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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001235-DG

COMMONWEALTH OF KENTUCKY APPELLANT

ON DISCRETIONARY REVIEW FROM JEFFERSON CIRCUIT COURT
v. HONORABLE CHARLES L. CUNNINGHAM, JR., JUDGE
ACTION NO. 11-XX-000002

JAMES BEDWAY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, DIXON AND STUMBO, JUDGES.

DIXON, JUDGE: The Commonwealth has sought discretionary review of an opinion of the Jefferson Circuit Court holding that Appellee, James Bedway, was deprived of his statutory right under KRS 189A.105(3) "to attempt to contact and communicate with an attorney" after being arrested for driving under the influence, and that such deprivation mandated the exclusion of Bedway's breathalyzer test.

After reviewing the record and applicable law, we uphold the decision of the circuit court.

In the early morning hours of March 15, 2009, Jefferson County Deputy Sheriff Sean Hayden stopped a vehicle on I-264 in Louisville that was weaving erratically and had expired tags. Bedway, the driver of the vehicle, smelled of alcohol and had slurred speech. Bedway was administered field sobriety tests and then placed under arrest for operating a motor vehicle under the influence of alcohol. Upon arriving at Metro Corrections, Bedway was informed that under KRS 189A.105(3) he had ten to fifteen minutes to contact an attorney before submitting to a breathalyzer test. Appellant apparently requested to call his daughter to obtain the telephone number of attorney Paul Gold, who had previously done some work for the family. However, Bedway was told he could only call an attorney and was to use either the phone book or numbers written on the wall next to the phones. Bedway thereafter submitted to a breathalyzer test which produced a result of .161, more than twice the legal limit.

Prior to trial in the Jefferson District Court, Bedway moved to dismiss the charges against him on the grounds that the arresting officer did not have reasonable and articulable suspicion to stop his vehicle on the day in question. Although the district court granted the motion and dismissed the action, the Commonwealth appealed and the circuit court ultimately reversed the district court.

On December 7, 2010, the matter proceeded to a bench trial in the district court. At the close of evidence, Bedway moved to suppress all evidence on the basis that he was not afforded his statutory right to attempt to contact an attorney as provided in KRS 189A.105(3). The district court denied the motion, finding that Bedway's request to call his daughter did not trigger the statutory provisions. Bedway thereafter entered a conditional guilty plea to driving under the influence and appealed to the circuit court.

On June 8, 2011, the circuit court sitting in its appellate capacity rendered a thorough and well-reasoned opinion finding that Bedway's statutory right to contact and communicate with an attorney was denied and, as a result, evidence of the breathalyzer test should be suppressed. The circuit court acknowledged that although there are a number of published opinions shedding light on the operation of KRS 189A.105(3), the issue of whether contacting a third party to obtain an attorney's telephone number is encompassed within the meaning of "attempt" is one of first impression. After engaging in an analysis of the applicable case law, including *Litteral v. Commonwealth*, 282 S.W.3d 331, 333 (Ky. App. 2008), *Bhattacharya v. Commonwealth*, 292 S.W.3d 901 (Ky. App. 2009), and *Commonwealth v. Long*, 118 S.W.3d 178 (Ky. App. 2003), the circuit court concluded that a multi-factor test adopted in *Long* was a "compelling approach to the issue at hand[,]" explaining:

> [L]aw enforcement must make a reasonable effort to accommodate a suspect in his attempt to contact an attorney, which can include permitting him to obtain

contact information through a third party. Therefore, under the totality of the circumstances, a trial court must determine whether this right is reasonably facilitated. Factors to include, but are not limited to, the following: (1) time of day; (2) whether the suspect is attempting to obtain the number(s) of a specific attorney whom he knows personally, or knows by reputation; (3) whether the suspect affirmatively states that a third party has an attorney phone number not available in the phonebook (i.e. home or cell number); and (4) whether the request is timely. According to *Litteral, supra,* and *Bhattacharya, supra*, the underlying concern of KRS 189A.105 is obtaining accurate test results. So long as this task moves forward without delay, the Court sees no legitimate reason why a suspect cannot utilize the time afforded under subsection (3) to act in reasonable furtherance of attempting to contact, and communicate with, an attorney.

. . .

When applying this test to the facts of the immediate case, it is clear that Mr. Bedway was not allowed to reasonably effectuate his right to attempt to contact an attorney. The time of his observation period was approximately 5:45 a.m., which is a difficult time to contact an attorney at an office. With respect to the second factor, Mr. Bedway testified that he knew Mr. Gold's work because he previously represented his daughter. As such, although there was no established attorney-client relationship, Mr. Bedway's desire to call his daughter to obtain Mr. Gold's numbers was not as random as opening a phonebook and dialing any attorney's number, a practice the Commonwealth apparently *would* allow. Under the third factor, Mr. Bedway testified that his daughter had Mr. Gold's home and cell phone numbers. With respect to timeliness, the record indicates that Mr. Bedway made his request with sufficient time to make the calls and secure at least some minimal amount of counseling. (Citations omitted.)

