

# SUPPLEMENTAL READING

## RECENT KENTUCKY CASE LAW IN DRIVING UNDER THE INFLUENCE

### DRIVING UNDER THE INFLUENCE

McKenzie v. Com., WL 2918854 (Ky. App. 2006)

**FACTS:** In late 2001, McKenzie left Ohio to visit relatives in Johnson County, Kentucky. Because of previous serious back injuries, he had prescriptions for pain medication and muscle relaxants. Knowing that the drive would be “hard on his back,” he took Roxicet (oxycodone/acetaminophen) prior to leaving Ohio and Valium and Lortab when he arrived in Johnson County. The next morning, his family went for a visit, and originally, McKenzie did not go with them. He decided, later, however, to join them, but had already taken a Soma (a sleeping medication) and two Lortabs. Knowing he would be gone for some time, he carried additional medication in a pill bottle with his brother’s name on the container.

As he drove along, “McKenzie allegedly became distracted looking at a cedar house built on a hillside.” The opinion noted that McKenzie “failed to notice when his van left the road, traveled over barriers separating the road from a ditch and slammed into a car driven by a rural mail carrier, Shepherd. Shepherd died of her injuries. Tests of McKenzie’s blood and urine indicated the presence of Valium, Soma, oxycodone, codeine and hydrocodone. He was indicted for Wanton Murder, and later with PFO. He was eventually convicted of Second-Degree Manslaughter, enhanced by his PFO status.

McKenzie appealed.

**ISSUE:** Is voluntary intoxication a defense to a crime with the mental state of wantonness?

**HOLDING:** No

**DISCUSSION:** The Court noted that several witnesses testified as to McKenzie’s appearance and erratic driving before and after the wreck. One witness, a registered nurse, watched him stagger around the crash scene and physically prevented him from starting his van and driving off, by taking his keys. She stated that he did not “smell of alcohol” but did have a “glazed look, pinpoint pupils and difficulty walking, and that “he was under the influence of something.” The witness did not believe his difficulty in walking was due to an injury. Deputy Fairchild (Johnson Co. SO) was the first officer on the scene. He too described McKenzie as having a “dazed appearance, slurred speech and glazed eyes” and that McKenzie appeared to be unable to understand him and could not follow directions. Fairchild tried to do field sobriety tests, but “McKenzie was unable to perform any of the tasks requested.”

McKenzie denied a need for medical treatment, but did agree to blood and urine testing. He admitted to having taken Soma and Lortab. Fairchild noted the bottle with McKenzie’s brother’s name, and that they appeared to be, in fact, the drugs claimed. McKenzie claimed that “he was never advised that the

particular combination of medications he ingested could impair his driving, and that as such, “the jury could not properly convict him of an offense requiring the mens rea (mental state) of wantonness.” He did agree, at trial, however, that the Soma bottle warned of drowsiness and that he had gotten drowsy before while taking Soma.<sup>1</sup> Further, the Court noted that it had never actually been shown that McKenzie was prescribed Soma, and there was some indication that the prescription for that drug, in fact, belonged to McKenzie’s wife. The Court agreed it was reasonable for a jury to find that he was “voluntarily intoxicated” when he took both Soma and Lortab prior to driving.

In previous cases, the Court noted, it had been “held that voluntary intoxication is no defense to offenses involving wantonness.” Specifically, in Slaven v. Com., the Court had found that “voluntary intoxication ... is not a defense to second-degree manslaughter.”<sup>2</sup> Further, the Court agreed that the case of Estep v. Com.,<sup>3</sup> it was unnecessary for the prosecution to specifically prove that a defendant was aware of the possible side effects of taking such prescription drugs together, when the defendant provides some evidence that in fact, they knew at least some of the effects of the medication when taken individually. McKenzie further argued that the urine test evidence was inadmissible because it lacked “sufficient scientific accuracy” to meet the standards of Stringer v. Com.<sup>4</sup> and Goodyear Tire and Rubber Company v. Thompson.<sup>5</sup> The Court agreed that although he was not charged with driving under the influence (there is no explanation for this, however) the provisions of KRS 189A which allows such testing apply whenever an officer reasonably suspects a violation of that statute. Clearly, given the evidence provided, such reasonable suspicion existed.

Given that KRS 189A continues to include a provision for urine testing, the Court further found that the legislature considered such testing to have evidentiary value with regards to driving impairment. The KSP lab technician testified that certain drugs would appear in urine longer than in blood. She concluded that since the hydrocodone and oxycodone were in his urine, but not his blood, that they were not in his system at the time the blood sample was taken. As such, McKenzie argued that the test results were prejudicial to him, but the Court disagreed. Further, McKenzie argued that the chain of custody on the test samples was not properly preserved, but the Court disagreed, noting in detail the steps taken by Dep. Fairchild in handling this evidence. Fairchild had initially stated that he took the samples to the sheriff’s evidence room, and then further stated that he mailed the samples to the KSP lab, but he clarified at trial that he did not actually mail them himself, only left them to be mailed. Dep. Dotson later testified that he hand-delivered the samples to the KSP lab in Ashland. The KSP analyst stated he received them sealed in Ashland, performed the blood alcohol test, and then resealed the package to be sent to Frankfort for further testing.

The Court noted that in Rabovsky v. Com. it had been held that “it is unnecessary to establish a perfect chain of custody”<sup>6</sup> but that instead, the “Commonwealth is only required to provide persuasive evidence that no one tampered with the sample.” Of course, any “gaps in the chain of custody may affect the weight given to the evidence by the jury.”<sup>7</sup> The Court agreed that the law enforcement agencies collectively “maintained sufficient control” over the samples for them to be admissible.

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<sup>1</sup> Soma is categorized as a muscle relaxant.

<sup>2</sup> 962 S.W.2d 845 (Ky. 1997).

<sup>3</sup> 957 S.W.2d 191 (Ky. 1997).

<sup>4</sup> 956 S.W.2d 883 (Ky. 1997).

<sup>5</sup> 11 S.W.3d 575 (Ky. 2000).

<sup>6</sup> 973 S.W.2d 6 (Ky. 1998).

<sup>7</sup> Love v. Com., 55 S.W.3d 816 (Ky. 2001).

McKenzie's conviction was affirmed.

