COMMONWEALTH OF KENTUCKY
SUPREME COURT
FILE NO. 2012-SC-000771

FILED
JAN 17 2014
CLERK
SUPREME COURT

COMMONWEALTH OF KENTUCKY **APPELLANT**

DISCRETIONARY APPEAL FROM THE COURT OF APPEALS

FILE NO. 2011-CA-001235-DR

VS.

JAMES BEDWAY **APPELLEE**

REPLY BRIEF FOR THE APPELLEE, JAMES BEDWAY

Respectfully Submitted,

Paul Gold
Republic Plaza, Suite 320
200 S. 7th St.
Louisville, KY 40202
(502) 583-2500
Attorney for James Bedway

CERTIFICATE OF SERVICE

This is to certify that pursuant to CR 72.10 (b) and CR 72.10 (2) a copy of the foregoing was mailed on this 16th day of January, 2014, to the Hon. Charles L Cunningham, Jr., Judge, Jefferson Circuit Court, Division Four (4), Jefferson Judicial Center, 700 W. Jefferson St., Louisville, KY 40202; Hon. David Sexton, Special Assistant Attorney General, Assistant Jefferson County Attorney, Fiscal Court Building, 531 Court Place, Suite 900 Louisville, KY 40202; Hon. Jack Conway, Atty. Gen., 1024 Capital Center Dr., Suite 200, Frankfort, KY 40601; and Samuel Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601; postage prepaid, through the United States postal system. I further certify that the record on appeal was not withdrawn from office of the clerk.

Paul Gold

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION

The purpose of this reply brief is to respond to the arguments made by the Appellant.

ORAL ARGUMENT STATEMENT

Appellee requests oral argument. Although telephone calls to third parties for the purpose of procuring an attorney's phone number have been approved by the Supreme Court for another section of KRS 189A, this is a matter of first impression for the Court regarding KRS 189A.105(3).

COUNTERSTATEMENT OF THE CASE

The Appellee believes that the Court of Appeals rendered a more accurate and succinct rendition of the facts of the case than the statement of the case presented by the Commonwealth. Therefore, the Appellee adopts the statement of the Court of Appeals, set forth for the convenience of this Court, as follows:

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 phonebook 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.

This Court granted the Commonwealth's motion for discretionary review of the *Opinion* of the Court of Appeals. This appeal followed. Further facts will be developed as necessary in the body of the appeal.

ARGUMENT

I. THE PLAIN MEANING OF KRS 189A.105 (3) PERMITS AN ACCUSED CITIZEN TO ATTEMPT TO COMMUNICATE WITH AN ATTORNEY

KRS 189A.105 (3) sets forth the right of a DUI suspect to seek counsel before submitting to a breath test:

> 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 that 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 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.

In its appeal the Commonwealth advances a troubling argument that the government can intentionally flout its statutory obligation to afford a person an opportunity to attempt to contact an attorney with no sanctions. The issue in this case is "attempt". Somehow, the government views the statutory language as meaning only a person-to-person telephone conversation is permitted between the defendant and his attorney during the attempt; taken to its logical conclusion, if the attorney has a secretary, the person would be prohibited statutorily from

speaking to the secretary. This overly constricted analysis of the statute is not logical, at best; at worst, the analysis runs contrary to established case law for statutory analysis in the Commonwealth. For example, "attempt" in the statute could be defined, by the government's cramped logic, as the defendant sitting in a jail cell and yelling for an attorney in hopes that one would hear his call and come to his assistance. *Bedway v. Commonwealth*, 11XX0002 (Jefferson Circuit Court, 2011). After all, the statute in question provides the right to "attempt to contact and communicate with an attorney".

In determining the term "attempt" in the statute in question, a prudent approach is to turn to the universal rule of statutory construction—"it must be presumed that the Legislature intended *something* by what it attempted to do.'" *Kentucky Dept. of Corrections v. McCullough,* 123 S.W.3d 130, 140 (Ky.2003) (quoting *Reyes v. Hardin County,* 55 S.W.3d 337, 342 (Ky.2001), in turn quoting *Grieb v. National Bond & Inv. Co.,* 264 Ky. 289, 94 S.W.2d 612, 617 (1936). Thus, the statute intends to provide an accused citizen a means to "attempt" to contact an attorney. A corollary to the universal statutory construction rule is that the "plain meaning" of the statute controls. The Supreme Court has steadfastly adhered to the plain meaning rule unless to do so would constitute an absurd result. *Wheeler & Clevenger Oil Company v. Washburn*, 127 SW. 3d 609 (Ky., 2004).