The circuit court thereafter turned to the issue of whether the violation of KRS 189A.105(3) required suppression of Bedway's test results. The court rejected the Commonwealth's reliance on *Litteral* and *Beach v. Commonwealth*, 927 S.W.2d 826 (Ky. 1996), for the proposition that evidence obtained in violation of a statutory right, where no constitutional right is involved, need not be suppressed. The court opined:

> [U]nder the Commonwealth's analysis it really does not matter whether law enforcement officers follow the mandates of the statute because there is no remedy. . . .
>
> With respect to access to legal counsel during testing, the Legislature bestowed the right to at least attempt to seek the advice of counsel, however brief it may be. This counseling could touch a suspect's right to refuse testing . . . which is similar in effect to the right against self-incrimination. The right against self-incrimination has been held to be nearly sacrosanct, and, although not required by the Constitution, law enforcement officers must recite certain rights upon arresting suspects or risk suppression of incriminating statements. . . . [T]he right to attempt to contact an attorney is not a hollow right because it can have a substantial impact on the prosecution of drivers arrested for DUI. As with *Long*, ignoring the mandates of the informed consent statute without fear of suppression would render the statute meaningless and incentivize law enforcement practices that do not conform to the Legislature's mandate.

Accordingly, the circuit court reversed the district court's denial of Bedway's motion to suppress the evidence. The Commonwealth thereafter filed a motion for discretionary review in this Court.

The Commonwealth first argues that the circuit court impermissibly expanded the scope of KRS 189A.105(3). The Commonwealth cites to *Litteral v.*

Commonwealth, 282 S.W.3d 331,333 (Ky. App. 2008), wherein a panel of this Court held that "[t]he 'right' described is very circumscribed. It is merely the right to 'an opportunity . . . to attempt to contact and communicate with an attorney[,]'" and further that "the Legislature intended only to allow such right as would not infringe upon the Commonwealth's need to obtain accurate evidence regarding a violation of KRS 189A.010." As such, it is the Commonwealth's position that the statute bestows the right to contact an attorney and no one else. Moreover, the Commonwealth complains that even if KRS 189A.105(3) was violated, suppression of the evidence was erroneous because the drastic remedy of exclusion of evidence is reserved only for the violation of fundamental constitutional rights.

Our standard of review is set forth in *Bhattacharya v. Commonwealth*, 292 S.W.3d at 903, wherein a panel of this Court stated:

> If the trial court's findings of fact are supported by substantial evidence, then they are conclusive. We conduct *de novo* review of the trial court's application of the law to the facts. We review findings of fact for clear error, and we give due weight to inferences drawn from those facts by resident judges and local law enforcement officers. (Internal citation omitted.)

Since the proper interpretation of KRS 189A.105(3) is purely a legal issue, our review is *de novo*. *Long*, 118 S.W.3d at 181. As noted in *Long*, "On review, it is our duty to construe the statute so as to effectuate the plain meaning and unambiguous intent expressed in the law. Moreover, we understand that the judiciary is not at liberty to add or subtract from the legislative enactment . . . or to attempt to cure any omissions." *Id.* (internal quotations and citations omitted).

KRS 189A.105(3) provides:

> During the period immediately preceding the administration of any test, the person shall be afforded an opportunity of at least ten (10) minutes but not more than fifteen (15) minutes to attempt to contact and communicate with an attorney and shall be informed of this right. Inability to communicate with an attorney during this period shall not be deemed to relieve the person of his obligation to submit to the tests and the penalties specified by KRS 189A.010 and 189A.107 shall remain applicable to the person upon refusal. Nothing in this section shall be deemed to create a right to have an attorney present during the administration of the tests, but the person's attorney may be present if the attorney can physically appear at the location where the test is to be administered within the time period established in this section.

Recently, in *Ferguson v. Commonwealth*, 362 S.W.3d 341 (Ky. App. 2011), a panel of this Court addressed the operation of KRS 189A.105(3). Therein, Elizabeth Ferguson was arrested for driving under the influence and transported to the Carroll County Detention Center. Upon arriving at the center, Ferguson's purse containing her cell phone was confiscated, and she was thereafter informed of her rights under KRS 189A.105(3) to an opportunity to attempt to contact and communicate with an attorney during the ten to fifteen minutes immediately preceding the administration of the breathalyzer test. Ferguson told officers that she had an attorney whose number was stored in her cell phone and requested access to such. Officers denied her request, however, and she was provided access to a collect-call only telephone on the wall of the jail. Ferguson thereafter submitted to the breathalyzer test and produced a result of 0.092.

