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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000699-MR

JOYCE CRABTREE — APPELLANT

v.

APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE LARRY MILLER, JUDGE
ACTION NO. 04-CR-00033

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HOWARD AND MOORE, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: Appellant, Joyce Crabtree, was convicted of second-degree assault following a jury trial in Breathitt Circuit Court. She received a sentence of ten years' imprisonment. On appeal, Crabtree argues that she is entitled to a new trial because the jury returned inconsistent verdicts by finding her guilty of second-degree assault and acquitting her of driving under the influence of intoxicants (DUI). We affirm.

[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On December 8, 2003, Crabtree was driving southbound in her van in an area known as Five Mile Stretch along two-lane Highway 15 in Breathitt County, Kentucky. In an attempt to pass slower vehicles, Crabtree pulled her vehicle into the northbound lane and struck the vehicle of Sheldon Short, Jr. Short suffered extensive injuries that included seventeen broken bones, twelve different surgeries, and an extensive hospital stay of over nine months. Apparently, Crabtree never made any type of defensive maneuver when she pulled into oncoming traffic.

Kentucky State Trooper, Robert Wood, responded to the scene of the incident and noticed that Crabtree's speech was slurred and that her eyes were glassy and red. Trooper Wood administered two field sobriety tests that Crabtree failed. She was then placed under arrest and was transported to the Kentucky River Medical Center where a sample of her blood was obtained. The blood analysis revealed that Crabtree's blood contained amounts of Methadone, Oxycodone, Nordiazapam, and Alprazolam. The levels of Methadone, Oxycodone, and Alprazolam were all within therapeutic levels, while the amount of Nordiazapam was below a therapeutic level. Crabtree was indicted on one count of first-degree assault and one count of DUI. The jury found Crabtree guilty of the lesser included offense of second-degree assault and acquitted her of the DUI charge. Crabtree received a sentence of ten years' imprisonment. This appeal followed.

Crabtree argues that she is entitled to a new trial because the jury returned inconsistent verdicts by finding her guilty of assault while acquitting her of DUI.

Crabtree contends that the acquittal on the DUI charge necessarily negates the element of wantonness needed to convict her of second-degree assault. We disagree.

The Supreme Court of Kentucky has held that "rigid adherence to a prohibition against inconsistent verdicts may interfere with the proper function of a jury, particularly with regard to lenity." *Commonwealth v. Harnell*, 3 S.W.3d 349 (Ky. 1999)(citing *Dunn v. United States*, 284 U.S. 390, 393 (1932)). Consistency in a verdict is not necessary, rather there must simply be sufficient evidence to sustain each count of an indictment. *Id.*

In the present case, we cannot conclude that inconsistent verdicts were returned by virtue of the DUI acquittal. KRS 508.020(1) (c) provides that "[a] person is guilty of assault in the second degree when:... [h]e wantonly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument." KRS 501.020(3) defines "wantonly" as follows:

> A person acts wantonly with respect to a result or to a circumstance when he 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 the 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.

Crabtree's contention that the acquittal of DUI negates the element of wantonness for the assault charge because the jury found that she was not intoxicated is simply too narrow an interpretation of the evidence in this case. A conviction of the DUI charge is not a

prerequisite for an assault conviction. Focusing solely on the sufficiency of the assault charge, the evidence demonstrated that Crabtree had intoxicating agents in her system, pulled out into oncoming traffic attempting to pass several vehicles at once, and failed to take any defensive measures when confronted with the impending collision despite evidence that she had time to return to her own lane. We find that there was sufficient evidence to sustain the conviction for second-degree assault.

Accordingly, the judgment of the Breathitt Circuit Court is affirmed.

MOORE, JUDGE, CONCURS.

HOWARD, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

HOWARD, JUDGE: Respectfully, I dissent. I have no disagreement with the majority's holding that inconsistent verdicts do not, in themselves, require reversal. Both the United States Supreme Court, in *Dunn v. United States,* 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356 (1932) and the Kentucky Supreme Court, in *Commonwealth v. Harrell,* 3 S.W.3d 349 (Ky. 1999), have so held.

