COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO.: 2013-SC-000830

COMMONWEALTH OF KENTUCKY — **APPELLANT**

vs. *ON DISCRETIONARY REVIEW FROM JESSAMINE CIRCUIT COURT, HON. HUNTER DAUGHERTY, JUDGE CASE NO. 11-XX-00005*

ADRIAN PARRISH — **APPELLEE**

BRIEF OF APPELLANT COMMONWEALTH OF KENTUCKY

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this Brief was served upon the parties of interest by mailing same to the following on this the 5th day of November, 2014.

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Judge, Jessamine District Court
107 North Main Street
Nicholasville, KY 40356

Honorable Hunter Daugherty
Judge, Jessamine Circuit Court
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Hon. Thomas Lockridge
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INTRODUCTION

This is a DUI case, tried in the Jessamine District Court, in which the Commonwealth appeals the Jessamine Circuit Court's creation of a Brady violation in direct contradiction to facts admitted to by the Appellee and in complete contravention of U.S. Supreme Court case law including Brady vs. Maryland and Arizona vs. Youngblood.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellant does not request an oral argument before this Honorable Court, unless the Court should find it beneficial.

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STATEMENT OF THE CASE

Appellee was charged with Driving Under the Influence, 1st offense, by Officer Erik Cobb of the Nicholasville Police Department ("the Officer") on November 18th, 2010. The Officer observed the Appellee fail to make full stops at two stop signs and then drive down the wrong side of the road on Strawberry Lane. Pursuant to his training, the Officer activated his emergency equipment and stopped the vehicle. Upon approaching the vehicle, the Officer smelled the odor of alcohol. The Appellee was administered field sobriety tests from which the Officer determined that he showed signs of impairment. The Officer then administered a preliminary breath test ("PBT") to determine the *presence of alcohol* consistent with his training. The PBT used by the Officer did register a breath alcohol "level" of a sort thus confirming the Officer's sense of smell that indeed the Appellant had consumed alcohol. Consistent with his standard practice, the Officer showed the PBT level reading to his police cruiser video and recorded on his citation "PBT detected the presence of alcohol". He then placed the Appellee under arrest and brought him to the Jessamine County Detention Center where an Intoxilyzer Breath Alcohol Level test was administered in compliance with KRS 189A.103 and 500 KAR 8:030. The result of that test was .086. The Officer then charged the Appellee with Driving Under the Influence, 1st offense.

On his citation, consistent with his training, the Officer checked a box indicating his cruiser had an in-car video. When Counsel for the Appellee attempted to obtain the video directly from the police department, he was told

that the video did not exist. The Nicholasville Police Department cruiser videos are set to automatically activate and "pre-record" 30 seconds before activation when an officer activates his emergency equipment. In this case, as sometimes happens with NPD cruiser videos and all technology, the video equipment inexplicably failed, and did not record.

The Appellee chose not to make a discovery request in this case. Although he filed a motion to suppress the stop, based on lack of probable cause, he chose not to file any pretrial motions addressing the cruiser video. He did not present an expert for an extrapolation defense, nor did he make any motion regarding that defense or the use of the PBT.

At bench trial, the Commonwealth agreed to combine trial and suppression testimony, and allowed the Appellee to take the stand to address issues relevant to the stop without being subjected to full cross examination. After the Commonwealth presented the testimony regarding probable cause for the stop, the Appellee testified. Counsel for the Appellee used this opportunity to elicit substantial testimony regarding the Appellee's character which he used in closing argument. The Appellee did not dispute the allegations made by the Officer, and Counsel for the Appellee basically conceded the suppression issue.

The Appellee also stipulated to the foundation and admissibility of the Intoxilyzer results. On cross examination, Counsel for the Appellee attempted to lay foundation for an extrapolation defense through the Officer's testimony over the Commonwealth's objection. The court allowed the testimony as lay testimony but sustained every objection as to scientific testimony. The Officer

was cooperative throughout cross examination, despite the Commonwealth's consistent objections. The Officer went so far as to volunteer that though the Appellee improperly turned during the walk and turn test, sober people often turn improperly.

In response to cross examination, the Officer conceded that he did not recall the PBT level, and could not testify whether it was above or below .08. He stated that he intended to record the entire encounter with the Appellee, and that the video would have shown the Appellee's performance on the field sobriety tests, as well as the "level" reading on the PBT. Counsel for the Appellee went so far as to thank the Officer during his testimony for his honest answers!

