

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2008-CA-000425-DG

SHERRY WALLER FIELDS

APPELLANT

ON DISCRETIONARY REVIEW FROM JESSAMINE CIRCUIT COURT  
v. HONORABLE C. HUNTER DAUGHERTY, JUDGE  
ACTION NO. 07-XX-00005

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON AND MOORE, JUDGES; KNOPF,<sup>1</sup> SENIOR JUDGE.

KNOPF, SENIOR JUDGE: This Court accepted discretionary review of an opinion and order of the Jessamine Circuit Court, in which it affirmed the Jessamine District Court's judgment of conviction against Sherry Waller Fields.

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<sup>1</sup> Senior Judge William L. Knopf sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

Fields was convicted of operating a motor vehicle under the influence of alcohol (DUI), second offense; resisting arrest; and disorderly conduct. Fields argues that the evidence adduced at trial did not support her convictions for DUI and resisting arrest. Finding that her convictions were supported by substantial evidence, we affirm.

#### FACTUAL AND PROCEDURAL BACKGROUND

On the night of December 6, 2006, two officers from the Nicholasville Police Department were dispatched to a local restaurant to investigate a public disturbance in the restaurant's parking lot. Upon arriving at the restaurant, the officers found Fields in the parking lot, where she was yelling, screaming, and shouting profanities at other individuals. After a brief investigation, the officers arrested Fields for second-offense DUI, resisting arrest, and disorderly conduct.

In 2007, Fields' case proceeded to a bench trial. At trial, Gina Atkerson testified on behalf of the Commonwealth. According to Atkerson, she, along with three passengers, arrived at the restaurant and observed Fields' sports utility vehicle (SUV) sitting in a handicapped parking place. Atkerson testified that she thought that Fields' SUV was going to back out of the parking place because she observed that the SUV's brake lights and back-up lights were illuminated. At trial, Atkerson testified that she observed these lights for approximately five minutes while she and her passengers waited for Fields to leave. Atkerson explained that she, J.B. Robinson, and Nancy Toy exited

Atkerson's vehicle and proceeded to the restaurant. According to Atkerson, once she exited her vehicle, she heard the engine of Fields' SUV running.

After Atkerson testified, J.B. Robinson testified on behalf of the Commonwealth. Robinson had been a passenger in Atkerson's automobile. At trial, he explained that he observed that the back-up lights on Fields' SUV were illuminated and that he observed this for approximately five minutes while he and his companions waited for Fields to back out of her parking place. Robinson opined that Fields' SUV was running and had to be in the reverse gear since he observed the back-up lights.

Nancy Toy, another passenger in Atkerson's vehicle, testified for the Commonwealth as well. Like the prior witnesses, Toy testified that she observed Fields' SUV and noticed that the back-up lights were illuminated. Toy explained that they waited for Fields to leave, but she did not. According to Toy, she eventually exited Atkerson's car with Atkerson and J.B. Robinson, and, while outside the car, she heard the engine of Fields' vehicle running.<sup>2</sup>

After the other witnesses had testified, the Commonwealth called Officer Todd White of the Nicholasville Police Department to the stand. Officer White explained that he and Officer Resor were dispatched to investigate a disturbance at a local restaurant. Officer White testified that, upon arriving, he saw Fields outside the restaurant and heard her yelling, screaming, and cursing. He

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<sup>2</sup> In addition to Atkerson, J.B. Robinson, and Toy, Carolyn Robinson, who was also a passenger in Atkerson's car, testified for the Commonwealth. Carolyn Robinson corroborated the testimony of the other witnesses.

explained that he spoke with Fields and found her to be very belligerent. Officer White opined that Fields was extremely intoxicated since she had slurred speech, smelled of alcohol, and was unsteady on her feet. According to Officer White's testimony, he informed Fields that he was placing her under arrest and told her to put her hands behind her back. Officer White testified that when he and Officer Resor grabbed Fields, she started struggling with them. Officer White testified that Fields pulled away from him and Officer Resor and jerked her arms away from them. Officer White also explained that Fields eventually began to flail her arms in an attempt to get away from them. Eventually, the officers handcuffed Fields and took her into custody.

