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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001204-MR

JOSHUA LEWELLEN — APPELLANT

v.

APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 09-CR-00291

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, KRAMER, AND TAYLOR, JUDGES.

KRAMER, JUDGE: Joshua Lewellen appeals the Jessamine Circuit Court's orders denying his motions to suppress blood test results and incriminating statements Lewellen made to law enforcement in this wanton endangerment case. After a careful review of the record, we affirm because the officer was not obligated to administer a breathalyzer test before a blood test, and the circuit court did not err in failing to suppress Lewellen's statements.

I. FACTUAL AND PROCEDURAL BACKGROUND

Lewellen was the driver of a vehicle involved in a collision. Following the collision, he was indicted on one count of operating a motor vehicle while under the influence of alcohol and two counts of first-degree assault. The two counts of assault alleged that Lewellen caused serious physical injury to Eric Gullette and Erin Gullette when he operated his motor vehicle in a manner that created a grave risk of death to another person. Lewellen moved to suppress statements he made when he was interviewed and questioned by a law enforcement officer on the day of the events in question. Lewellen filed a separate motion to suppress the results of the blood test administered in this case because, according to Lewellen, it was administered in violation of KRS[1] 189A.103(5).

The officer who was initially at the accident scene[2] attested during the suppression hearing in this case that he was called to the scene of an accident. Deputy Hall observed the initial accident scene, which involved a vehicle driven by Eric Gullette, in which Erin Gullette was a passenger. There were no injuries as a result of the initial accident. However, while Deputy Hall was investigating the initial accident, he saw a second accident occur when a vehicle driven by Lewellen crashed into the Gullette vehicle. Deputy Hall testified that his police cruiser's video camera captured the entire second accident involving Lewellen. Deputy Hall

[1] Kentucky Revised Statute.

[2] In his brief, Lewellen says this person was then-Jessamine County Deputy Sheriff Kalen Hall, so that is the name we will use in this opinion.

initially approached Lewellen to check on him and told Lewellen to just stay in his vehicle while Deputy Hall went and checked on the Gullettes. Deputy Hall did not smell alcohol on Lewellen at that time. Yet, a fireman later told Deputy Hall that he smelled alcohol on Lewellen. Deputy Hall attested that when he approached Lewellen the second time, he also smelled alcohol on Lewellen. Deputy Hall asked Lewellen if he had been drinking, to which Lewellen responded in the affirmative. According to Deputy Hall, Lewellen told him that he drank a shot of whiskey about an hour and a half before the collision. Deputy Hall administered a PBT,[3] which Lewellen failed. He also failed one field sobriety test and when Deputy Hall was beginning to conduct a second type of field sobriety test, Lewellen told him to just take him to jail. Before taking Lewellen to jail, Deputy Hall took him to the hospital because he was complaining of elbow and knee pain. The officer testified that while driving to the hospital, Lewellen told him he could drink forty beers and they would not "mess him up as much as one shot of whiskey." Deputy Hall attested that he read the Implied Consent Form to Lewellen at the hospital and that Lewellen consented to a blood test. The officer did not give Lewellen the option of a breath test. On cross-examination, Deputy Hall testified that he requested a blood test as a matter of convenience to himself and because of Lewellen's injuries. However, he acknowledged that Lewellen's injuries were not serious and he was able to walk into the hospital himself. In fact, the blood test was obtained first before Lewellen's injuries were addressed.

[3] Preliminary Breath Test.

Deputy Hall only suspected alcohol in Lewellen's blood, not drugs, and he only requested the blood be tested for alcohol, not for drugs.

Lewellen testified that Deputy Hall told him that if he did not submit to the blood test, Lewellen would be in more trouble. Lewellen also attested that he did not request to be taken to the hospital for treatment of his injuries. Lewellen acknowledged that he ultimately consented to the blood test.

The circuit court denied Lewellen's motion to suppress his statements, reasoning that Lewellen was not "in custody" when he made the statements and, therefore, they need not be suppressed. The court also denied Lewellen's motion to suppress the results of the blood test after finding that pursuant to the statute, Deputy Hall had the option of choosing which test to use. The circuit court concluded that there was no requirement for Deputy Hall to use a breath test before using a blood test.

