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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000931-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 11-CI-000210

HON. DONALD ARMSTRONG; AND
THE REAL PARTY IN INTEREST,
MICHAEL G. HOWARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND KELLER, JUDGES.

ACREE, CHIEF JUDGE: The Commonwealth appeals an order of the Jefferson Circuit Court denying its petition for a writ of prohibition. The issue underlying the Commonwealth's writ petition is whether the Jefferson District Court properly

granted Appellee Michael G. Howard's motion to suppress evidence acquired following his arrest for driving under the influence. We affirm.

I. Facts and Procedure

On January 10, 2010, Louisville Metro Police Officer Brandon Hogan was on routine patrol in Louisville, Kentucky. At approximately 5:00 a.m., a concerned citizen called 911 and reported that an individual was passed out in a vehicle parked in a parking lot adjacent to Fourth Street Live, an entertainment district in downtown Louisville. The concerned citizen said the individual had his foot on the accelerator and the vehicle's engine was revving. Officer Hogan responded.

Arriving at the scene, Officer Hogan approached the vehicle and observed Howard asleep in the vehicle's driver's seat. The vehicle was legally parked with its doors locked, the key was in the ignition, and the vehicle was running. Howard's foot was on the accelerator causing the engine to rev continuously.

At the suppression hearing, Officer Hogan described Howard as slouched over and unresponsive, with one hand on the steering wheel and one hand on the gear shift. Officer Hogan observed the engine's temperature gauge was almost in the red zone. Officer Hogan attempted to wake Howard by tapping on the window, yelling loudly, and shining his flashlight in Howard's face. When those methods failed, Officer Hogan broke the vehicle's back window, unlocked the doors, and removed Howard from the vehicle. Howard then woke up.

Howard informed Officer Hogan he had been drinking whiskey at Fourth Street Live and "was really, really drunk." Officer Hogan observed Howard was unsteady on his feet, was slurring his speech, smelled of alcohol, and had blood-shot eyes. Officer Hogan arrested Howard for driving under the influence (DUI) and transported him to Louisville Metro Corrections where a breathalyzer test was administered.

Howard moved to suppress the results of the breathalyzer test. Howard argued that Officer Hogan lacked probable cause to arrest him for driving under the influence because he was not operating or in physical control of his vehicle at the time of the arrest, as required by Kentucky Revised Statute (KRS) 189A.010(1). The district court agreed and granted Howard's suppression motion.

The Commonwealth then filed a Petition for a Writ of Prohibition and/or Mandamus in Jefferson Circuit Court seeking to prohibit the district court from suppressing the results of Howard's breathalyzer test. The circuit court denied the petition. The Commonwealth promptly appealed.

II. Prerequisites for the Grant of a Writ of Prohibition

"A writ of prohibition or mandamus is an extraordinary form of relief and should not freely be granted." *Riley v. Gibson*, 338 S.W.3d 230, 233 (Ky. 2011). The decision to issue a writ, however, rests within the sound discretion of the court with which the petition is filed. *Hoskins v. Maricle*, 150 S.W.3d 1, 9 (Ky. 2004). A writ may be issued if:

> (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise, and great injustice and irreparable injury will result if the petition is not granted.

Mahoney v. McDonald-Burkman, 320 S.W.3d 75, 77 (Ky. 2010) (citation omitted).

Here, the Commonwealth asserts the district court acted within its jurisdiction, but erroneously – the second category of writs. Analysis under this category prohibits consideration of the merits, unless the petitioner first establishes he has no adequate remedy by appeal and will suffer great and irreparable injury if error has been committed and the petition denied. *Gilbert v. McDonald-Burkman*, 320 S.W.3d 79, 84 (Ky. 2010). The Commonwealth has met this preliminary burden.

A. Inadequate Remedy by Appeal

Demonstrating the lack of an adequate remedy by appeal is "an absolute prerequisite" to the issuance of a writ in cases where the circuit court is acting within its jurisdiction. *The Independent Order of Foresters v. Chauvin*, 175 S.W.3d 610, 615 (Ky. 2005). "'No adequate remedy by appeal' means that any injury to [the petitioner] could not thereafter be rectified in subsequent proceedings in the case." *Id.* at 614-15 (quoting *Bender v. Eaton*, 343 S.W.2d 799, 802 (Ky. 1961)).

