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NOT TO BE PUBLISHED OPINION

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RENDERED: MARCH 18, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2003-SC-0276-MR

DATE 5-20-04 E.A.F. Grant, D.C.

TERRELL LITTLE

APPELLANT

V.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
2002-CR-0043

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from a jury verdict convicting Little of murder and first degree assault and sentencing him to twenty years in prison.

The questions presented are: (1) whether an inadequate foundation was laid by the Commonwealth before positing expert testimony under KRE 702; and, (2) whether KRS 507.020(1)(b) is constitutional without proving a single act that manifests a conscious disregard of extreme indifference to human life by the defendant.

At about noon on March 3, 2002, Little drove his Ford Ranger truck onto a dangerous curve, crossed the centerline of the road, proceeded 99 feet in the opposing traffic lane, and collided with an on-coming full-size Ford F-150 truck killing the driver and seriously injuring the passenger of that truck. Little suffered injuries, including a bleeding brain and lung injuries requiring surgery and 16 days of hospitalization. Rescuers had to cut his vehicle open in order to get him out. Even his foot had been

pinned underneath the brake pedal requiring further extraction efforts. The response personnel described him as unresponsive to questions or their requests for assistance from him during the extraction process and said he sat in the vehicle staring straight ahead. They recalled no complaints of pain from him, either.

The relative vehicle positions were used to reconstruct the accident. The victim's truck had been pushed over 13 feet backwards by the impact. The victim's vehicle was determined to have been traveling with the right tire outside of the fog line. Little's truck was determined to have been at least two feet across the centerline at impact.

The cause of the accident was ascertained to be something other than mechanical defects or conditions. It was a clear day and the road was dry. Police had the trucks inspected after the accident and no mechanical failure capable of causing the accident could be found. Testimony at trial included observations that in order for Little's lighter truck to push the heavier F-150 backwards on impact, Little must have been traveling a greater speed than the victim's vehicle.

About an hour after the accident, hospital blood tests were drawn from Little that revealed blood levels of 0.047mg% Diazepam; 0.009 mg% Nordiazepam; and 0.011mg% Cocaine. Diazepam and Nordiazepam are the chemicals comprising the drug known as Valium. During later investigation at the hospital, Little denied having taken any prescription medicines or having prescriptions for any medicines that would contain these chemicals, but admitted ingesting cocaine a few days prior to the accident.

At trial, the Commonwealth's expert, Dr. Rolf, testified that these drugs might have had a "synergistic" effect to heighten effects, but abandoned that theory without modifying her opinion. Her opinion was that despite the minute levels, as a matter of science, the drugs impaired Little. The defense rebutted with their expert, Dr. Reasor,

who instead stated that no significant medical studies have been conducted as to whether the presence of both of these chemicals could have intoxicating synergistic effects. His testimony included that cocaine levels could have been twice as much at the time of the accident, and that cocaine causes a “euphoric” state. Both experts agreed that no studies have been performed on the exact effects of these drugs when taken together. Although discussion was made that the relative effects may “cancel” each other out, it was explained that each drug works on different types of neurological transmitters, rather than affecting the same places in the brain.

Little told police that he did not have prescriptions for the drugs found in his system on March 3, 2002. The amounts were consistent with therapeutic levels, that is, levels consistent with those levels created when the drugs are taken for treatment purposes. The Commonwealth showed that therapeutic levels of Valium can have impairing effects, including slower reaction times, impeded muscle coordination, and impaired eyesight. The impairing effects of the drug can be greater if the drug is taken irregularly, at differing amounts, and without medical supervision.

The jury convicted Little on both counts. He was sentenced to twenty years for the murder and ten years for assault to run concurrently. This appeal followed.

I. The Admissibility of Expert Testimony

Little attacks the qualifications and sufficiency of facts underlying the testimony of the Commonwealth’s expert, Dr. Rolf. He argues that because Dr. Rolf has taken no toxicology classes and had performed only one other evaluation of drug levels for driving impairment purposes, she was unqualified to be an expert in this case. Furthermore, he charges error to the trial court in failing to find specific facts upon which it admitted her as an expert. The question is therefore whether Dr. Rolf could be

admitted as an expert witness and whether the quality of her testimony could be admitted as expert opinion.

