers in his vehicle and nowhere for Blades to obtain alcohol between the location of his truck and where he was found. Both *White* and *Blades* are easily distinguishable from the facts of the case *sui juris*. The evidence impacting our analysis of the third factor in *Wells* favors McCreary.

The final factor *Wells* directs us to consider is the intent of the person behind the wheel. Officer Toth denied that McCreary indicated his intent to stay parked until he was sober, but agreed that this would have been a proper decision. He did express concern about the cold, noting that McCreary lived about two miles away from where he was parked and that a motel and gas station/convenience store were located within walking distance. Officer Toth believed that McCreary might have decided to drive out of the parking lot before he was sober in order to reach one of those locations. Had he done so, McCreary would have violated KRS 189A.010.

McCreary testified that he began drinking between ten minutes and half an hour after he parked where Officer Toth found him. He never started the

vehicle once he was parked, instead putting the keys in his pocket before he started to drink. He was unable to say for certain what time he stopped drinking, but he told the jury that about an hour after dark he decided to stay in the parking lot and sober up. McCreary stated he would have stayed in his parked vehicle as long as it took to become sober. However, he agreed with the Commonwealth's contention that, when he first arrived, he did not intend to spend the night in the parking lot. On the whole however, nothing but Officer Toth's speculation and the proximity of possible destinations support a belief that McCreary intended to relocate his vehicle while under the influence of alcohol.

"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[.]" *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). We believe that in applying this standard, the *Wells* factors have continued applicability.

For purposes of our review, we will presume McCreary was under the influence of alcohol. Even when considered in the light most favorable to the Commonwealth, the evidence does not support a finding that McCreary was in physical control of his vehicle while under the influence of alcohol. The evidence is that McCreary began drinking after he arrived, turned off the engine, and put the keys in his pocket. Those circumstances did not appreciably change until Officer Toth arrived. No evidence contradicts that proof. More importantly, in light of *Blades*, no evidence supports a reasonable inference that McCreary was operating

or “in physical control of a motor vehicle” – as that term is used in KRS 189A.010 – contemporary with his being under the influence of alcohol.

For the foregoing reasons, the judgment convicting McCreary is reversed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Morris Lowe
Bowling Green, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Sam R. Phillips
Special Assistant Attorney General
Franklin, Kentucky