RENDERED: JULY 21, 2006; 10:00 A.M.
ORDERED NOT PUBLISHED BY KY. SUPREME COURT: DECEMBER 13, 2006
(2006-SC-000607-D)

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002207-DG

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

ON DISCRETIONARY REVIEW FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 04-XX-00055

STEPHEN BRADLEY FILBEN — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: MINTON AND SCHRODER, JUDGES; MILLER,[1] SPECIAL JUDGE.

MILLER, SPECIAL JUDGE: This matter is before us upon an Order of this court dated July 28, 2005, granting discretionary review.[2] We affirm in part and reverse and remand in part.

During the early morning hours of February 19, 2005, Officer Douglas Curtis of the St. Matthews Police Department in Jefferson County, Kentucky, observed a 2004 Jetta automobile traveling in a southerly direction on Breckinridge Lane.

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[1] Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

[2] See Kentucky Rules of Civil Procedure (CR) 76.20.

Concluding that the vehicle was traveling at an excessive rate of speed and that it had inoperative tail lamps, Officer Curtis effected a stop. The vehicle was operated by the Appellee, Steven Bradley Filben. Filben was asked to exit the car. He appeared unsteady on his feet. He was administered, and failed, a number of field sobriety tests. According to a Criminal Complaint later filed, the vehicle and Filben smelled of alcohol.

Filben was placed under arrest and taken to Metro Corrections, where he was administered a Breathalyzer® test. Filben was charged with driving under the influence of alcohol[3] (DUI) and operating a motor vehicle with no working tail lamps.[4] In accordance with KRS 189A.103(7) Filben requested an independent alcohol concentration test[5], and that he be taken to University Hospital for same. Officer Curtis transported Filben to that institution, where he was advised that the hospital had

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[3] Kentucky Revised Statutes (KRS) 189A.010

[4] KRS 189.050.

[5] KRS 189A.103(7) provides as follows: "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."

a policy of not performing such tests.[6] Consequently, Filben was unable to obtain an independent test at University Hospital. For whatever reason, he was not tested elsewhere. Because he had not received an independent test in compliance with his request, Filben moved to suppress the results of the Commonwealth's Breathalyzer® test administered following his arrest.

According to Filben's suppression hearing testimony, at some point during the venture to University Hospital Officer Curtis informed him that he was only entitled to "one" opportunity to obtain a private test.[7] After University Hospital refused the testing, Officer Curtis informed Filben that Suburban Hospital performed private blood/alcohol testing. Filben, however, did not request to be taken there, as he believed such a request would be of no avail because of the purported "one-stop rule."

The District Court concluded that the efforts of Officer Curtis did not meet the "reasonable efforts" standard as set forth in Commonwealth v. Long, 118 S.W.3d 178 (Ky. 2003). Specifically, the court stated as follows: "The facts reveal

[6] One can only speculate as to whether it was a simple preference of the hospital not to become entangled in sobriety testing or whether the institution thought its purpose could better be advanced by directing its resources toward the care and treatment of patients rather than Crime and Punishment.

[7] Officer Curtis testified that he "did not recall" telling Filben this.

[the] police officer failed to provide Defendant with the independent test to which he was entitled under the totality of circumstances." As a result, the court ordered that the results of the Commonwealth's Breathalyzer® test rendered at Metro Corrections be suppressed. In addition, over the Commonwealth's objection, the District Court summarily dismissed the charges against Filben. Upon appeal, the Jefferson Circuit Court affirmed. We subsequently granted discretionary review.

An appellate court's standard of review of the trial court's decision on a motion to suppress requires that we first determine whether the trial court's findings of fact are supported by substantial evidence. Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky.App. 2002). If they are, then they are conclusive. Kentucky Rules of Criminal Procedure (RCr) 9.78. Based on those findings, we must then conduct a *de novo* review of the trial court's application of law to those facts to determine whether its decision is correct as a matter of law. Id.; Adcock v. Commonwealth, 967 S.W.2d 6, 8 (Ky. 1998); Commonwealth v. Opell, 3 S.W.3d 747, 751 (Ky.App. 1999).