There is no support for an argument that the trial judge abused his discretion because the video record of Little's Daubert hearing was not made part of the certified record on appeal. The designation of the record to be considered on appeal is appellant's responsibility. CR 75.01. It is his responsibility to ensure that a complete designated record is prepared and certified by the clerk of the trial court within the time prescribed by CR 73.08. CR 75.07(5).

The evidence at trial supported admitting Dr. Rolf's expert testimony. Expert opinion evidence is admissible so long as: (1) the witness is qualified to render an opinion on the subject matter; (2) the subject matter satisfies the requirements of Daubert; (3) the subject matter satisfies the test of relevancy set forth in KRE 401, subject to the balancing of probativeness against prejudice required by KRE 403; and, (4) the opinion will assist the trier of fact per KRE 702. Stringer v. Commonwealth, Ky., 956 S.W.2d 883 (1997), cert. denied 523 U.S. 1052, 118 S.Ct. 1374, 140 L.Ed.2d 522 (1998) (internal citation omitted). Little argues that under Mitchell v. Commonwealth, Ky., 908 S.W.2d 100 (1995) and Goodyear Tire & Rubber Co. v. Thompson, Ky., 11 S.W.3d 575 (2000), each of which clarified the incorporation of Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) into Kentucky law, that Dr. Rolf's testimony failed. Furthermore, Little contends that her testimony was not "scientific knowledge". We disagree and analyze the issue under the Stringer standards here.

A. Dr. Rolf's Qualifications

Dr. Rolf was qualified to render an opinion on the subject matter. Little

challenges the training and experience of Dr. Rolf in an attempt to disqualify her expert testimony as to drug impairment. In evaluating whether the expert is qualified, "Kentucky's case law clearly indicates that the decision required of the trial judge is to determine if an expert has 'adequate' rather than 'outstanding' qualifications." Lawson, The Kentucky Evidence Law Handbook, § 6.15 (3d ed.). With respect to medical experts, "a general practitioner usually may testify as to medical problems that a specialist might treat in a clinical setting." Wright and Gold, Federal Practice and Procedure; Evidence, § 6265 (citing cases). The decision as to the qualifications of an expert rests within the discretion of the trial judge. Ford v. Commonwealth, Ky., 665 S.W.2d 304, 309 (1983), cert. denied, 469 U.S. 984, 105 S.Ct. 392, 83 L.Ed.2d 325 (1984).

At trial, Dr. Rolf testified that she has a degree in biology, pre-medicine from Penn State, she graduated from Medical College of Ohio in 1991, completed a three year residency at Case Western Reserve University in Ohio, and received specialty training during a one year forensic medicine fellowship at a county coroner's office in Cleveland, Ohio. Since 1997, when she began working for the Kentucky State Medical Examiner's Office, she has been determining whether drugs caused the death of the individuals whose blood, fluids, and tissues she tests for the presence of drugs. She regularly researches pharmacological and toxicological literature and consults other experts in the field to perform her duties. She has testified in another trial regarding the effect of a drug on driving skills.

In short, she was qualified to give expert testimony in this case on the presence and potential effects of the drugs found in Little's blood. Little's argument revolves around comparing Rolf's testimony to his own expert, Dr. Reasor, who is a professor

with experience in pharmacological and toxicological effects of drugs. Such comparisons are to be made by the jury, whereas the trial judge's job was to determine whether Dr. Rolf was minimally qualified to meet the standards of KRE 702. See, e.g., Cree v. Hatcher, 969 F.2d 34, 38-39 fn. 5 (3d Cir.1992), cert. dismissed, 506 U.S. 1017, 113 S.Ct. 1147, 121 L.Ed.2d 577 (1992) ("The fact that a doctor is not a specialist in a particular field goes not to the admissibility of the opinion but rather to the weight that the jury may wish to place upon it."). Therefore, Little's argument was made to the jury, and they were able to determine whether Dr. Rolf's opinion compared to Dr. Reasor's opinion. The trial judge did not abuse his discretion by permitting Dr. Rolf to testify as an expert witness.