Lewellen subsequently moved to suppress the results of the blood test on the basis that the arresting officer compelled Lewellen "to permit the taking of a sample of his blood for chemical testing without first obtaining a search warrant." The circuit court found that the officer administered "a PBT first as required by KRS 189A.103(5)." The court then noted that pursuant to *Beach v. Commonwealth*, 927 S.W.2d 826 (Ky. 1996) "and other authority, in the absence of an explicit statutory directive, evidence should not be excluded for the violation of a statute where no constitutional right is involved." Lewellen's motion to suppress the blood test was ultimately denied, with the circuit court reasoning that

Deputy Hall "testified that after smelling alcohol on the defendant at an accident scene[,] he administered a PBT[,] which defendant failed." The circuit court noted that pursuant to *Beach*, the officer chose to take Lewellen to the clinic to have a blood test administered and that after Deputy Hall read the implied consent warning, Lewellen consented to the blood test. The court found the search was consensual, rendering *Missouri v. McNeely*, __ U.S. __, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013) inapplicable. The court concluded that "case law indicates that any coercive effect (loss of license, more severe penalties, etc.) of the implied consent statute does not negate voluntariness of consent."

The Commonwealth provided an offer on a plea of guilty. Specifically, it proffered to amend one of the first-degree assault charges to first-degree wanton endangerment and to dismiss the other first-degree assault charge in exchange for Lewellen's guilty plea to the DUI charge and to the amended charge of first-degree wanton endangerment. The Commonwealth's offer did not mention that Lewellen's plea would be a conditional guilty plea. Lewellen moved to enter a conditional guilty plea to the charge of first-degree wanton endangerment and he moved to enter a guilty plea to the charge of DUI, first offense. His motion to enter a conditional guilty plea to the charge of first-degree wanton endangerment did not specify upon which condition(s) it was based. Additionally, the court's order accepting Lewellen's guilty pleas to the charges did not mention that his guilty plea to one of the charges was conditional. Finally, the circuit court's judgment and sentence also did not note that his guilty plea to the wanton

endangerment charge was conditional. The court sentenced Lewellen to imprisonment for a maximum term of three years, which was probated with an alternative sentence for five years.[4]

Lewellen now appeals, contending that: (a) the arresting officer improperly directed Lewellen to submit to the taking of a blood sample for testing without first administering a breath test; and (b) the trial court committed reversible error by failing to suppress incriminating statements allegedly made by Lewellen.

II. STANDARD OF REVIEW

We will not disturb the circuit court's findings of fact subsequent to a hearing on a motion to suppress if they are supported by substantial evidence. *Drake v. Commonwealth*, 222 S.W.3d 254, 256 (Ky. App. 2007). However, the circuit court's legal conclusions are reviewed *de novo*. *Id.*

III. ANALYSIS

Before we address Lewellen's claims, we find it necessary to address whether Lewellen's guilty pleas were really conditional guilty pleas, entitling him to the right to appeal. As previously noted, the Commonwealth's offer on a plea of guilty did not mention that the guilty pleas would be conditional; Lewellen's motion to enter a guilty plea to the DUI charge did not mention that it was conditional; Lewellen's petition to enter a conditional guilty plea to the wanton endangerment charge did mention that it was conditional, but it did not specify

[4] Lewellen's sentence of probation was stayed and the circuit court is permitting him to remain free from custody while this appeal is pending.

upon what grounds it was conditioned; the circuit court's order accepting Lewellen's guilty pleas did not mention that one of his pleas was conditional; and the court's judgment did not mention that Lewellen's guilty plea to the wanton endangerment charge was conditional. Furthermore, during his plea colloquy, the circuit court asked Lewellen if he understood that by pleading guilty, he was waiving the right to appeal the charges, to which Lewellen replied in the affirmative. However, at the end of the plea colloquy, defense counsel told the court that it was a conditional plea, because Lewellen was preserving his right to appeal something that defense counsel stated, but which was unintelligible on the video recording of the plea colloquy. The court responded "all right, got it," to defense counsel's statement that he wanted the record to reflect that it was a conditional plea. Yet, the court's judgment did not note that Lewellen's guilty plea to the wanton endangerment charge was conditional.