First, the Commonwealth contends that the District Court erred in concluding that Officer Curtis failed to comply with the "reasonable efforts" requirement as articulated in Commonwealth v. Long, supra. Long involved a situation in which an arrestee sought a private test and was denied the opportunity

to make a phone call to obtain the funds necessary for the testing. In some detail the court addressed an arrestee's rights under KRS 189A.103(7):

> Under our statutory scheme however, an individual arrested for driving under the influence who has submitted to the initial test administered by the state is allowed an independent test "to obtain another result to compare with or controvert the police officer's test." Commonwealth v. Minix, Ky., 3 S.W.3d 721, 724 (1999); KRS 189A.103(7).
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> The officer *shall* make reasonable efforts to provide transportation to the tests.
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> In construing the statutory scheme of KRS Chapter 189A, we believe the plain meaning and unambiguous intent expressed by our legislature is that once an individual has submitted to the state's breath, blood or urine test to determine his or her alcohol concentration, that individual has a statutory right to have an independent test by a person of his or her own choosing within a reasonable time of the arrest at the individual's own expense. Moreover, our legislature makes provisions to insure that individuals who have been arrested for driving under the influence know that they have this right by mandating that the police inform them of their right at least two different times. In order to give effect to this right, the statute requires some minimal police allowance and assistance.
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> Because an individual is in police custody during the period when he or she is entitled

to an independent blood test, the statute requires some level of facilitation by the police to afford the individual this right. In other words, by the nature of the proceedings, the individual does not have the liberty of arranging for the test himself, so the statute makes at least one provision for police assistance, which is police transportation to the independent testing facility.

. . . .

Other jurisdictions having similar statutory schemes and having considered the level of facilitation required by the police have also taken a totality of the circumstances approach. See State v. Buffington, 189 Ga.App. 800, 377 S.E.2d 548 (1989); State v. Messner, N.D., 481 N.W.2d 236, 240 (1992) ("Whether the accused has made a reasonable request for an independent test and whether police have interfered by denying the accused a reasonable opportunity to obtain that test depend on the totality of the circumstances."); Bilbrey v. State, Al.App., 531 So.2d 27, 30 (1987); Commonwealth v. Alano, 388 Mass. 871, 448 N.E.2d 1122, 1128 (1983). *See generally* John P. Ludington, Annotation, Drunk driving: Motorist's right to private sobriety test, 45 A.L.R.4th 11 (1986.) In Buffington, the Georgia court of appeals concluded that the police did not give an individual arrested for driving under the influence the opportunity to have an independent blood test when that individual came up a few dollars short of the required amount, and the police officer did not permit him to contact a relative to bring him the remainder. See id. at 549. In reaching this conclusion, the appellate court considered the applicable Georgia statute that allowed one accused of driving under the influence the right to have a chemical analysis of his blood and urine by a qualified person of his own choosing. See id. at 550. Moreover, the court held that

there was a “corresponding duty on the part of law enforcement officers not to refuse or fail to allow the accused to exercise that right.” Id.

. . . .

Similar to our statute, the Georgia statute stated that “the justifiable failure or inability to obtain an additional test shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer.” Id. (citing O.C.G.A. § 40-6-392(a)(3)). Accordingly, the Georgia appellate court held that it was incumbent on the trial court to determine whether the failure or inability to obtain the additional test is justified. In making that determination, the trial court must decide if, under the totality of the circumstances, the officer made a reasonable effort to accommodate the accused who seeks an independent test. Factors to be considered include, but are not limited to, the following: (1) 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. Id.

. . . .