**Hudson v. Com., 202 S.W.3d 17 (Ky. 2006)**

**FACTS:** On June 21, 2004, Officer Ball (Mt. Sterling PD) saw a vehicle "drift across the center line, forcing Ball and another ... motorist to swerve off the road to avoid a head-on collision." Ball could not see the driver well enough to identify him, but did immediately go after the vehicle. The vehicle disappeared momentarily as it pulled into an apartment building parking lot, but Ball quickly caught site of it again and followed it as it parked.

Ball immediately approached it and found Hudson, "alone in the vehicle, seated in the driver's seat with the engine running, the radio blaring, and a forty-ounce beer bottle sitting on the passenger-side floorboard." Hudson admitted to having had several of the beers that day and Ball found him "too unstable to be safely subjected to a field sobriety test." Ball took Hudson to the hospital for a blood test, and it was found to be .30. The vehicle was owned by Hudson's girlfriend. Hudson claimed that someone else actually drove him to the apartment complex, and that he visited his grandmother for some money at that location. When he returned to the car, he found it running and the "driver missing."

Hudson was charged with DUI and went to trial. Hudson argued that the trial court should have instructed the jury on alcohol intoxication.<sup>8</sup> However, the trial court found that alcohol intoxication "is not a lesser included offense of DUI because each requires proof of an element that the other does not" and refused to give the instruction.

Hudson was convicted at trial, and appealed.

**ISSUE:** Should a jury instruction be given on alcohol intoxication be given in a DUI case?

**HOLDING:** Not necessarily

**DISCUSSION:** The Court agreed that earlier opinions had suggested that "an instruction on a separate, uncharged, but 'lesser' offense is required whenever the evidence could conceivably support the charge. The Court, however, found that such an instruction, in effect, an "alternative theory of the crime" is only required when guilt as to one would "amount to a defense to the charged crime" – when it is impossible to be guilty of both. The appellate court agreed that Hudson "was either guilty of DUI or he was not guilty." Although he could have been charged with alcohol intoxication, he was not, but that "does not change this analysis."

Hudson's conviction was affirmed.

**Lewis v. Com., 217 S.W.3d 875 (Ky. App. 2007)**

**FACTS:** On the day in question, Officer Gordon (Carrollton PD) arrested Lewis for DUI. At trial, he testified as to "his certification to operate the Intoxilyzer and as to the steps he took before conducting the test ...." He specifically testified "regarding the initial air blank test, the calibration test which registered .082, the second air blank test, and finally Lewis' actual test on which he registered .118. In addition, the

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<sup>8</sup> KRS 222.202.

Court admitted the test printout, which reflected the time and the results of the five checks done by the Intoxilyzer. During cross examination, Gordon was questioned about “whether any aspect of the GAC test reflected an alcohol simulator analysis,” to which Gordon replied that “such information had not been discussed or provided in his training.”

Lewis moved to have the results of the test struck, because no aspect of the test reflected the “alcohol simulator analysis” as required by Com. v. Roberts<sup>9</sup> and the relevant regulation.<sup>10</sup> However, he was convicted, and then appealed.

**ISSUE:** Is the ambient air blank test on the Intoxilyzer the alcohol simulator analysis required by state regulation?

**HOLDING:** Yes

**DISCUSSION:** The Court reviewed the regulation which required, as one of the steps, an “alcohol simulator analysis.” The Court noted that the five steps involve three “ambient air blank tests” which are “designed to insure that no lingering alcohol remains in the testing chamber.” The calibration check, the second step, involves having a “solution having a known alcohol concentration of .08 ... introduced into the machine’s testing chamber to check its calibration.” The Court found that part of the test is the “alcohol simulator analysis” required by the regulation, and that the printout properly recorded each of the steps in the test.

Lewis’ conviction was upheld.

### **Bridgers v. Com., 2007 WL 121846 (Ky. App. 2007)**

**FACTS:** On Oct. 25, 2000, Trooper Crumpton (KSP) saw a vehicle, driven by Bridgers, cross the centerline of Hwy 55 twice, and then cross the fog line twice, near Taylorsville. Trooper Crumpton then made a traffic stop. He had Bridgers perform the following field sobriety tests: the one-leg stand, the walk-and-turn, the horizontal gaze nystagmus (HGN) and the preliminary breath test. Bridgers’ performance on the FSTs led to Crumpton arresting him for DUI, and following a search, he was further charged with possession of marijuana and drug paraphernalia (a pipe). Bridgers registered a 0.129 on the Intoxilyzer.

Bridgers was convicted of all charges, and appealed.

**ISSUE:** Does an officer have to be qualified as an expert to testify as to the results of field sobriety tests?

**HOLDING:** No

**DISCUSSION:** Bridgers argued that the field sobriety test evidence “was technical in nature and therefore subject to the trial court’s gate-keeping function” as discussed in Daubert v. Merrell Dow Pharmaceuticals.<sup>11</sup> Bridgers relied upon a Maryland District Court case, which held that FSTs could not be used to “prove a

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<sup>9</sup> 122 S.W.3d 524 (Ky. 2003).

<sup>10</sup> 500 KAR 8:030.

<sup>11</sup> 509 U.S. 579 (1993).

specific blood alcohol content” and that officers could give only “lay opinion testimony” concerning their observations of the performance of the test.

The Court noted that the trial court did not require the Commonwealth to prove the “field sobriety testing was scientifically valid,” but did require them to show that the “tests were properly carried out by Trooper Crumpton.” The Court viewed the videotape. Bridgers complained that the walk-and-turn was done incorrectly, because the “ground where Bridgers was required to perform the test was not level” – but the Court “held that Bridgers could address that objection through cross-examination.” (However, it did not come up again, because Crumpton noted that Bridgers actually passed that test.) The Court noted that it had previously held that FSTs are admissible and the officers “may offer both lay and expert testimony that a [subject] was intoxicated.”<sup>12</sup>

Bridgers also complained that although Crumpton testified about the Intoxilyzer and stated that it was working, the Commonwealth did not “offer any evidence concerning the machine’s maintenance records.” At the time of the trial, the Court noted that the case of Wirth v. Com. established the “foundation requirements for the introduction of breath tests results.”<sup>13</sup> However, the Court had since revisited Wirth and clarified that the Commonwealth could satisfy the requirements “by relying solely on the testimony of the operator so long as the documentary evidence, i.e. the service records of the machine and the test ticket produced at the time of the test, are properly admitted.” In this case, “the service records of the machine were not introduced.” However, the Court found that while this was an error, it was a harmless error “in light of the other testimony indicating Bridgers was intoxicated.” The Court further noted that breath testing “has been existence for a long time” and while perhaps not flawless, “has sufficient reliability to be admissible.” Requiring detailed testimony as to the science of the test “would only serve to confuse the jury.” Finally, Bridgers argued that there was no evidence that he was subjected to the breath testing within two hours of the stop, but the Court noted that the videotape showed the “time and date of the stop and arrest” and that the test ticket also marked that time and date.

