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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-000009-DG

JOSEPH D. O'DANIEL

APPELLANT

DISCRETIONARY REVIEW
FROM LYON CIRCUIT COURT
v. HONORABLE CLARENCE A. WOODALL, III, JUDGE
ACTION NO. 15-XX-00003

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, MAZE AND STUMBO, JUDGES.

STUMBO, JUDGE: Joseph O'Daniel appeals the Lyon District Court's denial of his motion to suppress, his conviction of operating a motor vehicle with alcohol concentration of or above 0.08 (hereinafter referred to as DUI), and the Lyon Circuit Court's affirmation of his conviction on appeal. Appellant argues that the trial court erred in not granting his motion to suppress and that the trial court erred

in allowing the Commonwealth to introduce evidence at trial which was not disclosed in pre-trial discovery. We find no error and affirm.¹

On August 27, 2014, Appellant was arrested for DUI by Kentucky State Trooper Eric Fields. Trooper Fields transported Appellant to the Lyon County Jail and offered Appellant a breathalyzer and blood test. Appellant initially refused both tests, but later consented to the breath test. The breathalyzer machine at the Lyon County Jail was inoperable; so Trooper Fields drove Appellant to the Caldwell County Jail where a working breathalyzer machine was located.

During the time Trooper Fields was transporting Appellant, someone contacted the Caldwell County Jail and spoke to Deputy Jailer Vicky Boyd. Ms. Boyd was told to turn the breathalyzer machine on to warm it up. Ms. Boyd was not certified to operate the machine, but she turned it on. She testified that she does not remember what button she pushed, or how many she pushed, to do so. Immediately upon arriving at the Caldwell County Jail, Trooper Fields administered the breath test, which showed a blood alcohol content of 0.98. Appellant was then booked into the Caldwell County Jail.

On November 19, 2014, a district judge of Lyon County entered a discovery order requiring the Commonwealth to produce any and all discovery in the case. The only discovery ultimately delivered to Appellant's counsel was the

¹ We must note at the outset that Appellant's brief has zero citations to the record. This is in violation of Kentucky Rule of Civil Procedure (CR) 76.12(4)(c)(v). We caution Appellant, and all attorneys in the Commonwealth, that a brief should have ample citations to the record; otherwise, this Court can strike the brief in its entirety. *Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010); CR 76.12(8)(a). In this case, we will rule on the merits.

printout from the breathalyzer machine which indicated Appellant's blood alcohol content.

On September 10, 2014, a suppression hearing was held in which Appellant challenged the validity of the breath test. Appellant alleged that Trooper Fields violated Kentucky Revised Statute (KRS) 189A.103(3)(a), which requires a police officer to observe the person taking the breath test for 20 minutes before administering the test. Appellant also alleged that a non-certified person operated the breathalyzer machine. The trial court denied the motion to suppress.

A trial was held on June 15, 2015. At the beginning of trial, Appellant's counsel moved to exclude all of the Commonwealth's evidence because it had not complied with the pre-trial discovery order. The trial court asked if the defense would like a continuance. The defense declined the continuance and requested the exclusion of the Commonwealth's evidence. The trial court denied the motion in part. The court allowed Trooper Fields and a breathalyzer technician to testify, but would not allow the Commonwealth to introduce any other evidence other than the breathalyzer printout. Appellant was convicted of DUI, first offense, and was sentenced to the minimum fine, no jail time, and the minimum license suspension. Appellant then appealed to the Lyon Circuit Court, which affirmed. We granted discretionary review.

Appellant raises two arguments on appeal to support his contention that the breathalyzer results should have been suppressed. First, he claims that Trooper Fields violated KRS 189A.103(3)(a) which states:

(3) The breath, blood, and urine tests administered pursuant to this section shall be administered at the direction of a peace officer having reasonable grounds to believe the person has committed a violation of KRS 189A.010(1) or 189.520(1).

(a) Tests of the person's breath, blood, or urine, to be valid pursuant to this section, shall have been performed according to the administrative regulations promulgated by the secretary of the Justice and Public Safety Cabinet, and shall have been performed, as to breath tests, only after a peace officer has had the person under personal observation at the location of the test for a minimum of twenty (20) minutes.

Specifically, Appellant argues that Trooper Fields did not properly observe him at the "location" in which the breath test was given for 20 minutes prior to administering the test. In this case, the location would be the Caldwell County Jail. Trooper Fields testified that he did not observe Appellant for 20 minutes at the location in which the breath test was given. Instead, he testified that he observed him during the ride from the Lyon County Jail to the Caldwell County Jail, which lasted longer than 20 minutes.

