

**IMPORTANT NOTICE**  
**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***

Supreme Court of Kentucky **FINAL**

2002-SC-0415-MR

DATE 9-16-04 EJA Grant, D.C.

JIMMY GILLUM

APPELLANT

V. APPEAL FROM McCracken Circuit Court  
HONORABLE JEFFERY HINES, JUDGE  
01-CR-00193

COMMONWEALTH OF KENTUCKY

APPELLEE

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

Appellant, Jimmy Gillum, appeals to this Court as a matter of right<sup>1</sup> from his convictions of first-degree wanton endangerment (two counts), first-degree criminal mischief, leaving the scene of an accident, and being a first-degree persistent felony offender (PFO). Appellant was also charged with driving on a DUI suspended license, for which he agreed to plead guilty prior to trial. Appellant was sentenced to various terms for all offenses, but in lieu thereof to a total of twenty (20) years as a first-degree PFO. Finding no reversible error, we affirm Appellant's convictions in full.

This incident arises from Appellant's involvement in an automobile hit and run accident that occurred during the evening hours on Interstate 24 near Paducah, Kentucky on June 15, 2001. Rodney Moeller was traveling with his son in his red

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<sup>1</sup> Ky. Const. § 110(2)(b).

Chevy truck when he noticed a white car traveling at a high rate of speed in the rear view mirror. He estimated that the car was traveling at approximately 85-90 miles per hour (MPH). The tires on the white car suddenly squealed as it pulled directly alongside Moeller's truck. The white car veered over and struck Moeller's truck on the driver side pushing it some sixty yards off of the Interstate highway. Both Moeller and his son were jostled "up and down pretty hard" but received only minor abrasions, cuts, and bumps when the top of Moeller's head hit the doorframe. Moeller stopped his truck, checked to see if his son was injured, and walked back up to the Interstate highway. It was then that Moeller noticed the white car getting ready to leave, and he instructed his son to write down its license plate number. Another motorist, Georgiana Johnston, who observed the incident, stopped at the scene and called the police on her cellular phone. The police quickly responded to the scene and Moeller reported the incident. Ms. Johnston also provided Moeller with her business card and telephone number.

After returning home, Ms. Johnston received a call from the police asking her to accompany them to identify the driver of the white car. She traveled with the police to the Indian Oak Trailer Court where she observed the white car upon jacks. The white car had red paint on it and the hood was raised. She also saw the driver of the white car wearing what appeared to be the same white t-shirt that he was wearing when she saw him at the scene of the accident. At the time of the accident, Appellant's driver's license was suspended. His license suspension would have expired on October 17, 2001.

At trial, Georgiana Johnston testified that she was driving in the right lane on Interstate 24 near mile-marker 8 when a white car passed her in the left lane

traveling at an approximate speed of 80-85 MPH. Moeller's red Chevy truck was directly in front of her car. The white car suddenly and erratically swerved to the right, hit the red truck, and knocked it off the road. As a result of the collision, the white car also went off the right shoulder into the grass. Ms. Johnston pulled over next to the white car, rolled down the passenger-side window, and asked the driver of the white car if he was okay. She reported that the driver said that he was "fine" and asked if she had a cell phone. She responded that she did have a cell phone, and he immediately sped away. At trial she identified the driver of the white car as Appellant and gave a description of the car.

On cross-examination, Ms. Johnston testified that there was a younger person sitting in the passenger seat of Appellant's white car. She also stated that it appeared that the driver of the white car did not see the red truck, and that the accident did not appear to be intentional.

Captain Jim Smith testified that he had heard the report of the accident and the license plate number of the alleged perpetrator over his cruiser radio, and that he had driven to the Indian Oak Trailer Court to investigate. At the trailer park, he observed a young man fixing a vehicle with a matching license plate and damage consistent with the accident. The young man stated that he was not the driver of the car and that a woman owned the car. Captain Smith told the young man that he needed to speak with the owner of the car because the vehicle had been involved in an accident. At that time, Smith observed Appellant standing in the trailer drinking a longneck Budweiser beer. Over Appellant's objections at trial, Captain Smith was allowed to testify that when he stepped onto the porch of the trailer to speak to Appellant, Appellant stated that Smith "needed a search warrant" to enter the trailer.

Captain Smith replied that Appellant could be detained until he determined “what is going on.” Smith then testified that he told Appellant that he had been informed that the driver of the white car had been involved in an accident. Appellant responded that he had been drinking at his trailer all afternoon and had not driven.

Smith further testified that Appellant was belligerent, refused to produce his driver’s license, and that he would not come outside of the trailer. Smith testified that Appellant stated that “this wasn’t his first rodeo” and that he could be arrested for alcohol intoxication if he stepped outside. Smith testified that Appellant appeared to be under the influence of alcohol because he had slightly slurred speech and red, glassy eyes. Another officer, John T. Coleman, also arrived at the trailer park and testified that Appellant was drinking. Officer Coleman stated that Appellant said, “If it was me, what am I looking at” and “what is my punishment going to be.”

