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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001592-DG

JAMES ANTHONY WILLIAMS APPELLANT

ON DISCRETIONARY REVIEW FROM JEFFERSON CIRCUIT COURT
v. HONORABLE CHARLES L. CUNNINGHAM, JR., JUDGE
ACTION NO. 12-XX-000142

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, J. LAMBERT, AND THOMPSON, JUDGES.

J. LAMBERT, JUDGE: James Anthony Williams appeals from the Jefferson Circuit Court's order reversing the Jefferson District Court's order suppressing blood alcohol test results in a driving under the influence prosecution. After careful review, we affirm the order of the circuit court.

This case arose as a result of a single vehicle rollover crash on I-65 in Jefferson County, approximately a half-mile before the junction with I-265. Police

observed Williams at the scene with slurred speech and eyes that were bloodshot and glassy. Upon inquiry from a police officer, Williams responded to the officer that he had drunk "too much to be driving."

Williams was transported by EMS to University Hospital and refused to consent to having blood drawn for the police officer's "blood kit." The uniform citation recited that Williams had informed the police officer he had been drinking alcohol at a party on campus at the University of Louisville. Further, the citation stated that Williams reported he had not known exactly how much he had had to drink but had "several cups from a bottle of liquor."

However, upon his arrival at University Hospital's Emergency Department, Williams was placed under a "warrantless arrest" per the hospital's protocol with patients who are homicidal, suicidal, or otherwise demonstrating impaired decision-making ability. During this process, a blood sample was taken to determine whether, because of the serious nature of the rollover accident, Williams had any alcohol in his system that would affect his treatment.

Prior to trial, Williams made a motion to suppress the blood alcohol evidence obtained by the hospital, as well as any statements made by him to law enforcement officers. Thereafter, hearings were conducted on two separate dates in district court concerning Williams' suppression motions.

Officer Lawrence Farmer of the Louisville Metro Police Department stated he was working the midnight to 10:00 a.m. shift on October 2, 2010. He further explained that he was dispatched to the scene of a one-vehicle crash at 4:17

that morning. He related that he and another officer were the first responders on the scene, and that upon arriving, he observed Williams outside of his vehicle. Officer Farmer went over to Williams to assess if he had sustained any injuries in the crash and otherwise to see how he was doing.

Officer Farmer could smell alcohol on Williams, and he observed him with bloodshot eyes and slurred speech. When the officer asked how much he had had to drink, Williams responded that it was too much to be driving. After EMS arrived at the scene, the officer followed the EMS vehicle to University Hospital in downtown Louisville. The police officer explained that Williams was being treated at the hospital for injuries sustained in the rollover crash. Officer Farmer asked Williams if he would submit to the taking of blood for purposes of his investigation as he suspected Williams may have been driving under the influence of alcohol. In response, Williams refused to submit to Officer Farmer's request for blood to be drawn.

Officer Farmer explained that he did not ask the hospital to place Williams in any sort of restraint or confinement that morning. He also explained that he prepared the citation charging Williams with driving under the influence without knowing about the hospital's testing of Williams that morning.

Angela McKnight, a registered nurse at University Hospital's Emergency Department, also testified during the course of the district court proceedings. She explained that the medical records the Commonwealth sought to introduce at trial were generated during the hospital's treatment of Williams on

October 2, 2010. She further explained that the medical records reflected, among other things, that testing had been done on Williams and that said tests revealed the presence of alcohol in his system. Per the hospital's protocol, Williams was considered in a "warrantless arrest" situation. She explained that the status was not a criminal matter, but is a status dealing with patients who are homicidal, suicidal, or are otherwise demonstrating impaired decision-making ability. She explained that the hospital conducts an evaluation of such patients and removes personal items so that the patients cannot harm themselves or others in any way.

At the hearings before the district court, Williams argued that the information gathered by University Hospital constituted state action and should be suppressed. The Commonwealth argued that the complained about information was not state action, as it was not the result of a police investigation, but was instead gathered by a private party at the hospital for use in treating Williams as a patient. Regarding Williams' inculpatory statement that he had been drinking too much to drive, the district court did not specifically rule on that issue, and defense counsel stated that "we can just review that before trial." The district court ruled that the alcohol test results gathered by University Hospital would be suppressed. At this point, the Commonwealth stated that it would not be able to proceed to trial without evidence of the blood alcohol tests. The trial court agreed, and on November 2, 2012, on its own motion, dismissed the driving under the influence case against Williams.

