

RENDERED: MAY 13, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001350-DG

WILLIAM LARRY MILLS

APPELLANT

ON DISCRETIONARY REVIEW FROM MARION CIRCUIT COURT
v. HONORABLE ALLAN R. BERTRAM, JUDGE
ACTION NO. 00-XX-00015

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: McANULTY AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹

McANULTY, JUDGE: Following a traffic stop, William Larry Mills was arrested on April 24, 2000, and charged with violation of KRS 189A.010, driving under the influence. Subsequently, the Commonwealth filed a motion in limine seeking to prohibit the introduction of "any evidence concerning whether or not the

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Defendant was under the influence on April 24, 2000, including evidence of field sobriety tests" and the videotape of the traffic stop.

The Commonwealth asserted that it was electing to prosecute the case under KRS 189A.010(1)(a), also known as the *per se* portion of the driving under the influence statute. The Commonwealth argued that because it would be trying the case under subsection (1)(a), evidence of whether Mills was under the influence, other than the evidence of the Breathalyzer result of .10 or greater (the limit at the time of Mills' arrest), was irrelevant. The Commonwealth cited King v. Commonwealth, 875 S.W.2d 902 (Ky.App. 1993), as authority. Although we find no order in the record, both parties to this appeal agree that the court essentially sustained the Commonwealth's motion. Thereafter, Mills entered a conditional plea of guilty, and reserved the right to challenge the court's evidentiary rulings.

On appeal to the Marion Circuit Court, the trial court's ruling prohibiting the introduction of other evidence was affirmed. The circuit court agreed that the other evidence as to Mills' impairment or lack thereof was not relevant to a prosecution under KRS 189A.010 for having a blood alcohol concentration over the limit, and therefore was not admissible under KRE 402. The circuit court thus affirmed Mills' conviction and remanded the case to the district court for

further proceedings. The case was placed in abeyance while Mills petitioned this Court for discretionary review.

In 2003, a panel of this court decided Commonwealth v. Mattingly, 98 S.W.3d 865 (Ky.App. 2002), in which a defendant argued against a court's exclusion of other evidence in a trial for driving under the influence in a prosecution under KRS 189A.010. This Court held that such evidence could constitute relevant circumstantial evidence that the test result was inaccurate. Therefore, exclusion of the evidence was not proper. The Kentucky Supreme Court denied discretionary review of Mattingly, and ordered this Court's opinion published.

In this discretionary review action, Mills urges us to find that the motion in limine below was improper because evidence of intoxication is relevant and admissible at trial. In addition, Mills argues that the exclusion of such evidence violates Section 11 of the Kentucky Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. Mills argues that this is the same issue as in Mattingly, and Mills' position on appeal was found to be valid in that case.

We agree that the issue in the case at bar is identical to that raised in Mattingly. Moreover, we concur with the holding of Mattingly. Therefore, we adopt that opinion as the opinion of this Court in this case. We thus reverse the order of the Marion Circuit Court and remand this case to the

District Court for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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