But the holding of *Harrell* is that, "The better approach would be to examine the sufficiency of the evidence to support each [guilty] verdict." 3 S.W.3d at 351. It is on this point that I dissent. I do not believe that there was sufficient evidence in this case to support a guilty verdict on the charge of Assault in the 2nd degree, because I do not believe there was sufficient evidence to show wantonness.

As the Commonwealth has pointed out, this case is factually very similar to *Estep v. Commonwealth,* 957 S.W.2d 191 (Ky. 1997). In both cases, a driver was

involved in an automobile accident, on the wrong side of the road, while attempting to pass another vehicle. Apart from questions of intoxication, the driving itself (certainly in this case and very possibly in both cases) constituted only ordinary negligence, not criminal conduct. In *Estep,* the conduct was more egregious than here, in that the woman was passing "at a high rate of speed" and in a no-passing zone, and there was testimony that she was "slumped over" in her seat seconds before the impact. Here, there was no evidence of excessive speed; the appellant was in a legal passing zone and there was no evidence of her being incapacitated before the accident. Both defendants were described as being "pretty zonked" (*Estep*) or "somewhat staggering" (the appellant) after the accident.

However, *Estep* did not primarily turn on these facts. The defendant in that case, as here, had in her system multiple prescription medications, all individually within or below therapeutic levels. In both cases, it is the presence of these drugs in the system that is alleged to make the conduct wanton.

KRS 501.020(3) defines "wantonly" as follows:

> A person acts wantonly with respect to a result . . . when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur . . . A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto.

KRS 501.020(4) then states that a person acts "recklessly" when she,

> . . . fails to perceive a substantial and unjustifiable risk that the result will occur . . . The risk must be of such nature and degree that failure to perceive it constitutes a gross deviation

> from the standard of care that a reasonable person would observe in the situation.

In other words, for wantonness, the Commonwealth must prove either that the defendant was aware of the "substantial and unjustifiable risk," (or the behavior must be so egregious that one can presume such), or she must be "voluntarily intoxicated." In *Estep,* there was direct evidence of such intoxication:

> Dr. Hunsaker, a prosecution expert witness, testified and described the effects of each of the substances. He testified that he could state with reasonable medical probability that given the presence of these drugs at the levels they were found in Estep's system, that their effect would be to cause impairment in operating a motor vehicle.

Estep, 957 S.W.2d at 193.

Based in large part on this testimony, the Supreme Court affirmed the conviction in a five to two decision. But even with the direct evidence of impairment, Chief Justice Lambert dissented, stating that,

> By virtue of the majority opinion in this case, I fear the distinction between wanton murder and reckless homicide will be lost. Under this decision, whenever there is evidence of misconduct in the operation of a motor vehicle exceeding ordinary negligence, the Commonwealth will be entitled to go to the jury on wanton murder. . . .
>
> While Dr. Hunsaker opined that the presence of such drugs and in the quantities found would cause impairment of one's ability to operate a motor vehicle, there was no evidence that appellant knew of the effects of such drug combinations.

Estep, 957 S.W.2d at 194-195.

Of course, the majority opinion in *Estep* is the law of Kentucky, which we must follow. And, although I find the Chief Justice's dissenting opinion persuasive in theory, I would be inclined to agree with the majority in *Estep,* on its facts – but only because of the direct testimony of impairment. In this case that testimony is missing. There was expert testimony about the *potential* effects of the drugs found in the appellant's system, individually, but there was no testimony about the effects of those drugs in combination, nor, more importantly, about their effects, either individually or in combination, on this appellant at the time of this accident.

As quoted above, KRS 501.020(3) requires, for wantonness, either evidence that the accused was aware of the risk or evidence that she was unaware of the risk solely due to voluntary intoxication. In *Estep* the Commonwealth produced evidence of such intoxication. In this case there is no proof that Ms. Crabtree was aware of the risk, no evidence that her driving was so extreme that such can be presumed, and no direct evidence that she was impaired or intoxicated, only that she had certain drugs, in therapeutic amounts, in her system. I do not believe this evidence is sufficient to support a guilty verdict for a crime requiring wantonness, and therefore would reverse the conviction and remand for a new trial on Assault in the 4th degree, based on a theory of recklessness, under KRS 508.030(1)(b).

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