The Commonwealth then appealed as a matter of right to the Jefferson Circuit Court. There, Williams moved to dismiss the Commonwealth's appeal, citing *Harrel v. Yonts*, 113 S.W.2d 426 (1938), for the rule that an appeal cannot be maintained "in cases where the appealing party agrees to termination of the action." Williams also cited *Stoecklin v. River Metal Recycling, LLC*, 370 S.W.3d 527, 529 (Ky. App. 2012), for the proposition that appeals "will not lie in favor of a party unless it was from an involuntary adverse judgment. If the judgment appealed from was rendered at the instance of the complaining parties or by their consent, they will not be permitted to complain upon an appeal."

The Commonwealth contended that it was properly before the Jefferson Circuit Court to review the final action of the district court, which dismissed its criminal prosecution. Relying upon Kentucky Revised Statutes (KRS) 23A.080(1), the Commonwealth noted that it was properly before the circuit court as the appeal taken by it was from a "final action" of the district court. Further, the Commonwealth also noted that pursuant to Section 115 of the Kentucky Constitution, it was entitled to one appeal as a matter of right. *Id*.

The Commonwealth also argued that there was nothing voluntary about the dismissal of its criminal prosecution of Williams. The Commonwealth pointed out that throughout the proceedings in the district court, it vigorously opposed the complained about suppression motion, which was ultimately granted by the district court, and throughout the proceedings in the trial court maintained that it was entitled to proceed to a trial on the merits. Further, the Commonwealth

noted that Judge Armstrong stated on the record that based upon his earlier rulings the Commonwealth was unable to go forward and that the case would therefore be dismissed upon the court's own motion. In its response, the Commonwealth noted that Williams acknowledged in his motion to dismiss the appeal that Judge Armstrong stated on the record that "I have pretty much taken away anything you could put on at a trial" and that Judge Armstrong specifically stated on the record that the dismissal from which the Commonwealth took its appeal was "on motion of the court."

The circuit court denied Williams' motion to dismiss in an opinion rendered on June 3, 2013. The court noted that the Commonwealth expressed frustration that it no longer had admissible evidence to submit to a jury, but felt as though it was not in a position to dismiss the case or amend the charges. The circuit court noted that there was never a motion by the Commonwealth to have the case dismissed and that "the record does reflect an objection by the Commonwealth to the dismissal." The circuit court noted that the district court dismissed the criminal prosecution "*sua sponte*" and that "[t]his Court is bound by that record on appeal and will not second guess the trial court's finding that an objection was made to the dismissal. For this reason, the Court does not agree with the defendant that the dismissal was with the Commonwealth's consent or at its behest."

Thereafter, the circuit court entered its opinion reversing and remanding on August 13, 2013. This Court granted discretionary review on January 24, 2014, and this appeal now follows.

On appeal, Williams argues that the Commonwealth waived its right to appeal from an order of dismissal and that the district court properly excluded evidence arising from a blood sample. The Commonwealth counters that the circuit court correctly concluded that it had properly invoked the appellate jurisdiction of the circuit court.

A review of the record indicates that the Commonwealth opposed the motion to suppress and consistently asserted that it was entitled to proceed to a trial on the merits with the evidence the district court suppressed. The district court observed that in view of its prior rulings the Commonwealth could not "go forward." The district court specifically noted that the dismissal of the criminal prosecution was on the trial court's own motion at least two times during the proceedings. The record indicates that the Commonwealth vigorously opposed the suppression efforts, and the circuit court below rightly rejected the notion that somehow the Commonwealth had consented to the termination of its criminal prosecution after the district court's rulings had "pretty much taken away anything that you could put on at trial."

