

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001838-MR

DWAYNE SMITH

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 05-CR-00002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: ACREE, SCHRODER, AND VANMETER, JUDGES.

VANMETER, JUDGE: Dwayne Smith appeals from a judgment of the Montgomery Circuit Court sentencing him to five years' imprisonment for operating a motor vehicle under the influence of an intoxicant, fourth offense within a five-year period.¹ Finding no error, we affirm.

In November 2004, Deputy Jason Townsend of the Montgomery County Sheriff's Department noticed a Chevrolet Tahoe with illuminated headlights, but no taillights. Townsend

¹Kentucky Revised Statutes (KRS) 189A.010(5)(d).

followed the vehicle briefly and pulled it over. Smith, the driver, was unable to produce a valid operator's license due to his prior DUI charges. Townsend requested that Smith exit the vehicle. Townsend testified that while Smith did not have difficulty walking, he smelled of alcohol, and he had slurred speech and red, bloodshot eyes. After Smith admitted he had consumed two beers, Townsend asked him to perform the One-Legged Stand and the Horizontal Gaze Nystagmus (HGN) field sobriety tests. Townsend then administered a preliminary breath test which, despite Smith's weak breath sample, showed a presence of alcohol. Believing that Smith would not be capable of performing a reliable breath alcohol test, Townsend elected to drive him to a local hospital for a blood test, which Smith then refused to take.

At trial, Townsend testified as to his training and experience as a police officer in administering field sobriety tests and detecting intoxication. Smith neither objected to Townsend's testimony, nor offered any testimony that the tests were not performed according to established procedures. However, Smith now argues that the administration of the tests was so flawed, and the proof of intoxication so slight, that the trial court erred in admitting evidence concerning the field

sobriety tests. He requests this court to review the error under the palpable error rule of RCr² 10.26.

Specifically, Smith argues that Townsend's testimony regarding his administration of both tests establishes that neither was administered according to regulations. As to the One-Legged Stand test, Townsend testified the test was administered on the side of the highway, in the asphalt "emergency lane." Smith failed the test as he raised his arms for balance during the test, and placed his foot down at the count of twenty-two. On cross-examination, in response to a question as to whether the pavement was uneven, Townsend testified that there was a downgrade on that side of the road. And to a question as to whether there was some loose gravel, Townsend stated, "Probably so." Smith argues that the test should have been administered on a smooth, level surface, and he should have been given the opportunity to complete the test by finishing his count to thirty. As to the HGN test, Townsend testified that after explaining to Smith how the test would be performed, he held his finger in front of Smith's face and moved it from side to side. Townsend's testimony was that the test revealed four of six signs of intoxication including lack of smooth pursuit by Smith's eyes, and nystagmus, *i.e.*, a rapid

²Kentucky Rules of Criminal Procedure.

involuntary oscillation of the eyeballs,³ at maximum deviation in both eyes. Smith complains that Townsend did not testify that he complied with national standards by holding his finger 12 to 15 inches from Smith's face, by moving his finger at a slow rate such that it took two seconds for Smith' eyes to reach maximum deviation from center, or by holding his finger at maximum deviation for a full four seconds.

A comparable factual situation was addressed in *Commonwealth v. Pace*, 82 S.W.3d 894 (Ky. 2002), in which the defendant's prior DUI convictions were introduced into evidence during the guilt phase of trial, in clear violation of his rights. The other evidence supporting the conviction included the defendant's admission that he had been drinking and the arresting officer's opinion testimony that the defendant was intoxicated. The court discussed the palpable error rule, stating that it

is not a substitute for the requirement that a litigant must contemporaneously object to preserve an error for review. RCr 9.22. The general rule is that a party must make a proper objection to the trial court and request a ruling on that objection, or the issue is waived. See *Bell v. Commonwealth*, Ky., 473 S.W.2d 820 (1971). An appellate court may consider an issue that was not preserved if it deems the error to be a "palpable" one which affected the defendant's "substantial rights" and resulted in "manifest injustice." RCr

³Merriam-Webster's Collegiate Dictionary.

10.26. In determining whether an error is palpable, "an appellate court must consider whether on the whole case there is a substantial possibility that the result would have been any different."

Commonwealth v. McIntosh, Ky., 646 S.W.2d 43, 45 (1983).

Id. at 895. Similarly, in the instant case, Smith admitted he had been drinking, he smelled of alcohol, his eyes were red and bloodshot, he had slurred speech, the preliminary breath test indicated the presence of alcohol, and the arresting officer's opinion testimony was that Smith was under the influence. Even were we to decide that the administration of the field sobriety tests was so flawed as to require their exclusion from evidence, like the court in *Pace* we are unable to conclude that the result would have been different had the test been excluded.

Smith's remaining argument is that the trial court erred in denying his motion for a directed verdict. Smith argues that absent the proof of the "improperly conducted" field sobriety tests, insufficient proof existed to convict him of driving under the influence.

The standard for a directed verdict is well known. On a motion for a directed verdict in a criminal proceeding, "the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth[,]" reserving to the jury all questions of credibility and weight of the evidence. See *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991);

Commonwealth v. Sawhill, 660 S.W.2d 3, 4 (Ky. 1983). Further, "[o]n 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." *Benham*, 816 S.W.2d at 187. As stated above, even if the two field sobriety tests had been excluded, the remaining evidence was sufficient to sustain a verdict of guilty.

The judgment of the Montgomery Circuit Court is affirmed.

ALL CONCUR.

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