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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: JANUARY 19, 2006
NOT TO BE PUBLISHED

FINAL

Supreme Court of Kentucky

2004-SC-000344-MR DATE 2-9-06 ELIA Grawhpc.

MICHAEL NEIL BROWN — APPELLANT

V.

APPEAL FROM CLINTON CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
NO. 03-CR-0075

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Michael Neil Brown was convicted of driving under the influence and four (4) counts of first degree assault. He was sentenced to fifty (50) years imprisonment, based on the recommendation of the jury. He now appeals to this Court as a matter of right.[1]

At approximately 7:00 a.m. on May 14, 2003, school bus driver, Bradley Bell, was following behind a vehicle occupied by Christie Branham and her three children, Kristen, Jacob, and Jonathan. Bell observed an oncoming vehicle, driven by Appellant, leave the highway, and subsequently jerk back onto the roadway. Once back onto the highway, the vehicle crossed the yellow center line and collided head-on with Branham's car. Branham's car was knocked completely off the roadway, and

[1] Ky. Const. § 110(2)(b).

Appellant's car spun out of control eventually coming to rest in contact with the school bus driven by Bell. Bell saw Appellant in the backseat of his car, and observed him climb out of the vehicle's back window. Bell testified that Appellant repeatedly asked him what happened, and he also noticed the strong odor of alcohol on Appellant's breath. Later, Bell noticed one open beer can in Appellant's vehicle and another open container on the roadway.

Emergency medical technician Dennis McWhorter responded to the scene and treated Appellant. McWhorter testified that he noticed cans of beer in Appellant's vehicle, and that he smelled the strong odor of alcohol on Appellant's person as well as emanating from the vehicle. Appellant was transported from the scene to the Clinton County Hospital Emergency Room, where detective Russell Decker attempted to obtain Appellant's consent to collect blood and urine samples. Appellant was unresponsive to Detective Decker's requests and appeared to have lost consciousness. Detective Decker then requested that a nurse draw blood and urine from Appellant before he was airlifted to another hospital. Thomas Frisbee of the Kentucky State Police Crime Lab in Louisville testified that he personally analyzed Appellant's blood sample and determined that the blood alcohol level approximately an hour and a half after the collision was .09.

As a result of the collision Ms. Branham and her three children were seriously injured. Kristen Branham, age two at the time of the collision, suffered a broken femur in her left leg, a fractured hand, facial lacerations, and scars on her face, mouth, and legs. Jonathan Branham, age nine at the time of the collision, suffered skull and facial fractures, had a piece of his brain removed, and endured reconstructive bone surgery on his head. Jacob Branham, age seven at the time of the collision,

suffered a severe closed head injury to his brain and a fracture to his left elbow. The injury to Jacob's brain caused stroke-like effects that have left him paralyzed on the left side of his body. Jacob cannot swallow, speak, or control his bowels, and his parents must constantly care for him.

The children's mother, Christy Branham, was also seriously injured as a result of the collision. The two bones in the lower portion of Ms. Branham's left leg were crushed and her ankle was severely injured. She also suffered broken ribs, a punctured lung, a ruptured spleen, a broken shoulder bone, a fractured pelvic bone, a crushed tail bone, fractures in her left hand and fingers, and a mild concussion. Medical testimony at trial indicated that without immediate and proper medical treatment, Ms. Branham, Jacob, and Jonathan would have likely died.

On appeal, Appellant asserts error in the admission of the testimony of Jane Purcell regarding a report (the report) prepared by the Kentucky State Police Crime Laboratory. Purcell, a supervisor with the Toxicology Section of the Kentucky State Police Crime Lab, testified at trial regarding a report prepared by Shannon Sullivan. The report contained urinalysis information regarding Appellant's marijuana use prior to the accident. Sullivan, the lab technician that actually performed the toxicology analysis on Appellant's urine, left the employment of the Kentucky State Police a year prior to the trial in order to take a position with the Bureau of Alcohol, Tobacco, and Firearms.

Appellant objected prior to the testimony of Purcell, and the trial court heard her testimony outside the presence of the jury. Purcell told the court that Sullivan's report indicated that Appellant had the "constituents" of marijuana in his urine and concluded that he would have used marijuana within 24 to 36 hours prior to the

accident. Purcell further told the court that the testing for which the report was made had been completed on August 12, 2003, and that she had reviewed the report herself three days later. She also stated that she had not observed the testing and could not say whether the testing had been properly conducted. Purcell noted that it was regular practice for the Kentucky State Police to keep such records.

