RENDERED: OCTOBER 13, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002243-MR

JAY H. MCKENZIE — APPELLANT

v.

APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE DANIEL SPARKS, JUDGE
ACTION NOS. 02-CR-00008 AND 04-CR-00030

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, SCHRODER, AND VANMETER, JUDGES.

ACREE, JUDGE: Jay McKenzie (McKenzie) appeals from a judgment of the Johnson Circuit Court convicting him of second-degree manslaughter and being a persistent felony offender in the second degree and sentencing him to eighteen years' imprisonment. McKenzie was charged as a result of a fatal car accident after he was found to be impaired from consumption of a combination of prescription medications. On appeal, he argues that his lack of knowledge of the effects of combining these medications negated the wanton state necessary to convict him.

Further, he raises issues concerning the admissibility of evidence regarding the results of blood and urine tests, the jury instruction on voluntary intoxication by prescription medication, and the trial court's refusal to dismiss the PFO charge which was obtained by a subsequent indictment two years after the original charges were brought. We have examined all of the issues presented and conclude that no reversible error occurred. Thus, the trial court's judgment is affirmed.

Two years prior to the incident giving rise to the charges herein, McKenzie was involved in a serious car accident which left him with severe back injuries. After an initial, unsuccessful surgery, McKenzie had a second surgery to implant titanium rods in his back. As a result, his back pain diminished from the excruciating pain he had constantly suffered to pain that was manageable with prescription pain medication and muscle relaxants.

In November and December 2001, McKenzie traveled from Ohio to Kentucky to visit relatives living in Johnson County. Because the four-hour drive was hard on his back, McKenzie took Roxicet prior to leaving Ohio and Valium and Lortab the night he arrived at his brother's house. The next morning, some of the men in his family decided to visit the stockyards. McKenzie initially stayed at the house before leaving to join them a little later. He had taken a Soma and two Lortab prior to

driving his van that day. Expecting to be gone for several hours, he carried additional pills in a prescription bottle with his brother's name on the label.

While driving along the highway, McKenzie allegedly became distracted looking at a cedar house built on a hillside. He failed to notice when his van left the road, traveled over barriers separating the road from a ditch and slammed into a car operated by mail carrier Cheryl Shepherd (Shepherd) as she distributed mail to houses at the bottom of a hill. Shepherd's spine was severed and she died as a result of injuries sustained in the collision. Tests of McKenzie's blood and urine taken after the accident revealed the presence of several chemical substances, including Valium, Soma, oxycodone, codeine and hydrocodone.

On August 17, 2002,[1] McKenzie was indicted for wanton murder. His first trial in January 2004 ended in a mistrial when one of the Commonwealth's witnesses became ill. The Commonwealth obtained an additional indictment in March charging McKenzie with being a persistent felony offender in the second degree. McKenzie filed a pretrial motion to exclude the urine evidence and another to dismiss the PFO charge, arguing that it

[1] McKenzie was originally indicted on January 21, 2002; however, a superseding indictment was returned that August after defense counsel filed a motion to dismiss the original indictment due to alleged false testimony in front of the grand jury. It is this August 2002 indictment which was the charging document in both the aborted January 2004 trial and the July 2004 trial which resulted in the judgment herein appealed from.

was a violation of his constitutional rights due to prosecutorial vindictiveness. The trial court denied both motions.

Both the murder and the PFO indictments proceeded to trial on July 12, 2004. After hearing the evidence against him, the jury convicted McKenzie of the lesser-included offense of second-degree manslaughter, enhanced by his status as a persistent felony offender. The trial court sentenced him to eighteen years' imprisonment in accordance with the jury's recommendation, and this appeal followed.

McKenzie first argues that the trial court erred in denying his request for a directed verdict because the Commonwealth failed to prove that his conduct in driving after ingesting prescription medication was wanton. The test on appeal for determining whether a directed verdict should have been granted 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*, 816 S.W.2d 186, 187 (Ky. 1991). In addition to the evidence regarding the medication which McKenzie ingested prior to driving, there were witnesses who testified to his erratic driving before the accident, as well as his apparent intoxication immediately afterwards.

Phyllis Goble (Goble), a registered nurse, saw McKenzie drive his van on and off the road, completely swerving from one lane into the other and back again. She testified that he narrowly avoided hitting several cars and a bridge abutment at an overpass. Goble observed McKenzie drive completely off the road on both sides prior to driving off the right side of the road, on a straight section, and slamming into the back of Shepherd's car. Goble never saw his brake lights flash.

