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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001374-MR
AND
NO. 2004-CA-001432-MR

ROSS BROTHERS CONSTRUCTION
AND DONALD SMOOT

APPELLANTS/CROSS-APPELLEES

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE MARC I. ROSEN, JUDGE
ACTION NO. 00-CI-00554

ROGER MOORE AND
ANGIE MOORE

APPELLEES/CROSS-APPELLANTS

OPINION VACATING AND REMANDING

** ** * * *

BEFORE: McANULTY, SCHRODER, AND VANMETER, JUDGES.

SCHRODER, JUDGE: Ross Brothers Construction and Donald Smoot, (hereinafter Smoot/Ross Brothers) appeal from a judgment of the Boyd Circuit Court entered on a jury verdict in favor of Roger Moore and Angie Moore (hereinafter the Moores) in an action arising from a motor vehicle accident. We conclude that the trial court erred in admitting opinion testimony of a non-expert

police officer as to vehicular speed which was properly within the province of an expert. Accordingly, we vacate the judgment and remand for proceedings consistent with this opinion. The issue raised by the Moores on cross-appeal is rendered moot.

This case arises out a motor vehicle accident which occurred at approximately 7:30 a.m. on February 11, 2000, on U.S. Route 60 ("U.S. 60") in Boyd County, Kentucky, in front of a McDonald's restaurant. At this location, U.S. 60 has two westbound lanes and two eastbound lanes separated by a median. Donald Smoot was driving an unloaded tractor-trailer westbound on U.S. 60.¹ As Smoot approached the McDonald's, an unidentified blue car turned in front of him into the McDonald's. Smoot applied his brakes in order to slow to avoid the blue car. Subsequently, a Chevrolet Blazer driven by Patricia Smith pulled out of the exit of the McDonald's and struck the side of Smoot's tractor-trailer. The tractor-trailer crossed the median and into the eastbound lanes of U.S. 60, where it impacted with a Ford Festiva driven by Roger Moore, who sustained injuries.

The investigating police officer was Ryan Conley, of the Boyd County Sheriff's Department. Patricia Smith admitted to Officer Conley that she did not see Smoot's tractor-trailer when she pulled out from the McDonald's.² Officer Conley also

¹ The tractor-trailer was owned by Ross Brothers Construction.

² Smith settled with the Moores prior to trial.

took a statement from Smoot, wherein Smoot related that he had braked to avoid the blue car, was then hit by Smith, and that the collision and his steering to avoid the collision with Smith caused his tractor-trailer to cross the median. Smoot stated that he was traveling approximately 25-30 mph when the accident occurred. The speed limit at the location was 45 mph.

In an April 17, 2000, deposition, Officer Conley indicated that he would testify at trial that Smoot was traveling "too fast for the conditions" when the accident occurred. Smoot/Ross Brothers filed a motion in limine to prohibit Officer Conley from being allowed to offer this opinion testimony at trial, on grounds that such testimony invaded the province of the jury, and further, that Officer Conley was not qualified to give such an opinion. In support, Smoot's/Ross Brothers' arguments included that when Conley investigated the accident he had no formal training in accident investigation, had not even attended the police academy, admitted that he did not know how fast Smoot was going, and could offer no evidence that Smoot was exceeding the 45 mph speed limit.

In an order entered on March 31, 2003, the trial court denied the motion. The trial court further ruled that Conley could be called as an expert, and that Smoot/Ross Brothers would be provided the opportunity to voir dire Officer Conley prior to his testimony at which time the court would make a determination

as to whether Conley's testimony would comply with the requirements of KRE 703. The motion was renewed at trial, and a Daubert hearing conducted. At the hearing, Conley admitted that at the time he investigated the accident, he had no formal training in accident investigation, was not qualified as an accident reconstructionist, and had not yet attended the police academy. He admitted he had no knowledge of how fast Smoot was traveling before the accident, and had no evidence to offer that Smoot was exceeding the 45 mph speed limit before the accident.

Conley testified that his opinion that Smoot was traveling "too fast for the conditions" was based on the following facts: that Smoot had told him that a blue car had turned in front of him into the McDonald's and that he applied the brakes to miss the blue car; when he (Conley) arrived at the scene he saw "squeegee" or "skip skid" marks, left by the tractor-trailer, which indicate a skid on wet pavement; the location of the squeegee marks (before the McDonald's) reinforced Smoot's statement that he locked up his brakes to avoid the blue car; the roadways were wet; the intersection where he observed the squeegee marks is a busy intersection; and that Smoot was coming down from a grade into this intersection, driving a tractor-trailer, which does not stop like a car. Conley testified that the length of the squeegee marks indicated

to him that Smoot's vehicle was going too fast for the road conditions and that Smoot was not able to control his vehicle.

Conley admitted, however, that the squeegee marks were only an indication of braking and did not tell him anything about Smoot's speed. He admitted that he had no idea of how fast Smoot was going. Conley further clarified that Smoot did not actually say that he "locked up his brakes" (as Conley had stated in the police report) when he braked to avoid the blue car, that this was Conley's own terminology, not Smoot's words.