After this testimony Appellant again objected, stating that he believed his right to effective cross-examination would be hindered by Sullivan not testifying. Specifically, he offered two grounds for objecting to the admission of the toxicology report: (1) the absence of the actual lab technician who performed the testing denied Appellant the right to effective cross-examination; and (2) the method of obtaining the urine sample violated 500 KAR 8:030.[2] In response to these objections the Commonwealth stated that it had properly laid the foundation for the toxicology report to be admitted under the business records exception to the hearsay rule. The trial court agreed with the Commonwealth, ruling that under KRE 803(6), even though the person who actually performed the testing was not present to be cross-examined, the testimony and report could be properly admitted as a business record. After the objection was overruled the jury was permitted to hear the testimony of Purcell, and the report was admitted into evidence.

It is important to note that Appellant did not expressly object to the report as hearsay, nor did he object to its admission as a business record. As previously stated, the objection was merely premised on the right to effective cross-examination. Appellant now asserts that the trial court erred by admitting the report, because it was

[2] 500 KAR 8:030 addresses the administration of breath alcohol tests and chemical analysis tests. Appellant has chosen not to argue this particular objection on appeal, and we therefore decline to review it.

hearsay, and not within any exception to the hearsay rule. The Commonwealth argues that because of the lack of objection to the report as a business record, the issue is not properly before the Court. We disagree. In The Kentucky Evidence Law Handbook,[3] Professor Lawson gives an explanation of the rationale behind the hearsay rule:

> The absence of an oath by the declarant and the inability of jurors to observe the demeanor of a declarant are often cited as reasons for the hearsay rule. But the absence of an opportunity for cross-examination of declarants is the predominant rationale for the rule. It is this third rationale (lack of opportunity for cross) that has guided authorities in the development of hearsay doctrine and that needs to be kept clearly in mind when addressing issues concerning admissibility of out-of-court statements, especially the threshold issue of whether such statements qualify as hearsay or nonhearsay.

The basis for any hearsay objection is, at its core, an objection regarding a lack of the ability to cross-examine the declarant. While we do not advocate nor encourage trial attorneys to make broad objections to evidence, in this case the objection was sufficient to preserve the perceived error for our review. The Commonwealth understood the objection at trial well enough to respond that the report was a business record, and no clarification of Appellant's objection was sought. Also, the trial court ruled on the objection and understood the basis of the claimed error. While our rules regarding the application of error preservation are indispensable, a strict application should only be used when the error is clearly unpreserved, the preservation attempt is purposefully vague, or when a party attempts to change the basis of objection on appeal. As none of these instances are present in this case, the claim of error is ripe for review.

[3] § 8.00[1], at 549 (4th ed. LexisNexis 2003).

We now turn to the substantive issue, whether the hearsay evidence was properly admitted through the business records exception. The business records exception is a bedrock of our jurisprudence,[4] codified in our rules of evidence at KRE 803(6). The business record exception states, in relevant part the following:

> KRE 803. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> . . . .
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> (6) Records of regularly conducted activity. A memorandum, report, record or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

As is apparent from the text of the rule itself, almost any "business" can qualify under the rule. The Kentucky State Police Crime Laboratory would clearly qualify as a "business", based on the inclusive definition of that term in the rule. Indeed, we have held that the definition of "business" in the rule includes public agencies.[5]

Furthermore, the report was made at or near the time of the urine analysis, by the person who had knowledge of the test results, Ms. Sullivan. Purcell testified that the toxicology results were recorded on the same day the testing was performed. Purcell herself reviewed the results three days after testing was completed,

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[4] See, e.g., Galbraith v. Starks, 79 S.W. 1191 (Ky. 1904).
[5] Prater v. Cabinet for Human Resources, 954 S.W.2d 954 (Ky. 1997).

and she stated that the testing was subjected to peer review. Having reviewed the records personally, Purcell was also the most qualified witness to communicate the report to the jury. Additionally, Purcell testified that it was the regular practice of the KSP to keep these types of records and make these reports.

We are therefore left with Appellant's main contentions challenging the admissibility of the report: that the report was not kept in the course of a regularly conducted business activity; and that the circumstances of the report indicate a lack of trustworthiness. Appellant hinges both arguments on his assertion that the report was prepared for litigation purposes. Since we are dealing with the KSP, this is a point worthy of serious consideration, and we will examine it within the context of the two main arguments.

