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TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2021-CA-0553-MR

ANDREW TODD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE OLU A. STEVENS, JUDGE  
ACTION NO. 19-CI-000326

COMMONWEALTH OF KENTUCKY,  
EX REL. MICHAEL J. O'CONNELL  
IN HIS OFFICIAL CAPACITY AS  
JEFFERSON COUNTY ATTORNEY

APPELLEE

OPINION  
REVERSING

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BEFORE: GOODWINE, JONES, AND MAZE, JUDGES.

MAZE, JUDGE: Andrew Todd (Todd) appeals an order of the Jefferson Circuit Court granting the Commonwealth's petition for a writ of prohibition. The issue underlying the Commonwealth's writ petition is whether the Jefferson District Court properly granted Todd's pre-trial motion to suppress and/or exclude the

results of the blood alcohol test performed subsequent to his arrest based on the Commonwealth's failure to lay a proper foundation. We reverse on the grounds that the circuit court erred in finding that the Commonwealth had demonstrated an irreparable injury and, therefore, there was no basis for the issuance of a writ of prohibition.

### **I. Facts and Procedure**

On March 1, 2018, Louisville Metro Police were called to investigate a call about an unresponsive individual (later determined to be Todd) in a car parked in the middle of the road in the Valley Station area. Upon arrival, they discovered that Todd had regained consciousness. They then conducted three field sobriety tests. Based upon the results of those tests, he was transported to Louisville Metro Department of Corrections (LMDC) on suspicion of driving while intoxicated. When Todd arrived at LMDC, Timothy Myers, utilizing the Intoxilyzer 5000 EN, performed a breathalyzer test. On March 6, 2018, Todd was charged with driving under the influence (DUI), second offense.

Todd moved to exclude the results of the breathalyzer test. He asserted that he had "burped" during the mandatory twenty-minute observation period, which would have required Myers to restart the period. However, Myers had proceeded with the test. Todd argued that the Commonwealth had failed to lay a proper foundation for the admission of the test results since it could not show

proper compliance with the statutes and regulations regarding the twenty-minute observation period. The district court agreed and granted Todd's motion to exclude the test results.

The Commonwealth then filed its petition for a writ of prohibition in the circuit court to prohibit the district court from excluding the test results. The circuit court granted its petition. Thereafter, Todd filed the within appeal.

## **II. Standard for the Grant of a Writ of Prohibition**

A writ of prohibition is an extraordinary remedy which "should not freely be granted." *Riley v. Gibson*, 338 S.W.3d 230, 233 (Ky. 2011). However, the decision to grant such a writ remains in the sound discretion of the court in which it was filed. *Hoskins v. Maricle*, 150 S.W.3d 1, 9 (Ky. 2004). It may be properly granted where:

(1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) . . . the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise, and great injustice and irreparable injury will result if the petition is not granted.

*Mahoney v. McDonald-Burkman*, 320 S.W.3d 75, 77 (Ky. 2010).

In this case, the Commonwealth argued that the district court, while acting within its jurisdiction, acted erroneously. Therefore, as set forth above, relief by prohibition would then be possible upon an additional showing that it has

no “adequate remedy by appeal” and that “irreparable injury will result . . . .”

However, this Court not only finds that the district court did not act erroneously, but that the circuit court failed to complete all three elements of the analysis required by *Hoskins, supra*.

### **III. Review of the Order Excluding the Results of Todd’s Breathalyzer Test**

KRS<sup>1</sup> 189A.103(3)(a) states:

Tests of the person’s breath, blood, or urine, to be valid pursuant to this section, shall have been performed according to the administrative regulations promulgated by the secretary of the Justice and Public Safety Cabinet, and shall have been performed, as to breath tests, only after a peace officer has had the person under personal observation at the location of the test for a minimum of twenty (20) minutes.

500 KAR<sup>2</sup> 8:030 § 1(1) states:

A certified breath test operator shall have the person under personal observation at the location of the test for a minimum of twenty (20) minutes prior to the breath alcohol analysis. During that period the subject shall not have oral or nasal intake of substances which will affect the test.

The district court specifically found that the officer performing the test began observing Todd at 4:06 a.m. and ended his observation period at 4:34 a.m.

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<sup>1</sup> Kentucky Revised Statutes.

<sup>2</sup> Kentucky Administrative Regulations.

KRS 189A.103(4) further provides:

A breath test shall consist of a test which is performed in accordance with the manufacturer's instructions or instructions adopted by the Department of Criminal Justice Training and approved by the manufacturer for the use of the instrument. The secretary of the Justice and Public Safety Cabinet shall keep available for public inspection and provide, upon request and without charge, copies of these manufacturer's instructions or instructions adopted by the Department of Criminal Justice Training and approved by the manufacturer for all models of breath testing devices in use by the Commonwealth of Kentucky[.]

