

RENDERED: OCTOBER 31, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001540-DG

EMILY A. ROWE

APPELLANT

ON DISCRETIONARY REVIEW FROM CAMPBELL CIRCUIT COURT
v. HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 07-XX-00001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: THOMPSON AND VANMETER, JUDGES; HENRY,¹ SENIOR
JUDGE.

THOMPSON, JUDGE: The sole issue to be addressed in this appeal is whether
KRE 803(8) requires the in-court testimony of the breathalyzer technician to
establish that the breath alcohol testing instruments were working properly when

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

the test was administered. In accordance with established precedent, we conclude that the technician's testimony is not required; and, therefore, affirm.

Emily Rowe was tried and convicted of driving under the influence. During the course of her Campbell District Court trial, Rowe objected to the admission of a Commonwealth exhibit that was offered as evidence of the calibration of the breathalyzer machine before and after Rowe was tested. The exhibit was a certification by Ronald W. Beck, a civilian employee of the Kentucky State Police Northern Regional Forensic Laboratory, that the machine was functioning properly before and after Rowe's test. Rowe appealed her conviction to the Campbell Circuit Court which affirmed. We accepted discretionary review.

Two cases are pivotal to our discussion: *Commonwealth v. Wirth*, 936 S.W.2d 78 (Ky. 1996), and *Commonwealth v. Roberts*, 122 S.W.3d 524 (Ky. 2003), both of which addressed the exceptions to the general rule that hearsay is not admissible as evidence. In *Roberts*, the Court acknowledged that there were existing conflicting interpretations by some lower courts of its opinion in *Wirth* and sought to clarify its holding. *Id.* at 526. Regarding the standards for the admission of breath alcohol test results, the Court unambiguously set forth the following:

- (1) That the machine was properly checked and in proper working order at the time of conducting the test.
- 2) That the chemicals employed were of the correct kind and compounded in the proper proportions.

3) That the subject had nothing in his mouth at the time of the test and that he had taken no food or drink within fifteen minutes prior to taking 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 administered according to standard operating procedures.

Id. at 526. It then reiterated its position in *Wirth* when it stated: “Provided the documentary evidence may be properly admitted, it is unnecessary to introduce the testimony of the technician who serviced and calibrated the machine.” *Id.* at 527.

So that its opinion could not be misunderstood, the Court unequivocally repeated its holding:

It is the holding of this Court that the Commonwealth can satisfy the foundation requirements for introducing a breath test by relying solely on the testimony of the operator so long as the documentary evidence, i.e., the service records of the machine and the test ticket produced at the time of the test, are properly admitted. If the documentary evidence is properly admitted, it is unnecessary to produce the testimony of the technician who serviced and calibrated the machine.

Id. at 530.

Despite the clarity provided by the Court in *Roberts*, Rowe relies on a third Kentucky Supreme Court case that also addressed the admission of a certified copy of a breath alcohol machine’s maintenance and test records without the in-court testimony of the technician. In *Commonwealth v. Walther*, 189 S.W.3d 570 (Ky. 2006), the Court acknowledged that *Wirth* and *Roberts* hold that the in-court

testimony of the technician is not required. However, it was compelled to re-examine its decisions in light of the United States Supreme Court's opinion in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), and the constitutional restrictions on the use of testimonial hearsay statements against a criminal defendant.

The Court concluded that the technician's role was ministerial and the technician had no identifiable interest in whether the certifications produced evidence favorable or adverse to the defendant. *Walther*, 189 S.W.3d at 575. Thus, the court reasoned, the certified copy of the breath alcohol machine's maintenance and test records was not testimonial and its admission not governed by the holding in *Crawford*. *Id.*

Despite the holdings of our Supreme Court, Rowe relies on a footnote in *Walther* wherein the Court noted that no objection was made in the trial court that the "records were inadmissible under KRE 803(8) because they contained factual findings offered by the government in a criminal case, KRE 803(8)(c), or under KRE 803(6)" *Id.* at 573 footnote 3. Rowe makes the mistaken assumption that in that footnote, the Court overruled its holdings in *Wirth* and *Roberts* and invited renewed challenges to the admission of the results of a breath alcohol test without the testimony of the technician. She advances the speculation that if the defendant had objected on the basis KRE 803(8)(b), the Court would have held the records inadmissible.

KRE 803(8), the public records exception to the hearsay rule, excludes from its scope, “[i]nvestigative reports prepared by or for a government, public office, or agency when offered by it in a case in which it is a party[.]” KRE 803(8)(b). We can find nothing in the Court’s opinion nor is it logical to assume that the Court was overruling the established precedent in this Commonwealth that the breath alcohol test technician who serviced and calibrated the machine is not required to testify in-court because under KRE 803(6), the business records exception, or KRE 803(8), the documents are admissible. *Roberts*, 122 S.W.3d at 528-529. Moreover, the Supreme Court has rejected any suggestion that the technician’s records implicate the lack of trustworthiness in those excluded by KRE 803(8). *Walther*, 189 S.W.3d at 575.

Based on the foregoing, the opinion and order of the Campbell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Harry P. Hellings, Jr.
Covington, Kentucky

BRIEF FOR APPELLEE:

R. Kim Vocke
Asst. Campbell County Attorney
Covington, Kentucky