

RENDERED: OCTOBER 5, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-000621-DG

TRACEY MILLER

APPELLANT

ON DISCRETIONARY REVIEW FROM CARROLL CIRCUIT COURT
v. HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 10-XX-00002

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 2011-CA-000623-DG

WILLIAM SHIRLEY

APPELLANT

ON DISCRETIONARY REVIEW FROM CARROLL CIRCUIT COURT
v. HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 10-XX-00003

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS AND MOORE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: These appeals seek reversal of circuit court judgments which affirmed orders of the district court denying motions to suppress Breathalyzer test results. The appellants, Tracey Miller and William Shirley, argue that the police officers administering the tests failed to follow standard operating procedures.

The underlying facts of the two cases are identical for purposes of resolving these appeals. The appellants were arrested on separate occasions for driving under the influence, after they had failed field sobriety tests. Each appellant was taken to the Carroll County Detention Center where the arresting officer administered a Breathalyzer test. Appellants were charged with driving under the influence, first offense (Shirley) and driving under the influence, second offense (Miller).

The appellants moved the district court to suppress the results of their Breathalyzer tests, arguing that the officers failed to perform the tests in accordance with standard operating procedures. Their motions were denied. They subsequently entered guilty pleas conditioned on the right to appeal the denial of the suppression motions. The circuit court affirmed the district court's rulings in

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

both cases. Miller and Shirley filed motions for discretionary review which were granted by this Court, and on June 6, 2011, the appeals were ordered to be heard together.

The applicable statute, KRS 189A.103(3)(a), provides that

Tests of the person's breath, blood, or urine, to be valid pursuant to this section, shall have been performed according to the administrative regulations promulgated by the secretary of the Justice and Public Safety Cabinet, and shall have been performed, as to breath tests, only after a peace officer has had the person under personal observation at the location of the test for a minimum of twenty (20) minutes.

The evidence necessary to lay the proper foundation for admission of a breath test is as follows:

- 1) That the machine was properly checked and in proper working order at the time of conducting the test.
- 2) That the test consist of the steps and the sequence set forth in 500 KAR 8:030(2).²
- 3) That the certified operator have continuous control of the person by present sense impression for at least twenty minutes prior to the test and that during the twenty

² The following procedures shall apply to breath alcohol tests:

(1) A certified operator shall have continuous control of the person by present sense perception for at least twenty (20) minutes prior to the breath alcohol analysis. During that period the subject shall not have oral or nasal intake of substances which will affect the test.

(2) A breath alcohol concentration test shall consist of the following steps in this sequence:

- (a) Ambient air analysis;
- (b) Alcohol simulator analysis;
- (c) Ambient air analysis;
- (d) Subject breath sample analysis; and
- (e) Ambient air analysis.

500 Kentucky Administrative Regulations (KAR) 8:030.

minute period the subject did not have oral or nasal intake of substances which will affect 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 performed in accordance with standard operating procedures.

Commonwealth v. Roberts, 122 S.W.3d 524, 528 (Ky. 2003).

The appellants argue that the police officers failed to perform the tests in accordance with standard operating procedures as required by section (5) of *Roberts*. An exhibit attached to the appellants' briefs, entitled "ADMINISTERING A BREATH TEST ONLY (FOR LAB PRACTICE & PROCEDURES)," directs the operator of the test to follow a series of steps. After the twenty-minute observation period is complete, the operator is instructed to ask the subject the following question: "Based upon the information which was previously read to you, I am now requesting you to submit to a test of your breath. Will you submit to the test?" The operator is then directed to attach the mouth piece to the breath tube, press the "Start Test" button, insert the test card and enter the subject's personal data (which includes information such as the subject's name, driver's license number, and date of birth) in the Breathalyzer machine. Another instruction sheet, entitled "Operational Instructions for Conducting a Breath Test" outlines a similar procedure. At the suppression hearings, the police officers testified that they commenced this preparatory part of the procedure before the twenty minutes had elapsed. The appellants do not dispute, however, that the

officers observed the full twenty-minute period prior to the actual administration of the test.

The circuit court dismissed the appeals after finding that the failure to follow the administrative procedures was not shown to have a substantive impact on the test results. The court further stressed that the primary and controlling concern in this regard was that the twenty-minute observation period was conducted before the breath sample was taken. We agree with the circuit court's analysis.

“It has been stated that the purpose of the observation period is so the operator ‘can testify positively that during this twenty-minute observation period defendant had nothing to eat or drink, did not regurgitate or smoke.’ *Tipton v. Commonwealth*, Ky.App., 770 S.W.2d 239, 240 (1989) (citing Chemical Test Manual for Kentucky § 8.8B(3)).” *Eldridge v. Commonwealth*, 68 S.W.3d 388, 391 (Ky.App. 2001). “The clear purpose of the twenty-minute observation period is to ensure that any residual alcohol present in the mouth has dissipated so that the Breathalyzer® machine measures only the alcohol content of breath exhaled from the lungs.” *Id.* at 392.

No argument has been made that the officers' actions in commencing the final test preparations before the full observation period had elapsed in any way interfered with their observation of the appellants. We agree with the appellee that the instructions are intended to provide a reminder to the operator that the individual being tested must be under personal observation for the statutorily-mandated period prior to administering the test. The pertinent statute and

regulation as cited above expressly require the observation period; they do not require strict and undeviating compliance with the operating procedures if it can be shown, as it was in this case, that the accuracy and reliability of the test results was not compromised.

The orders of the Carroll Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Edward M. Bourne
Owenton, Kentucky

BRIEFS FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Nicholas A. Marsh
Special Assistant Attorney General
Carrollton, Kentucky