

RENDERED: OCTOBER 14, 2005; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court Of Appeals**

NO. 2004-CA-001764-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE F. KENNETH CONLIFFE, JUDGE  
ACTION NO. 04-CI-003491

HON. DONALD ARMSTRONG,  
JUDGE, JEFFERSON DISTRICT COURT

APPELLEE

AND

SHEILA CARTER BROADY

REAL PARTY IN INTEREST

OPINION  
AFFIRMING

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BEFORE: KNOFF AND TACKETT, JUDGES; AND ROSENBLUM, SENIOR  
JUDGE<sup>1</sup>.

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<sup>1</sup> Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

KNOFF, JUDGE: The Commonwealth appeals from an order of the Jefferson Circuit Court denying its petition to prohibit the Jefferson District Court from enforcing an order suppressing breathalyzer-test results in a DUI case styled Commonwealth of Kentucky v. Sheila Carter Broady.<sup>2</sup> The Commonwealth argues that the district court erred in finding that the police officer did not reasonably accommodate Broady's request for an independent blood test as required by KRS 189A.103(7). Based upon the facts of this particular case, the district court did not abuse its discretion and the circuit court did not err by denying the Commonwealth's petition. Hence, we affirm.

The underlying facts of this action are not in dispute. On May 31, 2003, at approximately 1:30 a.m., a vehicle driven by the real party in interest, Sheila Carter Broady was stopped by an officer of the Louisville Metro Police Department. After observing Broady and conducting a field sobriety test, the officer arrested Broady for driving under the influence (DUI)<sup>3</sup> and failure to produce proof of automobile insurance.<sup>4</sup> Officer Michael Bogan

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<sup>2</sup> No. 03-T-033852.

<sup>3</sup> KRS 189A.010. Broady was subsequently charged in district court with DUI, first offense.

<sup>4</sup> KRS 304.39-080.

arrived at the arrest scene and then transported Broady to Metro Corrections where a breathalyzer test was performed. The test produced a blood-alcohol reading of .128.

Thereafter, Broady requested an independent blood test. Broady testified that, when asked where she wanted to go for the test, she indicated either Baptist East Hospital or Suburban Hospital, but she did not give a preference. Officer Bogan testified that Broady asked to be taken to Baptist East. However, the breathalyzer operator's test report reflected that Broady asked to be taken to "Norton's" hospital. Norton Healthcare owns a number of hospitals in Louisville Metro, including Norton Suburban Hospital.

Officer Bogan transported Broady to Baptist East Hospital. When they arrived at the hospital, Officer Bogan left Broady in the car, went inside, and asked a nurse about having an independent blood test performed. The nurse informed Officer Bogan that Baptist East did not perform such tests. He then returned to the car and relayed this information to Broady. But he did not offer to take Broady to another hospital, nor did Broady ask to be taken to another hospital. Rather, Officer Bogan drove Broady back to Metro Corrections.

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Prior to trial in Jefferson District Court, Broady moved to suppress the results of the breathalyzer. Officer Bogan and Broady testified at the hearing. At the conclusion of the hearing, the district court, per Hon. Donald Armstrong, granted the motion to suppress. The court found that Officer Bogan had failed reasonably to accommodate Broady's request for an independent blood test. Thereupon, the Commonwealth filed a petition for writ of prohibition with the Jefferson Circuit Court. After reviewing the record and the arguments of counsel, the circuit court denied the petition. The Commonwealth appeals from that ruling.

A writ of prohibition may be granted upon a showing that (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted.<sup>5</sup> There is no question that the district court was acting within its jurisdiction in

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<sup>5</sup> Hoskins v. Maricle, 150 S.W.3d 1, 10 (Ky. 2004).

granting the motion to suppress. However, the circuit court correctly noted that the Commonwealth cannot bring an interlocutory appeal from a district court ruling.<sup>6</sup> If the trial court's ruling on the suppression motion is incorrect, then the Commonwealth will suffer irreparable injury and there is no adequate remedy by appeal. Consequently, the circuit court properly focused on the propriety of the trial court's suppression ruling.

RCr 9.78 sets out the procedure for conducting suppression hearings and establishes the standard of appellate review of the determination of the trial court. Our standard of review of a court's decision on a suppression motion following a hearing is twofold: First, the factual findings of the court are conclusive if they are supported by substantial evidence; and second, this Court conducts a *de novo* review to determine whether the trial court's decision is correct as a matter of law.<sup>7</sup>

The Commonwealth does not challenge the district court's factual determinations. Rather, this case turns on

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<sup>6</sup> See Tipton v. Commonwealth, 770 S.W.2d 239 (Ky.App. 1989), holding that there is no statutory authority for the Commonwealth to bring an interlocutory appeal from a district court proceeding. Rather, relief is only available through an original proceeding for mandamus or prohibition in the circuit court. Id. at 241.