After hearing the evidence, the Jessamine District Court convicted Fields of second-offense DUI, resisting arrest, and disorderly conduct. Fields appealed her conviction to the Jessamine Circuit Court and the circuit court affirmed the judgment of the district court. Subsequently, Fields filed a motion for discretionary review with this Court. We granted review and now affirm Fields' conviction.

#### STANDARD OF REVIEW

When we review actions tried before the bench, we are bound to give due deference to the trial court's opportunity to judge the credibility of witnesses. For that reason, we will not disturb the trial court's findings of fact unless they are

clearly erroneous; that is, not supported by substantial evidence. CR<sup>3</sup> 52.01; *Black Motor Co. v. Greene*, 385 S.W.2d 954, 956 (Ky. 1965). According to the Supreme Court of Kentucky, substantial evidence consists of “evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men.” *Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971). In other words, it is that “evidence which would permit a fact-finder to reasonably find as it did.” *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986).

In actions tried before the bench, the trial court acts as the finder of fact. Thus, it has the sole responsibility to weigh the evidence before it and judge the credibility of all witnesses. Furthermore, it is not bound to accept the testimony of any witness as true. *Dunn v. Commonwealth*, 286 Ky. 695, 151 S.W.2d 763, 764-65 (1941). The trial court has the duty to weigh the probative value of the evidence and has the discretion to choose which testimony it finds most convincing. *Commonwealth, Dept. of Highways v. Dehart*, 465 S.W.2d 720, 722 (Ky. 1971). In other words, the trial court is free to believe all of a witness’s testimony, believe part of the witness’s testimony, or reject all of it. *Gillispie v. Commonwealth*, 212 Ky. 472, 279 S.W. 671, 672 (1926).

### DRIVING UNDER THE INFLUENCE

Upon discretionary review, Fields argues that her conviction for second-offense DUI was not supported by substantial evidence. According to

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<sup>3</sup> Kentucky Rules of Civil Procedure.

Fields, she was not operating or in physical control of her SUV as required by KRS 189A.010(1) in order to be convicted of DUI. To support her argument, Fields cites *Wells v. Commonwealth*, 709 S.W.2d 847, 849 (Ky. App. 1986), in which this Court described four factors for a trial court to consider when deciding whether a DUI suspect was in physical control of a vehicle: 1) whether the suspect in the vehicle was asleep or awake; 2) whether the engine of the suspect's vehicle was running; 3) the vehicle's location and all of the circumstances explaining how the vehicle arrived there; and 4) "the intent of the person behind the wheel."

According to Fields, if we apply the four *Wells* factors to the facts of her case, then we will conclude that she was neither operating nor in physical control of her SUV immediately before her arrest. Fields claims that the evidence presented at trial was not sufficient to establish that her engine was running. To support this claim, Fields presents the following theory. Fields admits that the headlights and the back-up lights of her vehicle were illuminated. However, she explains that the remote keyless entry device to her SUV has a special feature. This special feature turns on those lights when the device is used to remotely unlock the vehicle. Fields claims that, on the night in question, she used her remote keyless entry device to unlock her vehicle and that is why her back-up lights were illuminated. In addition, Fields reminds this Court that, at trial, she testified that she never started her engine and never placed her vehicle in reverse. Thus, she concludes that the second *Wells* factor was not met and she could not have been in physical control of her SUV per KRS 189A.010(1). Furthermore, she

claims that the fourth *Wells* factor was not met because she testified that she had no intent to drive her SUV.

We agree with Fields that the four factors found in *Wells* are applicable to this particular case. We also note that she does not dispute that the first and third factors have been met. Thus, we will limit our analysis to the second and fourth factors.

Regarding the second factor, whether her engine was running, we disagree with Fields' conclusion that the evidence adduced at trial did not establish this factor. To support her argument, Fields puts forth her theory regarding her remote keyless entry device. According to a copy of Fields' vehicle owner's manual,<sup>4</sup> when she uses her remote to unlock her SUV, the headlights and back-up lights are illuminated. However, according to her manual, these lights are only illuminated for forty seconds. Fields admits this in her brief. The evidence adduced at trial contradicts her remote keyless entry theory. At trial, Atkerson and her passengers testified that they observed that Fields' back-up lights were illuminated for approximately five minutes. Given the information from Fields' vehicle owner's manual and the evidence presented at trial, one could reasonably and logically infer that Fields' back-up lights were illuminated because Fields had started her engine and had placed her vehicle in reverse. This inference is confirmed by Atkerson and Toy, who both testified that they heard Fields' SUV running. Consequently, we conclude that the evidence presented at trial

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<sup>4</sup> Fields attached as an exhibit a photocopy of the relevant portion of her vehicle owner's manual to her brief.

demonstrated that Fields' engine was running, and, thus, the second factor found in *Wells* was met.