In closing argument, Counsel for the Appellee stated that he wanted the PBT result to do an extrapolation and that he wanted the court to consider that the evidence wasn't there. He conceded that he "may have had a problem with [admissibility] depending on when it was given and what it actually showed." He conceded that the evidence was not purposefully destroyed by the officer: **"I am not saying the evidence was destroyed purposefully by the police department or anything."** He conceded that the court need not give itself a missing evidence instruction. He stated **"I am not saying the officer hasn't dealt pretty fairly here, I think honestly he has."** Counsel for the Appellee went on to state that **"I think the court had a pretty good read on the Officer's view of this Appellee as well"**. He then conceded the Officer's testimony relating to extrapolation is not expert testimony. He admitted that he was aware of the issue with the in-car video stating "if there's a video, the defense is entitled

to it and if he can't he's entitled to an explanation." He did not request a continuance. He did not subpoena any witnesses, and at one point he is visibly upset that the Commonwealth did not subpoena the video that he stated to the court he was told did not exist.

The court began its ruling by commending the Officer and the Appellee on their courtesy and professionalism. The court noted that the Commonwealth elected to proceed under the "per se" provision of the DUI statute, and then ruled that the Appellee had been proven guilty beyond a reasonable doubt. In response to Counsel for the Appellee's protest, the court stated "I think they've met their burden without the video."

On appeal, the Appellee argued, among a number of issues, that after the Court of Appeals ruling in Stump v. Commonwealth, 289 S.W.3d 213 (Ky.App.2009) the Officer "should have known that the PBT could be admissible on the issue of guilt". The Appellee did not allege that the evidence was intentionally destroyed. The Appellee went on to allege a Brady violation based on the Officer's failure to preserve the PBT level.

In its Opinion on the appeal, the Jessamine Circuit Court held that the Officer's failure to preserve the PBT level amounted to a Brady violation. In doing so, the Court found that: (1) the Officer knew or should have known that the PBT level could be admissible, (2) that the preservation of the PBT result "should have been considered normal practice", (3) that the evidence was "destroyed inadvertently outside normal practice" and (4) it suggested to the trial

court that it may find that it is more probable than not that the results are below .08.

The Circuit Court remanded the case to the trial court with instructions to conduct a Daubert hearing on the "PBT results". The Court, however, specifically noted that the Appellee presented no basis for the court to consider an extrapolation defense, and that the PBT result must have occurred within 15 minutes of the stop.

The Commonwealth filed a Motion to Reconsider arguing that the Circuit Court could not find a Brady violation based on the facts present in this case, because, among other issues, the Circuit Court could not find that the Officer acted in bad faith as required by Allen v. Commonwealth, 817 S.W.2d 458 (Ky.App.1991). In response to this argument the Circuit Court held that "I think that he intentionally did not record the evidence when he saw it was below .08." (Feb. 24th, 2012 at 12:09:50)

ARGUMENT

I. THE CIRCUIT COURT ABUSED ITS DISCRETION

A. The Circuit Court abused its discretion when it substituted its opinion on the veracity of testimony for the Trial Court's opinion where the Trial Court did not abuse its discretion and the Trial Court's opinion was supported by substantial evidence and statements by Counsel for the Appellee.

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01 In the case at bar, the trial court found the Appellee guilty based upon the Officer's testimony as to his violation of KRS 189A.010.

The officer presented undisputed (and stipulated to) evidence that the Appellee violated the per se DUI law. With regard to administration of the PBT, the Officer testified that he administered the test, recorded the result as "presence of alcohol" and attempted to record the "level" on his cruiser video pursuant to his standard practice. The Appellee conceded there was no bad faith by that action. In fact, the Appellee commented on the *GOOD FAITH* of the officer. The trial court commented on the good faith of the Officer (and Appellee), and found the Appellee guilty based upon the Officer's testimony.

It cannot be said that the trial court's decision was not supported by substantial evidence. It cannot be said that the trial court abused its discretion. It cannot be said that the trial court's findings of fact were clearly erroneous – they were agreed with by Counsel for the Appellee.

The Circuit Court did not give due regard to the trial court's opinion on the credibility of witnesses. It improperly substituted its own judgment for that of the trial court.