We further agree that the Commonwealth was properly before the Jefferson Circuit Court seeking review of the final action of the district court, which dismissed the Commonwealth's prosecution for violating KRS 189A.010

and prevented the Commonwealth from proceeding to trial on the charged criminal offense. The circuit courts of this Commonwealth, as provided for by the Kentucky Constitution, "have such appellate jurisdiction as may be provided by law." Ky. Const. § 112(5). The General Assembly has set out the appellate jurisdiction of the circuit court by providing that "[a] direct appeal may be taken from District Court to Circuit Court from any final action of the District Court." KRS 23A.080(1).

"Section 115 of the Kentucky Constitution gives the Commonwealth the right to one appeal in all criminal cases except where such an appeal would otherwise violate the constitution…." *Collins v. Commonwealth*, 973 S.W.2d 50, 52 (Ky. 1998). The only exception or limitation on the right of the Commonwealth to take an appeal is that the "Commonwealth may not appeal from a judgment of acquittal in a criminal case, other than for the purpose of securing a certification of the law…" The exception contained in Section 115 has been construed as merely stating that the Commonwealth's right to appeal is limited by double jeopardy principles. *Commonwealth v. Brindley*, 724 S.W.2d 214, 215 (Ky. 1986). Other than the double jeopardy exception, "Section 115 does not distinguish between the appellate authority given to the defense and the Commonwealth in criminal cases." *Collins*, *supra*, at 53.

We agree that the appeal taken by the Commonwealth in this case is authorized by KRS 23A.080(1), which establishes the appellate jurisdiction of the circuit courts to hear a direct appeal "from any final action of the District Court."

There is no question that the district court's order of dismissal was final in this case, as the court below on its own motion dismissed the Commonwealth's drunk driving prosecution in its entirety and prevented the Commonwealth from proceeding to trial on the charged criminal offense.

We also agree that Williams' reliance on *Stoecklin*, *supra*, is misplaced. In *Stoecklin*, the plaintiff moved for a voluntary dismissal with prejudice from which an appeal was thereafter taken. The plaintiff in that case moved to dismiss his nuisance claim as the trial court excluded an expert as a witness at trial, and the plaintiff believed that his chance of success at trial was much greater if the expert testified. In this case, there is nothing voluntary about the dismissal of the Commonwealth's criminal prosecution. Throughout the proceedings in the district court, the Commonwealth vigorously opposed the complained about suppression motion that ultimately was granted by the district court, and throughout these proceedings it has maintained that it is entitled to proceed to a trial on the merits of the underlying criminal offense. Unlike the plaintiff in *Stoecklin*, the Commonwealth in no manner sought or acquiesced to the termination of the criminal proceedings against Williams.

Next, Williams argues that the district court properly decided that the Commonwealth could not take advantage of the blood sample or the evidence derived from it. Williams concedes that no state action was involved in obtaining the blood sample, and he acknowledges that conventional law requires proof of state action as a condition precedent to application of the exclusionary rule.

However, he argues, as he did before the circuit court, that there must be a remedy in addition to the conventional rule because Section 10 of the Bill of Rights does not say what should happen if a violation is shown. Williams alleges that remedy must arise from Section 2 of the Constitution, which prohibits arbitrary action by any agency of government. Because use of evidence obtained improperly would be arbitrary, a judge would be required to exclude that evidence.

The Commonwealth counters that the circuit court correctly held that the serum alcohol test results were improperly excluded. We agree with the Commonwealth.

The circuit court rejected all three arguments made by Williams. First, it rejected the argument that the rules governing the admissibility of evidence supported the trial court's ruling. The court explained that the blood alcohol test result is "presumptively reliable and any questions about the quality of the sample or the analysis would be fodder for cross-examination, not grounds for exclusion." We agree that the general rules of admissibility of evidence do not lend credence to Williams' argument that the blood evidence had to be excluded. We further agree that this is an issue properly ascertained through cross-examination at trial. We find no error in the circuit court's reasoning in this regard.

Regarding the Commonwealth's "state action" argument, the court below explained that it must follow the cases relied upon by the Commonwealth and that no state action had occurred in the instant case. Again, we agree. The investigating officer never instructed the hospital to obtain the blood sample for

alcohol testing. No such test was included with the officer's uniform citation report, nor did the Commonwealth seek to introduce any other state evidence at trial. Instead, we agree with the Commonwealth that the hospital was a private actor. Both the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution apply only to government actions, not the actions of private actors. *See Coolidge v. New Hampshire*, 403 U.S. 443, 91 SCt. 2022, 29 L.Ed.2d 564 (1971); *Stone v. Commonwealth*, 418 S.W.2d 646 (Ky. 1967). While Williams attempts to rely on Section 2 as somehow supporting the complained about suppression, he simply cannot get around the fact that there was no state or governmental action that infringed upon any state or federal constitutional provisions.