The Kentucky Supreme Court has held:

> [W]e will consider issues on appeal from a conditional guilty plea only if those issues: (1) involve a claim that the indictment did not charge an offense or the sentence imposed by the trial court was manifestly infirm, or (2) the issues upon which appellate review are sought were expressly set forth in the conditional plea documents or in a colloquy with the trial court, or (3) if the issues upon which appellate review is sought were brought to the trial court's attention before the entry of the conditional guilty plea even if the issues are not specifically reiterated in the guilty plea documents or plea colloquy.

Dickerson v. Commonwealth, 278 S.W.3d 145, 149 (Ky. 2009).

Because the issues raised in this appeal of Lewellen's wanton endangerment conviction were presented to the circuit court prior to entry of Lewellen's conditional guilty plea, we will consider them. However, because Lewellen's guilty plea to the charge of DUI, first offense, was not conditional, his conviction on that charge is not appealable, and we will not consider it.

A. BLOOD TEST

Lewellen first claims that the arresting officer improperly directed him to submit to the taking of a blood sample for testing without first administering a breath test. In support of this argument, Lewellen cites KRS 189.103(5) and *McNeely*, __ U.S. at __, 133 S.Ct. at 1552.

In *McNeely*, the officer saw McNeely's vehicle exceeding the speed limit and repeatedly crossing the centerline. The officer pulled McNeely's vehicle over, and the officer then observed various indicators that McNeely was intoxicated, "including McNeely's bloodshot eyes, his slurred speech, and the smell of alcohol on his breath." *McNeely*, __ U.S. at __, 133 S.Ct. at 1556. McNeely performed poorly on various field-sobriety tests and "declined to use a portable breath-test device to measure his blood alcohol concentration (BAC)," so he was placed under arrest. *Id*., __ U.S. at __, 133 S.Ct. at 1556-57. While he was being transported to the police station, McNeely "indicated that he would again refuse to provide a breath sample, [so] the officer changed course and took McNeely to a nearby hospital for blood testing. The officer did not attempt to

secure a warrant." *Id.*, __ U.S. at __, 133 S.Ct. at 1557. McNeely refused to give consent for the blood test, and the officer then directed the hospital's lab technician to obtain a blood sample from McNeely. *Id.*, __ U.S. at __, 133 S.Ct. at 1557. Ultimately, McNeely was charged with driving while intoxicated. He moved to suppress the blood test results, asserting that under the circumstances, his Fourth Amendment rights were violated when his blood was drawn for testing without a search warrant first being obtained. *Id.*, __ U.S. at __, 133 S.Ct. at 1557.

The United States Supreme Court granted certiorari in *McNeely* "on the question whether the natural dissipation of alcohol in the bloodstream establishes a *per se* exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigations." *Id.*, __ U.S. at __, 133 S.Ct. at 1558. The Court stated:

> The Fourth Amendment provides in relevant part that [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause. Our cases have held that a warrantless search of the person is reasonable only if it falls within a recognized exception. That principle applies to the type of search at issue in this case, which involved a compelled physical intrusion beneath McNeely's skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation. Such an invasion of bodily integrity implicates an individual's most personal and deep-rooted expectations of privacy.

Id., __ U.S. at __, 133 S.Ct. at 1558 (internal quotation marks and citations omitted). The Court noted that "[t]o determine whether a law enforcement officer

faced an emergency that justified acting without a warrant, this Court looks to the totality of the circumstances." *Id.*, __ U.S. at __, 133 S.Ct. at 1559. In explaining further, the Court stated:

> [I]t is sufficient for our purposes to note that because an individual's alcohol level gradually declines soon after he stops drinking, a significant delay in testing will negatively affect the probative value of the results. This fact was essential to our holding in *Schmerber* [*v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)], as we recognized that, under the circumstances, further delay in order to secure a warrant after the time spent investigating the scene of the accident and transporting the injured suspect to the hospital to receive treatment would have threatened the destruction of evidence.
>
> But it does not follow that we should depart from careful case-by-case assessment of exigency and adopt the categorical rule proposed by the State and its *amici*. In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so.

McNeely, __ U.S. at __, 133 S.Ct. at 1560-61 (internal citation omitted).

The Supreme Court concluded that

> while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber*, it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.

Id., __ U.S. at __, 133 S.Ct. at 1563.

