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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: JANUARY 22, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2007-SC-000613-TG

TIMMY G. CARROLL — APPELLANT

V.

ON APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
NO. 07-CR-00035

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Timmy G. Carroll, was convicted of fleeing and evading in the first degree and of being a persistent felony offender in the first degree. The jury recommended a sentence of five years' imprisonment, which was enhanced to twenty years by virtue of Appellant's persistent felony offender status. He now appeals to this Court as a matter of right. Finding no error, we affirm.

Appellant visited the home of Jerry Landrum and Landrum's girlfriend, Jessica DeArmond, on New Year's Eve, December 31, 2006. Appellant arrived on foot, but requested a ride home in DeArmond's car, a white Grand Prix. Because her children were sleeping and Landrum was drunk, DeArmond agreed to let Appellant borrow her car, which Landrum would drive home later. After two short visits with his siblings, Appellant and Landrum headed to Appellant's mobile home.

Kentucky State Trooper Timmy Jewell attempted to pull the Grand Prix over as Appellant and Landrum were en route to Appellant's home. He clocked the Grand Prix traveling thirteen miles per hour over the speed limit and turned on his lights and siren. Instead of pulling over, Appellant sped up, looking back towards Trooper Jewell as he veered left off the highway onto a narrow, country road. Jewell testified that Appellant was driving erratically, crossing into the oncoming lane several times. After cresting a small hill, Appellant lost control of the car and skidded into a field. The car traveled for some distance before hitting a ditch, and then Appellant fled on foot. Trooper Jewell stopped his cruiser near the Grand Prix and observed Landrum in the passenger seat. He then pursued Appellant on foot, but was unable to find him. With the assistance of a thermal imaging device, Appellant was eventually located hiding in the woods about a mile from the field. Upon his arrest, Appellant admitted to Trooper Jewell that he had used methamphetamine that evening. Blood and urine samples were taken, which tested positive for methamphetamine and amphetamines.

At trial, Appellant's defense was that Landrum was actually driving the car. He relied on his own testimony to that effect, as well as the testimony of his brother and nephew. His nephew testified that following a brief visit to Appellant's sister's house, Landrum was driving the car. His brother likewise testified that the two men visited him that evening, and that Landrum was in the driver's seat. The testimony of Jessica DeArmond, Trooper Jewell, and Landrum contradicted these assertions.

Appellant was convicted and this appeal followed. He argues that the combination jury instructions denied him a unanimous verdict, as the evidence only supported one theory of guilt. He also claims the trial court erroneously denied his motion for a new trial, based on juror bias, without an evidentiary hearing.

The trial court delivered a combination jury instruction on the fleeing and evading charge. In addition to proof that the defendant knowingly or wantonly disobeyed a direction by a police officer to stop his vehicle, KRS 520.095(1)(a) provides that a person is guilty of fleeing or evading police in the first degree if one of the following conditions is met: (1) the person is fleeing immediately after committing an act of domestic violence; (2) the person is driving under the influence of alcohol or any other enumerated controlled substance; (3) the person is driving with a suspended driver's license; or (4) the person causes or creates a substantial risk of serious physical injury or death to any person or property by fleeing or eluding. Here, the jury was permitted to find Appellant guilty if it found that he was under the influence or that he created a substantial risk of injury or death by fleeing.

Appellant now claims the evidence was insufficient to support a finding that he was under the influence of methamphetamine while operating the car. Though he admitted his prior use of methamphetamine to Trooper Jewell, and drug tests confirmed the presence of the drug in his system, Appellant argues that insufficient evidence was presented to the jury regarding the actual effects of methamphetamine on a person's ability to operate a vehicle.

The preservation of this error for appellate review is questionable. While defense counsel did move for a directed verdict on the ground that there was no evidence of impairment, an objection was not made to the instructions, nor were alternate instructions tendered, as required by RCr 9.54(2). Without determining if the error is adequately preserved, we find that the evidence was sufficient to support conviction under either theory of guilt.

There was ample evidence that Appellant used methamphetamine that evening: he admitted as much to both Trooper Jewell and Landrum, and the blood and urine tests confirmed this fact. In addition, Trooper Jewell and Landrum testified that Appellant was driving up to 100/mph on a narrow, country road; that he swerved into the oncoming lane several times; and that he disregarded numerous traffic laws.

To be in violation of KRS 520.095(1)(a) under the "impairment" theory, the Commonwealth must prove that the person is driving under the influence of a substance or combination of substances which impairs one's driving ability. KRS 189A.010(1)(c). Appellant concedes he was "under the influence" of methamphetamine, but argues there was no direct proof that the drug impairs one's driving ability. We have explained what proof is necessary in such instances:

> We take as legislative facts that: 1) alcohol (or other substances) *may* impair driving ability; and 2) a driver actually *under the influence* of such substances is impaired as a driver, conclusively, and presents a danger to the public. Proof that a driver was "under the influence" *is* proof of impaired driving ability.

Bridges v. Commonwealth, 845 S.W.2d 541, 542 (Ky. 1993) (emphasis in

original). See also Hayden v. Commonwealth, 766 S.W.2d 956, 956-57 (Ky. App. 1989) (explaining that KRS 189A.010(1), concerning driving while under the influence of alcohol, would "be redundant if read so as to require proof not only that the defendant was under the influence of alcohol but also that alcohol impairs one's driving ability"). Driving errors, such as those described by Landrum and Trooper Jewell, are not indispensable to a claim of impairment, though they are further evidence of such impairment. Bridges, supra. The evidence was sufficient to support a finding of guilt under either the "impairment" theory of fleeing in the first-degree, or the "risk of harm" theory. As such, there is no unanimity problem. Davis v. Commonwealth, 967 S.W.2d 574, 582 (Ky. 1998).

Appellant next argues that the trial court erred in denying his motion for a new trial. At a hearing on the motion, Appellant claimed that a member of the jury panel did not disclose to the trial court that he and Appellant were related. Apparently, one juror's brother was formerly married to Appellant's first cousin. On appeal, Appellant argues that he was entitled to an evidentiary hearing on this matter. We disagree.

This is not the type of relationship between a juror and the defendant or a witness where bias is to be presumed. Cf. Ward v. Commonwealth, 695 S.W.2d 404, 407 (Ky. 1985) (no error where trial court refused to exclude an ex-brother-in-law for cause). The fact that Appellant did not alert the trial court of this fact during voir dire, presumably because he did not recognize the juror himself, only underscores the absence of any real relationship. There is

no indication that this tenuous relationship would have provided a valid basis for a challenge for cause and, therefore, the trial court did not err in denying Appellant's motion for a new trial. Adkins v. Commonwealth, 96 S.W.3d 779, 796 (Ky. 2003) (To obtain a new trial because of juror mendacity, "a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire,* and then further show that a correct response would have provided a valid basis for a challenge for cause.") (internal citations omitted).

For the foregoing reasons, the judgment of the Muhlenberg Circuit Court is affirmed.

All sitting. All concur.

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