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Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000719-DG

COMMONWEALTH OF KENTUCKY

APPELLANT

ON DISCRETIONARY REVIEW FROM CAMPBELL CIRCUIT COURT
v. HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 17-XX-00011

WILLIAM MORGAN

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: CLAYTON, CHIEF JUDGE; MAZE AND NICKELL, JUDGES.

CLAYTON, CHIEF JUDGE: The Commonwealth of Kentucky appeals from the Campbell Circuit Court's order reversing and remanding the Campbell District Court's order holding that William Morgan's statutory rights under Kentucky Revised Statutes (KRS) 189A.105(4) were violated subsequent to his arrest for driving under the influence of alcohol ("DUI"). The circuit court held that the

violation of Morgan's statutory rights mandated suppressing the results of Morgan's breathalyzer test.

For the following reasons, we affirm the Campbell Circuit Court.

BACKGROUND

On March 27, 2017, an officer with the Campbell County Police Department arrested William Morgan and charged him with DUI. Upon arrival at the Campbell County Detention Center, the officer took Morgan into a room to perform a breathalyzer test. Before administering the breathalyzer test, the officer read the implied consent form to Morgan, which included a warning that Morgan could elect to obtain an independent blood test if he so chose. Morgan ultimately consented to the breathalyzer test, and the officer then began the twenty minute observation period required prior to conducting the breath test.

Just before the officer administered the breath test, Morgan mentioned needing to use the restroom. Approximately eleven minutes after Morgan took the breath test, he again stated that he needed to use the restroom. The officer continued asking Morgan questions and inputting information into his computer, however, and did not take Morgan out to his cruiser until approximately twenty-two minutes after he submitted to the breath test. The officer printed the citation in his cruiser and thereafter turned the body camera off. Based on statements made by the officer on the footage, the circuit court stated its belief that Morgan was

thereafter taken to booking and allowed to use the restroom after the body camera video footage ended.

The arresting officer did not read the independent blood test warning to Morgan a second time after conducting the breath test. Further, on the implied consent form, the officer checked the box that Morgan had declined an independent blood test and wrote on the signature line that Morgan “Did not sign due to needing to rush to the restroom.” Morgan ultimately blew a 0.187 on the breath test.

Prior to Morgan’s trial, the district court held a suppression hearing, with Morgan arguing that the arresting officer deliberately disregarded KRS 189A.105(4)’s requirement to read a second required warning concerning his right to an independent blood test. At the suppression hearing, the arresting officer testified that he read the warning to Morgan concerning the independent blood test the first time but failed to read it the second time because Morgan needed to rush to the restroom. While Morgan argued that the failure to read the warning a second time required suppression of the breath test results because the officer violated a statutory mandate, the Commonwealth asserted that Morgan put forth no evidence that the officer deliberately disregarded the statute.

The district court denied Morgan’s motion to suppress. In its order, the district court found that it was uncontested that the officer failed to give the

second KRS 189A.105(4) independent blood test warning. The district court also made oral findings on the record that it was relying on the fact that the officer believed that Morgan needed to use the restroom, which, the trial court stated, “was not in bad faith.” Thereafter, Morgan entered a conditional guilty plea, preserving the right to appeal the issue of whether the officer deliberately disregarded the KRS 189A.105(4) mandate.

Morgan subsequently filed a notice of appeal with the circuit court. The circuit court entered an order reversing the trial court’s denial of Morgan’s motion to suppress, stating that the trial court’s findings did not support its conclusion. The circuit court found that the officer’s justification for his failure to read the warning a second time did not hold up, because he continued inputting information into his computer and asking Morgan questions for approximately twenty-two minutes after Morgan submitted to the breath test and after Morgan requested to use the restroom. While not rising to the level of “bad faith,” the circuit court found that the foregoing time lapse, as well as the fact that the officer marked on the informed consent form that Morgan had declined an independent blood test, evidenced a “deliberate disregard” for the statute.

Thereafter, the Commonwealth filed a motion to reconsider, which the circuit court denied. This appeal followed.