KRS 189A.103 was amended in 2000, in part, to add the observation requirement. There is very little case law interpreting that addition and no cases directly on point as to whether or not the type of observation in this case satisfies the statute. Appellant argues that the observation must take place at the site of the breath test. The Commonwealth argues that the observation of Appellant in the trooper's police cruiser was sufficient.

Our standard of review of a [] court's decision on a suppression motion following a hearing is twofold.

First, the factual findings of the court are conclusive if they are supported by substantial evidence. The second prong involves a *de novo* review to determine whether the court's decision is correct as a matter of law.

Stewart v. Commonwealth, 44 S.W.3d 376, 380 (Ky. App. 2000) (footnotes and citations omitted). Here, the facts are not in dispute and the only issue before us is a matter of law.

“The purpose of the observation period is so the operator can testify positively that during this twenty-minute observation period defendant had nothing to eat or drink, did not regurgitate or smoke.” *Eldridge v. Commonwealth*, 68 S.W.3d 388, 391 (Ky. App. 2001) (citation and internal quotation marks omitted). The observation period ensures that the defendant does not take anything orally or nasally which could interfere with the breath test. *Id.* Our Supreme Court in *Commonwealth v. Roberts*, 122 S.W.3d 524 (Ky. 2003), held that the Commonwealth must show the following before a breath test may be admitted into evidence:

- 1) That the machine was properly checked and in proper working order at the time of conducting the test.
- 2) That the test consist of the steps and the sequence set forth in 500 KAR 8:030(2).
- 3) That the certified operator have continuous control of the person by present sense impression for at least twenty minutes prior to the test and that during the twenty minute period the subject did not have oral or nasal intake of substances which will affect the test.
- 4) That the test be given by an operator who is properly trained and certified to operate the machine.
- 5) That the test was performed in accordance with standard operating procedures.

Id. at 526.

Only the observation period is at issue in the case *sub judice*. The only case law this Court could find regarding the location in which the police officer observed the defendant for the required amount of time is the unpublished case of *Meadows v. Commonwealth*, No. 2010-CA-001155-DG, 2012 WL 410259 (Ky. App. Feb. 10, 2012). In that case, the police officer did not observe the defendant in the room which housed the breathalyzer machine, but did observe him in another room of the police station. Another panel of this Court stated:

Although the preferred practice would be for the entire twenty-minute observation to occur in the room where the breathalyzer test is to be conducted, we realize that this may not always be practical when, as occurred in this case, the room is occupied at the time that the officer arrives at the jail or police station with the defendant. Therefore, there is no error when the officer reasonably conducts the twenty-minute observation elsewhere in the jail or police station that houses the breathalyzer testing equipment. *Meadows* is splitting hairs by arguing that because at least part of the twenty-minute observation in her case was conducted while she was sitting in a chair immediately outside the testing room, her observation was not conducted at the “location” of the test.

Id. at 3.

In the case at hand, Appellant does not allege that he put something in his nose or mouth which could have interfered with the breath test. We believe Trooper Fields’ observation of Appellant was sufficient. As stated by *Meadows*, it is not always practical to observe a defendant in the room in which the breath test is to be administered. In addition, the observation in this case satisfied the intent

and purpose of the statute. Finally, the requirements for admissibility set forth in *Roberts* were met. We therefore affirm the lower courts' judgments that KRS 189A.103(3)(a) was not violated.

Appellant's second issue on appeal is that the breathalyzer results should have been suppressed because Deputy Jailer Boyd, who was not certified in the use of the breathalyzer machine, turned it on. This argument is without merit. KRS 189A.103(3)(b) states that breath tests must be given by a police officer who is certified to use the machine. Trooper Fields was certified to administer the breath test and did so. There was no error.

Appellant's final argument on appeal is that the trial court erred in failing to exclude evidence offered by the Commonwealth which had not been disclosed in pre-trial discovery. The proper standard for review of evidentiary rulings is abuse of discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

It is undisputed that the Commonwealth did not comply with the discovery order; however, we do not believe the trial court abused its discretion in allowing the Commonwealth to present some evidence at trial. The court offered Appellant a continuance, but that was declined. The court also excluded some of the Commonwealth's evidence. We believe the trial court acted reasonably in this instance.

Based on the foregoing, we affirm.

ALL CONCUR.

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