

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-002298-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

ON REMAND FROM THE SUPREME COURT  
ACTION NO. 99-SC-0768-DG

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE STEPHEN RYAN, JUDGE  
ACTION NO. 98-CR-000324

BRETT MORRISS

APPELLEE

### OPINION

### AFFIRMING

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BEFORE: DYCHE, McANULTY, AND MILLER, JUDGES.

MILLER, JUDGE: This matter is before us on remand from the Kentucky Supreme Court by Order dated February 16, 2000. The Court vacated our Opinion rendered July 30, 1999, and ordered us to reconsider it in light of Commonwealth v. Lopez, Ky., 3 S.W.3d 351 (1999). Having considered Lopez, we issue the following Opinion.

The Commonwealth of Kentucky brings this appeal from a September 8, 1998, Opinion and Order of the Jefferson Circuit Court. We affirm.

The facts are these: Appellee, Brett Morriss, was involved in a two-car accident in Louisville, Kentucky. The accident resulted in the death of one person and serious injury to another. Morriss was transported to Norton's Hospital. He was suspected of driving under the influence (DUI) under Kentucky Revised Statutes (KRS) 189A.010. Hospital personnel requested permission to draw his blood and perform certain tests thereupon, including an alcohol screen. Morriss refused. The record indicates that Morriss later agreed to the laboratory tests but with the understanding that the results of such tests would not be turned over to the police. A Louisville police officer and an Assistant Commonwealth Attorney thereupon obtained a search warrant to secure a blood and urine sample from Morriss for purposes of alcohol toxicology tests. An analysis conducted upon these samples revealed that the alcohol content of Morriss's urine was .15 grams per milliliter and the alcohol content of his blood was .12 grams per milliliter. Morriss was ultimately arrested for murder (KRS 507.020), driving under the influence (KRS 189A.010), first-degree assault (KRS 508.010), fourth-degree assault (KRS 508.030), first-degree criminal mischief (KRS 512.020), disregarding a traffic-control device (KRS 189.338), and speeding (KRS 189.390). Morriss filed a motion to suppress. Relevant to this appeal, Morriss challenged the validity of the search warrant. Specifically, Morriss contended the search warrant was obtained in violation of KRS 189A.105 because the

samples were obtained before he had been charged with a crime. The circuit court ultimately agreed with Morriss and granted the motion to suppress the evidence obtained by the search warrant. This appeal followed.

The Commonwealth contends the circuit court committed reversible error by granting the motion to suppress the evidence obtained by the search warrant. It maintains that cases such as this fall outside the implied consent statutory scheme. Therefore, it asserts, KRS 189A.105(2)(b) is inapplicable and the Fourth Amendment to the United States Constitution governs the situation. The Commonwealth concludes that because the seizure of Morriss's blood was taken pursuant to a valid search warrant, it was not violative of the Fourth Amendment and, hence, was legal. We do not agree.

KRS 189A.105 states in relevant part as follows:

(1) No person shall be compelled to submit to any test or tests specified in KRS 189A.103, but his refusal to submit to such tests shall result in revocation of his driving privilege as provided in this chapter.

. . .

[2](b) Nothing in this subsection shall be construed to prohibit a judge of a court of competent jurisdiction from issuing a search warrant or other court order requiring a blood or urine test, or a combination thereof, **of a defendant charged with a violation of KRS 189A.010, or other statutory violation arising from the incident, when a person is killed or suffers physical injury, as defined in KRS 500.080, as a result of the**

**incident in which the defendant has been charged.** (Emphasis added.)

This statute, in conjunction with the implied consent statute (KRS 189A.103), was interpreted in Combs v. Commonwealth, Ky., 965 S.W.2d 161, 164 (1998), as prohibiting compelled body searches of DUI suspects unless death or physical injury is involved. To this extent, the characteristic seizure tolerated under the Fourth Amendment to the U.S. Constitution and Section Ten of the Kentucky Constitution is curtailed.

We believe KRS 189A.105(2)(b) to be clear and unambiguous. Thereunder, no person suspected of DUI may be compelled by search warrant to submit to a blood or urine test unless he has been charged with a statutory violation growing out of an incident involving death or physical injury. It is undisputed that Morriss was suspected of DUI. Therefore, the results of his compelled blood test are admissible only if the aforementioned conditions were first met. The record, however, reflects that Morriss was not charged with a statutory violation when he was compelled to submit to same. *A fortiori*, the results of said test are not admissible.

We reject the Commonwealth's contention that suppression of evidence is not the appropriate remedy for violation of KRS 189A.105. In Combs, the Court held that admission of the results of a compelled blood test obtained in contravention of KRS 189A.105 is improper.

Upon the whole, we are of the opinion the circuit court did not err by granting Morriss's motion to suppress the results of a blood test secured prior to Morriss's formal arrest.

As directed by the Supreme Court, we have considered our ruling herein in light of Lopez and do not think Lopez dispositive of this case. In Lopez, the defendant (Lopez) was charged with DUI. After having been read the implied consent warning under KRS 189A.010, she consented to a blood alcohol test. The test revealed that her blood alcohol content exceeded the legal limit for operating an automobile. On the morning of trial, she moved to have the test results suppressed under the authority of Combs, wherein, the Supreme Court made the following statement:

It is the holding of this Court that the admission of the results of a blood test in a DUI case not involving death or physical injury is improper.

Combs, 965 S.W.2d at 165. As Lopez's DUI charge did not arise out of an incident involving death or injury, the district court suppressed the blood alcohol evidence. The Commonwealth moved for certification of the law.

The Supreme Court recognized that the above-referenced statement in Combs did not reflect the "true intent of the total Opinion." Lopez 3 S.W.3d at 353. The court deemed the statement overbroad and over-inclusive. It, therefore, clarified Combs by stating that blood alcohol test results may be admissible in DUI cases which do not involve death or injury if the defendant expressly consents to said test in compliance with the implied consent statute.

We do not believe the Supreme Court's holding in Lopez has bearing on the issues at hand. In the case *sub judice*, Morriss, unlike Lopez, did not consent to submit to a blood test

for law enforcement. Blood samples were obtained pursuant to a search warrant prior to Morriss being charged. In addition, Morriss' DUI charge arose out of an incident involving death and physical injury, whereas, Lopez's DUI charge did not. We believe such factual differences render Lopez inapplicable to this case.

For the foregoing reasons, the Opinion and Order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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