RENDERED: November 21, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001682-MR

AARON MATTHEW DEARMOND — APPELLANT

v.

APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 01-CR-00187

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

** ** ** ** **

BEFORE: BAKER AND SCHRODER, JUDGES; AND HUDDLESTON, SENIOR JUDGE.[1]

SCHRODER, JUDGE. This is an appeal from a judgment convicting appellant of fourth offense driving under the influence ("DUI"), second offense operating a vehicle on a DUI suspended license, and receiving stolen property over $300. Because the instruction on the fourth offense DUI charge improperly included

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

an alternative theory completely unsupported by the evidence (that appellant was driving under the influence of a substance other than alcohol), we must vacate the conviction on that offense. We reject appellant's remaining arguments as being either unpreserved or meritless. Hence, we affirm in part and vacate in part and remand the matter for further proceedings.

On the afternoon of August 30, 2001, Charlotte Tipton drove her gray 1993 Oldsmobile Cutlass Ciero to Betty B's, a bar in Bowling Green, and parked across from the back door. At some point, she went out to roll up her windows, left the keys in the console, and went back in the bar. When she came out thirty minutes later, her car was gone. According to Tipton, everyone in the bar that afternoon knew each other except three men who appeared to be brothers. They were playing pool, arguing loudly, and drinking tequila shots. When Tipton came back in the bar after discovering her car was gone, she noticed the younger of the three men was gone. She described the young man as medium build, wearing jeans and a t-shirt, with long, scraggly, dishwater blond hair. She testified that during the time she had been in the bar, he had been in and out of the bar at least twice. When it was discovered that Tipton's car was gone, the other two men called a cab and left.

It is undisputed that Tipton's car was involved in a car accident on the night in question. Shena Davis testified

that at around midnight she heard a loud noise and looked out her window and saw that a car, later identified as Tipton's, had crashed into the ditch in front of her house. She saw the driver's side door opening and a man starting to get out of the car. At that point, all she could say about the man, whom she later identified as the appellant, was that he had light-colored hair. She saw no one else in the car and never saw anyone else get out of the car. Davis further testified that she immediately got up and went outside to see if the man was alright, which took her anywhere from seconds to no more than a minute. When she opened the door, the same man was halfway outside the driver's side door. As the man then began walking away, she asked him if he was alright and, after she asked a second time, he said he was fine. Davis recalled that she asked him if anyone else was in the car with him and he said no, he was by himself. The man thereupon walked away from the scene and Davis called the police. According to Davis, a passerby reached in the car and turned off the ignition after the injured man left the scene.

Appellant, Aaron Dearmond, admitted to being in the vehicle in question when it crashed. He testified, however, that he got in the car as a passenger when an acquaintance of his named Jim Meyer offered him a ride outside Betty B's because he was in an argument with his brother. According to Dearmond,

he and Meyer stopped to buy a twelve-pack of beer after which he passed out and does not remember anything until he awoke when his forehead bounced off the dashboard. Dearmond claimed that Meyer then jumped out of the driver's side and took off running. Dearmond's brother, Terry, testified that he saw Dearmond get in the passenger's side of a blue 1980s model Pontiac Grand Prix or Grand Am. Terry stated that he did not know the driver, but that it was a guy who Dearmond had earlier been talking to in the bar.

Upon arriving at the scene, the police soon learned that the car had been stolen. Noting that the windshield had been broken and there was blood on the steering wheel, the police began searching the area for the injured driver. Shortly thereafter, Dearmond, whose face was bloody and who met the description given by Davis, was spotted and stopped by police. Initially, Dearmond stated that he had not been involved in a car wreck, but subsequently said he had not been driving and that he hit his head on the windshield. At that point, Officer Mills noticed that Dearmond smelled strongly of alcoholic beverages and decided to transport him back to the scene to see if Davis could identify him. At the scene, Davis identified Dearmond as the man she saw exiting the driver's side of the vehicle. Dearmond was then asked to submit to several field sobriety tests, all of which he failed. Dearmond was then

placed under arrest and transported to the police station where he consented to a breath test which showed his blood alcohol level to be 0.140.

Dearmond was indicted for fourth offense operating a motor vehicle under the influence, receiving stolen property over $300, and driving on a DUI suspended license, second offense. Pursuant to a jury trial, he was found guilty of all three charged offenses and sentenced to 10 years' imprisonment. This appeal followed.

