SUPREME COURT OF KENTUCKY

Case No. 2013-SC-742-DG

COMMONWEALTH OF KENTUCKY — **APPELLANT**

On Discretionary Review from Court of Appeals (No. 2011-CA-636-DG)
Appeal from Webster Circuit Court
Hon. C. Rene Williams, Judge
Action No. 10-XX-4

CHRISTOPHER DUNCAN — **APPELLEE**

Reply Brief for Commonwealth

Submitted by,

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CERTIFICATE OF SERVICE

I certify the appellate record was not withdrawn from the Clerk of this Court, and that a copy of this brief was delivered this 17th day of December, 2014, to C. Rene Williams, Judge, Webster County Courthouse, 35 U.S. Highway 41A South, P.O. Box 126, Dixon, KY 42409 (U.S. mail); Zac Greenwell, Esq., 112 South Main Street, P.O. Box 341, Marion, KY 42064-0341 (electronic mail); and Amealia R. Zachary, Esq., 66 U.S. Highway 41A South, P.O. Box 338, Dixon, KY 42409 (U.S. mail).

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STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION

In this criminal case, the Commonwealth of Kentucky seeks reinstatement of the circuit court order affirming the district court order denying Christopher Duncan's motion to dismiss the charge of driving while intoxicated. This reply brief is intended to reply to select arguments made by Duncan in his response brief.

ARGUMENT

I. Duncan's Response Brief Fails to Comply With CR 76.12.

As a preliminary note, Duncan's response brief fails to comply with CR 76.12 in at least two significant ways.

First, Duncan's mislabeled Counterstatement of the Case[1] fails to state whether he accepts the Commonwealth's Statement of the Case.[2] Instead, he claims that there are "no factual matters in issue in this action as *all matters* were stipulated and agreed to in the trial [c]ourt."[3] It is unclear exactly what "all matters" means. For example, he alleges the law enforcement officer who conducted the traffic stop "admitted that the breathalyzer was available but explained that it took too long to travel to the machine" and that "officers had been directed to just draw blood every time they had a [DUI]."[4] Despite searching the paper record and listening to the sometimes difficult to understand audio recording in the certified record, undersigned counsel has not located a supporting reference for these points.[5]

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[1] (Blue brief, p. 1.) The Commonwealth mislabeled its Statement of Points and Authorities. (Red
[2] CR 76.12(4)(d)(iii).
[3] (Blue brief, p. 1 (emphasis supplied).)
[4] (Blue brief, p. 1.)
[5] Undersigned counsel acknowledges the parties agreed to stipulate certain facts but the audio recording memorializing this stipulation (*i.e.*, people talking over one another) makes it difficult, if not impossible, to discern the extent of that stipulation, *e.g.*, why the officer did not offer a breath test to Duncan. (*See* Audio Tape; 07/10/07; 0:20 of 6:36.)

Second, Duncan's brief does not contain any citations to the certified record in either the mislabeled Counterstatement of the Case or Argument.[6] The closest he comes to a citation is the cryptic "See tape on appeal."[7] Needless to say, this total disregard for the citation requirement makes Duncan's brief useless as far as referring to the certified record or the two panel opinions from the Court of Appeals.

II. The Commonwealth Is Not Asking to Void Any Law.

In his brief, Duncan repeatedly maintains the Commonwealth is asking the Court to void KRS 189A.005(5) and KRS 189A.103(5).[8] According to Duncan these laws dictate that in an alcohol-only traffic stop, a law enforcement officer cannot even ask for a blood or urine sample absent exigent circumstances and the driver cannot be deemed to have refused a test so long as he is willing to give a breath sample.[9]

The Commonwealth is not asking the Court to void any law. To the contrary, the Commonwealth is asking the Court to apply *Beach v. Commonwealth*[10] to this case. To suggest the Commonwealth wants laws voided just to win this case is absurd.