Appellant exercised his Fifth Amendment right not to testify at trial. Upon appeal, he argues that the trial court committed the following trial errors: (1) The trial court violated his right to due process by admitting inadmissible prior bad acts evidence, and (2) the trial court improperly allowed the Commonwealth to elicit testimony which amounted to improper comment on Appellant’s right to remain silent. Additional facts will be presented as necessary for the development of these issues.

Appellant argues that he was denied due process by admission of testimony concerning his alcohol use and statements he made concerning his prior criminal record. Prior to trial, Appellant filed a Motion in Limine objecting to the evidence under KRE 404(b) and KRE 403. Appellant claimed that since he was not charged with DUI, his consumption of alcohol after the accident was not relevant to the charged offenses. The motion was overruled on the grounds that it was Appellant’s

alibi. At trial, Captain Smith recounted Appellant's statements and the events that transpired after finding him at his trailer. In response to the Commonwealth's question concerning what Appellant had said, Captain Smith testified that Appellant had stated that he had been at his trailer all afternoon drinking and that Appellant had stated that this was not his "first rodeo." Captain Smith also testified that he had observed Appellant drinking and in a state of intoxication. Appellant again objected on the same grounds and the trial court admitted the statement that it was not his first rodeo on the grounds that the statement was "subject to interpretation" by the jury.

For clarification sake, we will break the statements or testimony into three distinct parts for analysis: (1) Appellant's statement to Captain Smith that this was not his "first rodeo" and that if he exited his trailer he would be arrested for alcohol intoxication (2) Appellant's statement that he was not the driver of the car because he had been at his trailer all afternoon drinking, and (3) Captain Smith's testimony that Appellant was found drinking a longneck Budweiser and was intoxicated.

KRE 402 states that "all relevant evidence is admissible." Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.<sup>2</sup> Evidence of other crimes, wrongs, or acts under KRE 404(b) is inadmissible to prove "the character of a person in order to show action in conformity therewith." Such evidence may be admitted, however, "[i]f offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."<sup>3</sup> It is within the "sound

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<sup>2</sup> KRE 401.

<sup>3</sup> KRE 404(b)(1); Brown v. Commonwealth, Ky., 983 S.W.2d 513, 516 (1999).

discretion” of the trial judge to exclude such evidence if “its probative value is substantially outweighed by the danger of unfair prejudice.”<sup>4</sup> Upon review, we apply the abuse of discretion standard.<sup>5</sup>

We must determine whether there was an abuse of discretion when the trial court allowed Appellant’s statements to be admitted at trial. Appellant’s first statement that this was not his “first rodeo” should have been excluded because it was irrelevant and ambiguous as to its meaning. The fact that it was admitted as a statement by Appellant, and that it was “subject to interpretation” by the jury does not render such evidence relevant. Appellant’s second statement to Captain Smith, however, was admissible because it was admitted for some other purpose than to show the character of the accused. Although the record here fails to reflect that the trial court engaged in a proper KRE 403 analysis, it appears that the trial court determined admissibility by concluding that the evidence was admissible for another purpose than to show Appellant’s character as his alibi. Furthermore, as this was Appellant’s own statement to the police, it was properly admitted.<sup>6</sup> Finally, Captain Smith’s testimony as to Appellant’s consumption of alcohol and state of intoxication appears to be relevant to the charge of leaving the scene of the accident as the Commonwealth proposed, and was properly admitted. As we have determined that the trial court erred with respect to its admission of the “rodeo” statement, we must also consider whether the errors were prejudicial and whether this case as a whole would have been substantially different had the errors not occurred.<sup>7</sup>

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<sup>4</sup> KRE 403; English v. Commonwealth, Ky., 993 S.W.2d 941, 945 (1999).

<sup>5</sup> Partin v. Commonwealth, Ky., 918 S.W.2d 219, 222 (1996).

<sup>6</sup> KRE 801A(b)(1).

<sup>7</sup> Abernathy v. Commonwealth, Ky., 439 S.W.2d 949, 952 (1969).

RCr 9.24 provides that no error is grounds for a new trial unless it appears that the judgment is inconsistent with substantial justice. At every stage of the proceeding, courts must disregard error or defects that do not affect the substantial rights of the parties.<sup>8</sup> If, upon consideration of the whole case, a reviewing court does not believe there is a substantial possibility the result would have been different, then the trial court error will be held nonprejudicial.<sup>9</sup>

The evidence against Appellant was very nearly overwhelming. Eyewitnesses identified Appellant as the driver who forced the Moellers from the roadway. Appellant's white vehicle bore unmistakable indicia in the form of red paint indicating that it had collided with the Moeller vehicle. The license plate number of the offending motor vehicle was recorded by Moeller's son, and it was confirmed to be Appellant's license plate number. There was also other evidence that virtually compelled the conclusion that Appellant was the offending motorist. Thus, we conclude that any error in the admission of the disputed evidence relating to Appellant's statements and condition of intoxication was harmless. A defendant is guaranteed a fair trial but that does not mean a perfect trial free of any and all error.<sup>10</sup> A review of the entire proceedings indicates that Appellant received a fundamentally fair trial.