As to his qualifications, Conley testified that at the time of the accident, he had been a police officer for three years, and had worked hundreds of collisions. Since the accident, he attended the police academy and completed accident reconstruction training and now performs accident reconstructions for the police department. He testified that his opinion has not changed since his additional training.

At the conclusion of the hearing, the trial court, departing from its earlier order, ruled that Officer Conley's testimony would be taken as that of an investigating police officer, based on his knowledge as a police officer, and "not as [] an expert witness other than being a police officer." The trial court ruled Conley would be allowed to testify as the investigating police officer based on his training at the time of the accident, and not his subsequent training. The trial

court further ruled that Conley was not precluded from testifying as to the ultimate issue.

Accordingly, at trial, Officer Conley testified that Smoot was traveling too fast for the conditions. The jury returned a verdict in favor of the Moores, with fault apportioned 28% against Smoot and 72% against Smith. This appeal and cross-appeal followed.

On appeal, the sole issue raised by Smoot/Ross Brothers is that the trial court erred in allowing Officer Conley to offer opinion testimony at trial that Smoot was traveling "too fast for the conditions". We agree, although on somewhat different grounds than argued on appeal.

Officer Conley's opinion that Smoot was traveling too fast was based on his observations of the scene. "[E]xpert testimony as to the speed of [a vehicle] from the length of skid marks, the force of impact, the type of vehicle, condition of the road and all surrounding factors is competent." Ryan v. Payne, 446 S.W.2d 273, 277 (Ky. 1969). In the present case, the trial court ruled that Officer Conley was not qualified as an expert, but could offer the opinion evidence as an investigating police officer based on his knowledge as a police officer. This ruling is erroneous in light of the body of Kentucky case law which indicates that this type of opinion evidence is reserved for witnesses who qualify as experts. Ryan, 446 S.W.2d at 277;

Moore v. Wheeler, 425 S.W.2d 541, 543-544 (Ky. 1968); Southwood v. Harrison, 638 S.W.2d 706, 707 (Ky.App. 1982); Eldridge v. Pike, 396 S.W.2d 314, 316-317 (Ky. 1965); Lowe v. McMurray, 412 S.W.2d 571, 574 (Ky. 1967). Simply being a member of the police force does not qualify an individual to give opinion evidence as an expert. Southwood, 638 S.W.2d at 707; Eldridge, 396 S.W.2d at 316; Redding v. Independent Contracting Co., 333 S.W.2d 269, 271 (Ky. 1960). A police officer must qualify as an expert by virtue of special training and/or experience. Ryan, 446 S.W.2d at 277; Moore, 425 S.W.2d at 543-544; Southwood, 638 S.W.2d at 707. "The decision as to qualification of the witness as an expert rests in the discretion of the trial court." Moore, 425 S.W.2d at 544, quoting Kentucky Power Company v. Kilbourn, 307 S.W.2d 9, 12 (Ky. 1957). In light of the trial court's ruling that Conley was not qualified as an expert, it was improper for the trial court to permit Conley to offer the opinion evidence at issue. Eldridge, 396 S.W.2d at 316-317; Redding, 333 S.W.2d at 271. We believe Conley's testimony is analogous to that discussed in Redding v. Independent Contracting Co., 333 S.W.2d 269, 271 (Ky. 1960), wherein two state troopers who investigated an accident scene were allowed to testify as to their estimates of a vehicle's speed prior to the accident. The troopers based their estimates on viewing the wrecked vehicles at the scene. Because the troopers had no qualifications beyond "[having] been

in police work a good many years", the Redding court held this opinion evidence "clearly incompetent and valueless". Id.; see also, Eldridge, 396 S.W.2d at 316-317.

We further disagree with the Moores' assertion that Officer Conley's opinion that Smoot was traveling too fast is admissible as that of a lay witness, per KRE 701, as it was an inference based on Officer Conley's perceptions of the accident scene. Clement Brothers Construction Co. v. Moore, 314 S.W.2d 526, 530 (Ky. 1958), indicates that this rule is applicable to a witness who estimates the speed of a moving vehicle from his personal observation of the moving vehicle. Clifford v. Commonwealth, 7 S.W.3d 371, 374 (Ky. 1999). Officer Conley's testimony that Smoot was traveling too fast was not based on any personal observation of Smoot's moving vehicle. Accordingly, we conclude that KRE 701 does not authorize its admission.

For the aforementioned reasons, we conclude the trial court erred in permitting Officer Conley to offer opinion evidence that Smoot was traveling too fast for the conditions. As the testimony went to a disputed, and, what both sides agree is, a highly relevant issue of fact in this case, we cannot say that the error was harmless.³ Accordingly, the judgment must be

³ Having determined that the testimony was inadmissible for the reasons set forth in this opinion, we need not address the parties' arguments regarding the "ultimate issue".

vacated. The issue raised by the Moores in their cross-appeal is rendered moot.

For the aforementioned reasons the judgment of the Boyd Circuit Court is vacated and the case remanded for proceedings consistent with this opinion.

ALL CONCUR.

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