In the recent opinion of *Commonwealth v. Duncan*, __ S.W.3d __, No. 2013-SC-000742-DG, 2015 WL 2266474, *1 (Ky. May 14, 2015), the Kentucky Supreme Court reviewed *McNeely* and KRS 189A.103(5) in analyzing whether an officer violated Kentucky's Implied Consent law when the officer denied a breathalyzer test to the defendant and chose to request a blood test instead.

Kentucky Revised Statute 189A.103(5) provides:

> The following provision[] shall apply to any person who operates or is in physical control of a motor vehicle or a vehicle that is not a motor vehicle in this Commonwealth: . . . (5) When the preliminary breath test, breath test or other evidence gives the peace officer reasonable grounds to believe there is impairment by a substance which is not subject to testing by a breath test, then blood or urine tests, or both, may be required in addition to a breath test, or in lieu of a breath test.

For background purposes, in *Duncan*, the defendant was stopped by police for failing to use a seatbelt and for crossing the center lane of traffic. After pulling Duncan over, the officer noted that Duncan "smelled strongly of alcohol, had bloodshot eyes, and admitted to drinking three beers prior to driving." *Duncan*, __ S.W.3d __, No. 2013-SC-000742-DG, 2015 WL 2266474, at *1 (Ky. May 14, 2015). Duncan failed the field sobriety tests administered, and a PBT detected alcohol on Duncan's breath. *Id*. Duncan was placed under arrest. The officer asked Duncan if he would submit to a blood test, and Duncan refused to consent. Duncan asked the officer to utilize a breathalyzer test to ascertain his blood alcohol content. The officer denied Duncan's request and transported Duncan to jail. *Id*. The Kentucky Supreme Court held that

> Subsection (5) [of KRS 189A.103] 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[A].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.
>
> Our interpretation of KRS 189A.103(1) and (5) reinforces the notion that the General Assembly intended on providing law enforcement with wide discretion in determining which test to employ as the facts of any particular case may so require.

Duncan, __ S.W.3d __, No. 2013-SC-000742-DG, 2015 WL 2266474, at *3 (Ky. May 14, 2015).

The *Duncan* Court continued, noting that in *Beach*, 927 S.W.2d at 827, the issue was the same as in *Duncan*: "[D]oes Kentucky's Implied Consent law require law enforcement to seek a breathalyzer test before a blood test?" *Duncan*, __ S.W.3d __, No. 2013-SC-000742-DG, 2015 WL 2266474, at *3 (Ky. May 14, 2015). The *Duncan* Court noted that it held in *Beach* that, based upon the

> plain language of Kentucky's Implied Consent law[, . . .] the statute does not require that a police officer must first offer a DUI suspect a breath test before asking him or her to submit to a blood test. Likewise, the [*Beach*] Court rejected the argument that Subsection (5) [of KRS

> 189A.103] somehow limits an officer's authority to administer a blood test prior to a breath test.

Duncan, __ S.W.3d __, No. 2013-SC-000742-DG, 2015 WL 2266474, at *3 (Ky. May 14, 2015) (internal quotation marks and citation omitted).

The *Duncan* Court then discussed the United States Supreme Court's *McNeely* decision, noting that the Supreme Court explained in *McNeely* "that exigent circumstances do not exist in every drunk driving investigation simply because BAC evidence is inherently evanescent. Instead, the Court held, there must be additional circumstances demonstrating an emergency." *Duncan*, __ S.W.3d __, No. 2013-SC-000742-DG, 2015 WL 2266474, at *5 (Ky. May 14, 2015) (internal quotation marks and citation omitted). The *Duncan* Court continued its discussion of what additional circumstances might demonstrate an emergency:

> For example, in *Schmerber*, [384 U.S. AT 757, 86 S.Ct. at 1826,] an exigency was found because the blood test was delayed by the officer's investigation of the accident, in addition to the extra time needed to transport the suspect to the hospital for his injuries. . . . In *McNeely*, however, there was no such delay. The traffic stop was routine and, other than the normal dissipation of alcohol in the blood stream, there was no emergency justifying an immediate draw of the defendant's blood.

Duncan, __ S.W.3d __, No. 2013-SC-000742-DG, 2015 WL 2266474, at *5 (Ky. May 14, 2015).