Bridgers’ conviction was affirmed.

### Perry v. Com., 2007 WL 1300985 (Ky App. 2007)

**FACTS:** On the night of the arrest, Perry had stopped his car on the Hal Rogers/Daniel Boone Parkway. Officer Collett, KVE came along and stopped to see if he needed help. But, as Collett pulled in, Perry took off into traffic. Collett made a traffic stop to determine if Perry was impaired. Collett cited Perry for careless driving and asked Perry if he’d “take anything that might impair his driving.” Perry produced three Percocet pills from his pocket. Collett gave him field sobriety tests, which he failed, and arrested Perry for DUI and possession of a controlled substances. During the subsequent search, Collett found 13 bags of cocaine.

Perry was indicted, and requested suppression, arguing that Collett lacked even reasonable suspicion to stop him. When that was denied, Perry took a conditional guilty plea, and appealed.

**ISSUE:** May an officer stop a vehicle to determine if a driver who had been parked along the road is alright?

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<sup>12</sup> See Kidd v. Com. 146 S.W.3d 400 (Ky. App. 2004) and Com. v. Rhodes, 949 S.W.2d 621 (Ky. App. 1996).

<sup>13</sup> 939 S.W.2d 78 (Ky. 1996).

**HOLDING:** Yes (fact-specific)

**DISCUSSION:** Perry argued that he had, apparently, been “improperly subjected to multiple stops in close proximity, and he was unduly detained at the scene.” He also argued that Collett’s in car video did not support Collett’s version of events, but it was not made a part of the record. As such, the appellate court could not use it. The Court concluded that Collett’s testimony supported the original stop and as such, the ensuing arrest and search were lawful as well.

The Laurel Circuit Court decision was affirmed.

**Prater v. Com., 2007 WL 625081 (Ky. App. 2007)**

**FACTS:** On Nov. 9, 2003, at about 7 p.m., McGinnis was driving westbound on the Mountain Parkway in Magoffin County. He saw a white Crown Victoria (later discovered to be driven by Prater) approaching him, “going eastbound ... on the shoulder of the westbound lane” at about 50-55 mph. McGinnis was forced to swerve to the left, and Prater then hit him, causing McGinnis’s vehicle to spin. Prater struck another vehicle, driven by Evans (and occupied as well by his wife and two children), head-on. Hurley, in yet another vehicle, struck the Evans’ vehicle. McGinnis and Hurley were uninjured, but all of the members of the Evans family suffered injuries. Ashley, the 12-year old daughter, became a paraplegic and further, due to abdominal injuries had to have a colostomy and can no longer eat solid foods. She is also unable to attend school.

Troopers McCarty and Dials (KSP) responded. They interviewed Prater at the hospital, and did an HGN test. They believed she was intoxicated on drugs or alcohol, and later testing indicated that she had, in her possession, two oxycodone tablets, three carisoprodol (Soma) tablets and a broken tablet of alprazolam (Xanax) Her blood testing showed a “therapeutic level of Xanax” and there was a suggestion of other drugs in her urine testing, including possibly hydrocodone or oxycodone.

Prater was indicted on First-Degree Assault, Second-Degree Wanton Endangerment, and DUI, along with related charges. (The DUI charge was later amended to a second offense.) She was eventually convicted on most of the charges, and appealed.

**ISSUE:** Is evidence of drug impairment sufficient to charge an individual with a wanton offense?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that the Assault and Wanton Endangerment charges both involve “an element of wanton conduct.” Prater argued, however, that her behavior was, at worst, negligent, not wanton. She also noted that there was little proof of intoxication, but the troopers had testified as to her performance on the HGN test and her “inability to conduct a conversation, slurred speech, glassy eyes and lethargic mannerisms.” There was no indication that she’d suffered acute trauma in the wreck, as to account for her behavior. Trooper McCarty testified that the evidence at the scene clearly indicated she’d been driving on the westbound shoulder. The Commonwealth also showed that she “had traces of at least two drugs in her system that could impair driving.” That was sufficient to “establish that Prater engaged in wanton conduct and not just civil negligence.”

Prater's convictions were affirmed.

**Jolley v. Harvell, 2007 WL 3390935 (6<sup>th</sup> Cir. 2007)**

**FACTS:** On October 6, 2002, Officer Harvell (Calvert City PD) "saw a 1996 Honda stop at four-way stop intersections, for what the officer characterized as a 'prolonged stop,' approximately thirty seconds." As it was dark, Officer Harvell could not see a plate of any kind. He pulled over the vehicle as it drove into a convenience store, finding it occupied by Jolley (age 19), the driver, and two friends, Konrad and Cunningham.

At this point, as captured on Harvell's in-car video, Harvell approached and asked for Jolley's license and insurance card, which Jolley provided. Harvell, believing he smelled marijuana, had Jolley get out, and asked him to perform several FSTs. Jolley was unable to successfully complete the one-leg stand and the walk-and-turn, claiming to be "too shaky." He did pass the HGN, but Harvell felt that since that was for alcohol use only, he did not consider it determinative. Harvell arrested Jolley for DUI, believing him to be under the influence of marijuana. (The citation detailed the facts, as above, but the vehicle was found to actually have a valid temporary tag.)

Jolley (and the other men) denied having smoked marijuana, and Jolley's tests indicated no marijuana in either blood or urine. A vehicle search, subsequent to the arrest, resulted in no marijuana being found. Three days after the arrest, the local newspaper ran a front-page story on the arrest. Approximately 6 months later, the charges were dismissed on the Commonwealth's motion, and the newspaper ran a story about the result. During that same time frame, Harvell was disciplined for having poorly performed the tests, and underwent remedial training. (He was also reprimanded for allowing one of the other passengers to leave with the car.)