KRS 189A has spawned a cluster of cases that are helpful in the analysis and application of the statutory right to the instant case. For example, *Bhattacharya v. Commonwealth*, 292 S.W.3d 901, 905 (Ky. App. 2009) illustrates the scope of the right to contact an attorney, even though the case specifically declined to address the immediate issue in this case. Therein, the defendant invoked his statutory right to attempt to contact an attorney, but the officer maintained control of the telephone and would only call attorney numbers listed in a local phonebook. Using the plain meaning analysis the court noted that nothing in the statute requires even a phone book be provided; however since the officer permitted the defendant to call an attorney there had to be some means of obtaining attorney telephone numbers.

Commonwealth v. Long, 118 SW. 3d 178 (Ky. App. 2002) addressed the scope of a defendant's right under KRS 189A. 103(7) of the statute, which provides a person with the right to additional blood alcohol concentration tests once the person has submitted to the initial tests. Ms. Long wanted an independent blood test, and had sufficient cash to pay for the test. However, her money was in her purse; she requested an opportunity to call her roommate to deliver the money. The officer refused. The appeal centered on the officer's refusal to permit the appellant to call her roommate. Pertinent to the analysis in the instant case, the court concluded that even though the statute does not specifically permit a call to a

third-party, "In order to give effect to this right, the statute requires some minimal police allowance and assistance. Considering the totality of the circumstances in this case, we believe the police officer denied long of her right to obtain an independent test because of a failure to make a reasonable effort to accommodate her right." Id, at 180-1.

Amplifying "totality of the circumstances" the court set forth a multi-factor test to determine whether the officer made a reasonable effort to accommodate the accused citizen's statutory right to an independent test. Factors included, but were not limited to: the availability of or access to funds to pay for the test; a protracted delay in beginning of the test if the officer complies with the requests; availability of police time and other resources; location of the requested facilities and the opportunity for the accused to make arrangements for testing. The Kentucky Supreme Court has recently affirmed the *Long* court's adoption of the test for KRS 189A compliance. See *Lee v. Commonwealth*, 313 SW. 3d 555 (Ky, 2010).

The same type analysis, which comports with the tests for statutory construction set forth above, applies to the issue at hand. Simply put, law-enforcement must make a reasonable effort to accommodate a suspect in his attempt to contact an attorney, which can include permitting a suspect to obtain contact information through a third-party. This reasonable effort is determined by a

totality of the circumstances test. Factors to be considered in determining the totality of the circumstances would be: the time of day; whether the suspect is attempting to obtain the number of a specific attorney whom he knows personally, or by reputation; whether the suspect states that a third-party has an attorney phone number not available in the phonebook a home or cell number; and, whether the request is timely. This analysis facilitates the statutory purpose of contacting an attorney and takes into account rapid technological changes that have occurred in communication with cell phones. It should be noted that with the advent of cell phones no one remembers telephone numbers as we once did. We rely on our cell phones to bring up all numbers instantaneously. Without the ability to call a family member or someone to get a lawyer' s home or cell number, a person's ability to have a meaningful 10 to 15 minutes to attempt to contact an attorney would be critically restricted. Importantly, jail phone books only provide office numbers, not cell phone numbers in many cases. DUI arrests often, and even generally, occur at night or in the early morning hours. The time of day factor listed above is particularly crucial. Realistically, an accused citizen has little or no chance of reaching his attorney at 3 or 4 AM at the attorney's office. Permitting a telephone call to a person who has the attorney's telephone number on their cell phone is no more onerous or time-consuming or burdensome then permitting a telephone call to a friend to bring money for a second blood alcohol test (see *Long*, supra).

Indeed, Kentucky's appellate courts recently addressed the communications changes that have occurred with the advent of cell phones:

> ...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. *Ferguson v. Commonwealth,* 362 S.W.3d 341, 344 (Ky.App. 2011) (footnote 2).

When applying the totality of the circumstances test to this case, it is clear that Mr. Bedway was not allowed to reasonably effectuate his right to attempt to contact an attorney. There would have been little or no strain on the availability of police time or other resources (the factor approved by *Long* and *Lee*, supra) had Mr. Bedway been permitted to call his family member's cell phone to obtain the phone number of attorney Paul Gold-who had previously done work for the family- and it would have achieved the statutory purpose of permitting an accused citizen to attempt to contact an attorney.

