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OPINION OF APRIL 19, 2013, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000636-DG

CHRISTOPHER DUNCAN APPELLANT

ON DISCRETIONARY REVIEW FROM WEBSTER CIRCUIT COURT
v. HONORABLE C. RENÉ WILLIAMS, JUDGE
ACTION NO. 10-XX-00004

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, STUMBO, AND THOMPSON, JUDGES.

CLAYTON, JUDGE: This is an appeal from the Webster Circuit Court's decision affirming Webster District Court's ruling on the issue of whether a blood test is warranted when a breathalyzer would be sufficient. Based upon the following, we reverse the decision of the Webster Circuit Court and remand this action for findings consistent with this opinion.

FACTUAL AND PROCEDURAL HISTORY

The appellee, Christopher Duncan, was arrested on March 31, 2007, for Driving Under the Influence ("DUI"). The arresting officer administered a portable breathalyzer test ("PBT"), which indicated a presence of alcohol. Duncan also failed a field sobriety test. The officer then asked Duncan to submit to a blood test, which Duncan refused. He did agree, however, to submit to a breathalyzer test at the station. The officer refused, and Duncan was arrested.

On October 23, 2007, Duncan filed a motion to dismiss the DUI charge with the Webster District Court. Duncan argued that the officer's request that he submit to a blood test rather than a breathalyzer or urine test was in error. On February 26, 2008, the Webster District Court denied Duncan's motion. Duncan then appealed this ruling to the Webster Circuit Court, which affirmed it.

Duncan moved a panel of this court for discretionary review of the Webster Circuit Court's affirmation of the district court ruling. Our court denied the motion for discretionary review, holding that the appeal was not ripe for review because Duncan had not been found guilty of the DUI charge.

On July 10, 2010, Duncan pled guilty to DUI, Second Offense, reserving the right to appeal the issue of whether the officer's actions requiring him to submit to a blood test were in error. Duncan then filed an appeal with the Webster Circuit Court which held that, pursuant to the ruling in *Beach v. Commonwealth,* 927 S.W.2d 826 (Ky. 1996), an arresting officer has the option as to which test may be given in a DUI case. It concluded that the Supreme Court of

Kentucky had already decided the issue raised by Duncan and that the arresting officer is the one who chooses which test to administer under KRS 189A.103(1).

The Webster Circuit Court councluded that Duncan's other constitutional issues were without merit. Specifically, it found that the United States Supreme Court has held that a blood test does not violate the Federal Due Process Clause, the Fifth Amendment, the Sixth Amendment or the Fourth Amendment. *Schmerber vs. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). Thus, the Circuit Court affirmed the decision of the Webster District Court. Duncan then brought a second motion for discretionary review which this Court granted.

STANDARD OF REVIEW

Whether the law of Kentucky allows an arresting officer to choose whether a suspect be offered a blood test rather than a breathalyzer test is a matter of law. We review questions of law *de novo*. *Western Kentucky Coca-Cola Bottling Co., Inc. v. Revenue Cabinet*, 80 S.W.3d 787, 790 (Ky. App. 2001).

DISCUSSION

As set forth above, the trial court relied on the holding in *Beach, supra*, in making its decision. In *Beach*, the officer arrived at the scene of a single vehicle accident and found Beach nearby. Beach told the officer that she had been driving the car, and she smelled strongly of alcohol. The officer administered a PBT and several field sobriety tests before taking Beach to a local hospital for a blood test. Beach consented to the blood test. The officer testified that the breathalyzer at the

local police station was not working. Beach objected to the results of the blood test being administered at trial, but the district court ruled in the Commonwealth's favor. Her appeal was heard by the Kentucky Supreme Court which held as follows:

> It is the holding of this Court that KRS 189A.103(1) and (5) do not require that a police officer must first offer a DUI suspect a breath test before asking him or her to submit to a blood text. The provisions of KRS 189A.103 provide that an individual driving on the highways of Kentucky has given implied consent to the performance of a blood, breath and/or urine tests in the event the individual is suspected of driving a vehicle under the influence.

Beach, 927 S.W.2d at 828.

Here, the officer testified that it was the policy of his department at the time for the officer to choose which test to administer. That policy was based on Kentucky's implied consent law and on the *Beach* decision. Duncan agreed to a breathalyzer, but the officer asked for a blood test.

Kentucky Revised Statute (KRS) 189A.103 provides, in relevant part, as follows:

> 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 whih 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;

. . . .

> (5) When the preliminary breath test, breath test, or other evidence gives the peace officer reasonable grounds to believe there is impairment by a substance which is not subject to testing by a breath test, then blood or urine tests, or both, may be required in addition to a breath test, or in lieu of a breath test[.]

In *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), the United States Supreme Court held that the taking of blood from a person is considered a search and is, consequently, subject to Fourth Amendment and state constitutional limitations. *See Farmer v. Commonwealth*, 169 S.W.3d 50 (Ky. App. 2005). In the recent United States Supreme Court case of *Missouri v. McNeely*, --- U.S. ---, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013), the Court held as follows:

> The question presented here is whether the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases. We conclude that it does not, and we hold, consistent with general Fourth Amendment principles, that exigency in this context must be determined case by case based on the totality of the circumstances.

Missouri, *supra*, at 1556. (Emphasis in original.)

The Missouri implied consent statute, VAMS 577.020, is very similar to Kentucky Revised Statute 189A.103 upon which the Kentucky Supreme Court based its decision in *Beach v. Commonwealth*, *supra*. In *Cardine v. Commonwealth*, 283 S.W.3d 641 (Ky. 2009), the Kentucky Supreme Court found

that ". . . the United States Supreme Court's interpretation of the federal constitution, as the supreme law of the land, trumps any competing interpretation by this Court and any inconsistent statute passed by this Commonwealth's General Assembly." *Cardine* at 647. Thus, this decision in *Missouri*, *supra*, is controlling. We therefore reverse the decision of the Webster Circuit Court and remand this case for further proceedings consistent with this opinion.

ALL CONCUR.

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