COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2013-SC-00830

COMMONWEALTH OF KENTUCKY APPELLANT

v.

ON DISCRESRETIONORY REVIEW
FROM JESSAMINE CIRCUIT COURT,
HON. C. HUNTER DAUGHERTY,
JUDGE, CASE NO. 11-XX-00005

ADRIAN PARRISH APPELLEE

BRIEF OF APPELLEE, ADRIAN PARRISH

CERTIFICATE OF SERVICE

This will certify that I have, this 21st day of November, 2014, served a true and complete copy of the foregoing *Brief of Appellee, Adrian Parrish,* upon all parties concerned in this action by hand-delivering same to:

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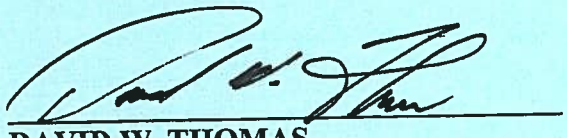

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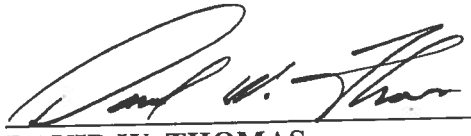

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INTRODUCTION

This case arises from a *per se* DUI conviction. The Jessamine Circuit Court overturned the conviction on appeal by finding that a *Brady* violation occurred. The Kentucky Court of Appeals affirmed the Circuit Court's decision. This Court granted discretionary review.

STATEMENT CONCERNING ORAL ARGUMENT

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

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COUNTERSTATEMENT OF THE CASE

Appellant's Statement of Facts is not accepted as accurate. Appellant includes facts that are not in evidence. Specifically, at pages 5-6 of its Brief, Appellant includes as "facts" the following:

> When Defense Counsel 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 lights. In this case, as sometimes happens with NPD cruiser videos and all technology, the video did not record.

(Appellant's Brief at pp. 5-6).

These facts are not in evidence, and should be stricken. Moreover, Appellant included numerous statements made by Appellee's counsel during arguments. These statements are not evidence and should be stricken. The Appellee will now summarize the evidence actually introduced at trial.

Appellee was stopped by Officer Cobb near Appellee's house at 12:04 a.m. on November 18, 2010 when he failed to come to a complete stop at two stop signs in the Orchard Subdivision in Nicholasville (Trial Tape at 11:43:47 – 11:44:07; 11:50:49). The officer had Appellee get out of his car to perform field tests. Appellee performed the heel to toe and one-legged stand tests very well. He was extremely polite and courteous, exhibited no speech or balance problems, and was oriented to time, place and person (Trial Tape at 12:01:49 – 12:02:22; 12:44:25 – 12:05;00). The Commonwealth ultimately conceded during closing argument that it could not prove a DUI under KRS 189A.010(1)(b), but was instead pursuing a *per se* violation pursuant to KRS 189A.010(1)(a).

Officer Cobb administered a preliminary breath test (hereinafter referred to as PBT) after the other field sobriety tests. He admitted that he obtained a numerical result and recorded same by showing it to his cruiser video. He did not write the result down on his DUI Arrest Report, nor did he remember the result (Trial Tape at 11:45:01 – 11:45:30). He conceded that the PBT may have been under .080% (Trial Tape at 12:13:35 – 12:14:20). When asked why he did not bring the cruiser video to court, he first said that he could not find it and then that he did not know if it existed (Trial Tape at 11:45:01 – 11:45:30; 12:02:30 – 12:43:00). He again conceded that the PBT result may have been under .080%.

In response to Officer Cobb's questioning at the scene, the Appellee stated that he had had three drinks during the 30 minutes before the stop (Trial Tape at 11:57:01). Officer Cobb testified that, based on his training, the Appellee would have absorbed very little of that alcohol into his blood if, as the Appellee told him, it was ingested close to the time of the stop (Trial Tape at 12:13:15 – 12:13:35). He also admitted that the Appellee would not have absorbed all of the alcohol before the stop regardless of when it was consumed during that 30-minute period (Trial Tape at 12:16:10 – 12:16:22; 12:13:15 – 12:13:35).

Appellee was arrested at 12:19 a.m., 15 minutes after the stop. He submitted to the breathalyzer at 12:49 a.m., 45 minutes after he ceased operating, or anywhere from 45 minutes to 75 minutes after he began drinking (based on his statement to the officer). His Intoxilyzer result was .086% (Trial Tape at 12:01:18; Record p. 1).

The Appellee presented no proof.

Appellee was found guilty under the *per se* DUI section and fined. He appealed on several grounds. The Circuit Court reversed the conviction and remanded the matter to District Court for a new trial. Specifically, the Court found that the failure to preserve the PBT results constituted a **Brady** violation.

Appellant filed a Motion for Reconsideration, arguing among other things that the Circuit Court's ruling improperly created a duty for law enforcement officers to administer a PBT or to obtain a "level" result, and that the Court improperly found a **Brady** violation.

The Circuit Court heard oral argument, and overruled Appellant's Motion for Reconsideration. The Court reiterated its finding that if a police officer decides to administer a PBT, then that officer should preserve the results. The Court further found that the officer had acted in bad faith regarding the preservation of the PBT results, and that such conduct constituted a *Brady* violation.

Appellant filed a Motion for Discretionary Review before the Kentucky Court of Appeals. The Court of Appeals granted that Motion. The Court of Appeals also found a Brady violation and affirmed the Circuit Court's decision. The Appellant filed a Motion for Discretionary Review before this Court, and this Court granted that Motion. Appellee submits his Brief in response to Appellant's brief.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION.

A. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN REVERSING THE DECISION OF THE TRIAL COURT AND REMANDING THE CASE BACK TO DISTRICT COURT FOR A NEW TRIAL

Appellant contends that the Circuit Court abused its discretion by substituting its opinion for the trial court's opinion. Appellant's argument ignores well established law regarding the effect of a *Brady* violation on a guilty verdict. The Circuit Court found that *Brady* violation occurred here, and revered Appellee's conviction. The Circuit Court held that had the PBT result been preserved and disclosed to Appellee, there was a reasonable probability that the result of the trial would have been different. *U.S. v. Bagley, 473 U.S. 667 (1985); Stricker v. Greene, 527 U.S. 263 (1999); Kyles v. Whitley, 514 U.S. 419 (1995).* The Circuit Court found that reversal was required because the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. *See Kyles, supra at 435; Youngblood v. West Virginia, 547 U.S. 867 (2006).* Once the Circuit Court found that a *Brady* violation had occurred and that such evidence would have put the whole case in such a different light as to undermine confidence in the verdict, the Court was required to reverse the Appellee's conviction. *Kyles, supra at 435.*

The Court of Appeals agreed with the Circuit Court that a **Brady** violation had occurred because the officer failed to preserve the results of the PBT.

B. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THE OFFICER ACTED IN BAD FAITH WITH REGARD TO THE PBT.

Appellant contends that the Circuit Court abused its discretion in finding the officer acted in bad faith regarding the PBT result. To support its argument, Appellant refers to facts not in evidence, includes arguments of counsel as evidence, personally vouches for the honesty of the officer, and attacks the Circuit Court. These are not facts in evidence. The Court's finding that the officer intentionally destroyed the PBT

evidence is supported by the evidence. He obtained a PBT result. He refused to write down that result. He allegedly videotaped the PBT result. But he either did not look for the videotape before trial, or it suddenly went missing. Regardless of which of those versions might be correct, it is certain that he saw no need to bring it to Court to get to the bottom of what happened to the evidence that he possessed and had a duty to preserve. These are the facts in evidence. Based on these facts, the Circuit Court found that the officer acted in bad faith with regard to the PBT result.

C. A BRADY VIOLATION OCCURRED

Appellant contends that there was no evidence to support the Circuit Court's finding of a *Brady* violation. In support of this contention, Appellant first argues that there is no evidence that exculpatory evidence ever existed in this case. Appellant next argues that even if such evidence had existed and was not preserved, there was no *Brady* violation. Appellant then argues that the officer had no duty to administer a PBT as a blood alcohol level test. Fourth, Appellant argues that the Circuit Court violated the separation of powers doctrine by creating a duty for the police to administer a PBT. Finally, Appellant argues that Appellee was aware of the non-existence of the video.

1. The PBT Result Constituted Exculpatory Evidence.

Appellant argues that the Circuit Court manufactured a *Brady* violation by "creating" exculpatory evidence (pp. 11-12 of Appellant's Brief). The Circuit Court relied on the officer's admission that the result could well have been under a .080%. The Court also relied on the officer's testimony that the Appellee performed very well on the two field sobriety tests that gauged balance and coordination—the one legged stand test and the heel-to-toe test. The Court further relied on the fact that Appellant conceded at

the close of its proof that it could not prove that the Appellee was under the influence of alcohol pursuant to KRS 189A.010 (1) (b). The Court relied as well on the uncontradicted evidence that the Appellee was oriented to time, place, and person, exhibited no speech or balance problems and was extremely polite and courteous. The Court also relied on the uncontradicted testimony that the Appellee had done his drinking right before he was stopped, that he would have absorbed very little of that alcohol into his blood by the time of his stop, or at the worst, he would not have absorbed it all by the time of his stop. In other words, except for the Intoxilyzer result of .086%, the testimony and evidence painted the picture of a man who, at the critical time of the stop of his vehicle, did not have a BAC of .08% or above. The PBT result would have decisively proven that.

The Court found that there was a good probability that the PBT result was under a .08%, and that had the result been preserved, the outcome of the trial may have been different. See *Kyles*, *supra*, at 435. Because of the abundant testimonial evidence of the Appellee's sobriety and the officer's admission that the PBT result may have been under a .08%, the Circuit Court found that in a close *per se* case like this (the Appellee blew a .086% on the Intoxilyzer test 45 minutes after he ceased operating his vehicle and 45 to 75 minutes after he finished drinking), the PBT result was likely exculpatory and could have caused a different outcome had it been preserved. Appellant refuses to concede that a PBT result of less than .08% would be exculpatory.

At oral argument of Appellant's Motion to Reconsider, the defining moment came when the Court tried to pin down Appellant as to what constituted exculpatory evidence. The colloquy went as follows:

Court: "You don't think it would be a **Brady** violation if somebody runs a PBT and they get something that's less than a .08 and not to put it down there? You don't think that's a **Brady** violation?"

Appellant: "Judge, the question is...."

Court: "Just answer my question. You don't think that's a *Brady* violation not to record something that's potentially exculpatory?"

Appellant: "Not if the test was not performed in such a manner that that result is reliable."

Court: "That's not the issue."

(Videotape of Oral Argument on 2/24/12 at 12:05:20-12:07:02)

The Court went on to explain that it is not up to the individual officer to decide *Daubert* issues.

Appellant also argues that Appellee's counsel is to blame for not producing the exculpatory evidence, saying counsel did not make a discovery motion requesting the videotape. That argument ignores the long-standing and agreed-upon practice of obtaining the cruiser videos in Jessamine County. The defense lawyer provides a computer disk or $5.00 to the Nicholasville Police Department and, in exchange, the Nicholasville Police Department provides defense counsel a copy of the cruiser video. Defense counsel, as he always does, made the request long before trial, and had previously provided a blank computer disk for copying that cruiser video. A copy was

never produced to defense counsel. Moreover, the state is under a continuing duty to provide exculpatory evidence.

2. The Circuit Court's Finding that a Brady Violation Occurred is Correct.

Appellant's argument that the officer did not act in bad faith ignores the officer's own testimony. The whole purpose in cross-examining the officer about the PBT result was to show that if he had preserved it properly, it would have led to an acquittal. What the examination also demonstrated was that the officer's two versions of the disappearance of the tape were inherently contradictory. The Circuit Court noted that Officer Cobb testified first that he could not find the videotape, and then that he did not know if it existed. The first explanation necessarily implies that he looked for it, whereas the second implies that he did not. He is the one who marked on the Citation that a videotape did exist. He is the only one who saw the result. He is the one who testified that the result may have been below a .08%. And he is the only person who actually possessed the PBT evidence and had a duty to preserve it once he obtained it. He consciously decided not to write it down or to produce it at trial.

Appellant argues that this case is the same situation as *Allen v. Commonwealth, 817 S.W.2d 458 (Ky.App. 1991)*. This case is not the same "situation" as *Allen* (*see* Appellant's Brief at pp. 13-14). In *Allen*, the Court found that the "charge against James Allen could have been proven without any of the technology used in the case." Id. at 462. Here the prosecution conceded that it could not prove a DUI under KRS 189.010(1)(b) (non *per se* DUI). Instead, it relied on technology to prove a *per se* violation. Moreover, here there was no firmly entrenched lab policy in place that resulted in the destruction of the PBT evidence. See ***Allen***, *supra, at 462*. The PBT result was

essential to Appellee's extrapolation argument, and the officer did not preserve it. *Brady v. Maryland, 373 U.S. 83 (1963).*

In affirming the Circuit Court's decision, the Court of Appeals found that a **Brady** violation had occurred.

3. The Circuit Court Did Not Hold that a Police Officer Has a Duty to Administer a PBT as a Blood Alcohol Level Test.

Appellant argues that the Court has created a duty on a police officer to administer a PBT as a blood alcohol level test. The Circuit Court held that if an officer obtains a PBT level result, then that officer must preserve it. The Court ruled that way because the result of a PBT may be admissible under *Stump v. Commonwealth,* 289 S.W.3d 213 (Ky.App. 2009).

4. The Circuit Court Did Not Violate the Separation of Powers Doctrine by Creating a Standard Practice for the Nicholasville Police Department Regarding PBT Results.

Appellant argues that the Circuit Court violated the separation of powers doctrine by creating a standard practice for the Nicholasville Police Department for preserving PBT results. The Court never held nor intimated that the Nicholasville Police Department must establish a standard practice for administering the PBT. The Court merely held that police officers, just like common citizens, are presumed to know the law, and that therefore they should know that PBT results may be admissible. The Court ruled that if an officer elects to administer a PBT and obtains a result, then he or she should write it down.

5. The Defense Was Not Aware of All The Facts Surrounding The Video.

Appellant contends that there cannot be a *Brady* violation because the defense was aware of the non-existence of the video. This argument merely rehashes Appellant's

argument in D(1) of its Brief, but adds the ironic proposition that even though Appellee allegedly made no discovery request regarding the videotape, he knew about its "non-existence." (p. 17 of Appellant's Brief). Appellee followed the standard practice in Jessamine County of obtaining a copy of the videotape (*See* Appellee's Response at (D) (1) above). It was only at trial that Appellee discovered said tape contained *Brady* material. In light of Officer Cobb's testimony at trial, Appellee's counsel does not know whether a tape exists or not.

D. THE CIRCUIT COURT'S DECISION TO REVERSE APPELLEE'S CONVICTION AND REMAND THE CASE TO DISTRICT COURT FOR A NEW TRIAL WAS PROPER.

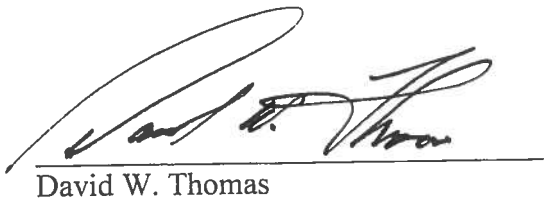
Appellant contends that even if the Circuit Court's analysis is correct, a new trial should not have been granted. Appellant argues that even had the PBT result been preserved, it would not have been admissible because it would not have survived *Daubert* scrutiny. As the Circuit Court made crystal clear to Appellant at the oral argument, it is not up to the police to decide *Daubert* issues; it is up to the trial court. The Court held that the *Brady* violation undermined confidence in the verdict and therefore required it to reverse the Appellee's conviction, without considering any *Daubert* challenge. Upon remand, the District Court will have to determine whether and how to conduct a *Daubert* hearing on a test that no longer exists.

CONCLUSION

Based on the foregoing arguments, Appellee respectfully requests that this Court affirm the opinion of the Kentucky Court of Appeals, which affirmed the decision of the

Jessamine Circuit Court reversing the conviction and remanding the case to District Court for a new trial.

Respectfully submitted,



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