B. Daubert Requirements

Although the record is unclear in this case, it appears that Little moved to exclude Dr. Rolf's testimony prior to trial and a *Daubert* hearing was held. Little objects to trial admission of Dr. Rolf's opinions that Cocaine and Valium at the levels found in Little's blood would mean he had been intoxicated. He disputes this expert opinion under the *Daubert* standard because Dr. Reasor testified that no adequate studies have been performed on the potential "synergistic" effects of Cocaine and Valium, nor measurements of either drug's intoxicating effects at this level. He therefore states that Dr. Rolf's opinion that Cocaine and Valium have intoxicating effects is mere speculation thereby violating Goodyear and Mitchell, supra. We disagree.

Both experts agreed that these two drugs were found in Little's blood. Blood tests for blood detection have been used as evidence in numerous cases, and we decline to invalidate such evidence in this case absent a convincing argument. Little's expert agreed that drug levels were higher earlier in the day of the collision. Each

expert based their opinions on the blood results and the methodology of measuring the presence of Valium or Cocaine in the blood is well accepted. Therefore we find no abuse of discretion.

C. Probativeness versus Prejudice

This part of the Stringer test requires us to balance the probativeness of Dr. Rolf's testimony against the prejudice. We have addressed the probative value of such testimony in Bush v. Commonwealth, Ky., 839 S.W.2d 550 (1992) and Estep v. Commonwealth, Ky., 957 S.W.2d 191 (1997). Both cases dealt with the admission of drug presence in the defendant pursuant to a trial for wanton murder due to automobile crashes.

Here, Little's argument seems to have a focus on the fact that Dr. Rolf stated with reasonable medical certainty that the Valium levels had impairing affects on Little's ability to operate a vehicle. He attacks her ability to state this, and did so with his own expert at trial. The jury was therefore able to give proper weight to this evidence, but the probative value of determining the impairing effects of Valium was necessary to sustain a conviction for wanton murder. In this case, because the balance between KRE 401 and KRE 403 was not exceeded, the trial judge properly admitted Dr. Rolf's testimony.

D. KRE 702

The last hurdle of the Stringer test is whether, as required by KRE 702, the testimony will help the trier of fact to understand the evidence or to determine a fact in issue. Dr. Rolf was used as a Commonwealth expert to explain the nature of the drugs found in the blood of Little. The Commonwealth had a burden of proving beyond a reasonable doubt the elements of the wanton murder charge. In order for the trier of

fact to understand how the drugs were influencing Little and to understand the nature of the drugs, Dr. Rolf's testimony explained these things to the court.

Dr. Rolf testified to the effects of Valium and the effects of Cocaine. She stated that each "can" impair driving skills. She commented that using each drug together does not cancel the effects out, and explained why: because each drug works on different transmitters in the brain, and therefore, it was not that the use of one drug blocked the other drug's ability to work on parts of the brain because they each affected different types of parts of the brain. Finally, and perhaps the most contentious statement in the eyes of Little, Dr. Rolf concluded that Little was impaired at the time of the accident. Little attacks this conclusion on the grounds that inadequate literature is available discussing the synergistic effects of these drugs and the effects of these drugs at the level measured in Little's blood. The tools available to a doctor to make conclusions regarding the medical condition of an individual are not confined to mere literature. They also use symptoms of the patient, and the actual condition of the patient together with their experience and that of their peers. Given the presence of the drugs and the behavior of Little, she made her conclusion with reasonable medical certainty, "based on science". The weight and value of her statement was to be measured by the jury, and in reference to Dr. Reasor's testimony. The trial judge properly admitted the evidence by this test.

