

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2014-CA-000015-DG

DULAGA REKIC

APPELLANT

ON DISCRETIONARY REVIEW FROM KENTON CIRCUIT COURT  
v. HONORABLE MARTIN J. SHEEHAN, JUDGE  
ACTION NO. 13-XX-00017

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, CHIEF JUDGE; NICKELL AND TAYLOR, JUDGES.

ACREE, CHIEF JUDGE: We granted discretionary review in this case to address Appellant Dulaga Rekić's appeal of the Kenton Circuit Court's November 12, 2013, opinion affirming a Kenton District Court order denying Rekić's motion to suppress the results of a blood test. We affirm.

On March 30, 2013, a police officer with the Edgewood Police Department observed Rekić operating his motor vehicle at a high rate of speed and in a reckless manner.<sup>1</sup> The officer conducted a traffic stop. The odor of alcohol could be smelled on Rekić and he had glassy, bloodshot eyes and slurred speech. He failed three field sobriety tests. A Portable Breathalyzer Test (PBT) indicated the presence of alcohol. Rekić admitted to drinking three beers. The officer placed Rekić under arrest, and transported him to a local hospital. The officer asked if Rekić would submit to a blood test. Rekić voluntarily consented. At no point did the officer request a breath-analysis test. The officer later stipulated that he suspected Rekić to be under the influence of only alcohol and no other substances.

Rekić was formally charged with reckless driving and operating a motor vehicle while under the influence of alcohol (DUI). He then filed a motion to suppress the results of the blood test as an unreasonable search and seizure. The district court denied Rekić's motion by order entered on August 20, 2013. In that order the court concluded that, pursuant to Kentucky Revised Statutes (KRS) 189A.103, the privilege of driving a vehicle in Kentucky carries with it the implied consent of every driver to testing of blood, breath, urine or a combination thereof, to determine alcohol concentration in the bloodstream which may impair driving ability. The district court also found that, under *Beach v. Commonwealth*, 927

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<sup>1</sup> According to the officer, Rekić crossed the center line in an attempt to pass a motorcycle, causing the officer to swerve off the roadway. The officer later observed that Rekić was unable to maintain his lane, and was crossing the center line.

S.W.2d 826 (Ky. 1996), KRS 189A.103 does not require officers to first offer suspects a breathalyzer test before asking them to submit to a blood test. The Supreme Court in *Beach* specifically stated “[t]here is no priority expressed in the statute[, KRS 189A.103,] and no preferred method for determining blood alcohol content.” *Id.* at 828. Rekić subsequently entered a conditional guilty plea to DUI reserving the right to appeal the denial of his motion to suppress.

Rekić appealed the adverse suppression ruling to the circuit court. The circuit court affirmed the district court’s decision. Rekić then sought reconsideration, which was denied. Upon Rekić’s request, this Court granted discretionary review.

This appeal was then formally placed in abeyance pending the Kentucky Supreme Court’s decision in *Commonwealth v. Duncan*, --- S.W.3d ---, ---- (Ky. 2015). The Supreme Court rendered *Duncan* in May 2015 and it became final on October 2, 2015. By previous order, we removed this appeal from abeyance and now decide its merits.

Our review of a ruling on a suppression motion is twofold. *Neal v. Commonwealth*, 449 S.W.3d 370, 375 (Ky. App. 2014). First, the trial court’s findings of fact are deemed conclusive if they are supported by substantial evidence. *Id.* Second, we review *de novo* the trial court’s application of the law to those facts. *Id.*

The parties concede that the trial court's factual findings are sound. The focus of this appeal is on the trial court's statutory interpretation and legal analysis.

Rekic argues that KRS 189A.103(5) prohibits the taking of blood or urine absent reasonable grounds to believe there is impairment by a substance *other than alcohol* which is not subject to testing by a breath test. In other words, he argues that where alcohol is the suspected intoxicant, a police officer is required to analyze the suspect's breath before proceeding to another test of blood alcohol content (BAC). This reasoning turns the statute's purpose on its ear and is contrary to *Beach*, the case upon which the circuit court based its analysis.