Appellant next makes a constitutional argument that the trial court improperly admitted several pre-arrest, pre-Miranda<sup>11</sup> statements by Appellant to Captain Smith. Appellant posits that his statement that Captain Smith "needed a search warrant" to enter the trailer, and his conduct in refusing to produce his driver's

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<sup>8</sup> RCr 9.24.

<sup>9</sup> Abernathy, 439 S.W.2d at 952.

<sup>10</sup> Michigan v. Tucker, 417 U.S. 433, 94 S. Ct. 2357, 41 L. Ed. 2d 182 (1974).

<sup>11</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 1624, 16 L. Ed. 2d 694 (1966).

license and exit his trailer all amounted to improper substantive use of the pre-arrest exercise of his Fifth Amendment right against self-incrimination.

Appellant filed a Motion in Limine to “prohibit any introduction of any statement by the Defendant that he wished to remain silent or to invoke his right to counsel.” Before the opening statements were given at trial, Appellant renewed his objection to the use of any of his pre-arrest statements, including comments about his refusal to cooperate with the police and that the police needed to obtain a warrant to enter his trailer. The trial court overruled that objection. Appellant again objected and was overruled when the testimony was elicited during trial.

At trial, Appellant tendered an objection before the Commonwealth’s opening statement on the grounds that his statement that the police “needed a warrant” amounted to improper use of his assertion of his Fourth Amendment Constitutional right against him. Appellant also objected to testimony that he had refused to take a Breathalyzer or field sobriety test on Fifth Amendment grounds. The trial judge responded that this evidence was admissible as “fair evidence” upon the Commonwealth’s argument that such evidence was relevant to Appellant’s motive to leave the scene of the accident.

Appellant argues that his statements that Captain Smith needed to obtain a warrant and his refusal to produce a driver’s license, while not direct comments on silence, “are clearly understood as communicating a desire to stand on his constitutional right against self-incrimination.” Appellant asks that this Court draw an inference that by not cooperating with police, he was exercising his Fifth Amendment rights. Appellant notes that Captain Smith said that he could be detained until he found out “what was going on.”

The substantive use of a defendant's post-arrest silence during the prosecution's case-in-chief is prohibited in Kentucky courts.<sup>12</sup> The United States Supreme Court has stated:

[I]t is impermissible to penalize an individual exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.<sup>13</sup>

The United States Supreme Court, however, has not yet addressed whether pre-arrest silence may be used as substantive evidence of guilt. “[S]ilence does not mean only muteness; it includes the statement of a desire to remain silent as well as of a desire to remain silent until an attorney has been consulted.”<sup>14</sup> In Coyle v. Combs,<sup>15</sup> the Sixth Circuit found the statement “talk to my lawyer” to be “properly analyzed as a comment on prearrest silence” and improperly admitted.<sup>16</sup>

The disclosure at trial of voluntary statements that do not equate to a comment on silence or a comment on requests for counsel while made under no official compulsion to speak does not implicate the Fifth Amendment privilege.<sup>17</sup> Some of Appellant's statements were denials of guilt and were clearly admissible. Other statements are either unintelligible or assertions of other constitutional rights. Perhaps

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<sup>12</sup> Hall v Commonwealth, Ky., 862 S.W.2d 321, 323 (1993), Green v. Commonwealth, Ky., 815 S.W.2d 398, 400 (1991).

<sup>13</sup> Miranda, 384 U.S. at 465 n.37.

<sup>14</sup> Wainwright v. Greenfield, 474 U.S. 284, 295 n.13, 106 S. Ct. 634, 640, 88 L. Ed. 2d 623, 632 (1986).

<sup>15</sup> 205 F.3d 269 (6th Cir. 2000).

<sup>16</sup> Id. at 283.

<sup>17</sup> Wade v. Commonwealth, Ky., 724 S.W.2d 207 (1986) (holding a post arrest oral statement voluntarily given to police in which a suspect offers an alibi which tends to exonerate him does not enjoy constitutional protection against self-incrimination because it is a waiver of the right to remain silent as to the subject matter of the statement).

some such statements should have been excluded, but under the evidence as a whole and as analyzed hereinabove, any error was harmless beyond a reasonable doubt.<sup>18</sup>

For the foregoing reasons, Appellant's conviction is affirmed.

All concur.

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<sup>18</sup> Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

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