In *Marks v. Commonwealth*, 698 S.W.2d 533 (Ky. App. 1985), a defendant was involved in a traffic accident and taken to a local hospital. At the hospital, a blood test was administered as part of the routine diagnostic procedures. Those tests revealed that the defendant's blood alcohol level was .27. This Court affirmed the decision to allow the tests into evidence, since the tests were not taken at the request of a law enforcement official. The same rationale applies in this case. The same issue was again addressed by this Court in *Osborne v. Commonwealth*, 867 S.W.2d 484 (Ky. App. 1993). Again, this Court held that because the blood sample was used by the physician for purposes of treatment, it was admissible as proof that the defendant was driving under the influence. We agree that both *Marks* and *Osborne* are controlling in the instant case.

We note that the recent decision by the Supreme Court of the United States in *Missouri v. McNeely*, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013), is also pertinent to the arguments made by Williams and the Commonwealth in the instant case. In *McNeely*, the defendant was stopped by a Missouri police officer for speeding and crossing the centerline. *Id*. at 1556. After declining to take a breath test to measure his blood alcohol concentration (BAC), he was arrested and taken to a nearby hospital for blood testing. The arresting officer never attempted to secure a search warrant. McNeely refused to consent to the blood test, but the officer directed a lab technician to take a sample. McNeely's BAC tested well above the legal limit, and he was charged with driving while intoxicated (DWI). He moved to suppress the blood result, arguing that taking his blood without a warrant violated his Fourth Amendment rights. The trial court agreed, concluding that the exigency exception to the warrant requirement did not apply because, apart from the natural dissipation of McNeely's blood alcohol sample, there were no other circumstances that prevented the officer from obtaining a warrant. The Missouri Supreme Court agreed, relying on *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), in which the Supreme Court of the United States upheld a DWI suspect's warrantless blood test where the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the 'destruction of evidence,'" *Id.* at 770.

In *McNeely*, the Court emphasized its holding in *Schmerber* that more is required than the "mere dissipation of blood-alcohol evidence to support a warrantless blood draw in an alcohol-related case[.]" 133 S.Ct. at 1557 (citing *State v. McNeely*, 358 S.W.3d 65, 70 (Mo. 2012)), and upheld the Missouri Supreme Court's ruling. "According to the court, exigency depends heavily on the existence of additional 'special facts,' such as whether an officer was delayed by the need to investigate an accident and transport an injured suspect to the hospital as had been the case in *Schmerber*." *Missouri v. McNeely*, 133 S.Ct. at 1557. The Court concluded that "[t]o determine whether a law enforcement officer faced an emergency that justified acting without a warrant, this Court looks to the totality of the circumstances." *Id*. at 1559. (Internal citations omitted).

The instant case can be distinguished from the facts of *McNeely*. The officer here did not direct hospital personnel to conduct the blood alcohol test. Instead the blood test was performed by University Hospital on its own accord for purposes of McNeely's treatment. Furthermore, while the officer was not transporting Williams to the hospital, as he was taken by EMS, the officer was investigating the rollover accident, which arguably qualifies as a special circumstance under *McNeely*.

Finally, the circuit court below rejected the argument that somehow the test result had to be suppressed because of "criminal behavior" by University Hospital. The court concluded that the hospital would have been negligent to not obtain this potentially vital datum as it prepared to treat Williams for possible

injuries from a vehicular rollover at highway speeds. We agree that there was no indication of criminal behavior by the hospital and that the hospital would have been negligent to treat Williams for any injuries without first obtaining a blood sample to determine what substances were already in his system.

Discerning no error by the Jefferson Circuit Court, we affirm its August 13, 2013, order reversing the district court's judgment and remanding the matter to the Jefferson District Court for trial.

ALL CONCUR.

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