Once the results of the breathalyzer test were suppressed, the Commonwealth had two options: (1) try this case without the suppressed evidence, or (2) seek review of the district court's interlocutory suppression order. In Kentucky, it is well-settled that the Commonwealth is prohibited from filing an interlocutory appeal contesting a district court's suppression ruling. *Commonwealth v. Williams*, 995 S.W.2d 400, 402 (Ky. App. 1999) ("KRS 23A.080, the statute addressing appeals from district court to circuit court, makes no provision for interlocutory appeals."); *cf.* KRS 22A.020 (providing for certain interlocutory appeals by the Commonwealth from the *circuit court* to the *court of appeals*, but not from *district court* to *circuit court*). Accordingly, "the Commonwealth's only vehicle for review of [a] district court's [interlocutory] ruling [is] an original action in circuit court seeking prohibition." *Williams*, 995 S.W.2d at 403; *see also Tipton v. Commonwealth*, 770 S.W.2d 239 (Ky. App. 1989) *abrogated in part on other grounds by Hoskins*, 150 S.W.3d at 10.

Furthermore, if the Commonwealth elected to proceed to trial without the suppressed evidence, then upon an acquittal it would be constitutionally prohibited from seeking appellate review of the suppression order. KY. CONST. § 115 ("[T]he Commonwealth may not appeal from a judgment of acquittal in a criminal case[.]"); *Ballard v. Commonwealth*, 320 S.W.3d 69, 72 (Ky. 2010). In sum, we agree that the Commonwealth lacks an adequate remedy by appeal if the district court is indeed acting erroneously. *Commonwealth v. Peters*, 353 S.W.3d 592, 595 (Ky. 2011).

B. Great Injustice and Irreparable Injury

"[G]reat [injustice] and irreparable injury" is something "of a ruinous nature[,]" *Bender*, 343 S.W.2d at 801; that is, some "incalculable damage to the applicant . . . either to the liberty of his person, or to his property rights, or other far-reaching and conjectural consequences." *Litteral v. Woods*, 223 Ky. 582, 4 S.W.2d 395, 397 (1928).

As this Court recognized in *Tipton*, and reiterated in *Williams*, "this form of interlocutory review is available from district court rulings [because,] '[o]therwise, the Commonwealth may be forced to trial without vital evidence or with some other significant prejudice to its case[.]'" *Williams*, 995 S.W.2d at 404 (citing *Tipton*, 770 S.W.2d at 241). The "great injustice" and "harm" afforded the Commonwealth by proceeding to trial without crucial evidence cannot be undone via appeal or otherwise. Accordingly, we are persuaded the Commonwealth would suffer great and irreparable injury if the district court erroneously suppressed the results of Howard's breathalyzer test.

III. Review of the order suppressing the results of Howard's breathalyzer test

Having found, in this case, that the Commonwealth is not precluded from seeking the remedy of a writ, we next proceed to the merits of the writ petition, *i.e.*, whether the district court erroneously granted Howard's motion to suppress the results of his breathalyzer test. We are persuaded the district court did not err as a matter of law in granting Howard's suppression motion.

On appeal, we defer, absent clear error, to the trial court's findings of fact with respect to the surrounding circumstances. *Commonwealth v. Marshall*, 319 S.W.3d 352, 357 (Ky. 2010); Kentucky Rules of Criminal Procedure (RCr) 9.78 ("If supported by substantial evidence the factual findings of the trial court shall be conclusive."). However, we conduct a *de novo* review to determine if the law was properly applied to the facts. *King v. Commonwealth*, 302 S.W.3d 649, 653 (Ky. 2010).

First, we find no clear error in the district court's fact-finding. The material facts in this case are largely undisputed. Nonetheless, to determine whether the circuit court's factual findings were supported by substantial evidence, we reviewed Officer Hogan's suppression hearing testimony; Officer Hogan was the sole witness. His testimony was clear, concise, and detailed, and there is no reason to doubt the veracity of his testimony. Accordingly, we conclude that the district court's factual findings were supported by substantial evidence, and are therefore conclusive.