Dearmond first argues that the trial court erred in allowing in certain testimony which he maintains was evidence of a prior bad act in violation of KRE 404(b). During the Commonwealth's case, the prosecution called Steve Brown, who was in the bar on the afternoon in question. Brown testified that there was a man in the bar that day who kept arguing with his brothers and then going outside. At one point, the man came up to the man sitting behind Brown and asked him if that was his black truck outside. The man replied that it wasn't, but that it was Brown's. The man then stated to Brown, "I started to steal it awhile ago." Brown testified that he told him he wished he had stolen the truck because it would not start. Brown stated that the man was gone later in the afternoon. It was undisputed that no one tried to steal Brown's truck that

day. Further, Brown could not identify the man in question at trial.

When the prosecution first called Brown as a witness, defense counsel objected, arguing that Brown's testimony regarding the man's statement that he almost stole Brown's truck earlier was irrelevant and that its prejudicial effect outweighed its probative value. The court overruled the objection.

On appeal Dearmond contends that Brown's testimony constituted evidence of other crimes, wrongs or prior bad acts in violation of KRE 404(b). However, defense counsel did not argue this rule as the basis for his objection and never raised the fact that it was evidence of "other crimes, wrongs or acts" at trial. He merely argued relevancy (KRE 402) and its prejudicial effect (KRE 403), which are two different grounds. "The appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court." Kennedy v. Commonwealth, Ky., 544 S.W.2d 219, 222 (1976). Accordingly, this issue was not preserved for our review.

Dearmond's second argument is that the instruction on the fourth offense DUI charge was in error because it encompassed three theories of guilt, one of which there was no evidence. The instruction at issue read as follows:

> You will find the Defendant guilty of Operating a Motor Vehicle With Alcohol Concentration of or Above 0.08 or While under the Influence of Alcohol or Other Substance Which Impairs Driving Ability (DUI), under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> That in this county on or about August 31, 2001, he operated a motor vehicle;
>
> AND
>
> That while doing so, he was Under the Influence of Alcohol or Other Substance Which Impairs One's Driving Ability, or the alcohol concentration in his blood or breath was of or above .08.

At trial, Dearmond objected to the above instruction on grounds that there was no evidence that he was under the influence of any substance other than alcohol on the night in question. The Commonwealth concedes that there was only evidence presented at trial that he was under the influence of alcohol. Consequently, it is Dearmond's position that since all three theories of guilt were offered in the same instruction, there was no way of determining whether jurors relied on the theory of guilt completely unsupported by the evidence (that he operated a motor vehicle under the influence of a substance that impairs one's driving ability other than alcohol), hence, the possibility of a nonunanimous verdict. According to Dearmond, giving such an instruction constitutes reversible error under Burnett v. Commonwealth, Ky., 31 S.W.3d 878 (2000).

In Burnett, the instruction for trafficking in a controlled substance contained multiple theories of guilt (possession with intent to manufacture, distribute, dispense, sell or transfer) when there was evidence of only one theory of guilt (possession with intent to sell). Relying on Boulder v. Commonwealth, Ky., 610 S.W.2d 615 (1980), overruled on other grounds, Dale v. Commonwealth, Ky., 715 S.W.2d 227 (1986), and Hayes v. Commonwealth, Ky., 625 S.W.2d 583 (1981), the Court found that such an instruction violates Section 7 of the Kentucky Constitution which guarantees a criminal defendant the right to a unanimous verdict.

The Commonwealth acknowledges that Dearmond's reliance on Burnett is well placed, but nevertheless urges us to ignore the holding in Burnett in favor of the United States Supreme Court's treatment of the issue in Griffin v. United States, 502 U.S. 46, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991). The Court in Griffin held that the defendant's right to a unanimous verdict under the United States Constitution was not abridged by a multiple theory instruction where one of the theories was factually unsupported, see Turner v. United States, 396 U.S. 398, 90 S. Ct. 642, 24 L. Ed. 2d 610 (1970), as opposed to being legally unsupported, see Yates v. United States, 354 U.S. 298, 77 S. Ct. 1064, 1 L. Ed. 2d 1356 (1957), overruled in part on other grounds, Burks v. United States, 437 U.S. 1, 98 S. Ct.