Jolley sued under 42 U.S.C. §1983, claiming a violation of his Fourth and Fourteenth Amendment rights. Upon Harvell's motion, the trial court granted summary motion in favor of Harvell and the city defendants, finding that the results of the tests gave Harvell probable cause to make the stop, and ultimately, to arrest Jolley. Upon motion and reconsideration, the Court concluded that the failure of the one-leg stand indicated a 65% chance that Jolley was intoxicated, but found that he did not, in fact, fail the walk-and-turn. Even though the Court acknowledged that, in hindsight, it was apparent that he was not intoxicated, the Court found sufficient reason to grant Harvell qualified immunity.

Jolley appealed.

**ISSUE:** Does a failure to get a conviction mean the officer has insufficient probable cause to have made an arrest, and is therefore liable?

**HOLDING:** No

**DISCUSSION:** The Court reviewed the "DUI/Standardized Field Sobriety Testing Course" manual used during the time Harvell received his training. Jolley argued that Harvell failed to take into account that Jolley was cold and nervous, his reasons for failing the physical tests. Coupled with the unusual stop, the Court found probable cause for the DUI arrest. Next, Jolley argued that since he was arrested for DUI (marijuana), that the manual's indication that his failures indicated a 65% chance that he had BAC higher than .10, a factor that applied only to alcohol. The Court, however, found that a "reasonable officer could

have interpreted a failure of the one-leg stand to indicate some form of impairment - whether marijuana or alcohol - such that Jolley could not safely drive a car."

Finally, Jolley argued that the totality of the circumstances did not support his arrest. Balancing the long stop, which he explained was to defrost his car window, he noted that he had been observed committing no other violations, had been cooperative, and that the video indicated his "speech was distinct and not slurred, that his thinking and reasoning were intact, and that his gait was normal." Refuting the trial court's note that at 50 degrees, the night was not cold, he indicated that he was wearing a "short-sleeved shirt" and was shivering. He also noted that Harvell allowed "Konrad to drive Jolley's automobile away from the scene without first checking Konrad's driver's license and administering field sobriety tests to him." The Court, however, concluded that there was probable cause to justify the arrest. The Court noted that "Harvell's conduct" was well within the range dictated by Saucier v. Katz,<sup>14</sup> and that "[a]lthough he may have made some mistakes ... he properly found probable cause."

The Court upheld qualified immunity in favor of Harvell.

### **Litteral v. Com., 2008 WL 5102145 (Ky. App. 2008)**

**FACTS:** On the day in question, Officer Combs (Lexington PD) arrested Litteral for DUI. At the jail, he explained the testing and offered Litteral his right to attempt to contact an attorney during the 20 minute required observation period. Litteral did, in fact, try to contact his sister, an attorney, and "Officer Combs remained in close proximity to Litteral" during this time.

Litteral requested suppression of the BA test results, and was denied. Eventually, Litteral took a conditional guilty plea, and appealed.

**ISSUE:** May an officer stay close to a DUI suspect while they are attempting to contact an attorney, during the waiting period prior to a breath test?

**HOLDING:** Yes

**DISCUSSION:** The Court reviewed the history of the DUI and implied consent law. The Court noted that taking such samples are not "critical stages of a prosecution" and that as such, a suspect is not entitled to an attorney being present anyway.<sup>15</sup> In 2000, the Court noted that the Kentucky General Assembly "added a very limited right to attempt contact with an attorney." The Court found that "Litteral's only complaint is that he was unable to consult privately with his attorney." The Court found that the legislature crafted the language purposefully and that the "statute specifically avoids creating a right to have counsel present." Further, the Court stated, "[i]f ... private consultation was intended, the Legislature could easily have granted that right."

The Court stated it believed:

the Legislature was mindful of the requirement, which it previously incorporated into the legislation, that breathalyzer testing be permitted "only after a peace officer has had the

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<sup>14</sup> 533 U.S. 194 (2001).

<sup>15</sup> Newman v. Hacker, 530 S.W.2d 376 (Ky. 1975).

person under personal observation at the location of the test for a minimum of twenty (20) minutes.” KRS 189A.103(3)(a). The purpose of this observation period is to assure that the test “subject shall not have oral or nasal intake of substances which will affect the test.” 500 KAR 8:030 Section 1(1). Considering that our Courts previously held the test subject was entitled to no contact with legal counsel, we believe the Legislature intended only to allow such right as would not infringe upon the Commonwealth’s need to obtain accurate evidence regarding a violation of KRS 189A.010.

The Court noted that “Officer Combs’ presence was mandated by KRS 189A.103(3)(a) to assure the accuracy of the test.”

Litteral’s plea was upheld.

**Little v. Com., 2009 WL 1110336 (Ky.2009)**

**FACTS:** On Aug. 9, 2004, Little collided with a car driven by Sosh, in Meade County. Sosh, her toddler son and another individual in her car were all injured. Little was also injured and transported to the hospital, “but his blood was not drawn until three hours had passed since the accident.” The results were .29% at that time. Witnesses agreed that Little had been drinking prior to the wreck but were unable to agree as to how much. Other witnesses also noted his erratic driving. Deputy Robinson (Meade Co. SO) found beer cans both inside and outside the truck. He was, of course, unsure of Robinson’s degree of intoxication at the scene.

Little was eventually indicted on numerous charges related to the wreck; He stood trial. He was convicted and appealed.

**ISSUE:** May blood tests taken three hours after a wreck be introduced in evidence in a KRS 189A.010(b) prosecution?

**HOLDING:** Yes

**DISCUSSION:** Little first argued that it was inappropriate to introduce his four prior convictions for DUI, which occurred between 1995 and 1997. The trial court admitted the convictions under KRE 404(b), as “prior bad acts” that indicated “his intent, knowledge, and absence of mistake regarding driving while intoxicated.” The Court, however, found that the introduction of the evidence was error, noting that in Com. v. Ramsey, it had held that “previous DUI convictions do not fall within either the exceptions outlined by KRE 404(b) or those recognized by this Court.”<sup>16</sup> The Court agreed that the evidence was “unduly prejudicial” and should not have been admitted.