Next, we undergo a *de novo* review of the law as applied to those facts. As framed by the Commonwealth, the sole issue before this Court is whether Officer Hogan had probable cause to arrest Howard for DUI. The Commonwealth argues probable cause existed because, under the totality of the circumstances and all reasonable inferences drawn therefrom, it is clear Howard was in physical control of his vehicle while intoxicated, thereby justifying his DUI arrest.

KRS 189A.010 provides, in relevant part, that "[a] person shall not operate or be in physical control of a motor vehicle anywhere in this state . . . [w]hile under the influence of alcohol[.]" KRS 189A.010(1)(b). A district court may grant a motion to suppress evidence resulting from an arrest that lacked probable cause. *Wilson v. Commonwealth*, 37 S.W.3d 745, 748 (Ky. 2001). "Probable cause must exist and must be known by the arresting officer at the time of the arrest." *White v. Commonwealth*, 132 S.W.3d 877, 883 (Ky. App. 2003). Probable cause exists if the arresting officer has a reasonable belief, in view of all the evidence, that there was a "fair probability" that the defendant was operating or in physical control of the motor vehicle while under the influence of alcohol. *Id.*; *see also Eldred v. Commonwealth*, 906 S.W.2d 694, 705 (Ky. 1994), *abrogated on other grounds by Commonwealth v. Barroso*, 122 S.W.3d 554 (Ky. 2003). In ascertaining probable cause, the trial court is permitted to consider circumstantial evidence. *Blades v. Commonwealth*, 957 S.W.2d 246, 250 (Ky. 1997).

The seminal case in Kentucky on this issue is *Wells v. Commonwealth,* 709 S.W.2d 847 (Ky. App. 1986). In *Wells*, rendered under a former version of KRS 189A.010, a police officer found Wells asleep in the driver's seat of his van. The van was parked in a parking lot outside a hotel. Wells was alone in the van, the keys were in the ignition, and the motor was running. The van's parking brake was engaged. The police officer discovered a case of beer in the van, with three or four cans missing and one can empty. The police officer concluded Wells was under

the influence of alcohol because he was unsteady on his feet, and he failed sobriety and breathalyzer tests.

In ascertaining whether probable cause existed to arrest Wells for driving under the influence, this Court examined several factors:

> (1) whether or not the person in the vehicle was asleep or awake; (2) whether or not the motor was running; (3) the location of the vehicle and all of the circumstances bearing on how the vehicle arrived at that location; and (4) the intent of the person behind the wheel.

Wells, 709 S.W.2d at 849 (citation omitted). The Court ultimately determined insufficient evidence existed to prove that Wells had operated his vehicle while under the influence of alcohol, because there was no evidence indicating that Wells had driven his vehicle to its current location while intoxicated or that he intended to operate his vehicle. *Id.* at 850. Instead, the Court inferred that Wells started drinking after he parked his vehicle in the hotel parking lot. *Id.*

Before going further and applying the *Wells* factors here, we note our agreement with the Commonwealth that the concept of physical control of a vehicle has evolved from a strict *Wells* analysis to a totality of the circumstances approach. However, we do not agree with the Commonwealth's argument that the district court and, in turn, the circuit court, erred by narrowly applying the *Wells* factors without considering the totality of the circumstances.

As aptly noted by the Commonwealth, the district court was required to exercise caution not to view the *Wells* factors in isolation, but to consider the totality of the circumstances. *See White*, 132 S.W.3d at 883-84 ("[T]he *Wells* and

Harris factors [are not] exclusive for determining probable cause . . . [because] [p]robable cause is 'a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules.'" (citation omitted)). Within the totality of the circumstances analysis, the *Wells* factors remain a useful tool in assessing whether a person was, in fact, operating or in physical control of a vehicle while intoxicated. *See id.* (recognizing the continuing validity of *Wells*). The *Wells* factors have been, and continue to be, equally applicable to this case.