At the scene of the accident, Goble found McKenzie without apparent injuries, but with a glazed expression and unresponsive to her questions. She checked on Shepherd and noted that she did not appear to be breathing and barely had a pulse. Because the car door was wedged shut by the guard rail, Goble was unable to get close enough to Shepherd to perform CPR. While she was trying to administer first aid, Goble heard McKenzie starting his van. Afraid that this might cause a fire, she ran back to the van and turned off the key and told him not to start the engine. When the fire department arrived, Goble saw McKenzie staggering around the crash scene and watched him fall into the road, scraping his forehead and arm. She testified that he did not smell of alcohol, but his glazed look, pinpoint pupils and difficulty walking indicated that he was under the influence of something. In Goble's opinion, his

staggering did not look like it was caused by an injury to his leg or back.

Sheriff's Deputy Aaron Fairchild (Fairchild) was the first officer to respond to the crash scene. He testified that a blue minivan had collided with the rear end of a red car and that the vehicles had come to rest 120 feet away from the point of impact. He spoke with McKenzie who was swaying but claimed to be fine. Fairchild described him as having a dazed appearance, slurred speech and glazed eyes. He testified that McKenzie could not understand what Fairchild was saying to him nor could McKenzie follow directions. The deputy attempted to administer field sobriety tests, but McKenzie was unable to perform any of the tasks requested.

McKenzie refused medical treatment, but agreed to furnish blood and urine samples. He told Fairchild he was distracted by a cedar house on a hillside and was looking at it until his van crashed into Shepherd's car. McKenzie admitted to having taken Somas and two Lortabs prior to driving. In addition, he told Fairchild that the pills were from his wife's prescription. Fairchild noted that the label on the pill bottle had McKenzie's brother's name on it, and that the pills it contained looked like Somas and Lortabs.

Although he was charged with wanton murder, the jury which heard all of this evidence convicted McKenzie of the

lesser-included offense of second-degree manslaughter. Kentucky Revised Statute (KRS) 507.040 defines second–degree manslaughter in relevant part as follows:

> (1) A person is guilty of manslaughter in the second degree when he wantonly causes the death of another person, including, but not limited to, situations where the death results from the person's:
> (a) Operation of a motor vehicle[.]

Wanton behavior occurs when a person

> is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof **solely by reason of voluntary intoxication** also acts wantonly with respect thereto.

KRS 507.020(3). (Emphasis added.) Voluntary intoxication takes place when a person "knowingly introduces [substances] into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice[.]" KRS 501.010(4).

McKenzie claims on appeal that he was never advised that the particular combination of medications he ingested could impair his driving. Thus, he argues the jury could not properly convict him of an offense requiring a *mens rea* of wantonness.

At trial, McKenzie testified in his own defense. He denied that he was impaired or that he drove erratically prior to the crash that killed Shepherd. However, he did admit that the label on the Soma bottle warned of possible drowsiness and advised using caution when driving. McKenzie also stated that Soma had caused him drowsiness in the past. Further, a patient history introduced as a defense exhibit failed to show that he had ever had a prescription for Soma. Thus, he fails to prove that a jury could not reasonably find that he was voluntarily intoxicated when he chose to take a combination of Soma (for which he could not furnish the prescription he claimed to have) and Lortab pills shortly before driving.

Our courts have previously held that voluntary intoxication is no defense to offenses involving wantonness. *McGuire v.Commonwealth*, 885 S.W.2d 931, 934 (Ky. 1994); *Nichols v. Commonwealth*, 142 S.W.3d 683, 689 (Ky. 2004). In fact, the Kentucky Supreme Court has specifically determined that "voluntary intoxication . . . is not a defense to second-degree manslaughter." *Slaven v. Commonwealth*, 962 S.W.2d 845, 857 (Ky. 1997). The Commonwealth relies on the case of *Estep v. Commonwealth*, 957 S.W.2d 191 (Ky. 1997), in countering McKenzie's argument that he was unaware of the effects of combining several prescriptions medications. In *Estep*, the

Kentucky Supreme Court affirmed a wanton murder conviction based on the following facts:

> Estep was charged with wanton murder and assault as the result of a fatal automobile accident on a two-lane road in Pike County. Testimony at trial indicated that the blue pickup truck driven by Estep passed a witness who was driving about 50 miles per hour. The pickup truck crossed the double-lined no passing zone and did not return to the right side of the road after passing the witness. The pickup truck collided head-on with a car traveling in the opposite direction. Evidence was presented that Estep was found to have five different prescription drugs in her system, three of which were found to be within proper therapeutic levels and the other two were at levels less than therapeutic quantities. This appeal followed the judgment of conviction.
>
> The principal issue is whether there was sufficient evidence for the jury to find Estep guilty of wanton murder. She argues that there was no evidence that she was aware of and consciously disregarded the risk that taking the various drugs would impair her ability to drive. She testified that no doctor had told her not to take these drugs in combination and that she did not know the effect of these drugs together. Estep also testified that she was well aware of the debilitating effects of these drugs. She stated that she did not take Elavil if she was home alone because it produced too deep a sleep and she was afraid that someone might break into her house and that she would not be aware of it. She further testified that she would not take Dilantin if she was by herself.