In *Duncan*, the Court noted that "[a]fter *McNeely*, law enforcement officers were no longer categorically permitted to obtain a suspect's blood sample without a warrant simply because the alcohol was leaving the suspect's blood

stream." *Id*. at *5. The *Duncan* Court then questioned whether *McNeely* was applicable to Duncan's case because the Kentucky Supreme Court had found in *Combs v. Commonwealth*, 965 S.W.2d 161 (Ky. 1998), while interpreting KRS 189A.105(2)(b), that the issuance of a warrant is "improper where neither death nor physical injury results." *Duncan*, __ S.W.3d __, No. 2013-SC-000742-DG, 2015 WL 2266474, at *5 (Ky. May 14, 2015).[5]

Regardless, the Court held in *Duncan*

> 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. The officer is under no obligation to administer a breathalyzer test prior to the administration of the blood test.

Duncan, __ S.W.3d __, No. 2013-SC-000742-DG, 2015 WL 2266474, at *5 (Ky. May 14, 2015).

In the present case, Deputy Hall had reasonable grounds to believe that Lewellen was operating his motor vehicle under the influence of alcohol, due to the following facts: A fireman advised Deputy Hall that Lewellen smelled of alcohol; Deputy Hall then noticed that Lewellen smelled of alcohol; and Lewellen failed one field sobriety test and while another field sobriety test was being conducted, Lewellen told the officer to just take him to jail rather than conducting

[5] In the present case, Lewellen acknowledges in his appellate brief that the collision of his vehicle with the Gullette vehicle caused Mr. Gullette and his passenger to be "taken to the hospital for treatment of non-life threatening injuries." Therefore, physical injury resulted from Lewellen's collision with the Gullette vehicle, and the issuance of a warrant would not have been improper, per *Combs*.

further field sobriety tests. Therefore, Deputy Hall could request that Lewellen submit to a blood test in order to determine Lewellen's BAC. Consequently, the officer was not obligated to administer a breathalyzer test before Lewellen's blood test was administered.

We further note that the facts of the case at hand are similar to those in *Beach*, 927 S.W.2d at 826. In *Beach*, as in the present case, the defendant was investigated for driving under the influence of alcohol, the defendant failed a PBT and at least one field sobriety test,[6] and the defendant consented to taking a blood test but subsequently moved to suppress the results of the blood test on the basis that the investigating officer violated KRS 189A.103 when the officer failed to first offer a breathalyzer test. The Kentucky Supreme Court in *Beach* held that "KRS 189A.103(1) and (5) do not require that a police officer must first offer a DUI suspect a breath test before asking him or her to submit to a blood test." *Beach*, 927 S.W.2d at 828. Therefore, *Beach* also directs us to conclude that Deputy Hall was not required to first offer Lewellen a breath test before asking him to submit to a blood test.

Moreover, we note that unlike the defendants in *Duncan* and *McNeely*, Lewellen consented to the administering of the blood test. Therefore, the arresting officer was not required to administer a breathalyzer test before having Lewellen's blood tested. Accordingly, Lewellen's claim that Deputy Hall

[6] The defendant in *Beach* actually failed multiple field sobriety tests. In the present case, Lewellen failed the first field sobriety test and while the second such test was being conducted, he told the officer to just take him to jail because he was drunk.

improperly directed him to submit to the taking of a blood sample for testing without first administering a breath test lacks merit.

B. FAILURE TO SUPPRESS STATEMENTS

Lewellen next alleges that the trial court committed reversible error by failing to suppress incriminating statements he allegedly made without first being Mirandized.[7] He asserts that following the collision of Lewellen's vehicle with the Gullette vehicle, Deputy Hall checked on Lewellen and asked questions "regarding the circumstances of the accident and whether [Lewellen] was injured." Deputy Hall told Lewellen to stay in his vehicle while Deputy Hall checked on the occupants of the Gullette vehicle. Deputy Hall did not suspect that Lewellen was an impaired driver at that time.