The Court also noted that the injuries sustained by the passenger in Sosh’s car were not serious, a bloodied nose, a cut lip and a cut on her knee. Some year later, she suffered another problem with her knee, but the Court noted no connection between that problem and the wreck. The Court agreed, however, that if the problem with her knee had been proven to have been caused by the wreck, it “could qualify as a serious physical injury because it is reoccurring and does affect the use of her right leg.” As such, the charge of first-degree assault was not appropriate in this case.

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<sup>16</sup> 920 S.W.2d 526 (Ky. 1996).

The Court did find it was appropriate to charge Little with First-Degree Wanton Endangerment with respect to another car he forced off the road. (The driver was uninjured.) Since the evidence indicated he had been drinking before that occurred, the charge was valid. Finally, the Court agreed it was appropriate to allow the introduction of the blood tests, taken 3 hours after the crash. Little argued that it was error because "KRS 189A.010(2) prohibits the admission of blood tests taken over two hours from the initial arrest to be used to determine blood alcohol levels as evidence for a prosecution under KRS 189A.010(1)(a) or (e)." However, "KRS 189A.010(2) clearly states that blood tests taken after two hours are admissible in prosecutions under KRS 189A.010(1)(b) or (d)." Since the case was proceeding under (b), the admission of the results was not error.

Little's conviction was overturned because of the KRE 404(b) issue.

**Mattingly v. Com., 2009 WL 1098111 (Ky. App. 2009)**

**FACTS:** On Sept. 2, 2007, a KSP trooper spotted Mattingly "driving a golf cart with a mixed drink in her hand" on a private road in Grayson County. She admitted drinking an alcoholic beverage and failed several FSTs. She was arrested and charged with DUI and having an open container of alcohol in a motor vehicle.

She moved to dismiss, arguing that the golf cart was not a motor vehicle under KRS 189A.010 and that it was not operated on a public highway. The trial court denied the motion and she took a conditional guilty plea. She then appealed.

**ISSUE:** Is a golf cart a motor vehicle for purposes of KRS 189A.010?

**HOLDING:** Yes

**DISCUSSION:** Mattingly continued her argument that a golf cart was not a motor vehicle. Since KRS 189A.010 does not give a specific definition for motor vehicle, Mattingly argued that the Court should use the definition under KRS 189.010(19) which indicates a motor vehicle "is a motorized transportation agent used for the purpose of transporting people or property over or upon the public highways of the Commonwealth." Because golf carts were not legally driven on the public roadways at the time, she claimed the definition did not include golf carts.

The Court, however, stated that since the definition in KRS 189 "was for the use of that term as used in that chapter and not necessarily as used in KRS Chapter 189A," it must instead "go to the common usage and approved usage of the term." The golf cart had motors and rubber tires and was being operated on a private road in a subdivision. That road was shared with vehicles and by driving on the road, she was placing others in danger.

The decision of the trial court was affirmed.

**Fields v. Com., 2009 WL 875327 (Ky. App. 2009)**

**FACTS:** On Dec. 6, 2006, Nicholasville officers were sent to investigate a disturbance in a local parking lot. They found Fields “yelling, screaming and shouting profanities at other individuals.” She was arrested for DUI, resisting arrest and disorderly conduct.

At trial, a witness testified that when she arrived at the restaurant, she saw Fields’ SUV in a handicapped parking place. She thought the vehicle was preparing to back out of the space because the “brake lights and back-up lights were illuminated.” She waited, but the vehicle did not back up, so she parked. When the witness got out, she could hear the SUV running. Two of the witness’s passengers testified to the same information. Officer White (Nicholasville PD) testified that when he arrived, Fields was out of her car and very belligerent. He believed her to be very “extremely intoxicated.” As he and Officer Resor arrested her, she struggled and pulled away from him, flailing her arms. Eventually, they got her into custody.

Fields was convicted, and appealed.

**ISSUE:** Is evidence that a vehicle is running proof that the driver is in physical control of it?

**HOLDING:** Yes

**DISCUSSION:** With respect to the DUI, Fields argued that she was not operating or in physical control of her vehicle. She explained that when she used the remote keyless entry to unlock her vehicle that the lights would come on automatically. She claimed she never started the vehicle. The Court looked to the four factors in Wells v. Com.<sup>17</sup> and found that the prosecution had presented sufficient information that the vehicle was, in fact, running, particularly since that feature of the car would have only illuminated the lights for about 40 seconds, a much shorter time than the witnesses claimed. Further, this indicated that she intended to drive the vehicle.

Fields’ conviction was affirmed.

### **Wilson v. Com., 2009 WL 960750 (Ky. App. 2009)**

**FACTS::** On Aug. 16, 2006, Officer Goodwin (Middlesboro PD) made a traffic stop of Wilson after Wilson backed out of a driveway, squealing and spinning tires. When Officer Goodwin approached, he “smelled alcohol.” Wilson failed all but one FST, and took a PBT which indicated the presence of alcohol.

Officers Goodwin and Greene searched the car and found syringes and cocaine residue. Wilson refused blood and urine testing at the hospital. He was indicted on numerous traffic related charges. Eventually Wilson was convicted of most of the charges, including DUI. He appealed.

**ISSUE:** May a PBT be mentioned as a Field Sobriety Test?

**HOLDING:** Yes

**DISCUSSION:** During Officer Goodwin’s testimony, he described the FST’s he performed and also mentioned the PBT. He stated the PBT detected the presence of alcohol, and Wilson objected at that time. The officer was cross-examined using the Standardized Field Sobriety Testing and Reference

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<sup>17</sup> 709 S.W. 2d 847 (Ky. App. 1986).

Guide, which included PBTs. The Court reviewed the statute, KRS 189A.194, and agreed that testimony concerning the PBT detecting the presence of alcohol was not evidence to prove guilt. The Court found it was not error to admit the mention of the PBT, however, as one of several FSTs.

Further, the Court found that the introduction of evidence of cocaine residue was also admissible, as Kentucky subscribes to the “any amount” test, rather than the “usable quantity” approach. Wilson also argued that the officer’s comment on his “bruised and scarred” arms was inappropriate, but the court concluded that its introduction was, at best, harmless error.

