

RENDERED: AUGUST 30, 2013; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2011-CA-001853-DG

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

ON DISCRETIONARY REVIEW  
FROM JEFFERSON CIRCUIT COURT  
HONORABLE MARY M. SHAW, JUDGE  
ACTION NO. 11-XX-00047

CHRISTOPHER T. RATLIFF

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: CLAYTON, COMBS, AND VANMETER, JUDGES.

VANMETER, JUDGE: This case is before us on the Commonwealth of Kentucky's petition for discretionary review of the Jefferson Circuit Court order affirming the Jefferson District Court order which dismissed, pre-trial, the charge against Christopher T. Ratliff for operating a motor vehicle under the influence of alcohol. We granted discretionary review and for the following reasons, reverse

the Circuit Court's order and remand this case to the District Court with directions to reinstate the charge against Ratliff.

### **I. Factual and Procedural Background**

On Sunday, May 8, 2011, Ratliff was arrested for operating a motor vehicle under the influence of alcohol, in contravention of KRS<sup>1</sup> 189A.010. The Uniform Citation issued for his arrest indicates that shortly after midnight, Officer Ronald Fey of the Louisville Metro Police Department was dispatched to the Dairy Queen on Brownsboro Road to respond to a call concerning a "man down" in the Dairy Queen parking lot. Twenty minutes prior to hearing the dispatch, Officer Fey had been at the Dairy Queen location in question and no vehicles were parked there at the time. Upon returning to the Dairy Queen, Officer Fey found Ratliff in his vehicle passed out. The engine, headlights and tail lights were all on. Officer Fey opened the driver's door, awoke Ratliff, reached across him to turn off the engine, and removed the key from the car's ignition. Ratliff was secured in the vehicle by his seat belt. Officer Fey detected a strong odor of alcohol coming from Ratliff, who denied drinking alcohol but stated that he was at the track earlier that day.<sup>2</sup> Ratliff refused to perform either a field sobriety test or a breathalyzer test, and repeatedly stated that he was not driving. Officer Fey's in-cruiser video camera recorded the incident. The vehicle in question was registered to Ratliff, whom

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<sup>1</sup> Kentucky Revised Statutes.

<sup>2</sup> Saturday, May 7, 2011 was Derby Day.

Officer Fey subsequently arrested for operating a vehicle under the influence of alcohol.

Prior to trial, Ratliff moved to dismiss the charge on the basis that Officer Fey lacked probable cause to arrest him. The Jefferson District Court held a hearing on Ratliff's motion to dismiss and thereafter granted the motion, finding that the evidence failed to show that Rafliff "operated" the vehicle for purposes of KRS 189A.010. The District Court ostensibly relied on the factors set forth in *Wells v. Commonwealth*, 709 S.W.2d 847 (Ky. App. 1986), in determining that Ratliff was not "operating" the vehicle so as to give Officer Fey probable cause to arrest him for operating a vehicle under the influence of alcohol. Accordingly, the District Court entered an order dismissing the charge.<sup>3</sup>

The Commonwealth appealed the District Court's order to the Jefferson Circuit Court, which affirmed the dismissal, holding that under *Wells*, the evidence did not show that Rafliff was "operating" his vehicle for purposes of KRS 189A.010. Thereafter, the Commonwealth filed a petition for discretionary review of the Circuit Court's decision, which we granted. Upon review, we vacate the Circuit Court's order.

## II. Standard of Review

"To determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide

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<sup>3</sup> As discussed *infra*, the motion to dismiss was ill-founded, and did not comport with the Kentucky Rules of Criminal Procedure ("RCr"), specifically RCr 9.64, and a number of recent cases addressing a trial court's pre-trial authority to dismiss a criminal charge.

‘whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to’ probable cause[.]’ *Maryland v. Pringle*, 540 U.S. 366, 371, 124 S. Ct. 795, 800, 157 L. Ed. 2d 769 (2003) (citation omitted).

The issue of the existence of probable cause “is a mixed question of law and fact subject to *de novo* review. In conducting this analysis, the reviewing court must give due weight to inferences drawn from the facts by the trial court and law enforcement officers and to the [trial] court's findings on the officers’ credibility.” *Baltimore v. Commonwealth*, 119 S.W.3d 532, 539 (Ky. App. 2003) (internal footnotes omitted).

### **III. Probable Cause Analysis**

In this case, the facts, as recited above, are not disputed. The issue is whether those facts gave rise to “probable cause” sufficient for Officer Fey to arrest Ratliff for a violation of KRS 189A.010. Probable cause to arrest someone for violating KRS 189A.010 must exist and must be known by the arresting officer at the time of the arrest. *White v. Commonwealth*, 132 S.W.3d 877, 883 (Ky. App. 2003). Probable cause exists if the arresting officer has reason to believe, in light of all the evidence, that a “fair probability” exists that the defendant was operating or in physical control of the motor vehicle while under the influence. *Id.*

In ascertaining whether probable cause existed, this court in *White* suggested the *Wells* factors as useful to consider in a trial court’s analysis of whether a defendant’s conduct constitutes “operating” or being “in physical control” of a motor vehicle:

(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.

*Id.* (citing *Wells*, 709 S.W.2d at 849; *Harris v. Commonwealth*, 709 S.W.2d 846 (Ky. App. 1986) (applying *Wells* factors in determining whether a defendant had exercised the requisite degree of control of the vehicle under KRS 189A.010(1)).