Id. at 192. McKenzie argues that *Estep* is readily distinguishable from the facts in his own case. We disagree.

Witnesses at the crash scene described his erratic driving prior to the fatal accident and his demeanor immediately afterwards. Blood and urine tests showed the presence of several substances which are used as muscle relaxants, pain medications, or sedatives. McKenzie admitted that Soma had previously made him drowsy and testified that he did not like its side effects. He also claimed that he would not take Soma and Valium together. Nevertheless, both substances were found in his blood.

Despite Estep's identical claim of lack of awareness of the effects of combining multiple medications, the Kentucky Supreme Court upheld a conviction for the more serious offense of wanton murder which requires "the operation of a motor vehicle under circumstances manifesting extreme indifference to human life. . . ." KRS 507.020(1)(b). In light of the holding in Estep, we do not believe the Commonwealth was required to prove that McKenzie had been advised of the possible side effects of combining these medications in order for a jury to convict him of second-degree manslaughter.

McKenzie next contends that the trial court committed reversible error when it instructed the jury on voluntary intoxication by prescription medication. Instruction No. IV, which defense counsel objected to at trial, read as follows:

> It is not a defense to impaired driving that the person is legally entitled to use any substance, even if prescribed by a

> physician. Voluntary Intoxication does not provide a defense to Wanton Murder.

McKenzie contends that this instruction was improper because it derived from the language of KRS 189A, which has previously been limited to prosecutions for driving under the influence. *Overstreet v. Commonwealth*, 522 S.W.2d 178 (Ky. 1975). Further, McKenzie points out that Instruction No. III, which contained definitions, excluded voluntary intoxication as a defense to wanton conduct and defined voluntary intoxication. Thus, he argues Instruction No. IV was unnecessary and prejudicial.

While we might agree with the first contention, we must point out that the instruction objected to specifically eliminated voluntary intoxication by prescription medication as a defense to wanton murder. Since the jury declined to convict McKenzie of murder and instead found him guilty of second-degree manslaughter, we hold any error in giving this instruction harmless.

McKenzie makes two arguments with regard to the evidence of test results on his blood and urine. First, he contends that the urine evidence was inadmissible due to irrelevance, prejudice and lack of scientific accuracy. In addition, he claims that the Commonwealth failed to establish a sufficient chain of custody to permit the results of tests on his blood and urine to be admitted. McKenzie filed a pretrial

motion *in limine* seeking the exclusion of the urinalysis evidence, and the trial court denied the motion.

Two chemists from the Kentucky State Police (KSP) lab testified regarding the results of tests on McKenzie's blood and urine. Diazepam (contained in Valium) and its metabolite, nordiazepam, and carisoprodol (contained in Soma) were found in his blood. In addition, chemists found oxycodone (contained in Roxicet), codeine and hydrocodone (contained in Vicoprofen and Lortab) in his urine. The Valium and Soma and their metabolites found in McKenzie's blood were individually within or below therapeutic ranges. Jane Purcell (Purcell), a KSP chemist testified that there was no way to measure whether the substances found in urine were within therapeutic levels. Consequently, between the time McKenzie's urine sample was taken and his trial almost three years later, KSP's lab had stopped reporting quantities of drugs in urine.

McKenzie now argues on appeal that the results of his urine tests did not possess sufficient scientific accuracy to meet the standards set forth in *Stringer v. Commonwealth*, 956 S.W.2d 883 (Ky. 1997) and *Goodyear Tire and Rubber Company v. Thompson*, 11 S.W.3d 575 (Ky. 2000). KRS 189A.103(1) provides for implied consent to blood, breath **or urine** tests, or a combination thereof any time an officer suspects a violation of KRS 189A.010(1). Although, as McKenzie correctly points out, he

was not charged with driving under the influence, the statute specifically states that it applies "to any person who operates or is in physical control of a motor vehicle . . . in this Commonwealth."

Cleary, the circumstances surrounding McKenzie's accident created reasonable grounds for an officer to believe that he was under the influence of substances which impaired his driving as required by the implied consent statute. This statute was last amended in April 2000, after the *Goodyear* decision. Thus, our legislature still believed that urinalysis possessed sufficient scientific reliability to indicate the presence of drugs which may impair a person's ability to drive. McKenzie has provided no authority to support his position that such evidence is inadmissible.