Ferguson's motion to suppress the results of the breathalyzer test was denied by the district court, which was later affirmed by the circuit court. Ferguson thereafter entered a conditional guilty plea and the matter proceeded on appeal to this Court, wherein the panel held that KRS 189A.105(3) was violated and Ferguson's test results should have been suppressed:

> Ferguson's argument presents two questions: (1) was her right under KRS 189A.105(3) violated, and, (2) if so, does the violation require suppression? . . .
>
> . . . .
>
> Ferguson knew which attorney she wished to contact and had the phone number in her cell phone. In today's technologically advanced society, many people store important contact information in their cell phones. It is not unreasonable to require some minimal police assistance, such as here, by providing reasonable access to a cell phone in the immediate area for the limited purpose of procuring an attorney's phone number or contacting said attorney in order to exercise one's right as provided by KRS 189A.105(3). (Citation and footnote omitted.)
>
> > [FN 2] In *Bhattacharya*, we found that where a detainee was interested in contacting an attorney, a phone book was sufficient for locating a number. In contrast, the detainee in the matter *sub judice* had the phone number of her attorney stored in her cell phone and advised the officer that her attorney only received phone calls on a cell phone. Certainly in today's society, ubiquitous use of cell phones makes the request to retrieve a phone number from a cell phone a reasonable request, and limiting an individual to a phone that makes collect-only phone calls places an impermissible limitation on the right to attempt to contact an attorney. Few attorneys are in their offices twenty-four hours a day, thus a call to an attorney's cell phone is reasonable. Also,

> expecting an attorney to accept a collect call, in such a situation, from a jailhouse phone is not reasonable. We are not saying that the officer need go beyond what is reasonably accessible in the immediate area to permit an individual to attempt to contact an attorney.

In order to exercise the right contained in KRS 189A.105(3), Ferguson required access to her attorney's phone number contained on her cell phone and should have been given the opportunity to retrieve the number and provided a telephone to contact said attorney. Thus, Ferguson's right contained in KRS 189A.105(3) was violated when, based on the totality of the circumstances, she was not provided with the means capable of contacting her attorney. . . .

. . . .

In addressing the second issue, whether the violation requires suppression, we review KRS 189A.105(3). That statute states, "Inability to communicate with an attorney during this period [preceding the tests] shall not be deemed to relieve the person of his obligation to submit to the tests and the penalties specified by KRS 189A.010 and 189A.107 shall remain applicable to the person upon refusal." Certainly the inability of Ferguson to contact and communicate with an attorney did not relieve her of the obligation to undergo the tests. However, it is just as certain that the sentence preceding the above-quoted sentence granted Ferguson the right to communicate with an attorney, and by virtue of state action Ferguson's right to attempt to contact her attorney was frustrated. (Footnote omitted.)

While the above-quoted sentence could be read to allow state action to eviscerate the right to attempt to contact and communicate with an attorney, we believe that this would be a strained reading of the statute and instead find that once the legislature granted the right to attempt to contact and communicate with an attorney, it did not intend for the succeeding sentence to render the right meaningless. Therefore, we find that Ferguson's

> right to contact and communicate with her attorney was frustrated by state action, and, thus, the trial court erred in not suppressing the results of all tests conducted pursuant to KRS 189A.

Ferguson, 362 S.W.3d at 343-46.

We can find no significant distinction between *Ferguson* and the instant case, and thus conclude that *Ferguson* mandates upholding the circuit court herein. As the circuit court aptly noted, Bedway sought to call his daughter to obtain the number of a specific attorney at a time when such attorney would certainly have not been in the office. The request was timely made and would have allowed Bedway some minimal time to consult with counsel. We simply cannot perceive how the Commonwealth would be negatively affected by allowing such a reasonable request. Further, we do not believe that the Legislature intended to solely limit a suspect's right to contact an attorney to one that could be randomly located in a phone book and contacted on a collect-call phone. Even the circuit court observed that the Commonwealth's position, taken to its extreme, could be construed so narrowly that "a defendant could be afforded his statutory right to 'attempt to contact an attorney' by sitting in a jail cell and yelling for an attorney, hoping one would hear and come to his attention."

As previously stated, it is our duty to construe the statute so as to effectuate the plain meaning and unambiguous intent expressed in the law. *Long*, 118 S.W.3d at 181. It is our opinion that the Commonwealth's interpretation of KRS 189A.105(3) is unreasonably narrow and is not supported by the plain language of

the statute. In accordance with the rationale set forth in *Ferguson*, we conclude the circuit court properly determined that Bedway's rights under KRS 189A.105(3) were violated and the suppression of his test results was warranted.

For the reasons set forth herein, the decision of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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