<sup>7</sup> Adcock v. Commonwealth, 967 S.W.2d 6, 8 (Ky. 1998).

the application of KRS 189A.103, which provides that any person who operates a motor vehicle in this Commonwealth shall be deemed to have given consent to blood, breath, or urine testing for alcohol or other substances which may impair one's driving ability. KRS 189A.103(1) Subsection (7) further provides:

After the person has submitted to all alcohol concentration tests and substance tests requested by the officer, the person tested shall be permitted to have a person listed in subsection (6) of this section of his own choosing administer a test or tests in addition to any tests administered at the direction of the peace officer. Tests conducted under this section shall be conducted within a reasonable length of time. Provided, however, the nonavailability of the person chosen to administer a test or tests in addition to those administered at the direction of the peace officer within a reasonable time shall not be grounds for rendering inadmissible as evidence the results of the test or tests administered at the direction of the peace officer.

In Commonwealth v. Long,<sup>8</sup> this Court addressed the extent of the police's duty to accommodate an individual who requests an independent blood test under this statute. In Long, the defendant did not have her purse with her when she was arrested for DUI. The police officer told the

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<sup>8</sup> 118 S.W.3d 178 (Ky.App. 2003).

defendant that the independent blood test could only be performed at a certain hospital. In addition, the police officer refused to allow the defendant to call a friend to bring money to the hospital to pay for the test. Consequently, the defendant was unable to have the test performed and subsequently moved to suppress the breathalyzer results.

This Court held that KRS 189A.103(7) requires some minimal police allowance and assistance to facilitate an individual who requests an independent blood test. Because an individual is in police custody during the period when he or she is entitled to the test, the individual does not have the liberty of arranging for the test herself. The statute makes at least one provision for police assistance, which is police transportation to the independent testing facility. The Court in Long further held that police officers have a duty to provide other assistance as may reasonably be necessary under the circumstances to facilitate an individual who has requested an independent blood test.<sup>9</sup> Factors to be considered in determining the reasonableness of the police assistance include, but are not limited to, the following: (1)

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<sup>9</sup> Id. at 183.

availability of or access to funds or resources to pay for the requested test; (2) a protracted delay in the giving of the test if the officer complies with the accused's requests; (3) availability of police time and other resources; (4) location of requested facilities, e.g., the hospital to which the accused wants to be taken is nearby but in a different jurisdiction; (5) opportunity and ability of accused to make arrangements personally for the testing.<sup>10</sup> Based upon the facts presented in Long, this Court concluded that the police officer had failed to reasonably accommodate the defendant's request for an independent blood test.

In the current case, the Commonwealth argues that Officer Bogan acted reasonably under the circumstances to accommodate Broady's request. The Commonwealth points out that Broady did not specify a preference for a particular hospital, but stated that either Baptist East or one of the Norton Hospitals would be sufficient. Furthermore, the Commonwealth notes that Broady never requested to be taken to a different hospital after Officer Bogan told her that Baptist East would not perform the test. In the absence of a specific request from Broady, the Commonwealth asserts

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<sup>10</sup> Id. at 184; *citing State v. Buffington*, 189 Ga.App. 800, 377 S.E.2d 548, 550 (1989).

that Officer Bogan was not obligated to take her to a different hospital of his own accord.

The Commonwealth couches its argument in terms of whether Broady had a duty to request to be taken to another hospital and whether Officer Bogan had a legal duty to do so in the absence of a specific request. However, Commonwealth v. Long makes it clear that the inquiry into reasonableness of the officer's action involves an application of an articulated legal standard to factual findings. Thus, we review the district court's ruling under an abuse-of-discretion standard.<sup>11</sup> Where there is no dispute concerning the facts or the applicable law, an abuse of discretion should be found only where the factual underpinning for application of an articulated legal rule is so wanting as to equal, in reality, a distortion of the legal rule.<sup>12</sup> Although this is a close case, we agree with the circuit court that the district court did not abuse its discretion by finding that Officer Bogan failed to reasonably accommodate Broady's request.

The Commonwealth raises a valid point that Broady did not specify a particular hospital for the test, nor did

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<sup>11</sup> Grange Mutual Insurance Co. v. Trude, 151 S.W.3d 803, 809 (Ky. 2004).

<sup>12</sup> Id.

she ask to be taken to a different hospital when Baptist East refused to perform the test. However, Broady makes a valid response that an individual arrested for DUI is unlikely to know exactly which hospitals will perform an independent blood test. The trial court accepted Broady's testimony that she asked to be taken to either Baptist East or to a Norton hospital. In addition, the breathalyzer operator's report states that Broady asked to be taken to Norton. Officer Bogan testified that he had never gone to Baptist East for a blood test, but he was aware that Norton had done independent blood testing in the past. Nevertheless, he chose to take Broady to Baptist East first.

Having made this decision, albeit in good faith, Officer Bogan should have at least asked Broady if she wanted to be taken to a different hospital after his first choice proved wrong. Although Broady did not make such a request after being informed that Baptist East would not perform the test, she had already asked to be taken to a Norton hospital. There was no evidence in the record that the delay in transporting Broady to Suburban would be unreasonable or that Officer Bogan was needed elsewhere. Finally, the district court and the circuit court both took notice of the fact that Norton Suburban Hospital is

approximately a one mile drive from Baptist East Hospital.  
The trial court's conclusions from the evidence are not  
clearly unreasonable based on the circumstances of this  
case.

Accordingly, the order of the Jefferson Circuit  
Court denying the Commonwealth's petition for a writ of  
prohibition is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR  
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