Wilson’s conviction was affirmed.

### **Litteral v. Com., 282 S.W.3d 331 (Ky.App. 2009)**

**FACTS:** On the day in question, Officer Combs (Lexington PD) arrested Litteral for DUI and took him to the jail. There, he explained Litteral’s rights, and Litteral called his sister, an attorney, during the waiting period. “Officer Combs remained in close proximity to Litteral while he was attempting to communicate with his attorney.”

Litteral took a conditional guilty plea and appealed.

**ISSUE:** Does an arrested DUI subject have a right to confer privately with an attorney prior to taking the Intoxilyzer?

**HOLDING:** No

**DISCUSSION:** Litteral argued that the test results should have been excluded because he did not have the opportunity to consult privately with his attorney. The Court reviewed the history of the implied consent law, and concluded that the statutory right “described is very circumscribed” and does not create a right to have counsel present or to consult privately with an attorney - and if the Legislature intended to create such a right, it could easily have done so. (The Court further noted that another statute required that the officer personally observe the subject for 20 minutes.) The Court continued:

We are convinced that the purpose of this very circumscribed right of access to counsel was to allow independent confirmation of the information conveyed by the law enforcement officer – and then only in a way that does not impact the accuracy of the test itself.

The Court also agreed that inability to actually make contact with an attorney did not relieve the person from an obligation to submit to the test.

Litteral’s plea was upheld.

### **Smith v. Com., 2009 WL 276794 (Ky. App. 2009)**

**FACTS:** Smith was indicted in Jefferson County on November 1, 2005, charging him with a DUI that occurred on October 24, 2005. On the date of the indictment, he’d had three convictions, but the third conviction actually occurred after the DUI for which he was charged. (The offense on October 24, 2004

"was his third chronological citation for DUI but his fourth conviction, due to his subsequent June 2005 citation and conviction.") He took a conditional guilty plea and appealed.

**ISSUE:** Does the date of a citation or a conviction control for subsequent DUI charges?

**HOLDING:** Conviction

**DISCUSSION:** The Court quickly determined that the date of conviction, not the date of citation, which controlled.<sup>18</sup> As such, the enhancement for the fourth DUI was appropriate.

Smith's conditional guilty plea was affirmed.

### **McCreary v. Com., 2008 WL 4601231 (Ky. App. 2008)**

**FACTS:** On the night in question, Officer Toth (Franklin PD) spotted a car parked beside an empty building. Concerned, he pulled behind the vehicle and turned on his emergency lights. Officer Toth found McCreary, sitting behind the wheel. The engine was turned off and the keys were in McCreary's pocket. Officer Toth observed that McCreary had trouble getting the window rolled down and that there were two half-empty wine bottles in the back seat. McCreary refused any field sobriety tests.

Officer Toth arrested McCreary. He refused a breath test at the jail. Ultimately, McCreary was charged with DUI, third offense. After a second trial, since the first jury deadlocked. McCreary was convicted. He appealed.

**ISSUE:** Is a person found sleeping in a vehicle with the vehicle turned off in violation of DUI?

**HOLDING:** No

**DISCUSSION:** McCreary argued that the evidence was insufficient to charge him with having physical control of a motor vehicle, an element of DUI. The Court looked to the Wells' factors.<sup>19</sup> The Court noted that they could not be sure if McCreary was asleep (as he claimed). The Court agreed, however, that the evidence indicated that the vehicle was turned off and the keys pocketed, which weighed in McCreary's favor. Officer Toth agreed that McCreary was "bothering no one" where he was parked. McCreary claimed to be waiting to sell some CB radios, and that he'd been parked, when arrested, for about four hours. He also had alcoholic beverages in the car, another factor that weighed in McCreary's favor. Finally, McCreary indicated that it was his intent to stay where he was until he sobered up, although that was not his initial intention when he parked the car.

McCreary's conviction was reversed.

### **Greene v. Com., 244 S.W.3d 128 (Ky. App. 2008)**

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<sup>18</sup> Royalty v. Com., 749 S.W.2d 700 (Ky. App. 1988).

<sup>19</sup> Wells v. Com., 709 S.W. 2d 847 (Ky. App. 1986); see also Harris v. Com., 709 S.W.2d 846 (Ky. App. 1986), White v. Com., 132 S.W.3d 877 (Ky. App. 2003), Blades v. Com., 957 S.W. 2d 246 (Ky. 1997). The Court noted that although Wells predated the current version of KRS 189A.010, its reasoning was still applicable.

**FACTS:** On April 20, 2005, Officer Cox (Elizabethtown PD) made a traffic stop of Greene, as a result of a telephone tip from Greene's ex-wife, Deanna. Deanna reported that Greene "had been drinking and that his license was suspended." Arriving, Officer Cox found a truck, as described, at a local Dairy Queen. The officer confirmed that Greene's license was suspended and further observed Greene get in the car and leave the parking lot, driving somewhat erratically. Officers stopped the vehicle and confirmed that Greene both lacked a license and had been drinking. (He admitted to two beers.)

Officer Cox administered two field sobriety tests, which Greene failed. Officer Fegett administered a PBT and confirmed the presence of alcohol. Greene was arrested for DUI and driving on a suspended OL. At the jail, his BA was found to be .096 on the Intoxilyzer. He requested suppression, which was denied. Eventually, Greene was tried and convicted on both charges. He then appealed.

**ISSUE:** May a court consider a PBT in making a probable cause arrest decision?

**HOLDING:** Yes

**DISCUSSION:** Greene argued that the tip was insufficient as reasonable suspicion to justify the stop. The Court found that the tip was a credible report and the officer confirmed information that further substantiated the tip, prior to making the stop. As such, the stop was valid.

Next, he argued that Officer Cox was not qualified to perform the FSTs, but in fact, the officer "testified he had been trained to perform the tests and he demonstrated the tests for the trial court." Although the Court noted there was some conflicting information, which it did not explain, it found that the trial court's decision was supported.