Regarding the last factor, Fields' intent, we disagree with the assertion that there was no evidence regarding her intent to drive. The evidence adduced at trial demonstrated that Fields was behind the wheel of her vehicle, had started the engine, and had placed the SUV in reverse. From this evidence, one could reasonably infer that Fields intended to drive her SUV. Consequently, the evidence demonstrated that the last *Wells* factor was met.

Since the evidence demonstrated that all four *Wells* factors were met, Fields' DUI conviction was supported by substantial evidence.

#### RESISTING ARREST

In her brief, Fields claims that her conviction for resisting arrest was not supported by substantial evidence. According to Fields, the elements of resisting arrest are

(1) A person is guilty of resisting arrest when he intentionally prevents or attempts to prevent a peace officer, recognized to be acting under color of his official authority, from effecting an arrest of the actor or another by:

(a) Using or threatening to use physical force or violence against the peace officer or another; or

(b) Using any other means creating a substantial risk of causing physical injury to the peace officer or another.

KRS 520.090.



Fields argues that no evidence was adduced at trial that she used or threatened to use force or violence against the officers. She also claims that the Commonwealth presented no evidence that she engaged in conduct which created a substantial risk of causing physical injury to the officers or to anyone else. Moreover, Fields asserts that there was no evidence that she forcibly resisted arrest. According to Fields, she merely refused to extend her arms in order to be handcuffed.

We note that the evidence adduced at trial contradicts Fields' assertion that she merely refused to extend her arms. Officer White testified that Fields pulled away from him and Officer Resor, that she jerked her arms away from them, and that she ultimately flailed her arms in an attempt to avoid being handcuffed.

Even though Fields did more than just refuse to extend her arms, we still must determine whether her conduct meets the elements of resisting arrest. In researching the issue, we found no case law in Kentucky that was sufficiently similar to be dispositive. However, we did uncover a case from Massachusetts that we find instructive: *Commonwealth v. Maylott*, 65 Mass.App.Ct. 466, 841 N.E.2d 717 (2006). In *Maylott*, the arresting officer attempted to arrest the appellant. When the officer informed the appellant that he was being placed under arrest, the appellant began flailing his arms. Furthermore, when the officer attempted to handcuff the appellant, he stiffened out his arm and refused to place his hands behind his back. Due to this behavior, the appellant was charged with and was ultimately convicted of resisting arrest. *Id.* at 718.

In resolving the appellant's claim, the Massachusetts Court of Appeals

set forth that state's resisting arrest statute which, at the time, read:

A person commits the crime of resisting arrest if he knowingly prevents or attempts to prevent a police officer, acting under color of his official authority, from effecting an arrest of the actor or another, by:

(1) using or threatening to use physical force or violence against the police officer or another; or

(2) using any other means which creates a substantial risk of causing bodily injury to such police officer or another.

MASS. GEN. LAWS 268 § 32B (2006). The Court in *Maylott* held that the appellant's conduct constituted resisting arrest under both subsections of the resisting arrest statute.

As can be seen, the facts and law in *Maylott* are virtually identical to the facts and law in the present case. Thus, we find that case to be persuasive. We conclude that, when Fields jerked and flailed her arms, she engaged in conduct that constituted a substantial risk of physical injury to Officers White and Resor. Thus, Fields' conviction for resisting arrest was supported by substantial evidence.

#### CONCLUSION

For the foregoing reasons, the opinion and order of the Jessamine Circuit Court, which upheld Fields' convictions for second-offense DUI and resisting arrest, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

David Russell Marshall  
Nicholasville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky  
Frankfort, Kentucky

Anna Roberts-Smith  
Special Assistant Attorney General  
Jessamine County Attorney's Office  
Nicholasville, Kentucky