In an effort to support this argument, Duncan quotes KRS 189A.005(5) as stating the following

> . . . If the breath testing sample and the alcohol concentration cannot be measured by the breath testing instrument, the law enforcement officer shall then request the defendant to take a blood or urine test in lieu of the breath test . . . .[11]

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[6] CR 76.12(4)(d)(iii); CR 76.12(4)(d)(iv).
[7] (Blue brief, p. 3.)
[8] (Blue brief, pp. 2, 3, & 5.)
[9] (Blue brief, pp. 4-5.)
[10] 927 S.W.2d 826 (Ky. 1996).
[11] (Blue brief, p. 2.)

He then contends this provision means that if the breath testing instrument cannot provide a measurement, only then may an officer ask for a blood or urine sample.[12]

Duncan has misquoted this portion of KRS 189A.005(5), however, as it expressly addresses the narrow situation of an "insufficient breath sample":

> If the breath testing instrument for any reason shows an insufficient breath sample and the alcohol concentration cannot be measured by the breath testing instrument, the law enforcement officer shall then request the defendant to take a blood or urine test in lieu of the breath test.[13]

Further, this language does not limit a law enforcement officer's authority to choose the manner of testing. Rather, it simply defines the protocol for the specific situation of when "an insufficient breath sample" precludes alcohol concentration measurement via a breath testing instrument.

III. The *Beach* Decision Remains Good Law.

In an effort to minimize *Beach*, Duncan characterizes the following express holding as being *dictum* or merely advisory[14] in nature:

> In order to determine whether an individual is driving a vehicle under the influence, the legislature provided that a person is deemed to consent to one or more or any combination of blood, breath or urine tests. The language of the statute provides that a police officer may require an individual to submit to such tests in the absence of a provision to the contrary.
>
> The argument that Subsection 5 limits the police in their ability to administer blood or urine tests is without merit. There is no priority expressed in the statute and no preferred method for determining blood alcohol content.
>
> . . .
>
> It is the holding of this Court that KRS 189A.103(1) and (5) do not require that a police officer must first offer a DUI suspect a breath test before asking him or her to submit to a blood test.

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[12] (Blue brief, p. 5.)
[13] KRS 189A.005(5).
[14] (Blue brief, pp. 6-9.)

> The provisions of KRS 189A.103 provide that an individual driving on the highways of Kentucky has given implied consent to the performance of a blood, breath and/or urine tests in the event the individual is suspected of driving a vehicle under the influence.[15]

The plain language of the opinion – "It is the holding of this Court" – belies Duncan's argument.

In the alternative, Duncan asks the Court to overrule *Beach* and argues, "The legislature did not intend for law enforcement to pick and choose which test to administer or how or where to administer same without following any guidelines."[16] If the General Assembly had wanted to set forth a mandatory testing order, it would have done so. The fact it did not do so when KRS 189A.103 was enacted; in the amendments after *Beach*;[17] or at any time since *Beach* was rendered eliminates all legitimate doubt that no testing order was intended.[18] In his brief, Duncan completely ignores the General Assembly's decision not to amend KRS 189A.103 to counteract *Beach* and the significance of this inaction.

Duncan also looks to *Combs v. Commonwealth*[19] for support and in particular the following two sentences: "There is no due process violation. The record is silent as to any proof that Combs requested a different type of testing."[20] Duncan then asserts these sentences mean this Court "held that had Combs requested a different type of testing and been denied, that there would have been a due process violation."[21]

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[15] *Beach*, 927 S.W.2d at 827-28 (text reformatted).
[16] (Blue brief, pp. 6-9.)
[17] Kentucky Revised Statute 189A.103 became effective July 1, 1991 and was amended in 2000 and 2007. Section five of the statute has remained the same since its 1991 enactment.
[18] *Rye v. Weasel*, 934 S.W.2d 257, 262 (Ky. 1996) ("courts have recognized the failure of the legislature to change a known judicial interpretation of a statute as extremely persuasive evidence of the true legislative intent. There is a strong implication that the legislature agrees with a prior court interpretation of its statute when it does not amend the statute interpreted.").
[19] 965 S.W.2d 161 (Ky. 1998).
[20] (Blue brief, pp. 7-9.)
[21] (Blue brief, p. 7.)