The first of the enumerated factors in *Wells* assesses whether the defendant was asleep or awake. 709 S.W.2d at 849. In the case before us, Officer Hogan testified that when he arrived Howard was slouched over in the driver's seat asleep. As noted by the *Wells* court, "[a] sleeping person is seldom operating anything[,]" particularly a vehicle which is not in motion. *Id.* at 849-50 (citation omitted). The first factor has not been met.

The second factor is whether the vehicle's engine was running. Officer Hogan testified Howard's truck was running and the engine was revved. The second factor has been satisfied.

Third, the Court must examine the vehicle's location and all of the circumstances reasonably evidencing how the vehicle arrived there. Officer Hogan testified Howard's vehicle was properly situated in a parking spot, and there was nothing unusual about how or where Howard's vehicle was parked. Officer Hogan also testified that Howard's vehicle was located in a lot frequently utilized by

Fourth Street Live patrons, and Howard indicated he had, in fact, come from Fourth Street. From this testimony, it was reasonable for the district court to infer Howard parked his vehicle prior to going to Fourth Street. Further, given the vehicle's location, similar to the defendant in *Wells*, there is no evidence Howard moved or otherwise operated his vehicle while intoxicated. 709 S.W.2d at 850; *cf. White v. Commonwealth*, 132 S.W.3d 877, 880 (Ky. App. 2004) (truck resting against a guardrail with its rear section partially in the roadway); *Blades,* 957 S.W.2d at 248 (truck parked in the roadway with its emergency flashers operating); *Newman v. Stinson*, 489 S.W.2d 826, 828 (Ky. 1972) (vehicle stopped at an intersection with its motor running and the driver nearly asleep). The evidence impacting our analysis of the third factor favors Howard.

The final factor requires us to consider the intent of the person behind the wheel. The Commonwealth argues that Howard intended to drive his vehicle while under the influence of alcohol because, drawing all reasonable inferences, it is clear Howard returned to his vehicle intoxicated from Fourth Street, started the vehicle, put one hand on the gear shift and the other on the steering wheel, and pushed the gas pedal down, all in preparation to drive away. Consequently, the Commonwealth contends, Howard was one step away (*i.e.*, putting the vehicle in gear) from driving the vehicle, thereby clearly establishing Howard intended to operate and was in physical control of his vehicle. We cannot embrace the Commonwealth's contention that the fact that Howard's foot was fully depressing the accelerator conclusively indicates he intended to drive. The fact is that *fully*

depressing the accelerator is *not* the step that immediately precedes putting the vehicle's transmission into gear. As Officer Hogan testified, Howard was asleep and exceedingly difficult to rouse. In light of that fact, it is more reasonable to infer that, while Howard was asleep, he inadvertently pressed the accelerator fully to the floor.

We do not fail to appreciate the Commonwealth's argument, nor the officer's concern, that Howard was one step away from committing a crime – DUI – that might have resulted even in the loss of life. However, that single step is the dividing line between a legal and an illegal act.

Effectively, the district court concluded that there was not a "fair probability" that Howard committed the crime prohibited by KRS 189A.010(1). Under the totality of the circumstances, we cannot conclude that the district court's determination was erroneous. While the vehicle's engine was running, the vehicle was in park. Considering it was a cold January evening, the district court effectively found it a "fair probability" that Howard started the engine to stay warm. As in *Wells*, we do not "believe that merely starting the [vehicle's] engine . . . [constituted] an exercise of actual physical control[.]" 709 S.W.2d at 850.

Considering all the circumstances, the inference to be drawn is not that Howard intended to operate a motor vehicle while intoxicated, but that he had returned to his vehicle after an evening of merry-making, entered his vehicle and started it to warm himself while he sobered, at least to some degree, before returning home. But for the fact that Howard fell asleep and did not wake until the

officer wakened him, perhaps he might have committed the crime of driving under the influence. But he did not.

IV. Conclusion

The Jefferson Circuit Court's April 25, 2011 order denying the Commonwealth's petition for a writ of prohibition is affirmed.

ALL CONCUR.

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