The district court found that the manual states that “if the subject regurgitates note the time and delay starting a breath test for at least an additional 20 minutes.” The court then quoted the case of *Eldridge v. Commonwealth*, 68 S.W.3d 388, 392 (Ky. App. 2001), in which this Court held that “[b]elching and regurgitating may contaminate the mouth with alcohol volumes from the stomach, and this is a rational basis for re-administering the observation period.” Based upon that holding and the district court’s own observation that Todd had “burped on two separate occasions,” the court held that the observation period should have been recommenced and that the operator’s failure to do so invalidated the test results.

In its opinion and order granting the Commonwealth’s petition for a writ of prohibition, the circuit court held that the case of *Commonwealth v. Roberts*, 122 S.W.3d 524 (Ky. 2003), offered “a clear rule for assessing the

admissibility of a breath test.” The court then noted that the operating instructions for the Intoxilyzer 5000 EN contained no restart requirement for belches and concluded that “*Roberts* and not *Eldridge* is the controlling case on this issue[.]”

However, *Roberts* does not conflict with *Eldridge*. The *Roberts* Court held that:

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[s] of the steps and the sequence set forth in 500 KAR 8:030(2).
- 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.

122 S.W.3d at 528 (emphasis added).

In *Eldridge*, the Court specifically held, “The clear purpose of the twenty-minute observation period is to ensure that any residual alcohol present in the mouth has dissipated so that the Breathalyzer machine measures only the

alcohol content of breath exhaled from the lungs. Belching and regurgitating may contaminate the mouth with alcohol volumes from the stomach, and this is a rational basis for re-administering the observation period.” 68 S.W.3d at 392. Clearly, this case holds that belching constitutes an “oral or nasal intake of substances which will affect the test[,]” and therefore, the district court did not err in applying it. 500 KAR 8:030 § 1(1).

However, even had this Court found that the district court erred, it could not have found that the Commonwealth met its burden of showing all of the elements of *Hoskins, supra*.

As noted in the factually comparable case of *Commonwealth v. Williams*, 995 S.W.2d 400, 402 (Ky. App. 1999), “KRS 23A.080, the statute addressing appeals from district to circuit court, makes no provision for interlocutory appeals.” Therefore, the Commonwealth’s only remedy for review of such an order is by the extraordinary remedy provided by a writ. *Id.* at 403. Given the Kentucky Constitution’s<sup>3</sup> prohibition against appealing a judgment of acquittal, the Commonwealth herein would clearly be without an “adequate remedy by appeal” for any error by the district court. *Commonwealth v. Peters*, 353 S.W.3d 592, 595 (Ky. 2011).

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<sup>3</sup> KY. CONST. § 115.

However, when the *Williams* Court turned its attention to the issue of whether the Commonwealth would suffer “great injustice and irreparable injury” without the intervention of the circuit court, it quoted from the case of *Tipton v. Commonwealth*, 770 S.W.2d 239 (Ky. App. 1989), *abrogated on other grounds by Hoskins*, 150 S.W.3d 1, wherein the Court stated that without such intervention “the Commonwealth may be forced to trial without vital evidence or with some other significant prejudice to its case . . . .” *Williams*, 995 S.W.2d at 404 (quoting *Tipton*, 770 S.W.2d at 241). Nevertheless, the Court cautioned, “We neither intend nor imply that in every instance where the loss of evidence forces dismissal of the Commonwealth’s case the result amounts to irreparable harm justifying the issuance of a writ.” *Id.*

Indeed, in the more recent case of *Ortiz v. Commonwealth*, 630 S.W.3d 714, 717 (Ky. 2021), the Court concluded that the Commonwealth failed to prove that great injustice or irreparable harm justifying issuance of a writ had been shown in a DUI case where the blood test had been suppressed by the district court. In that case, the district court had also specifically found that there was probable cause for the officer to pull Ortiz over, there was reasonable and articulable suspicion to justify an investigation, and there was probable cause for the DUI arrest. On appeal, the Court concluded, “This evidence has not been suppressed. The Commonwealth can use all of it in trial when prosecuting Ortiz.

Ortiz’s blood test, while useful, is not the gravamen of the Commonwealth’s case.”

*Id.*

Here, as in *Ortiz, supra*, the Commonwealth could have used other evidence of Todd’s intoxication to support a conviction. Evidence such as the initial call to the scene regarding an unconscious man in a car in the middle of the road, the officer’s observations of Todd, and the results of the field sobriety tests could all have been used by the Commonwealth in its prosecution. This Court must find that there has been no showing of “great injustice” or “irreparable harm” and, therefore, the circuit court erred in its issuance of a writ of prohibition.

Accordingly, we reverse.

ALL CONCUR.

BRIEF FOR APPELLANT:

J. Nathan Miller  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Daniel Cameron  
Attorney General of Kentucky  
Frankfort, Kentucky

Michael J. O’Connell  
Jefferson County Attorney  
Louisville, Kentucky

David A. Sexton  
Special Assistant Attorney General  
Louisville, Kentucky