RENDERED: SEPTEMBER 18, 2009; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001563-MR

BILLY REED — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 08-CR-00048

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; VANMETER, JUDGE; LAMBERT,[1] SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Appellant, Billy Dwayne Reed, appeals from his conviction, entered upon a jury verdict, for second-degree manslaughter. The conviction arose from a motor vehicle fatality. In this court, Appellant asserts that the trial court erred in admitting certain evidence concerning his medical treatment.

[1] Senior Judge Joseph E. Lambert 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.

He also argues that the recording of a 9-1-1 call from an anonymous caller was erroneously admitted in evidence. Finally, Appellant contends that the trial court erred in denying his motion to quash the indictment and dismiss the charge of wanton murder based on his constitutional claim that wanton murder under KRS 507.020(1)(b) is void for vagueness.

The factual circumstances giving rise to Appellant's conviction occurred on January 7, 2008, when Appellant drove his pick-up truck into the victim's motorcycle. The victim was sitting, unmoving, in a turning lane when Appellant swerved into the lane and struck the victim, throwing him nearly sixty feet. The evidence showed that Appellant made no attempt to brake before the collision and his vehicle traveled another 500 feet before coming to a stop. Emergency personnel responded, but the victim's injuries were fatal. At the scene, police officers performed various sobriety tests on Appellant, and he was arrested upon his failure to pass any of the tests. It was later determined that Appellant had visited a treatment center in West Virginia earlier the day of the accident where he received a therapeutic treatment of methadone. Thereafter, he consumed about half of a beer despite warnings from the methadone treatment center that mixing alcohol and methadone was highly dangerous. Blood tests revealed that Appellant also had Valium and Xanax in his system.

Appellant was charged with wanton murder pursuant to KRS 507.020(1)(b), which provides that a person is guilty of murder when:

> Including, but not limited to, the operation of a motor vehicle under circumstances manifesting extreme indifference to human life, he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person.

He was convicted of the lesser included offense of manslaughter in the second degree under KRS 507.040(1)(a), which provides:

> A person is guilty of manslaughter in the second degree when he wantonly causes the death of another person, including, but not limited to, situations where the death results from the person's . . . [o]peration of a motor vehicle[.]

The culpable mental state, "wantonly," is central to our review of Appellant's claim that the trial court erred in permitting the introduction of testimony from his medical treatment providers. Appellant asserts that Dr. Azeb and Dr. Hoover should not have been permitted to testify because both physicians had prescribed Loritab for Appellant, a drug that was not detected in his system at the time of the accident. However, Dr. Hoover had also prescribed Xanax, a drug that was present.

The mental state "Wantonly" is defined as follows:

> A person acts wantonly with respect to a result or to a circumstance described by a statute defining an offense 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 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.

KRS 501.020(3). To establish that Appellant was voluntarily intoxicated, as opposed to accidental intoxication due to ingesting various drugs without reasonably anticipating the result, the Commonwealth introduced the testimony of Dr. Azeb, Dr. Hoover, and Mr. Joe Chapman, the clinical director of the methadone treatment center. The two physicians testified that neither of them knew that Appellant was getting medication from the other or from the methadone treatment facility and that, had they known, they would not have treated him. Moreover, both physicians testified that they had counseled Appellant about the effects of alcohol when mixed with the narcotics that were prescribed and that they had warned Appellant not to see other physicians, use multiple pharmacies, or drink alcohol. Mr. Chapman testified concerning Appellant's methadone treatment, and he produced a "consumer information form" signed by Appellant. The form included information as to the risks and hazards of methadone treatment and explained that using alcohol, Valium, or other drugs in combination with methadone could have lethal effects. The form specifically urged patients to use caution while driving.

The testimony described hereinabove was admissible under Kentucky Rules of Evidence (KRE) 404(b)(1) to show that Appellant's intoxication was not the result of an accident in mixing the drugs. Moreover, the trial court did not abuse its discretion in finding that its probative value outweighed the danger of any prejudicial effects. KRE 401; KRE 403.

Appellant's related contention that the testimony of Dr. Azeb and Dr. Hoover was not relevant because their treatment of Appellant was too attenuated and remote in time is clearly refuted by the record. Indeed, Appellant had received a prescription from Dr. Azeb less than thirty days before the accident, and Dr. Hoover had treated Appellant as recently as the month before the accident.

Upon thorough consideration of Appellant's arguments and the entirety of the physicians' testimony in view of the culpable mental state, we discern no abuse of discretion in the trial court's evidentiary rulings in this regard.

Appellant next contends that a 9-1-1 recording of an anonymous caller should not have been admitted into evidence. The caller reported that a vehicle, roughly matching Appellant's vehicle, was driving erratically and had struck a guard rail. The caller indicated that the vehicle was traveling in the direction of the point where the fatal accident later occurred. The call was placed at 5:12 p.m., six minutes before the accident. Appellant asserts that admission of the 9-1-1 call violated his confrontation rights as recently expressed in the U.S. Supreme Court decisions, *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), and *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

We recognize that *Crawford* and *Davis* have significantly restricted the admissibility of testimonial statements, particularly, in comparison with the more liberal "indicia of reliability" test of *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), the previously prevailing rule. Upon review of the

trial court's decision to admit the 9-1-1 call, we must first determine whether the statements made during the call were testimonial in the context of Confrontation Clause analysis. *Davis* provides specific guidance for evaluating statements to determine whether they are testimonial or non-testimonial.

> Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 822. For a discussion of the testimonial/non-testimonial dichotomy, *see also Heard v. Commonwealth*, 217 S.W.3d 240 (Ky. 2007).

In this instance, the 9-1-1 caller was reporting to the emergency operator that he was seeing a dangerous circumstance as it was unfolding. Whether concerned for his own safety or for the safety of other drivers on the highway, the caller was clearly seeking police assistance to address what he perceived as an imminent, ongoing safety threat. With respect to conclusory statements made in response to the operator's follow-up questions, which may have evolved into testimonial statements, the trial court properly ordered redaction. Thus, only the safety concerns expressed by the 9-1-1 caller were admitted in evidence. Accordingly, admission of the 9-1-1 call did not violate the rule in *Davis* nor the Sixth Amendment Right of Confrontation as it was not testimonial.

Further attacking the 9-1-1 caller's description of the vehicle as different from the actual vehicle Appellant was driving, Appellant contends that the call should have been excluded due to unreliability. Appellant emphasizes that his accident reconstructionist testified that the damage to the side of Appellant's vehicle could have been caused by a guardrail, but not by a guardrail in the immediate vicinity – again, a potential discrepancy in the content of the 9-1-1 call. Appellant's legal argument concerning these discrepancies is unclear, as he relies on a qualification applicable only to the business records hearsay exception, one which is clearly not implicated here, as well as on KRE 403. Therefore, presumably, Appellant's argument is based on a claim of undue prejudice in the 9-1-1 call. This argument must fail. Appellant has not shown an abuse of discretion in the trial court's refusal to find that the danger of undue prejudice outweighed the probative value of the 9-1-1 call.

Finally, we address Appellant's contention that the wanton murder statute and second-degree manslaughter statute are void for vagueness when applied to vehicular homicide cases.

In 1998, the Supreme Court of Kentucky specifically rejected a contention that wanton murder under KRS 507.020(1)(b) was void for vagueness. *Brown v. Commonwealth*, 975 S.W.2d 922 (Ky. 1998). The constitutional challenge in *Brown* referenced the culpable mental state of "wantonly," but focused primarily on the additional requirement of "manifesting extreme indifference to human life." KRS 507.020(1)(b). Conceding that the foregoing

phrase is not "capable of precise definition," the Court explained that "[t]he accepted test in determining the required precision of statutory language imposing criminal liability is whether the language conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Brown*, 975 S.W.2d at 925 (*quoting Sasaki v. Commonwealth*, 485 S.W.2d 897 (Ky. 1972)). "However, all that is required of a statute is fairness. 'Condemned to the use of words, we can never expect mathematical certainty from our language.'" *Brown*, 975 S.W.2d at 925 (*quoting Payne v. Commonwealth*, 623 S.W.2d 867, 870 (Ky. 1981) (*quoting Grayned v. City of Rockford*, 408 U.S. 104, 110, 92 S.Ct. 2294, 2300, 33 L.Ed.2d 222 (1972)). *Brown* concluded that the wanton murder statute was not void for vagueness. This holding was reaffirmed in *Cook v. Commonwealth*, 129 S.W.3d 351 (Ky. 2004).

Appellant's argument is similar to those rejected in *Brown* and *Cook*. However, Appellant focuses primarily on the definition of "wantonly." He asserts that the definition of "wantonly," and particularly that portion stating that "a person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto," cannot serve as a predicate to criminal liability.

"Voluntary Intoxication" is defined as:

> Intoxication caused by substances which the defendant knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or

> under such duress as would afford a defense to a charge of crime.

KRS 501.010(4). Appellant devotes much of his argument to a claimed lack of notice under the statute that ingestion of a small amount of alcohol and prescription medicine may constitute "wanton" conduct. However, the statute specifically declares that where a person creates a substantial and unjustifiable risk, but is unaware that he is doing so solely by virtue of his own voluntary intoxication, he acts wantonly. Thus, the General Assembly provided Appellant with adequate notice. Portions of Appellant's argument seem to allege ambiguity in the statute because intoxication depends on individual factors, such as a person's tolerance. However, this is an evidentiary question concerning whether Appellant was actually "intoxicated" and is not an attack upon the constitutionality of the statute.

Although Appellant's constitutional challenge focuses on the definition of "wantonly," as opposed to the "extreme indifference to human life" provision that was challenged in *Brown* and *Cook*, the Supreme Court's reasoning in those cases is equally applicable here. Appellant's challenge is even less persuasive as "wantonly" has been given a statutory definition. KRS 501.020(3).

Accordingly, Appellant's conviction of second-degree manslaughter is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:

Tommy Ryan May
Pikeville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Julie Scott Jernigan
Assistant Attorney General
Frankfort, Kentucky

ORAL ARGUMENT FOR APPELLEE:

Julie Scott Jernigan
Frankfort, Kentucky