II THE TEST RESULTS TAKEN IN VIOLATION OF THE STATUTE SHOULD BE SUPPRESSED

The government argues that even if it violated Mr. Bedway's statutory right to consult an attorney, it should not be sanctioned for its violation by suppression of the evidence. The argument is misplaced, for a number reasons.

First, the specific issue of whether the violation of a defendant's right to consult an attorney provided by KRS 189A.105(3) has been recently decided. In *Ferguson,* supra, the court ruled:

> 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.
>
> 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.

The Commonwealth's arguments regarding suppression of the fruits of its violation of Mr. Bedway's KRS 189A rights are perplexing. In addition to the recent published opinion the Commonwealth litigated which directly contravenes

their argument in this case (*Ferguson*, supra), the County has vigorously argued for the inherent power of a court to address fairness in cases. In *Commonwealth v. Davis*, 12-T-028747, the Jefferson County Attorney recently argued:

> ... in Kentucky, a trial court clearly has the inherent power to control the handling of cases on its docket. It is fundamental that the courts of this Commonwealth possess "the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel and litigants." *Rhem, et all versus Clayton, et all*, 132 SW. 3d 864, 869 (2004) quoting *Landis v. North American Co.*, 299 US 248, 254 (1936). RCr 1.04 provides that "(t) Rules of Criminal Procedure are intended to provide a just resolution of every criminal proceeding. They shall be construed to **secure complicity in procedure, fairness administration and the elimination of unjustifiable expense and delay...".** This motion serves to advance these principles. The Commonwealth's motion simply calls upon this court to exercise its inherent authority to control its docket in a manner which will further the underlying policies of the Kentucky Rules of Criminal Procedure.

Indeed, as the Jefferson County Attorney argued (above) and well knows, courts have inherent powers. This axiom was recently reaffirmed in *Beshear v. Haydon Bridge Company*, **2011-SC-000563-TG (KY, 2013)**, fn. 15:

> We hasten to add that this Court has the inherent power to act when the executive or legislative branch is not fulfilling an obligation under the Kentucky Constitution. Thus, in *Rose v. Council for Better Education,* 790 S.W.2d at 186, this Court held the legislature had not fulfilled its constitutional obligation with respect to providing an efficient system of public education. Fulfilling that critical governmental obligation required the spending of public funds and the separation of powers doctrine was no bar to this Court requiring the General Assembly to meet its constitutional responsibility. This case is, manifestly, not about legislative failure to fund a constitutionally imposed obligation and this Court is not in any

way suggesting that in a case of that kind the Court is powerless to require compliance with our Kentucky Constitution.

Fundamental fairness is a key concept of the due process clause to the Fifth Amendment of the United States Constitution and to Section 2 of the Kentucky Constitution. "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba v. People of State of California*, 314 U.S. 219, 236, 62 S.Ct. 280, 290, 86 L.Ed. 166 (1941). Fundamental fairness is a touchstone of due process. *Gagnon v. Scarpelli,* 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1972), Fundamental fairness is a requirement of the 14th amendment. *Bearden v. Georgia*, 461 US 660 (1983).

The Commonwealth argues that it can violate a defendant's statutory right without sanctions. The argument is offensive to the concept of fundamental fairness, a constitutional right. As such, a court has a constitutional duty to suppress under Section 2 of the Kentucky Constitution and under the Fifth Amendment due process fundamental fairness component of the United States Constitution made applicable to the states by the Fourteenth Amendment to the United States Constitution. Additionally, a court has an inherent power to act where there is a constitutional issue being violated (*Beshear*). Finally, the Sixth Amendment (the right to advice from an attorney) and the Fifth Amendment

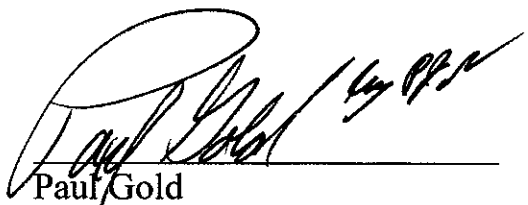
(protection against self-incrimination) are implicated in the government's decision to deny Mr. Bedway his right to attempt to contact an attorney.

This court is respectfully urged to follow the recent precedent and affirm the well-reasoned decision of the Jefferson Circuit Court, and the Kentucky Court of Appeals.

CONCLUSION

Wherefore, based upon the foregoing, the Jefferson Circuit Court's order should be affirmed.

Submitted by,



Paul Gold
Suite 320, Republic Plaza
200 S. 7th St.
Louisville, KY 40202
(502) 583-2500

APPENDIX