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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2016-CA-000840-DG

COMMONWEALTH OF KENTUCKY

APPELLANT

ON DISCRETIONARY REVIEW FROM CARROLL CIRCUIT COURT  
v. HONORABLE REBECCA LESLIE KNIGHT, JUDGE  
ACTION NO. 15-XX-00002

RICKY MEFFORD

APPELLEE

OPINION  
AFFIRMING

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BEFORE: KRAMER, CHIEF JUDGE; CLAYTON AND TAYLOR, JUDGES.

KRAMER, CHIEF JUDGE: The Commonwealth of Kentucky appeals the Carroll Circuit Court's order reversing the Carroll District Court's order denying Ricky Mefford's motion to suppress the results of his breathalyzer test and remanding for further proceedings. After a careful review of the record, we affirm because the

Commonwealth failed to lay a proper foundation for admission of the breath test into evidence, so the breath test results should have been suppressed.

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

Ricky Mefford was charged with, *inter alia*, operating a motor vehicle with an alcohol concentration of or above 0.08, first offense (DUI-1st). He moved to suppress the results of his breathalyzer test. After conducting a hearing, the district court denied his motion. Mefford then moved to enter a conditional guilty plea to the charge of DUI-1st, reserving the right to appeal any of the court's pretrial rulings. The court accepted his conditional guilty plea.

Mefford then appealed to the Carroll Circuit Court. He alleged that the Kentucky State Trooper who conducted his breathalyzer test failed to conduct the test according to the manufacturer's instructions and failed to observe Mefford for the twenty-minute observation period. The circuit court reversed the district court's order denying Mefford's motion to suppress after finding that "the Officer did not follow the manufacturer's instructions for performing a Breathalyzer Test and did not properly observe [Mefford] for twenty (20) minutes before giving the Breathalyzer Test."

The Commonwealth sought discretionary review in this Court. Its motion for discretionary review was granted. The Commonwealth now contends that: (a) the violation of an internal policy is not grounds for suppression; and (b) the breathalyzer test should not be excluded because of Mefford's claim of the invalidity of the test.

## II. STANDARD OF REVIEW

The Kentucky Supreme Court has stated:

When reviewing an order denying a motion to suppress, we consider the trial court's findings of fact "conclusive" if they are "supported by substantial evidence." RCr<sup>[1]</sup> 9.78. Using those facts [if supported], the reviewing court then conducts a *de novo* review of the trial court's application of law to those facts to determine whether the decision is correct as a matter of law.

*King v. Commonwealth*, 374 S.W.3d 281, 286 (Ky. 2012) (internal quotation marks and citation omitted); *see also Simpson v. Commonwealth*, 474 S.W.3d 544, 546-47 (Ky. 2015) (holding that the standard of review of a trial court's decision regarding a motion to suppress remains the same, even after RCr 9.78 was deleted and superseded by RCr 8.27).

## III. ANALYSIS

### A. VIOLATION OF INTERNAL POLICY

On appeal, the Commonwealth first alleges that the violation of an internal policy is not grounds for suppression. It states that Mefford claimed in the circuit court that the police officer's failure "to read a question as set forth in a flow chart prepared by the manufacturer of the [breathalyzer test machine] warrants suppression." The Commonwealth contends that Mefford was wrong, however, because he "cannot point to any provision in the Kentucky Revised Statutes, the Kentucky Constitution or the Kentucky Administrative Regulations

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<sup>1</sup> Kentucky Rule of Criminal Procedure.

where it states that the officer must ask the question ‘in the last 20 minutes have you brought anything up from your stomach to your mouth?’”

Pursuant to KRS<sup>2</sup> 189A.103(4), “[a] breath test shall consist of a test which is performed in accordance with the manufacturer’s instructions for the use of the instrument.” Further, in *Commonwealth v. Roberts*, 122 S.W.3d 524, 527 (Ky. 2003), the Kentucky Supreme Court noted that “KRS 189A.103(4) . . . requires the test to be performed in accordance with the manufacturer’s instructions.” The *Roberts* Court compared this requirement with that discussed in two prior cases, *Marcum v. Commonwealth*, 483 S.W.2d 122 (Ky. 1972) and *Owens v. Commonwealth*, 487 S.W.2d 897 (Ky. 1972). In making this comparison, the Court noted that “[t]he language in *Marcum* and *Owens* states that the test should be administered according to standard operating procedures. We find this to be a distinction without a difference.” *Roberts*, 122 S.W.3d at 527.

The *Roberts* Court then stated:

Based on the relevant cases, statutes and administrative regulations in this opinion, we restate the evidence necessary to lay the proper foundation for admission of a breath test:

- (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<sup>3</sup> 8:030(2).

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<sup>2</sup> Kentucky Revised Statute.

<sup>3</sup> Kentucky Administrative Regulation.

(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[-]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.

*Roberts*, 122 S.W.3d at 528.

In the present case, the district court denied Mefford's motion to suppress by simply writing "motion to suppress - overruled" on the docket entry pertaining to the hearing on the motion. However, in reversing that decision, the circuit court found as follows:

The Court finds that the Officer did not follow the manufacturer's instructions for performing a Breathalyzer Test and did not properly observe the Appellant for twenty (20) minutes before giving the Breathalyzer Test. The Officer testified on several occasions that he would have begun the 20-minute observation period over if the Defendant had coughed. It is clear that the Defendant did cough during the observation period.... While it is not clear if there was any regurgitation, the officer himself did not clarify that regurgitation would necessitate starting the 20-minute observation period over. Only simply that if he had noticed the Defendant coughing, he would have done so. The results of the Breathalyzer Test should have been suppressed.

A transcript of the district court suppression hearing is in the record. According to the transcript, Kentucky State Police (KSP) Trooper Ryan Gosser was the officer who conducted the breathalyzer test on Mefford. Trooper Gosser testified that he observed Mefford by present sense impression for twenty minutes prior to conducting the test. He attested that he performed the test according to the instructions issued to him by the KSP, not according to the manufacturer's instructions that were posted next to the breathalyzer machine. According to the manufacturer's instructions for the machine used in this case, after the twenty-minute-observation period and immediately prior to administering the test, the person conducting the test should ask the person on whom the test will be conducted, "[i]n the last 20 minutes have you brought anything up from your stomach to your mouth?" However, the KSP instructions, which Trooper Gosser followed, do not require this question to be asked immediately before conducting the test. Consequently, Trooper Gosser did not ask that question, and he did not follow the manufacturer's instructions, as required by KRS 189A.103(4).

Further, a review of the video recording of the twenty-minute observation period of Mefford before the test was conducted shows that Mefford coughed shortly before the test was conducted (and within the observation period), and the sound of something coming up with the cough can be heard.<sup>4</sup> As the circuit court noted, Trooper Gosser stated more than once while testifying during

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<sup>4</sup> It is unclear what was brought up, but Mefford testified during the suppression hearing that he had been sick with a bacterial infection and a sinus infection at the time of his arrest, and he was on medication due to his illness.

the suppression hearing that if he had observed Mefford cough, he would have restarted the test. Mefford clearly coughed, yet the twenty minutes of observation was not restarted.

KRS 189A.103(4) requires the test to be performed according to the manufacturer's instructions, and yet the test in this case was not because the trooper failed to ask the requisite question before administering the test. Thus, the circuit court did not err in finding that the results of the breathalyzer should have been suppressed. Although in *Roberts*, the Court stated that the test must be performed in accord with "standard operating procedures," *see Roberts*, 122 S.W.3d at 528, the Court also noted that "KRS 189A.103(4) . . . requires the test to be performed in accordance with the manufacturer's instructions." *Roberts*, 122 S.W.3d at 527. The Court found that these requirements are "a distinction without a difference." *Roberts*, 122 S.W.3d at 527. In *Roberts*, these requirements certainly were "a distinction without a difference." However, the Court in *Roberts* could not have anticipated the unique circumstances of what occurred in this case—that the KSP's standard operating procedure differs from the manufacturer's instructions on one point that not only is relevant to the case, but it is a point upon which the case turns. The trooper in this case did not ask Mefford, as required by the manufacturer's instructions, whether he had brought anything up from his stomach to his mouth in the twenty minutes preceding him taking the breath test. Further, he can be heard coughing and bringing something up, although it is unclear what was brought up, on the video recording of the observation period.

Accordingly, because the test was not conducted in a manner required by statute and by the Supreme Court's decision in *Roberts*, the Commonwealth did not lay the proper foundation for admission of the breath test. *See Roberts*, 122 S.W.3d at 528. Consequently, the test results should have been suppressed because the test never should have been admitted into evidence.

## **B. EXCLUSION OF BREATHALYZER TEST**

The Commonwealth also asserts that the breathalyzer test should not be excluded because of Mefford's claim of the invalidity of the test. However, because we have concluded, *supra*, that the breath test should not have been admitted into evidence because the Commonwealth failed to lay the proper foundation for its admission, this claim is moot.

Accordingly, the order of the Carroll Circuit Court is affirmed.

ALL CONCUR.

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