In such situations, we hold that a police officer has a duty to act reasonably under the circumstances, considering such factors as those outlined above in the Buffington opinion. Moreover, the Commonwealth would be free to establish during a subsequent trial the effect of the passage of time on a

> person's blood alcohol level to explain any differences between the state-administered test and the individual's later independent blood test. However, as long as the test can be administered within a reasonable time of the individual's arrest, that individual is entitled to police cooperation to obtain the test.

Long, 118 S.W.3d 178, 181 (Ky. App. 2003)(Emphasis added).

In the case at hand, we agree with the District Court's conclusion that the police did not undertake the required reasonable efforts to facilitate Filben's statutory entitlement to an independent alcohol concentration test. Officer Curtis testified that he was aware beforehand that Suburban Hospital administered private blood testing.[8] Upon the refusal of University Hospital to administer the private test, Officer Curtis failed to undertake the minimal additional step of offering to transport Filben to the nearby Suburban Hospital for testing.[9] Upon the initial failure to obtain the test, at minimum, the reasonable efforts requirement imposed in Long would oblige an officer to inform an arrestee of a known

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[8] In this regard, it would seem reasonable that a well-trained officer would be aware that University Hospital *did not* participate in testing.

[9] Officer Curtis testified that Suburban Hospital was around a ten minute drive from University Hospital on Interstate 64.

nearby alternative testing site and an offer to transport him there.

For these reasons we are compelled to agree with the District Court's determination that Officer Curtis failed to use reasonable efforts in facilitating Filben's request for a private blood test. Accordingly, suppression of the Breathalyzer® test administered following Filben's arrest was proper. We affirm upon that issue.

The Commonwealth contends that even if its Breathalyzer® test was suppressed, it was nevertheless entitled to proceed to trial upon conventional evidence. We agree.

Both the District Court and the Circuit Court construed the holding in Long as authorizing dismissal in the event of a violation of KRS 189A.103(7). We believe this an erroneous interpretation of this decision. In Long, as here, the District Court dismissed the DUI charge against the defendant on the basis that police had failed to comply with KRS 189A.103(7). However, in Long the dismissal was not appealed.

It is clear from the comments of the trial court at the conclusion of the suppression hearing that dismissal of the charges was intended as a sanction on the basis that police had failed to comply with KRS 189A.103(7). We find no authority under Kentucky law with respect to this issue. Based upon our review of the approaches in other jurisdictions, two different

schools of thought appear to dominate with respect to the proper sanction to be applied when police fall short of the requirements pertaining to a request for independent testing. The *minority* position imposes a stricter sanction for police misconduct by outright dismissal. See Wendel v. Commonwealth, 407 S.E.2d 690 (Va. Ct. App. 1991); People v. Underwood, 396 N.W.2d 443 (Mich. Ct. App. 1986); Puett v. State, 248 S.E.2d 560 (Ga. Ct. App. 1978). In Underwood the court reasoned that the defendant was deprived of an opportunity to obtain potentially exculpatory evidence by an independent test, thus a dismissal was warranted.

Other jurisdictions, in what appears to be the *majority* rule, opine that suppression of the state's alcohol test is sufficient. See State v. George, 754 P.2d 460 (Kan. Ct. App. 1988); State v. Broadley, 656 A.2d 1319 (N.J.Super. 1992); Lockard v. Killen, 565 So.2d 679 (Ala. Crim. App. 1990). In Broadley the court held: "Due to the failure of the Deptford Township Police Department to establish reasonable procedures to provide defendants an opportunity to exercise the right to an independent blood test, the Breathalyzer® results must be suppressed. The court below found evidence, independent of the Breathalyzer® results, to find defendant guilty of driving while under the influence beyond a reasonable doubt." Broadley, 656 A.2d at 1322.

We conclude that the only appropriate sanction in the case at hand was the suppression of the Commonwealth's Breathalyzer® test. As hereinbefore shown, the police unquestionably failed to facilitate Filben's right to an independent blood test. However, an outright dismissal was not warranted, as the Commonwealth has the option of proceeding on other admissible evidence. We are not of the opinion that Long dictates otherwise.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

No brief for Appellee.