In *Combs*, the defendant was stopped due to his erratic driving, he failed multiple field sobriety tests, and when taken to the jail "he requested that further testing stop and [] refused to submit to a blood test to determine his blood alcohol."[22] After the officer secured a search warrant, a blood sample was taken from the defendant.[23]

Near the end of *Combs*, the Court rejected the defendant's argument that a refusal of a blood test constituted a request for a different type of test:

> The argument presented by Combs in refusing to submit to testing as a request for a different form of testing is without merit. There is no due process violation. The record is silent as to any proof that Combs requested a different type of testing. There was no allegation of police violence or misconduct. *See Beach v. Commonwealth*, Ky., 927 S.W.2d 826 (1996) and *Schmerber*, *supra*.[24]

It is from this that Duncan attempts to draw support.

Duncan reads far too much into the two sentences from *Combs*. The Court rejected the "I said no but really meant yes to something else" argument because there was no proof the defendant asked for a different test and no proof of police wrongdoing. That's it. The *Combs* opinion does not stand for the premise that a suspect is denied due process if he asks for and is denied his choice of alcohol concentration test as this would fly in the face of *Beach* – which was cited positively by the *Combs* court.[25]

As for Duncan's reliance on *Barker v. Commonwealth*[26] as somehow undercutting *Beach*, the lower appellate court's opinion does nothing of the sort.[27]

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[22] 965 S.W.2d 161, 163 (Ky. 1998).
[23] 965 S.W.2d 161, 163 (Ky. 1998).
[24] 965 S.W.2d 161, 165 (Ky. 1998).
[25] It is worth noting *Beach* and *Combs* were authored by the same justice (J. Wintersheimer).
[26] 32 S.W.3d 515 (Ky. App. 2000).
[27] (Blue brief, p. 9.)

IV. *McNeely* Has No Application to This Case.

While discussing *Missouri v. McNeely*,[28] Duncan claims "[o]ne cannot be forced to waive his constitutional rights in order to be afforded due process."[29] He also laments, in all caps, that "[n]o intrusion should have been forced upon [him]."[30]

Duncan was not forced to "waive" any constitutional rights and there was no "intrusion" forced upon him. When Duncan declined the request for a blood sample, the officer respected his wishes and no blood sample was taken. Duncan gains no traction from the *McNeely* decision.

V. Duncan Argues Issues Not Before the Court.

To end his brief, Duncan offers arguments about how he allegedly did not refuse testing per KRS 189A.005(5) and that "exculpatory evidence" was not preserved.[31] In support, Duncan asserts he "was not properly informed that to refuse to allow the officer to take blood and request a breathalyzer would be considered a total refusal to be tested" and "that he would be taken elsewhere to have his blood drawn or that a paramedic would be called."[32] Duncan also maintains "there was no person authorized [by law] to take his blood."[33]

These fact-based issues have not been addressed by any court and Duncan fails to show where in the certified record relevant findings of fact were made. The Court should not consider these fact-based issues.[34]

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[28] 133 S.Ct. 1552 (2013).
[29] (Blue brief, p. 10.)
[30] (Blue brief, p. 11.)
[31] (Blue brief, pp. 11-12.)
[32] (Blue brief, pp. 11-12.)
[33] (Blue brief, p. 11.)
[34] *See Vinson v. Sorrell*, 136 S.W.3d 465, 470-71 (Ky. 2014) ("It is fundamental that a party who asserts a claim must prove that claim to the satisfaction of the trier of fact, and on failure of the

CONCLUSION

For these reasons, this Court should vacate the decision of the Court of Appeals and reinstate the order of the Webster Circuit Court affirming the denial of Duncan's motion to dismiss the charge of driving while intoxicated.

Respectfully submitted,

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fact-finder to rule on the contention, the pleading party must seek a ruling from the trial court by means of a request for additional findings of fact.").