B. The Circuit Court abused its discretion when it found the Officer intentionally destroyed evidence in bad faith without any evidence in the record to support that conclusion, and despite contrary statements made by Counsel for the Appellee indicating the Officer acted in good faith.

Regardless of the fact that the Circuit Court improperly substituted its judgment for that of the trial court, the Circuit Court's ruling on the evidence was itself "clearly erroneous". There is no evidence in the record whatsoever to support the Circuit Court's finding that the Officer acted in bad faith. To the contrary, the Officer was overly fair to the Appellee in his testimony. The Officer

conceded several points to the Appellee, even over the objection of the Commonwealth. His testimony regarding the PBT was nothing short of complete, 100% honesty. The Trial Court Judge and Counsel for the Appellee commented on the Officer's good faith.

Both the fact that the appeal was taken and that this Brief has been filed are testament to the Officer's honesty. If the Officer had the malicious intent that the Circuit Court suggests, he would have simply testified that the PBT level was well above a .08. If an Officer was willing to destroy a video – as the Circuit Court suggests by its finding of bad faith – surely substituting a lapse in memory for a favorable "level" was well within his ability. He didn't. He told the truth, the complete truth, the whole truth – even though it was not to the benefit of the Commonwealth or his case. And he has been rewarded for that admirable conduct by being accused of being worse than a liar.

C. No Brady violation occurred in this case.

In order to show a Brady violation, the Appellee must show that (1) exculpatory evidence existed, (2) that it was in the custody or control of the agents of the Commonwealth and (3) that it was not disclosed to the Appellee. Brady has not been violated in this case.

1. There is no evidence exculpatory evidence ever existed in this case.

The Circuit Court attempted to find a Brady violation by "creating" exculpatory evidence. There is no evidence in this case that the PBT level was below .08. None. And despite the Appellee's attempts at trial to appear helpless and place the burden on the Commonwealth to present the Appellee's evidence,

the Appellee had every opportunity to provide this evidence. The Appellee could have made a discovery request at any time subsequent to his arraignment. It is much more plausible that the Officer could have remembered the PBT level a month after the arrest than almost a year after the arrest when the Appellee chose to berate him for forgetting it. The Appellee could have filed a motion to dismiss for lack of probable cause, or a motion to use the PBT in an extrapolation defense, or a motion for a "missing evidence instruction." At a hearing on one of these motions, the Appellee could have testified that the level was below .08 without being subjected to cross examination at trial. The Appellee could have filed a motion to have the Commonwealth produce the video as discoverable material, and upon its inability to be produced, requested the **trial court** find a Brady violation. The Appellee could have asked the trial court for the relief which it received from the Circuit court – the "creation" of a PBT level for use in some sort of extrapolation argument. The Appellee did none of these things. There is simply NO evidence whatsoever that exculpatory evidence ever existed in this case.

2. When evidentiary material has not been preserved, the Appellee must show bad faith on the part of the police in order to claim a Brady violation pursuant to Arizona v. Youngblood and Allen v. Commonwealth.

In the case at bar, the Circuit Court attempted to create exculpatory evidence using a Brady violation by finding a Brady violation. Said differently, in response the Appellee's suggestion that the evidence may have been exculpatory, the Circuit Court reasoned "if the evidence was exculpatory, then it would have to have been disclosed, therefore I am finding that BECAUSE the

evidence was not disclosed, it WAS exculpatory." This is a trap an appellate court should never fall into. There is no limit to this backwards logic and no basis for it. The possibilities for a defendant would be endless were this the law. Ask the police officer randomly if there was a shoe in the road. The police officer testifies "I don't remember if there was or not," but admits that "if there was I surely would have seen it." Is a defendant then entitled to presume that there was a shoe in the road – the court then allowed to presume that the reason the police officer didn't remember the shoe is because he was intentionally hiding the fact that the real driver fled the scene? Of course not, and that is why this backwards logic is not the law.

In cases where evidence is discarded or destroyed, the good/bad faith of the government is entirely relevant, and the accused must show bad faith or ill motive underlying the destruction for there to be a Brady violation. As stated by the U.S. Supreme Court in Arizona v. Youngblood, 488 U.S. 51 at 57 (1988), "The Due Process Clause of the fourteenth Amendment, as interpreted in Brady, makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." Additionally, mere negligence by the Commonwealth in failing to collect or preserve evidence will not satisfy the bad faith standard required by Youngblood. *See* Collins v. Commonwealth, 951 S.W.2d 569 (Ky. 1997) In

Collins, this Court held that failure to collect a towel into which a sexual assault suspect allegedly ejaculated did not violate due process absent some showing the officers did so intentionally.