Little's last argument is that certain hypothetical questions presented to Dr. Rolf violated his right against self-incrimination. Essentially, Little complains about the hypotheticals positing a time of Little's Cocaine ingestion. Dr. Rolf was asked to assume that Cocaine ingestion had been in the last few days. Little states that these questions are improper hypotheticals and it appears that he invokes the right against

self-incrimination because he could not rebut this evidence without admitting himself when he ingested Cocaine. The experts each agreed that the Cocaine amount present in Little's blood had a half-life of about an hour. This fact meant that each hour the dose dropped in half, or, looking backwards, the Cocaine level would be double for each hour prior. That evidence alone was enough to support a hypothetical question limiting the time of ingestion to be within a few days. Little would not need to incriminate himself to rebut that assumption, but rather provide an alternative theory for the presence of Cocaine measured in his blood. The jury could determine the believability of the Commonwealth's theory against his, but in neither case was it an improper hypothetical. In short, the limitations of Dr. Rolf's testimony go to the weight and not the admissibility of the evidence. We cannot say the trial court abused its discretion in admitting Dr. Rolf's testimony as an expert.

II. Constitutionality of KRS 507.020(1)(b)

Little argues that KRS 507.020(1)(b) is void for vagueness because the phrase "extreme indifference to human life" is a "nebulous concept" incapable of certain grasp by the average man. In the alternative, he claims that even if this phrase could be held in the minds of reasonable and average men with certainty, there is no specific act of Little's that on its own could fulfill the requirement of that *mens rea*. He asserts that the phrases "Valium" and "Cocaine" merely prejudiced the jury against him. This premises his argument that no single act of wantonness, that is, with a "depraved heart", or, with "purposeful or knowing" indifference to a known risk, can be named in his actions. We disagree with both arguments.

A statute is vague if "men of common intelligence must necessarily guess at its meaning." Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Likewise, if men of common intelligence must necessarily guess at the meaning of a statute and differ as to its application, the statute is vague. United States v. Lanier, 520 U.S. 259, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997). We have stated the test of vagueness to be "whether a person disposed to obey the law could determine with reasonable certainty whether contemplated conduct would amount to a violation." Commonwealth v. Foley, Ky., 798 S.W.2d 947 (1990) *overruled on other grounds by Martin v. Commonwealth*, Ky., 96 S.W.3d 38 (2003). We examined KRS 507.020(1)(b) in Brown v. Commonwealth, Ky., 975 S.W.2d 922 (1998), and found it to be Constitutional and therefore not vague. There is no reason to revisit that meticulous examination here, other than to reiterate that the phrase "extreme indifference to human life" has a succinct meaning capable of being grasped in the mind of the common man. The question of whether Little's actions manifested such indifference was an assessment for the trier of fact.

The jury was faced with a defendant who had Cocaine and Valium in his system, drove his vehicle across the median of the road at a high rate of speed, and despite being conscious, was unresponsive to emergency response personnel who attempted to cut him out of his own crushed vehicle. The jury was free to make all reasonable inferences from these points of evidence. Dillingham v. Commonwealth, Ky., 995 S.W.2d 377 (1999). They were able to determine whether Little was unresponsive at the accident scene because of shock or because of intoxication. They were also able to determine whether operating his vehicle involved a risk of death. They were able to put these things together and determine from that evidence whether they believed Little

had conducted himself with the required *mens rea* of “extreme indifference to human life”. Stopher v. Commonwealth, Ky, 57 S.W.2d 787 (2001). The jury could determine whether Little took the Valium without a prescription in order to attempt to “cancel out” his cocaine intoxication. Although Little argued this point about the effect of Valium to try and disprove intoxication, the jury was free to reasonably infer that the effects were not cancelled out because Little showed signs of being intoxicated at the crash scene. Therefore, the jury may have inferred that Little was knowingly intoxicated and attempted a self-remedy prior to driving. Little argues that there had to be one specific act. Given the totality of the circumstances, including, as Little informs us, the notoriety of the extremely dangerous nature of this particular curve in the road, we can see no unreasonable prejudice for the jury to reach this verdict. See Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991).

The judgment of conviction is affirmed.

All concur except Stumbo, J., who concurs in result only.

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