

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001226-DG

COMMONWEALTH OF KENTUCKY

APPELLANT

ON DISCRETIONARY REVIEW FROM PERRY CIRCUIT COURT
v. HONORABLE DOUGLAS C. COMBS, JR., JUDGE
ACTION NO. 00-XX-00002

BARRY L. SMITH

APPELLEE

OPINION

REVERSING AND REMANDING

** ** * * *

BEFORE: BUCKINGHAM, GUIDUGLI AND McANULTY, JUDGES.

GUIDUGLI, JUDGE. The Commonwealth of Kentucky appeals from an order of the Perry Circuit Court reversing the conviction of Barry Lee Smith ("Smith") on the charge of driving under the influence. For the reasons stated herein, we reverse and remand the order on appeal.

The facts are not in controversy. On or about January 29, 2000, Kentucky State Trooper Tim Mullins ("Mullins") and Perry County Deputy Sheriff Ira Napier ("Napier") stopped a

vehicle in Hazard, Kentucky, when it failed to proceed through a green light at an intersection. The vehicle was being driven by Smith, and it contained two additional passengers. Mullins and Napier questioned Smith when they noticed the odor of alcohol and vomit coming from the interior of the vehicle.

Smith stated that he had been consuming alcohol, and Mullins administered a field sobriety test called a horizontal gaze nystagmus test ("HGN"). The test allows an investigating officer to observe a subject's eye movement to assist in determining if the subject is intoxicated. Other tests also were conducted. In Mullin's opinion, one or more tests indicated that Smith was intoxicated. Smith was also given a preliminary breath test ("PBT"), though the results of this test later were ruled inadmissible. Smith was arrested for driving under the influence. Later at the Perry County jail, Smith refused to submit to a breath test.

The matter proceeded to trial in Perry District Court on the charge of driving under the influence.¹ Smith moved for a directed verdict at the close of the Commonwealth's case and again at the end of the trial. As a basis for the motions, Smith argued that the Commonwealth failed to produce evidence sufficient for the matter to go to the jury. He noted that the PBT was ruled inadmissible, and maintained that the HGN test,

¹ Charges including failure to wear a seatbelt and failure to have insurance were dismissed.

taken alone, was not sufficient to support a conviction. The motions were denied, and the jury returned a guilty verdict. Smith was sentenced to a fine of \$200.

Smith appealed to the Perry Circuit Court, arguing that the trial court erred in failing to grant his motions for a directed verdict. Upon considering Smith's argument, the circuit court opined that the HGN test was not sufficient to sustain a conviction. In so doing, the court noted that the National Highway and Safety Administration took the position that the HGN test should not be used as the sole indicator of intoxication. It reversed Smith's conviction, and the Commonwealth now appeals.

The Commonwealth now argues that the circuit court erred in ruling that the evidence against Smith was insufficient to withstand Smith's motions for a directed verdict. It notes that the trooper and deputy sheriff observed Smith's vehicle remain stationary at a green light; that they smelled alcohol coming from the driver's window; that Smith failed the HGN test; that Mullins testified that he believed Smith was intoxicated; that Smith refused to submit to an intoxilyzer 5000 breath test; and, that Smith admitted consuming alcohol and admitted driving the vehicle. The Commonwealth argues that this evidence, when considered in its entirety, clearly is sufficient to withstand a

motion for a directed verdict, and that the circuit court erred in failing to so rule.

As the parties are aware, Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991) sets forth the standard for reviewing motions for a directed verdict. It states that,

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

□ On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Benham, 816 S.W.2d at 187.

We have closely studied the record, the law, and the written arguments, and must conclude that the circuit court erred in ruling that Smith was entitled to a directed verdict. Commonwealth v. Hicks, Ky., 869 S.W.2d 35 (1994) states that a DUI conviction may be upheld based solely on the testimony of the police (" . . . a [DUI] conviction may stand upon the testimony of the police without resort to the various [testing]

devices." Hicks, 869 S.W.2d at 37). In the matter at bar, Trooper Mullins testified that he believed Smith was intoxicated. In light of Hicks, this evidence, taken alone, is sufficient to overcome Smith's motion.

Clearly, if the testimony of the police is sufficient to sustain a conviction which requires proof of guilt beyond a reasonable doubt, it must also be sufficient to withstand a motion for a directed verdict where only "some evidence" is required. Benham, 816 S.W.2d at 188. Even if the circuit court properly concluded that the HGN test was insufficient to withstand Smith's motions, Hicks indicates that the Trooper's testimony by itself is sufficient. As it is uncontroverted that Trooper Mullins testified that he believed Smith was intoxicated, and since Benham requires the trial court to draw all fair and reasonable inferences in favor of the Commonwealth from this testimony, we must conclude that the district court properly denied the motions for a directed verdict.

For the foregoing reasons, we reverse the order of the Perry Circuit Court, and remand the matter to the Perry District Court for any necessary proceedings consistent with this opinion.

ALL CONCUR.

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