The *Wells* factors are **not** exclusive, however, for resolving the issue of probable cause. *White*, 132 S.W.3d at 883. In conducting a probable cause analysis, the court must not examine the *Wells* factors in a vacuum, but instead must consider the totality of the circumstances. *Id.* Indeed, “[p]robable cause is ‘a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules.’” *Id.* (citation omitted). The court is to deduce from the facts, the surrounding circumstances, and suggested *Wells* factors, whether there was a “fair probability” that the defendant operated or was in physical control of the vehicle while under the influence.<sup>4</sup>

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<sup>4</sup> Both *Wells* and *Harris* were decided by the same panel of this court in March, 1986, and importantly, both were decided following trials on the merits in the district courts. *Wells*, 709 S.W.2d at 848 (bench trial); *Harris*, 709 S.W.2d at 847 (jury trial). We note the distinct difference in level of proof between a probable cause determination, and its attendant “fair probability” standard, and a criminal conviction of guilt, and its standard of “proof beyond a reasonable doubt.” See *Williams v. Commonwealth*, 147 S.W.3d 1, 7 (Ky. 2004) (quoting *Maryland v. Pringle*, 540 U.S. 366, 371, 124 S.Ct. 795, 800, 157 L.Ed.2d 769 (2003) and noting that “[f]inely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the [probable-cause] decision.” [*Illinois v. Gates*,] 462 U.S.213, 235, 103 S.Ct. 2317 (1983)).

In this instance, Ratliff's arrest was supported by probable cause. We note that Ratliff was asleep, and the vehicle's engine was running and headlights were on. The critical facts, however, which distinguish this case from *Wells* are derived from Officer Fey's testimony that 1) Ratliff and his vehicle had not been at the Dairy Queen location a short time, approximately twenty minutes, prior to the dispatch call; 2) Ratliff's vehicle was parked across several parking spots, at a closed, fast food restaurant; and 3) Ratliff was secured in the vehicle by his seat belt. These facts address the intent of the driver, the location of the vehicle and circumstances as to how it arrived at its location. While we recognize the intent of a sleeping person may be difficult to discern, we likewise find it difficult to discern a reason for wearing a seat belt other than to guard against injury **while operating a motor vehicle**. See KRS 189.125(6) (requiring driver and all passengers to wear a properly adjusted and fastened seat belt while "operat[ing] a motor vehicle manufactured after 1981 on the public roadways of this state[]").

In *Wells*, the defendant was found asleep in his vehicle at a motel parking lot. No evidence was presented as to how long the vehicle in question had been parked at that location. The court noted this factual distinction from other cases, stating:

In the above cases,<sup>5</sup> the vehicle in question could not have reached their locations without some form of operation. Further the circumstances rendered it virtually

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<sup>5</sup> *Jacobson v. State*, 551 P.2d 935 (Alaska 1976) (defendant found asleep, vehicle running, but two wheels were on pavement and two wheels off); *State v. Lariviere*, 2 Conn.Cir 221, 197 A.2d 529 (1963) (defendant found asleep, vehicle running, in parking lot obstructing traffic).

impossible that anyone besides the respective defendants could have performed these maneuvers. Thus, one may reasonably conclude that the various defendants did in fact operate these motor vehicles.

*Wells*, 709 S.W.2d at 850. In distinguishing two earlier Kentucky cases, *Newman v. Stinson*, 489 S.W.2d 826 (Ky. 1972) and *DeHart v. Gray*, 245 S.W.2d 434 (Ky. 1952), the court in *Wells* noted “the respective vehicles must have been controlled by someone to reach their locations and it appeared certain that the persons charged exercised that control.” *Wells*, 709 S.W.2d at 850.

In this case, by contrast, Ratliff’s vehicle must have been controlled by someone to reach its location at the Brownsboro Road Dairy Queen in the approximate twenty minutes between Officer’s Fey’s first pass by that location and the dispatch call.<sup>6</sup> Furthermore, the details of the dispatch call, as well as Officer Fey’s finding Ratliff secured in the vehicle by his seatbelt support a reasonable conclusion that Ratliff was the person exercising that control. Officer Fey therefore had reason to believe, in light of all the evidence, that a “fair probability” existed that Ratliff was operating or in physical control of the motor vehicle while under the influence. Ratliff’s arrest was therefore supported by probable cause,

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<sup>6</sup> The time period between the vehicle’s arrival at the Dairy Queen and someone noticing it was likely shorter than twenty minutes, since the parties stipulated that the 911 call reporting the situation occurred at 12:18 a.m. on Sunday, May 8, 2011. Since Officer Fey arrived on the scene at 12:25 a.m., and had been at the location approximately 20 minutes previously, the arrival of defendant and his vehicle must have occurred between 12:05 a.m. and 12:18 a.m. This fact is germane to distinguish this case from *Wells*, since in *Wells* no testimony established how long Wells and his vehicle had been in the parking lot. See *Blades v. Commonwealth*, 957 S.W.2d 246, 250 (Ky. 1997) (noting proximity of time of arrest to time of offense).

and the Jefferson District Court, and the Jefferson Circuit Court, conclusion to the contrary was erroneous.

Because we agree that Ratliff's arrest was supported by probable cause, it is unnecessary for us to decide whether the district court properly entertained a motion to dismiss for lack of probable cause to arrest.

#### **IV. Conclusion**

For the foregoing reasons, we reverse the opinion and order of the Jefferson Circuit Court, and remand this case to that court with instructions to further remand the case to the Jefferson District Court with instructions to reinstate the charge against Ratliff.

ALL CONCUR.

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