*Commonwealth v. Duncan, supra*, reaffirms *Beach*; it is controlling; and, it is directly on point. In *Duncan*, the Supreme Court rejected the argument that KRS 189A.103(5) prohibits an officer from administering a blood test prior to a breath test. The Supreme Court first examined the plain language of KRS 189A.103(1) and found:

[O]nce law enforcement has reasonable cause to believe that a driver is operating a motor vehicle under the influence of drugs or alcohol, that officer may utilize a breath, blood, or urine test, or a combination thereof, in order to uncover the driver's BAC. The statute [KRS 189A.103] does not declare that a specific testing order is to be followed, nor does it state that a breath test is the primary or preferred method of ascertaining the driver's BAC. Indeed, we can find no explicit or implicit directive from the General Assembly requiring law enforcement to administer a breathalyzer test first, prior to proceeding with blood testing. Furthermore, this statute in no way bestows power upon the driver to

dictate to law enforcement which test to administer first. As a result, we must conclude that [the officer] was under no statutory obligation to provide [Duncan] with a breathalyzer test prior to requesting that he submit to a blood test.

*Duncan*, --- S.W.3d at ---.

The Court then turned its attention to KRS 189A.103(5). It rejected Duncan’s argument, which Rekić parrots, that this subsection in some fashion limits an officer’s discretion as to which of the three tests – breath, blood, or urine – must administer first. The Court reasoned:

It is abundantly clear to this Court that Subsection (5) only applies to situations wherein the driver is suspected of driving under the influence of substances that are not detectable by a breath test, *e.g.*, drugs such as controlled substances or prescription medications, not alcohol. In those investigations, preliminary testing, such as a PBT, would be insufficient in detecting the presence of drugs. For that reason, the officer would be without “reasonable grounds” to believe that the driver was operating his or her vehicle under the influence of drugs, which in turn would prevent the officer from obtaining additional blood or urine testing. *See* KRS 189.103(1). Consequently, we believe Subsection (5) merely provides law enforcement with the authority needed to seek blood or urine testing when investigating an individual suspected of driving

under the influence of a substance undetectable via breath testing.

*Duncan*, --- S.W.3d at ---. We must reject Rekić’s argument to the contrary.

If an officer suspects a driver is under the influence of alcohol, KRS 189A.103(5) is not implicated; KRS 189A.103(1) alone provides sufficient

authority for an officer the unfettered choice to pursue a blood, urine, *or* breath test.

Even more specifically applicable to the case now under review, the Supreme Court in *Duncan* explicitly held “that when a law enforcement officer has reasonable grounds to believe that a driver is operating a motor vehicle under the influence of alcohol, that officer may request that the driver submit to a blood test in order to determine the driver’s BAC.” *Id.* at ---. That is precisely what happened in this case. The officer’s request in no way offended KRS 189A.103(1) or (5).

To the extent Rekić asserts that the blood test itself violated his constitutional right to be free from an unreasonable search and seizure, we need only emphasize that Rekić consented to the blood test. The Fourth Amendment to the U.S. Constitution and Section 10 of the Kentucky Constitution protect citizens from unreasonable searches and seizures by the government. U.S. Const. amend IV; Ky. Const. § 10. A search or seizure without a proper warrant is presumed to be unreasonable unless it falls into one of the delineated exceptions to the warrant requirement. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967). Consent is an exception to the warrant requirement, provided it is voluntarily given. *Helphenstine v. Commonwealth*, 423 S.W.3d 708, 714 (Ky. 2014). Rekić expressly consented to the blood test, and has at no point challenged his consent on involuntariness grounds. We perceive no Fourth Amendment violation.

For the foregoing reasons, we affirm the November 12, 2013, opinion of the Kenton Circuit Court affirming the August 20, 2013, order of the Kenton District Court.

ALL CONCUR.

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