McKenzie also claims that the evidence of substances found in his urine was irrelevant and prejudicial. Purcell testified that substances ingested would show up in urine longer than they would in blood. She specifically listed hydrocodone as a substance that would show up in a urine sample, even if several days had passed since it had been ingested. Since hydrocodone and oxycodone were found in McKenzie's urine, but not his blood, Purcell concluded that they were not in his system at the time his blood sample was taken. Thus, McKenzie claims that admission of the urinalysis was prejudicial to him.

Inasmuch as he admitted to taking Roxicet (oxyocodone) the day before his accident and Lortabs (hydrocodone) prior to driving, we fail to perceive any prejudice from evidence of a laboratory analysis confirming that he had taken these substances in the past, but indicating they were not in his system at the time of the accident.

At trial, McKenzie objected to the admission of evidence regarding blood and urine tests, arguing that the Commonwealth failed to establish a sufficient chain of custody. Kentucky Rule of Evidence (KRE) 901(a) requires "evidence sufficient to support a finding that the matter in question is what its proponent claims" in order to establish authentication prior to admitting evidence. McKenzie claims that the Commonwealth failed to prove that the blood and urine tested were the same substances taken from him after the accident.

Fairchild transported McKenzie to a nearby medical center, witnessed a lab technician draw his blood, watched the restroom being prepared to prevent tampering with the urine sample, and watched as the test kit was signed and sealed. The lab technician was present at trial to testify to performing all of the above actions. Fairchild told the jury that he delivered the samples to the evidence room at the sheriff's office. In an earlier deposition, Fairchild stated that he mailed the samples to the KSP lab. At trial he clarified his prior statement,

saying that he never mailed samples himself and he had only meant that he intended the samples to be mailed to the lab.

Deputy Howard Dotson (Dotson) testified that he received the samples from the evidence officer and hand delivered them to the KSP lab in Ashland. The evidence officer was not called to testify. Matthew Ryan Cross (Cross), an analyst for KSP, testified that the samples were still sealed and there was no evidence of tampering when Dotson delivered them to him at the lab. After performing a blood alcohol test, Cross resealed the kit and sent it to the Central Lab in Frankfort where additional tests were performed.

McKenzie contends that Fairchild's trial testimony, which differed from his deposition, indicated uncertainty as to the fate of the samples after they were taken to the sheriff's office. Further, he points to the absence of the evidence room officer and claims that the chain of custody was destroyed, rendering the evidence inadmissible. The Kentucky Supreme Court has previously held in the case of *Rabovsky v. Commonwealth*, 973 S.W.2d 6 (Ky. 1998), that it is unnecessary to establish a perfect chain of custody. Rather, the Commonwealth is only required to provide persuasive evidence that no one tampered with the sample; however, gaps in the chain of custody may affect the weight given to the evidence by the jury. *Love v. Commonwealth*, 55 S.W.3d 816, 821 (Ky. 2001). The evidence

introduced at trial indicated that law enforcement agencies maintained sufficient control over McKenzie's blood and urine samples to prevent tampering and to reliably maintain their identity. Consequently, the trial court did not err in denying McKenzie's motion to exclude this evidence due to defects in the chain of custody.

McKenzie's final argument concerns the PFO charge that was added two years after the original indictment charging wanton murder. He filed a pretrial motion, which was denied by the trial court, to dismiss the new indictment. On appeal, he argues that the PFO indictment was a violation of fundamental fairness and a vindictive prosecution.

It is a violation of constitutional protections to punish a criminal defendant for exercising a legal right. *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). Nevertheless, the *Pearce* holding has been narrowed over time, and the Supreme Court has stated that "the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of 'vindictiveness.'" *Blackledge v. Perry*, 417 U.S. 21, 27; 94 S.Ct. 2098, 2102; 40 L.Ed.2d 628 (1974). Even the case of *United States v. Goodwin*, 457 U.S. 368, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982), cited by McKenzie in support of his position, declined to apply a blanket presumption

of prosecutorial vindictiveness to invalidate a prosecutorial decision to pursue felony charges after a defendant declined to plead guilty to a misdemeanor.

In the case at hand, the mistrial of the original charge resulted, not from anything that McKenzie did, but rather from the inability of the Commonwealth's own witness to attend trial due to a sudden, severe illness. Thus, McKenzie fails to point to any act on his part for which we might assume that the prosecutor wished to punish him. This absence of any indication of actual prosecutorial vindictiveness is fatal to his claim that the trial court erred in refusing to dismiss the PFO indictment.

For the foregoing reasons, the judgment of the Johnson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Julia K. Pearson
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky