

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001726-MR

MILICENT JONES

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 16-CR-00284

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, NICKELL AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: Milicent Jones appeals from a judgment of the Jessamine Circuit Court reflecting a conditional plea of guilty to one count of driving under the influence, fourth offense. Jones argues that the circuit court erred in failing to conclude that she was improperly denied her statutory and

constitutional right to an independent blood alcohol test after a DUI arrest. We find no error, and AFFIRM the judgment on appeal.

On September 21, 2016, the Jessamine County grand jury returned an indictment charging Jones with one count of driving under the influence, fourth offense. The indictment arose from Jones' arrest on August 20, 2016, in Nicholasville, Kentucky. Prior to the arrest, Nicholasville Police Officer Eric Cobb observed a motor vehicle operated by Jones weaving on U.S. 27. Officer Cobb made contact with Jones and observed that she smelled of alcohol, that her eyes were red and glassy, and that her speech was slurred. Officer Cobb administered field sobriety tests on Jones, which included asking her to walk a straight line heel to toe, and directing her to stand on one foot. Cobb's report noted that Jones performed poorly on these tests and that Jones acknowledged having consumed beer.

After her arrest, Jones was transported to jail where a breathalyzer test was administered. The test indicated that Jones had a blood alcohol level of .217, which was well above the legal limit of .08. Officer Cobb's body camera recorded these events, along with a dialogue between Cobb and Jones after the administration of the breathalyzer. Officer Cobb informed Jones that she had the right to have another blood alcohol test performed by an independent third party at her own expense, but that such a test was optional. Cobb estimated the cost at

\$500. After informing Jones of this option, Officer Cobb asked her if she wanted to be transported to a hospital where the independent test could be conducted or to go to jail and call someone. Jones asked Cobb what she should do, and he replied that he could not give her legal advice.

Officer Cobb asked Jones several times if she wanted the test, and asked her to answer yes or no. Jones responded that she did not have \$500 to pay for the test, after which Officer Cobb again asked for a yes or no answer. After Jones gave no direct answer, Cobb again asked for a yes or no response, and Jones asked about legal representation. Ultimately, Jones was not transported to the hospital for the additional test.

The matter proceeded in Jessamine Circuit Court, whereupon Jones' counsel moved to suppress her blood alcohol test results on the grounds that she was denied an independent blood test. In support of the motion, Jones cited the "shall be permitted" language of Kentucky Revised Statute (KRS) 189A.103(7). A hearing on the motion was conducted, where Jones' argument on this issue centered on the conversation between Jones and Officer Cobb. When Officer Cobb was questioning Jones as to whether she wanted an independent blood alcohol test, he stated that the test cost \$500. At the hearing, the Commonwealth confirmed that this amount was incorrect, and evidence was adduced that an independent blood test cost between \$316 and \$443. Jones argued that Officer

Cobb's inflated estimate of the cost was tantamount to a denial of her right to obtain the independent test, because it dissuaded her from participating in the test.

After taking proof, the Jessamine Circuit Court made oral findings denying the motion. In support of the denial, the court found that no evidence was offered that Jones could pay for the independent test irrespective of its price, that the other evidence demonstrated that Jones was intoxicated and unable to rationally discuss the matter with Officer Cobb, and that the difference between Cobb's estimate and the actual cost was not so substantial as to constitute a tacit denial of Jones' right to receive an independent blood test. Jones later entered a conditional guilty plea, and received a sentence of one year in prison. This appeal followed.

The sole issue for our consideration is whether the Jessamine Circuit Court erred in concluding that Officer Cobb's estimate of \$500 for the cost of an independent blood alcohol test was so inaccurate as to constitute a denial of Jones' right to receive the test. KRS 189A.103(7) states,

The following provisions 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:

...

(7) After the person has submitted to all alcohol concentration tests and substance tests requested by the officer, the person tested shall be permitted to have a person listed in subsection (6) of this section of his or her

own choosing administer a test or tests in addition to any tests administered at the direction of the peace officer. Tests conducted under this section shall be conducted within a reasonable length of time. Provided, however, the nonavailability of the person chosen to administer a test or tests in addition to those administered at the direction of the peace officer within a reasonable time shall not be grounds for rendering inadmissible as evidence the results of the test or tests administered at the direction of the peace officer.

The recent Kentucky Supreme Court case of *Commonwealth v. Riker*, 2017-SC-000483-DG, 2018 WL 6567681 (Ky. Dec. 13, 2018), disposes of the matter before us. In *Riker*, Lexington Police Officer Michael Steele responded to the scene of an accident, where he observed that driver James Riker appeared to be intoxicated. Officer Steele administered a blood alcohol test, which registered a .281 blood alcohol level. Riker was placed under arrest, and Officer Steele informed him of his statutory right to have an independent blood test. Riker was transported to a hospital where a receptionist told Officer Steele that the blood test would cost \$450. Riker only had \$100 with him, and told Officer Steele to “take me back to jail.” *Id.* at *1. Officer Steele complied, and Riker was charged with third offense DUI.

The matter proceeded in Fayette District Court, which conducted an evidentiary hearing and denied Riker’s motion to exclude the blood test results. On appeal, the Fayette Circuit Court concluded that Riker had been denied his right to an independent blood test, and it excluded the results. The Circuit Court

also determined that Riker's right to due process had been violated because the results of the independent blood test may have provided him with exculpatory evidence. A panel of the Court of Appeals affirmed the circuit court's ruling.

On discretionary review, the Kentucky Supreme Court reversed the ruling of this Court upon concluding that, 1) Riker was properly informed of his statutory right to seek an independent blood test, and 2) Riker's right to Due Process was not violated. In reaching this conclusion, the Supreme Court noted that while the cost of the test could become prohibitive at a certain price and this concern was not without merit, "that problem is beyond the purview of the courts." *Id.* at *2. The Supreme Court went on to distinguish its holding from that of *Commonwealth v. Long*, 118 S.W.3d 178 (Ky. App. 2003), wherein a panel of this Court adopted a "totality of the circumstances" test to determine if an arresting officer made a reasonable effort to accommodate the request for independent testing.

The salient facts before us parallel those of *Riker*. As in *Riker*, Officer Cobb expressly informed Jones of her statutory right to have an independent blood test conducted at her own expense. Similarly, the arresting officers in each case availed their respective arrestees of transportation to a hospital for testing if so requested.¹ Further, both Riker and Jones ultimately

¹ Jones was not transported to a hospital because she did not request the independent blood test.

declined additional testing because of the cost. And finally, the *Riker* Court determined that the arrestee’s inability to pay for the independent test did not implicate a violation of Due Process, as “the price of the test . . . is completely out of the officer’s control.” *Riker*, 2018 WL 6567681 at *2. In similar fashion, we conclude that neither the actual cost of Jones’ independent test nor Officer Cobb’s estimate of the price give rise to a Due Process violation.

In sum, the reasoning expressed in *Riker* disposes of Jones’ claim of error. Jones was informed of her statutory right to have an independent blood test, and her apparent inability to pay for the test did not constitute a deprivation of that right. Accordingly, we find no error and AFFIRM the judgment on appeal.

ALL CONCUR.

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