Appellant first contends that the report was inadmissible because it was not kept in the course of a regularly conducted business activity. Appellant argues that the report was not prepared as an ongoing business concern, but rather it was prepared and kept only when an investigation was requested. Professor Lawson notes that the primary purpose of requiring that the business record be made or kept in the regular course of business is to exclude "records that are made with an eye on litigation, since litigation is not a regularly conducted business activity."[6] While we agree with this view, as the KSP is a police agency, litigation is not unanticipated. The KSP performs tests and creates records in the process of investigating possible criminal conduct, and the investigation of crime often leads to litigation. The notion that a report made in anticipation of litigation is not a routine business task, neatly fits into the paradigm of a civil case in which a manager or employee creates a report because of a fear of an

[6] Lawson, § 8.65[3], at. 680. (internal citations omitted).

impending suit. However, with the KSP and specifically the Crime Laboratory, every record produced could theoretically be viewed as prepared with an eye toward litigation. We are unwilling to adopt the theory that every record prepared by the KSP Crime Laboratory is inadmissible under the business records exception due to the nature of its creation.

We therefore hold that the report in question was made and kept in the regular course of business, despite its possible preparation for use in litigation. We also note, that the admission of this report in particular, and every report prepared by the KSP Crime Laboratory in general, must withstand scrutiny under the trustworthiness element of KRE 803(6).

Appellant argues that the hearsay evidence in this case is not trustworthy, and thereby does not qualify for admission under the business records exception. Appellant asserts that the report was prepared solely for the purpose of litigation, thereby calling its trustworthiness into doubt. In Stopher v. Commonwealth[7] we held that a report prepared in anticipation of trial, and specifically in preparation of a defense, indicated a lack of trustworthiness.[8] However, an indication of a lack of trustworthiness and an actual lack of trustworthiness are not one in the same, because the indication can be rebutted. In the instant case the report in question is not substantially similar to the report excluded in Stopher. The report in Stopher was taken by an investigator with the Louisville Public Defender's Office, and its sole purpose was to prepare a defense for the defendant in that case.

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[7] 57 S.W.3d 787 (Ky. 2001).
[8] Id. at 801.

We equate the case at bar to the facts of Kirk v. Commonwealth.[9] In that case, a pathologist's autopsy report was admitted during the testimony of the supervising coroner. The pathologist who prepared the report died prior to trial, and on appeal issues arose regarding whether the report was admissible as a business record, and without the pathologist there to personally testify. The supervising coroner testified that the autopsy was performed as part of the regular practice of preparing an accurate death certificate. We held that the report was admissible, despite the pathologist's inability to testify in court, because it was the regular practice of the coroner's office to prepare such a report, the report was made at or near the time of the autopsy, by a person with knowledge, and the report was kept in the regular course of conduct of the coroner's office.

In the case at bar, while it is obvious that a KSP employee prepared the report as part of her occupational duties, the report was not prepared in anticipation of trial, as that phrase is traditionally used and thought of in this area of law. We are not dealing with the sort of self-serving report the United States Supreme Court condemned in the seminal case of Palmer v. Hoffman,[10] nor are we dealing with inadmissible opinion testimony like that in Prater v. Cabinet for Human Resources.[11] The report in this case was prepared with no preference as to what its result would be. The KSP is as much in the business of proving innocence as it is guilt, and Sullivan in particular had no motive to present the test results as anything other than what they were. Neither Sullivan nor any other KSP lab technician has any stake in whether test results lead to guilt or innocence. KSP lab technicians use a strict scientific methodology, and whether

[9] 6 S.W.3d 823 (Ky. 1999).
[10] 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943).
[11] 954 S.W.2d 954 (Ky. 1997).

the person's urine is found to contain drugs or not, is of no consequence to the individual technician. As is the case of a pathologist performing an autopsy, a drug screen report is grounded in science, not the opinions of an interested party. While the investigator in Stopher sought out evidence to prove innocence, Sullivan sought out data to prove facts. "Science is the search for truth – it is not a game in which one tries to beat his opponent, to do harm to others."[12] The trustworthiness of the report is found in the years of scientific advancements that have made it accepted among scholars. For these reasons, the report did not indicate any lack of trustworthiness.

For the foregoing reasons we hold that the report was admissible under the business record exception to the hearsay rule, and the trial court committed no error by allowing it into evidence.

All concur.

[12] Linus Carl Pauling, No More War! 209 (1958).

COUNSEL FOR APPELLANT:

Randall L. Wheeler
Assistant Public Advocate
Department of Public Advocacy
Suite 302, 100 Fair Oaks Lane'
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Wm. Robert Long, Jr.
Assistant Attorney General
Criminal Appellate Division
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601-8204