

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000632-DG

BRENT T. CULVER

APPELLANT

ON DISCRETIONARY REVIEW
FROM NELSON CIRCUIT COURT
v. HONORABLE LARRY D. RAIKES, JUDGE
ACTION NO. 95-XX-00023

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM AND VANMETER, JUDGES; AND EMBERTON, SENIOR JUDGE.¹

VANMETER, JUDGE: Brent T. Culver filed a petition for discretionary review with this Court and requested a review of an appellate opinion of the Nelson Circuit Court entered on November 18, 2002 which affirmed the Nelson District Court's denial of Culver's motion to suppress the results of his blood alcohol test. Finding no error, this Court affirms the Nelson

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.

Circuit Court's opinion and the Nelson District Court's denial of Culver's motion to suppress.

On March 29, 1995, in Nelson County, Culver was arrested by Kentucky State Trooper Gosser and charged with driving under the influence of alcohol (DUI). KRS 189A.010. Trooper Gosser transported Culver to the Nelson County Jail where Culver submitted to a breath test to determine his blood alcohol (BA) level. Trooper Gosser used a breath test machine known as the Intoxilyzer 5000® (Intoxilyzer), which is the standard machine used throughout the Commonwealth. The twenty minute observation period began at 23:57. The printout from the Intoxilizer indicates that the first air blank test was performed at 00:16, the calibration check at 00:16, the second air blank test at 00:17, the subject test at 00:17, and the third and final air blank test at 00:18.² According to the test results, Culver had a blood alcohol level of .165, which was well above .10, the legal limit at the time.

Culver filed a motion to suppress with the Nelson District Court and argued that the test results should have been suppressed because Trooper Gosser did not observe Culver for

² The air blank tests, or ambient air analysis, performed by the Intoxilizer 5000 are designed to insure that no lingering alcohol is in the testing chamber. During the calibration check, a solution having a known concentration of .10 alcohol is introduced into the machine to check its calibration. In the instant case the calibration check indicated .099, which was within the parameters of "plus or minus 0.005 alcohol concentration units" required by 500 KAR 8:020 § 2(1).

twenty (20) minutes as required by statute and regulation, and because the particular Intoxilyzer used had not been approved by the secretary of the Justice Cabinet. The trial court denied Culver's suppression motion and Culver entered a conditional guilty plea contingent upon his right to appeal. Culver appealed to the Nelson Circuit Court, which affirmed the trial court's denial. This Court accepted discretionary review on April 21, 2003.

On discretionary review, Culver argues that the trial court erred in denying his suppression motion, asserting that Trooper Gosser failed to observe Culver for twenty minutes prior to the administration of the breath test, as required by 500 KAR 8:030. Culver states that the observation time in this instance was only nineteen minutes. He arrives at this conclusion by arguing that the breath test consists of five parts,³ beginning with the first ambient air analysis, and since the test card indicates that portion began at 00:16, and Trooper Gosser's official observation time began at 23:57, the observation time was nineteen minutes, notwithstanding that the actual analysis of Culver's breath was at 00:17.

Under 500 KAR 8:030 §1(1), presence sense perception is required for "at least twenty (20) minutes prior to breath

³ 500 KAR 8:030 §1(2) mandates that the breath alcohol concentration test shall consist of five sequential steps, the fourth of which is the subject's breath sample analysis.

alcohol analysis." Culver has overlooked that the twenty minutes is required prior to "breath alcohol analysis" not prior to the "breath alcohol concentration test." Under a plain reading of the regulation, the start time of the overall test is irrelevant. The times of the calibration check and the second ambient air analysis are also irrelevant. The time of the subject's "breath alcohol analysis" is controlling. The relevant issue is whether the officer had the subject under presence sense perception, or personal observation, for twenty minutes prior to the actual analysis or test of the subject's breath. In the instant case, the record is clear that Officer Gosser had Culver under presence sense perception for twenty minutes prior to Culver's breath alcohol analysis, as required by the regulation.

Culver cites *Commonwealth Transportation Cabinet Department of Vehicle Regulation v. Mullins*, Ky. App., 812 S.W.2d 164, 165 (1991) and *Boulder v. Commonwealth*, Ky., 610 S.W.2d 615, 618 (1980), *overruled by Dale v. Commonwealth*, Ky., 715 S.W.2d 715 (1986), for the proposition that "doubts in the construction of a penal statute will be resolved in favor of lenity and against a construction which would produce extremely harsh or incongruous results." These cases, however, do not compel a different result. The statute, KRS 189A.103, and regulation, 500 KAR 8:030 § 1, are neither ambiguous nor

extremely harsh. All that is required is twenty minutes of observation prior to analysis of the subject's breath.⁴

When this Court reviews suppression issues, it first reviews the trial court's factual findings to determine whether the findings were supported by substantial evidence. If supported by substantial evidence, the factual findings will be conclusive. RCr 9.78. Next, this Court reviews *de novo* the circuit court's application of the law to the facts to determine whether the trial court's legal conclusions were correct. *Commonwealth v. Neal*, Ky. App., 84 S.W.3d 920, 923 (2002).

In this instance, the trial court's findings were supported by substantial evidence, and are therefore conclusive. This Court will not disturb the trial court's decision since it properly applied the law to the facts and concluded that Trooper Gosser complied with the twenty-minute observation period.

Therefore, this Court affirms the circuit court's opinion and the district court's denial of the Culver's motion to suppress.

⁴ The twenty-minute observation period exists so the Intoxilyzer's operator can testify truthfully that a DUI suspect, prior to the test, did not belch, regurgitate, or smoke, or place anything into his mouth or nose, since any of the above might affect the accuracy of the breath test. *Eldridge v. Commonwealth*, Ky. App., 68 S.W.3d 388, 391 (2002) (citing *Tipton v. Commonwealth*, Ky. App., 770 S.W.2d 239, 240 (1989) and 500 KAR 8:030 § 1(1)). In addition, the period exists, "to ensure that any residual alcohol present in the mouth has dissipated so that the Breathalyzer® machine measures only the alcohol content of breath exhaled from the lungs." *Id.* at 392. Given the purpose of the observation period, common sense dictates that the Intoxilyzer's operator should observe a DUI suspect until the suspect actually exhales into the Intoxilyzer's receptacle.

ALL CONCUR.

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