While checking on the occupants of the Gullette vehicle, Deputy Hall was approached by a fireman who informed him that Lewellen smelled of alcohol. Deputy Hall returned to Lewellen's vehicle and, without Mirandizing Lewellen, asked whether he had been drinking. Lewellen told Deputy Hall that he had consumed a "shot" of whiskey approximately one and a half hours before the collision. Deputy Hall decided to arrest Lewellen at that time, but he still did not Mirandize him. Rather, Deputy Hall conducted one field sobriety test, and while he was conducting a second, Lewellen told Deputy Hall that "he was drunk," and to "take him to jail." Deputy Hall attested that he handcuffed Lewellen but still did not Mirandize him because he did not plan on interrogating Lewellen. Deputy Hall

[7] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

testified that while driving to the hospital for blood testing, and during "normal" conversation, Lewellen told Deputy Hall that he "usually gets hammered on whiskey" but he can drink forty beers and not get as drunk as he does on one shot of whiskey.

Lewellen moved to suppress the statements he made to Deputy Hall. The circuit court denied the motion, reasoning that at the time Deputy Hall asked Lewellen if he had been drinking, Lewellen "was not 'in custody' in that he was simply instructed to stay in his own vehicle at an accident scene. He was not arrested, cuffed, or placed in a cruiser. Considering the 'totality of the circumstances,' it was not the 'equivalent of an arrest.'"

The circuit court's factual findings that Lewellen had simply been instructed to stay in his own vehicle at an accident scene and that Lewellen had not been arrested, handcuffed, or placed in Deputy Hall's cruiser at that time are supported by substantial evidence. Therefore, we will not disturb them. However, we review the circuit court's conclusions of law *de novo*. *See Drake*, 222 S.W.3d at 256.

The Kentucky Supreme Court has stated:

> *Miranda* warnings are only required when the suspect being questioned is "in custody."
>
> Custodial interrogation has been defined as questioning initiated by law enforcement after a person has been taken into custody or otherwise deprived of freedom of action in any significant way. *Miranda* warnings are required only where there has been such a restriction on the freedom of an individual as to render him in custody.

> The inquiry for making a custodial determination is whether the person was under formal arrest or whether there was a restraint of his freedom or whether there was a restraint on freedom of movement to the degree associated with formal arrest.
>
> Custody does not occur until police, by some form of physical force or show of authority, have restrained the liberty of an individual. The test is whether, considering the surrounding circumstances, a reasonable person would have believed he or she was free to leave. The United States Supreme Court has identified factors that suggest a seizure has occurred and that a suspect is in custody: the threatening presence of several officers; the display of a weapon by an officer; the physical touching of the suspect; and the use of tone of voice or language that would indicate that compliance with the officer's request would be compelled. Other factors which have been used to determine custody for *Miranda* purposes include: (1) the purpose of the questioning; (2) whether the place of the questioning was hostile or coercive; (3) the length of the questioning; and (4) other indicia of custody such as whether the suspect was informed at the time that the questioning was voluntary or that the suspect was free to leave or to request officers to do so, whether the suspect possessed unrestrained freedom of movement during questioning, and whether the suspect initiated contact with the police or voluntarily . . . acquiesced to their requests to answer some questions.

Smith v. Commonwealth, 312 S.W.3d 353, 358-59 (Ky. 2010) (internal quotation marks and citations omitted).

We find that at the time Deputy Hall asked Lewellen if he had been drinking, which led to the statements Lewellen presently challenges, Lewellen was not in custody. Deputy Hall testified that at the time he asked if Lewellen had been drinking, he did not physically touch Lewellen and he did not display his weapon. Additionally, only Deputy Hall and possibly one other officer spoke with Lewellen

during the entire incident. Therefore, there was no threatening presence of several officers. Although Deputy Hall asked Lewellen if he had been drinking for the obvious purpose of determining if he had been drinking, the location of the questioning was not hostile or coercive--it was on a public street. The length of the questioning does not appear overly long, and it does not appear that Lewellen alleges it was lengthy. Deputy Hall testified that before he suspected Lewellen of being drunk, he told Lewellen to stay in his car because Lewellen was injured and because Lewellen was not free to leave, due to the fact that he had just caused a collision. Thus, when Deputy Hall asked Lewellen if he had been drinking, Lewellen was not free to leave simply because he had just caused a collision that the officers needed to investigate, not because he was already in custody. Therefore, we find that Lewellen was not in custody when he made his statements to Deputy Hall. Consequently, Deputy Hall was not required to Mirandize Lewellen before asking him if he had been drinking, and the circuit court did not err in failing to suppress Lewellen's statements.

Accordingly, the orders of the Jessamine Circuit Court are affirmed.

ALL CONCUR.

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