2141, 57 L. Ed. 2d 1 (1978). The Griffin Court reasoned that a jury is not equipped to determine whether a particular theory is contrary to law, but is capable of determining whether a theory is supported by the facts i.e. the Griffin Court gave the jury credit for being able to disregard and not convict based on a theory not factually supported by the evidence. Griffin, 502 U.S. at 59.

As the Commonwealth well knows, this Court is not in a position to overrule or ignore a holding of our state's highest Court. Tucker v. Tri-State Lawn & Garden, Inc., Ky. App., 708 S.W.2d 116 (1986). Rather, we are constrained to follow precedent. SCR 1.030(8)(a). We would note that Griffin was rooted in the Due Process Clause of the United States Constitution, whereas the Court in Burnett based its decision on the United States Constitution and Section 7 of the Kentucky Constitution, which was its prerogative.

Nor can we view the instant case as distinguishable from Burnett. One could argue that the portion of the instructions providing "or other substance which impairs one's driving ability" did not constitute an alternate theory of guilt because it was to be considered along with alcohol to be part of the "under the influence" theory of guilt i.e. there were only two theories of guilt presented – the "under the influence"

theory and the "alcohol concentration" theory. Apparently, that was the basis of the lower court's ruling in this case allowing the instruction to stand. However, given the language in Burnett, it would seem to be applicable to any instruction with an alternative finding on any fact comprising the offense:

> The requirement that the Commonwealth must prove beyond a reasonable doubt every fact necessary to constitute the crime with which a defendant is charged is a basic and fundamental protection of the Due Process Clause of the United States Constitution. Section 7 of the Kentucky Constitution and RCr 9.82(1) guarantee a defendant the right to a unanimous verdict. Construed together, these two constitutional provisions require that each juror's verdict be based on a theory of guilt in which the Commonwealth has proven each and every element beyond a reasonable doubt. (emphasis added) (citation omitted).

Burnett, 31 S.W.3d at 883-884.

Since it is possible that a juror in the present case could have voted to convict Dearmond under the theory that he was operating a motor vehicle under the influence of a substance other than alcohol, we must vacate the conviction for fourth offense DUI pursuant to the dictates of Burnett and remand for further proceedings.

Dearmond's final argument is that trial court erred when it refused to grant his motion for directed verdict on all the charges based on there being insufficient evidence that he was driving the vehicle in question. "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." Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). Dearmond does not deny that he was in the car in question when it wrecked into the ditch. Dearmond simply maintains that there was insufficient evidence that he was ever operating or in physical control of the car, pointing to his brother's testimony that he saw Dearmond get in a car outside the bar as a passenger and the fact that no one saw him stealing or driving the car.

Circumstantial evidence can be considered in determining whether an individual charged with DUI was in physical control of a motor vehicle. Blades v. Commonwealth, Ky., 957 S.W.2d 246 (1997). Wells v. Commonwealth, Ky. App., 709 S.W.2d 847, 849 (1986), set out several factors that a court should consider in making that determination:

> (1) whether or not the person in the vehicle was asleep or awake; (2) whether or not the motor was running; (3) the location of the vehicle and all of the circumstances bearing on how the vehicle arrived at that location; and (4) the intent of the person behind the wheel. (citation omitted).

Shena Davis testified that Dearmond was awake and climbing out of the driver's side door when she first saw the

car after the crash. She also testified that the car's motor was still running after the crash until a passerby turned it off. As to how the car arrived in the ditch, the evidence is undisputed that the car was driven into the ditch immediately prior to Davis seeing it. It is also undisputed that Dearmond's face/head was bloody after the accident and there was blood found on the steering wheel. Finally, Davis testified that Dearmond told her he was by himself when she asked him if anyone else was in the car. Although no one saw Dearmond actually driving the car, we believe the above constituted more than sufficient circumstantial evidence that Dearmond was in physical control of the vehicle on the night in question. Accordingly, the lower court properly denied the motion for directed verdict.

For the reasons stated above, the judgment of the McCracken Circuit Court is affirmed in part as to the convictions for second offense driving on a DUI suspended license and receiving stolen property over $300, and vacated as to the fourth offense DUI conviction and the matter remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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