ANALYSIS

An appellate court reviews a lower court's grant of a motion to suppress under a two-part analysis. *Commonwealth v. Bedway*, 466 S.W.3d 468, 471 (Ky. 2015). "The factual findings by the trial court are reviewed under a clearly erroneous standard, and the application of the law to those facts is conducted under *de novo* review." *Cummings v. Commonwealth*, 226 S.W.3d 62, 65 (Ky. 2007) (internal citation omitted).

Turning to the applicable statutory language at issue in this appeal, KRS 189A.105(2) provides:

(a) At the time a breath, blood, or urine test is requested, the person shall be informed:

.....

3. That if the person first submits to the requested alcohol and substance tests, the person has the right to have a test or tests of his blood performed by a person of his choosing described in KRS 189A.103 within a reasonable time of his arrest at the expense of the person arrested.

Further, KRS 189A.105(4) states:

Immediately following the administration of the final test requested by the officer, the person shall again be informed of his right to have a test or tests of his blood performed by a person of his choosing described in KRS 189A.103 within a reasonable time of his arrest at the expense of the person arrested. He shall then be asked "Do you want such a test?"

The officer shall make reasonable efforts to provide transportation to the tests.

(Emphasis added). Therefore, under the foregoing statutory language, the officer gives the first warning concerning an independent blood test along with a number of other implied consent warnings, with the first such warning requiring no independent affirmation or dissent from the defendant concerning whether they wish to have the independent blood test performed. However, once a defendant has consented to the requested alcohol or substance test and the test has been administered, KRS 189A.105(4) directs that the officer must give a second warning of the defendant's right to an independent test, and the statute requires a "yes" or "no" answer as to whether a defendant desires such a test. It is the absence of this second warning in this situation which Morgan argues requires suppression of the results of his breathalyzer test.

Generally, evidence is suppressed under the exclusionary rule only in response to searches violative of an individual's constitutional rights. *Copley v. Commonwealth*, 361 S.W.3d 902, 905 (Ky. 2012). In *Bedway*, however, the Kentucky Supreme Court found that suppression may still be warranted upon the violation of a statutory right if there is "prejudice to the defendant, in the sense that the search might not have occurred or been so abusive if the rule had been followed, or . . . if there is evidence of deliberate disregard of the rule." *Bedway*, 466 S.W.3d at 477 (quoting *Copley*, 361 S.W.3d at 907). Thus, we must determine

not only whether a statutory right was violated, but whether such violation either resulted in prejudice to Morgan or the facts support evidence of the officer's "deliberate disregard" of the statute.

In this case, we agree with the circuit court that the officer violated the KRS 189A.105(4) statutory mandate when he did not give Morgan the second independent blood test warning. The uncontested fact is that the arresting officer did not give the second independent blood test warning to Morgan. The statutory language requires that the officer give the second blood test warning, including specifically asking the defendant whether he or she desires an independent blood test, immediately after the individual submits to the breath test. Further, we agree that no reason existed for the officer not to have read the second warning to Morgan during the time between the breath test and taking him to booking. The officer did not testify that he forgot to give the second warning, but rather that he did not read the warning because he was in a rush to get Morgan to the restroom. The body camera footage, however, shows that the officer continued asking Morgan questions and performing other tasks for approximately twenty-two minutes before taking Morgan to booking. Thus, the officer violated a statutory mandate when he failed to read the second independent blood test warning to Morgan.

The next inquiry under *Bedway* is whether the violation of the statutory mandate required suppression of the breath test evidence Morgan provided. As to the “deliberate disregard” analysis, we agree that the overriding factor illustrating that the officer deliberately disregarded his statutory duty was that the officer marked “no” on the sheet to the specific question of whether Morgan sought an independent blood test. Again, the officer did not testify that he merely forgot to read the second independent test warning. Instead, on the implied consent form, the officer checked the box indicating that Morgan had declined the independent blood test, when this was never actually the case. Therefore, we agree that the officer deliberately disregarded the statutory mandate, and therefore that suppression of the breath test evidence was proper.

CONCLUSION

For the foregoing reasons, we affirm the Campbell Circuit Court’s order granting Morgan’s motion to suppress the evidence of the results of his breathalyzer test.

ALL CONCUR.

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