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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001465-MR

LAMONT ROBERTS APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 06-CR-004034

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND KELLER, JUDGES; KNOPF,[1] SENIOR JUDGE.

DIXON, JUDGE: Appellant, Lamont Roberts, was convicted in the Jefferson Circuit Court of second-degree manslaughter and driving under the influence (DUI), 2nd offense. He was sentenced to seven and one-half years' imprisonment and fined $500. He now appeals to this Court as a matter of right.

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

On December 18, 2006, Appellant was indicted by a Jefferson County Grand Jury for murder, illegal possession of a controlled substance (cocaine), and DUI 2nd offense. A co-defendant, Walter Lee Colbert, was indicted for murder, DUI 1st offense, and operating a motor vehicle on a revoked license. The indictments stemmed from an automobile collision in October 2006, wherein the passenger in Appellant's vehicle, Jessica McCawley, was killed.

Appellant and Colbert were tried together in April 2008. Louisville "Metro" Police Officer, Christopher Dison, testified that in the early morning hours of October 12, 2006, he was traveling southbound on Dixie Highway in Louisville, Kentucky. In front of him was a Dodge Caravan, operated by Colbert, that he estimated was traveling about 50 miles per hour in a posted 40-mile-per-hour zone. Officer Dison observed a red Cadillac, operated by Appellant and heading northbound on Dixie Highway, attempt a left hand turn across the median and collide with the Caravan. Officer Dison testified that the Cadillac was not in a turning lane when it made the left-hand turn. Although neither driver suffered serious injures, Appellant's passenger, Jessica McCawley, was killed in the collision.

The Commonwealth introduced a toxicology report indicating that a blood sample taken from Appellant at 6:09 a.m. had .15 blood alcohol content. Medical Examiner, Dr. Burrous-Beckham, testified that, using standard alcohol dissipation rates, Appellant's blood at the time of the collision would have had .18 to .19 blood alcohol content.

At the close of trial, Appellant was found guilty of second-degree manslaughter and DUI, 2nd offense. The jury recommended, and the trial court ultimately sentenced Appellant to a total of seven and one-half years' imprisonment and fined him $500. This appeal ensued.

Appellant argues that the trial court erred by denying his motion to suppress the toxicology report showing the blood-alcohol results. Appellant argues that the police officers violated both his statutory and constitutional rights when they failed to acquire either his consent or a search warrant prior to the blood test. We disagree.

Admittedly, the testimony concerning the taking of Appellant's blood sample is confusing at best. The record indicates that there were actually two samples drawn. The first, taken at 5:07 a.m., was for medical purposes and is not contested by Appellant[2]. The second sample was taken at 6:07 a.m. at the direction of Officer Shoenlaub. At trial, Officer Shoenlaub first testified that Appellant may have been unconscious at the time he attempted to have him sign the consent form. Officer Shoenlaub then stated that he read the consent form to Appellant in the presence of the hospital chaplain, and that he believed Appellant consented by nodding his head. Since Appellant was unable to sign his name at that time, Officer Shoenlaub checked off the appropriate boxes on the form. However, on

[2] Appellant points out that the KSP lab concluded that the first sample was "insufficient for analysis." However, he fails to mention that the hospital also tested the blood sample and at trial, the hospital's medical technologist, testified that the sample had a .192 blood alcohol content.

cross-examination, Officer Shoenlaub again conceded that Appellant may have slipped out of consciousness as he was attempting to gain his consent for the test.

Certainly, Officer Shoenlaub presented conflicting testimony as to Appellant's consent. However, we are of the opinion that such is essentially irrelevant because there is no evidence that Appellant expressly refused to submit to the test.

KRS 189A.103 governs implied consent in DUI cases and provides, in pertinent part:

> The following provisions shall apply to any person who operates or is in physical control of a motor vehicle or a vehicle that is not a motor vehicle in this Commonwealth:
>
> (1) He or she has given his or her consent to one (1) or more tests of his or her blood, breath, and urine, or combination thereof, for the purpose of determining alcohol concentration or presence of a substance which may impair one's driving ability, if an officer has reasonable grounds to believe that a violation of KRS 189A.010(1) or 189.520(1) has occurred;
>
> (2) Any person who is dead, unconscious, or otherwise in a condition rendering him or her incapable of refusal is deemed not to have withdrawn the consent provided in subsection (1) of this section, and the test may be given[.]

The language "'has given his consent' makes it unmistakable that a suspected drunk driver must submit to a test to determine blood alcohol concentration." *Commonwealth v. Hernandez-Gonzalez*, 72 S.W.3d 914, 915 (Ky. 2002). Further, unconsciousness does not invalidate implied consent. KRS 189A.103(2). In light of the statutorily implied consent, the Commonwealth herein did not have to prove

that Appellant voluntarily consented to the blood test. Clearly, there is no evidence of a "positive refusal" by Appellant to the test. *See Cook v. Commonwealth*, 129 S.W.3d 351, 360 (Ky. 2004).

Appellant further argues that under KRS 189A.105, not only must the individual be informed as to the effect of refusal to submit to testing, but also that such test may be used against him in court. In addition, the individual has the right to speak with an attorney prior to testing. KRS 189A.105(3). Because Officer Shoenlaub did not follow the dictates of KRS 189A.105, Appellant argues that the blood test should have been deemed inadmissible. Again, we disagree.

We would point out that while subsection (3) does provide an individual the right to communicate with counsel prior to a blood test, it further states that "[i]nability to communicate with an attorney during this period shall not be deemed to relieve the person of his obligation to submit to the tests and the penalties specified by KRS 189A.010 and 189A.107 shall remain applicable to the person upon refusal. Furthermore, as the Kentucky Supreme Court held in *Beach v. Commonwealth*, 927 S.W.2d 826, 828 (Ky. 1996),

> Exclusion of evidence for violating the provisions of the informed consent statute is not required. It has been held in Kentucky and elsewhere that in the absence of an explicit statutory directive, evidence should not be excluded for the violation of provisions of a statute where no constitutional right is involved. *See Little v. Commonwealth*, Ky., 438 S.W.2d 527 (1968). The Commonwealth cites a number of authorities from other state and federal courts. We find the language of the Wisconsin Supreme Court to be persuasive. It held in *State v. Zielke*, 137 Wis.2d 39, 403 N.W.2d 427 (1987),

> that the exclusion of evidence was not required for violation of the implied consent statute of the state noting that the overall purpose of the legislation was to facilitate obtaining evidence of driving while under the influence. KRS 446.080(1) provides that all statutes of this state shall be liberally construed with a view to promote their objects and to carry out the intent of the legislature.
>
> Even under the interpretation urged by Beach, the statute contains no explicit or implicit directive from the General Assembly that requires exclusion of evidence obtained. The United States Supreme Court has held that a blood test does not violate the Federal Due Process Clause, the Fifth Amendment against self-incrimination, the Sixth Amendment right to counsel or the Fourth Amendment right to unlawful search and seizure. *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

Accordingly, we conclude that neither Appellant's statutory or constitutional rights were violated. As a driver on the roads of Kentucky, Appellant is bound by the implied consent laws. As such, he is deemed to have consented to the blood test and the trial court properly admitted the toxicology report.

The judgment and sentence of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

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