In furtherance of this point, this Court should consider the ruling in Allen v. Commonwealth, 817 S.W.2d 458 (Ky. App. 1991). In Allen, the defendant, without proof, was claiming that unpreserved evidence MAY have been exculpatory and attempted to use that fact to his advantage. The Allen court wisely held, "[w]e think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." (Allen at 462)

The Circuit Court's presumption in this case violates Allen because there is NO indication that the Officer acted in bad faith. Without evidence, the Circuit Court created bad faith by assuming bad faith based upon the Officer's failure to record the evidence, then used that creation to find a Brady violation. The Circuit Court then used the manufactured Brady violation to create exculpatory evidence, which it then used to find bad faith. This baseless, circular reasoning, violates the rule of law decided by every case dealing with the issue. And it is all

because there was no evidence of bad faith and no evidence that exculpatory evidence ever existed.

In fact, in its original opinion, the Circuit Court intentionally stopped short of finding bad faith. It was only upon the Motion to Reconsider – when the Circuit Court was presented with the holding from Allen – that the Circuit Court took the leap of finding bad faith on the part of the Officer. This leap was an abuse of discretion, and there was no basis in the law, record or evidence to support it.

3. An officer does not have a duty to administer a PBT as a blood alcohol "level" test.

In order to manufacture the Brady violation the Circuit Court sought, it created a duty upon the Officer to administer the PBT as a blood alcohol "level" test. It is not such a test. The Officer testified that he administered the PBT and recorded the result. In furtherance of this point, his citation does state "PBT detected the presence of alcohol". This is all that a PBT is meant to do. It is one of several tests used by law enforcement in combination to determine if there is probable cause that someone is operating their vehicle under the influence. It was the "number", the "level", shown by the PBT that was only presented to the in-car camera and ultimately forgotten by the Officer. "How could this number be 'forgotten'?!?" the Circuit Court and Appellee ask rhetorically. The answer is simple. It doesn't mean anything. Officers are trained to administer the PBT as a presence of alcohol test, not as a blood alcohol level test. This training occurs because the legislature of this Commonwealth has written that PBTs are not admissible to prove guilt. After probable cause to arrest is established, the PBT level means nothing to an officer. In fact, many officers stop the test once

presence is established. It is true that the machine records a "level" but that level is meaningless and never intended by the law or anyone else (except the Circuit Court) to be otherwise.

In order to find a Brady violation the Circuit Court created a duty upon the police to administer the PBT as a blood alcohol level test. There is no basis in the law to create this duty. Stump did not create such a duty, and none of the legislative bodies responsible for doing so have done so.

4. The Circuit Court abused its discretion and violated the separation of powers doctrine when it created a "standard practice" for the Nicholasville Police Department based upon the Stump ruling when such practice did not exist, and, in fact, the legislative bodies responsible for setting the standard practice specifically rejected its creation.

The Circuit Court used its newly created duty to administer a PBT as a blood alcohol level test to create a standard practice for the Nicholasville Police Department *ex post facto*. Specifically, because a "level" was recorded (or at least the Officer tried to record it on what turned out to be his malfunctioning in-car camera), the Circuit Court opines that the Officer should have known that the level may be admissible pursuant to Stump and it should have been standard practice to record the level on the citation. The Circuit Court then finds a Brady violation because the evidence was destroyed outside the newly applied ex post facto standard practice. Importantly, Brady does not allow this sort of circular reasoning. Brady addresses what standard practice ARE, not what standard practices COULD be. Brady certainly does not authorize a court to create a duty upon an officer (contrary to his training and current/ongoing training by law enforcement bodies) and then apply that duty ex post facto upon the officer.

Brady does not authorize a court to then use that officer's violation of that non-existent policy to infer bad faith on the part of the officer for failing to follow a policy that did not exist when the action was taken. And Brady does not then allow that court to use this created bad faith to find a Brady violation that the court uses to create exculpatory evidence by which it can find a Brady violation.