Greene then argued that the PBT results should not have been considered by the Court. The Court noted that prior to the changes in KRS 189A.104, in 2000, Kentucky permitted the PBT to be mentioned, but did not permit testimony as to its specific results. The Court noted, however, that "[c]ontrary to Greene's argument, the enactment of KRS 189A.104 does not clearly abrogate this rule." Instead the Court found that only the Intoxilyzer results could be used to enhance a penalty, and agreed that the "trial court may consider the pass/fail determination of the PBT to rule on the question of probable cause for arrest." The Court noted, however, "that it is imperative the arrest officer demonstrate proficiency in utilizing the PBT as well as evidence the PBT be in proper working order" but that absent that, the Commonwealth had presented sufficient evidence of probable cause for the arrest in this case. (Note, the evidence was before the judge, not a jury.)

Next, Cox argued that his statements concerning his beer-drinking, made both before and after his arrest, should be suppressed. The Court found that his statements at the scene were admissible, as he was not in custody at the time. As such, Miranda was not required. However, the Court noted that "[a]fter administering the Intoxilyzer test, Officer Cox specifically asked Greene how much and where he had consumed the alcohol." The Court found this to be a custodial interrogation and that the statement should have been suppressed. Because it was simply cumulative, however, the Court found the error to be harmless in this case. Finally, the Court addressed the admissibility of the Intoxilyzer results. Greene noted that the law requires a twenty minute personal observation before the test is administered. The Court noted the timeline and an error on the paperwork completed by Cox that confused the time of the observation period, but the Court found that the trial court was not in error to believe Officer Cox's

testimony that he did the proper observation. The Intoxilyzer was properly calibrated and the test was properly administered.

After addressing several other procedural matters, the Court upheld his conviction.

**Hoppenjans v. Com., 299 S.W. 3d 290 (Ky. App. 2009)**

**FACTS:** At Hoppenjans' trial for DUI, the arresting officer mentioned that he refused to take a PBT. Hoppenjans made a timely objection and asked for a mistrial, which the trial court denied. The judge did admonish the jury to disregard the testimony, and the court legally presumes that a jury will follow such admonitions. Hoppenjans was convicted of DUI, and appealed to the Circuit Court, which also affirmed. He further appealed.

**ISSUE:** Is the mention of a PBT improper in trial testimony?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that the improper testimony came in during direct examination when the "prosecutor asked the arresting officer to describe the traffic stop of Hoppenjans." The officer described his "performance on various coordination tests," and was then prompted by "what did you do next?" The officer then "discussed the PBT and Hoppenjans's refusal to take the test."

The Court concluded that the trial court had no reason to find that the jury would have failed to follow the admonition. However, it noted that the "holding in this matter should not be construed as an approval of the admission of this type of evidence." Kentucky law is clear that such evidence is prohibited<sup>20</sup> and "prosecutors and police officers participating in DUI cases should be fully aware of these rules." Further, the Court noted "this type of error should be easily avoidable with proper preparation of witnesses."

Hoppenjans's conviction was affirmed.

**Tejeda v. Com., 2009 WL 4060176 (Ky. App. 2009)**

**FACTS:** On November 20, 2006, Officer Curry (KVE) learned of an accident on I-75, in Laurel County. He spotted a vehicle of which he'd earlier received a complaint, a white Mustang, "maneuvering around road debris and eventually stalling." A truck assisted in pushing the vehicle off the highway. Officer Foster went to investigate and the driver, Tejeda, explained his car had run out of fuel. Officer Foster agreed to call for a wrecker and returned to where Curry was working the wreck. He told Foster that "he thought he had detected the smell of alcohol on Tejeda's breath." Officer Curry went to check and eventually "administered several field sobriety tests which Tejeda was either unable to complete or 'failed.'" Tejeda agreed that he had been drinking when approached but denied having been drinking prior to running out of fuel. He was arrested for DUI.

Tejeda moved for suppression. The trial court agreed that he had not been in "actual physical control of an operable vehicle" and therefore could not be convicted of DUI. His charges were dismissed. The

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<sup>20</sup> KRS 189A.100(1); KRS 189A.104(2).

Commonwealth appealed and the Circuit Court agreed that the matter was one for the jury to decide. Tejada appealed.

**ISSUE:** Is a decision about whether a vehicle is in control of the driver a matter for the jury?

**HOLDING:** Yes

**DISCUSSION:** The Court ruled that the issue was whether the officers had the right to make an investigatory stop of the vehicle. The Court agreed they did, and although the “timing of the alcohol consumption” could be debated, the facts before the officers supported probable cause that “Tejada had operated the vehicle while under the influence.” As such, it was proper for the case to go to the jury and remanded the matter back to the trial court for further proceedings.

**Helton v. Com., 299 S.W.3d 555 (Ky. 2010)**

*NOTE: This case is a modification of an earlier decision.*

**FACTS:** Helton was convicted of multiple counts of wanton murder and related charges, resulting from a car accident in which she was driving while under the influence of alcohol. At issue was the taking of a blood sample from her. This was done while she was unconscious at the hospital, at the request of responding Jessamine County deputy sheriffs. The sample tested at .16%. At trial, Helton moved for suppression, arguing that the taking of blood was in violation of KRS 189A.105(2)(b), but the Court found that her condition made her consent “statutory” under KRS 189A.103. She took a conditional guilty plea and appealed.

**ISSUE:** Is the Kentucky implied consent statute unconstitutional?

**HOLDING:** No

**DISCUSSION:** Helton argued that the two statutes were in conflict and that as a result, the deputies should have sought a warrant. The Court, however, noted that if a driver actually refuses the test, they have withdrawn consent, but that would subject them to other sanctions. “KRS 189A . 105(2)(b) comes into play by requiring the officer to obtain a warrant before testing the suspect when a motor vehicle accident results in a fatality, as is the case here, unless the blood test ‘has already been done by consent’” The Court noted, that consent is the “default rule,” or “statutorily implied consent” in that by driving in the state, a driver has given consent, unless explicitly revoked. A person physically unable to revoke is deemed “not to have withdrawn consent.” The Court then moved to her second argument, which is that implied consent testing is unconstitutional. The Court looked to Breithaupt v. Abram, in which the Court had held that the taking of a blood sample was a slight intrusion.<sup>21</sup> The closest case to the facts is Schmerber v. California, in which the Court had rejected non-search and seizure related arguments.<sup>22</sup> However, in Schmerber, the officers had other indicia of alcohol intoxication prior to forcing the test.