5. No Brady violation occurred, as the Appellee was aware of all the facts surrounding the video.

There is no evidence that exculpatory evidence existed in this case. There is no evidence the result of the PBT was under .08. Even if it was, the Officer attempted to record the level pursuant to his standard practice, which was above and beyond what was required by his training. The failure of the video equipment to record is not a "destruction of evidence outside of normal business practices" nor is the Officer's failure to recall a number – which meant nothing to him or the case – almost a year after the arrest. The Appellee stated on the record that he was aware of the non-existence of the video.

D. Even if the Circuit Court's analysis were correct, the issue did not affect the outcome of the trial.

If the Court assumes the Circuit Court's analysis was correct, there was still no basis for the Circuit court to overturn or remand the case back to District Court. Any error created did not affect the outcome of the trial. The Appellee did not present an expert at trial. As the Circuit Court pointed out in its ruling, without scientific evidence an extrapolation argument cannot be accomplished. Furthermore, an extrapolation argument could not be made in this case as the Appellee did not exercise his right to an independent test from which such an

argument could be made. A PBT level is not a scientifically reliable and accurate measure of a person's blood alcohol level such that an extrapolation argument could be made by comparing them to the results from the Intoxilyzer 5000. Said more directly, even if the Appellee was allowed to present an artificially created "level", as the Circuit Court suggests in its opinion, that "level" could not undermine the Intoxilyzer 5000 result. And most importantly, there was no extrapolation defense presented at trial and there was no expert witness testimony regarding same. Nothing prevented the Appellee from presenting an extrapolation defense if he wished. He could have hired an expert, relied upon the statements made to the Officer or presented testimony from the Appellee himself regarding the timing of his alcohol and food consumption. He simply did not do so. He chose not to present an extrapolation defense prior to trial – as trial strategy. Counsel for the Appellee is a seasoned and skillful defense attorney. Unfortunately for him, the result of that strategy was a conviction for the Appellee. He now seeks a second chance to elect trial strategy and this the Court must not allow.

The result of the Appellee's trial strategy meant no evidence was presented from which an expert could even attempt to extrapolate a level, despite, as discussed above, the Appellee's having the ability to present it. As is always the case in an extrapolation defense, the burden is on the Defendant. In this case, that meant the Appellee, not the Officer, was in the best position to provide testimony regarding his drinking, food consumption and other factors pertinent to an extrapolation defense. And that testimony would have allowed an

expert to formulate an opinion as to his intoxication at the time of his arrest. But the Appellee chose not to pursue any of this testimony and the result was the Commonwealth proved a per se violation of the DUI statute and did so with little if any evidence to the contrary.

Moreover, even if the "level" had been available at trial in this case, it would not have been admissible. And, if this Court remands for a Daubert hearing as the Circuit Court suggests, the results of that hearing will be that the test is inadmissible. The reason, there was no foundation laid at trial for the admissibility of the test. Why not? Because the test in this case is not admissible, even if one were to assume admissibility of the PBT, under any circumstances because it cannot meet the requirements of 500 KAR 8:030. The Circuit Court's own opinion states that the PBT was given within fifteen minutes of operation yet the Administrative Regulations require a twenty minute observation period, strict maintenance of the machine used and compliance with the manufacturer's guidelines. None of these requirements were met; no evidence was presented regarding the calibration of the PBT; no evidence as to the accuracy of the PBT; nor any evidence as to which PBT device was used. What does that mean? That means that any result in this case would have been unreliable. And that is exactly what all PBT levels are...unreliable. PBT tests are not administered in such a manner as to make any "level" scientifically reliable or admissible. There are no foundation requirements written in the law for the introduction of a PBT level because they are meant to be used as an aid in the probable cause determination an officer has to make. They are meant to be

used to determine if there is alcohol present in someone's blood – nor more, no less.

CONCLUSION

The Circuit Court erred by substituting its judgment for the judgment of the trial court and reversing the conviction of the Appellee. The Circuit Court ignored well established law in order to overturn the well reasoned opinion of the trial court. Moreover, the result the Circuit Court seems to want would not affect the outcome of this case. Finally, the Circuit Court's baseless allegation of bad faith on the part of the Officer undermines the integrity of the Commonwealth and the Nicholasville Police Department without cause or justification.

WHEREFORE, the Appellant respectfully moves this Honorable Court to reverse the Jessamine Circuit Court and the Court of Appeals; to vacate the opinions of both; and to reaffirm the Appellee's conviction for Driving Under the Influence by reinstating the District Court's sentence.

Respectfully Submitted,

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