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<sup>21</sup> 352 U.S. 432 (1957).

<sup>22</sup> 384 U.S. 757 (1966).

In the past, Georgia has held unconstitutional a similar statute that “allowed for testing of any person who had been involved in an accident resulting in serious injuries or fatalities.”<sup>23</sup> However, Kentucky’s case applies only when an officer has “reasonable grounds” to believe the subject has been driving under the influence, in contrast to Georgia’s, which permitted it with “any sufficiently serious accident.” “Nothing in the Kentucky implied consent statute allows it to be invoked merely because a person is involved in a serious accident” - “there must be some suspicion of driving under the influence before implied consent can be invoked.”

The Court noted that “to pass constitutional muster, ‘reasonable grounds’ must equate at least to probable cause.” Because no testimony was taken on that issue, no proof was taken “about what the police knew at the time of the accident that gave them reasonable grounds to require such a test,” the Court did not rule on that issue. The Court agreed that if the officers had probable cause, the test was lawful, but since the “trial court did not engage in the whole analysis necessary,” it was required to vacate the decision and remand the case for a new suppression hearing to address that issue.

**Cowles v. Com, 2010 WL 392006 (Ky. App. 2010)**

**FACTS:** On August 8, 2007, Cowles was riding his motorcycle home after drinking with a friend. He was clocked by Trooper Garyantes (KSP) at the speed of 85 mph in a 55 mph zone. The trooper went in pursuit.

When Cowles entered one of the busiest intersections in the county, he encountered two staggered vehicles in the two lanes in front of him. Cowles passed one vehicle and then switched lanes, without signaling, to pass the other vehicle. At this point, Garyantes’ radar showed Cowles was traveling at 90 m.p.h. With his lights and siren still activated, Garyantes continued to pursue Cowles, who turned around and looked at him. Garyantes signaled for Cowles to pull over, yet Cowles instead turned into a residential area, where he traveled at approximately 45-50 m.p.h. in a 25 m.p.h. speed zone. At the top of a hill, Cowles pulled over, turned off his engine, and dismounted his motorcycle. Garyantes exited his patrol car and approached Cowles, noticing a strong odor of alcohol on him. Garyantes then conducted three field sobriety tests, which Cowles failed. Garyantes, who said Cowles admitted to consuming beer, described Cowles as uncooperative and verbally combative. Cowles was arrested and taken to Hardin Memorial Hospital, where a blood sample was drawn. Subsequent testing revealed a blood alcohol (B.A.) level of 0.22.

Cowles was charged with Wanton Endangerment 2<sup>nd</sup> degree, DUI, Speeding and related traffic offenses.<sup>24</sup> He was convicted and appealed.

**ISSUE:** May a DUI case be made without Intoxilyzer results?

**HOLDING:** Yes

**DISCUSSION:** Cowles argued that it was hearsay for the trooper to state who drew the blood at the hospital, and that it was not shown that a non-alcoholic substance was used to clean the skin prior to the

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<sup>23</sup> Cooper v. State, 587 S.E.2d 605 (Ga. 2003).

<sup>24</sup> He was charged with First Degree, but instructions on both were properly given to the jury.

blood draw. The Court looked to Matthews v. Com.<sup>25</sup> and agreed that a proper foundation was laid to introduce the evidence. The Court ruled that it was properly established that the blood draw was presumed to be regular. Further, the Court noted, there was sufficient evidence even without the blood to indicate that Cowles was intoxicated and that prior case law had supported DUI charges even in the absence of breath testing results.

Cowles's conviction was affirmed.

### **Com. v Lamberson, 304 S.W.3d 72 (Ky. App. 2010)**

**FACTS:** On December 17, 2004, Lamberson was indicted for DUI, 4<sup>th</sup> offense, following a traffic stop in Jefferson County. Previously, he had a 1990 DUI (with serious bodily injury) in Florida, a 2000 DUI conviction in Bullitt County and two prior DUIs in 2001 and 2002, in Jefferson County. The Court elected to rely on the three previous Kentucky convictions to enhance his current DUI to a felony. Lamberson had argued that Bullitt County had not verified his waiver of his right to be present at the time he took a guilty plea in 2000 - he was in a Missouri residential treatment facility at the time. (Instead, his attorney submitted his guilty plea, along with signed orders authorizing him to do so.)

The trial court found that suppression of the 2000 conviction was required by Tipton v. Com., which stated that it is "an abuse of discretion to accept a plea of guilty *in absentia* for any offense, such as driving under the influence, for which an enhanced penalty may be imposed for subsequent convictions."<sup>26</sup> The Commonwealth raised several arguments, to no avail. The Commonwealth appealed and the case was returned by the Court of Appeals to Jefferson County to determine whether Lamberson properly waived his right to be present in 2000.

Following a subsequent proceeding, in 2008, the Commonwealth found that he did not waive his right to be present when he entered his guilty plea *in absentia* to the DUI offense in 2000. The Commonwealth again argued that since he did not object, in 2002, to the entry of a DUI 2<sup>nd</sup> offense, based on the 2000 plea, that he had waived the right to argue that later. Again, the trial court disagreed and found in Lamberson's favor, and again, the Commonwealth appealed.

**ISSUE:** Must an objection to the use of a prior DUI conviction (for purposes of sentencing enhancement) be made at the earliest opportunity?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that Lamberson was not even in Kentucky when the 2000 guilty plea was entered by his attorney. Further, it was undisputed that while he signed the guilty plea form and a "checklist of constitutional rights he could waive by entering a guilty plea," he did not give a "written waiver of appearance specifically required by RCr 8.28(4). As a result, Bullitt County should not have accepted the plea in 2000.<sup>27</sup> However, the Court continued, that did not end the analysis in this case, as Lamberson did not raise the issue when his two Jefferson County DUI offenses were enhanced because of the 2000 plea. The Commonwealth maintained that since conviction could have been enhanced under similar

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<sup>25</sup> 44 S.W.3d 361 (Ky. 2001).

<sup>26</sup> 770 S.W.2d 239 (Ky. App. 1989).

<sup>27</sup> The rule had been amended in 1999 to require the form.

circumstances for purposes of PFO status, that the same should apply to enhancement of a DUI offense. (For PFO, the defendant “must challenge any underlying conviction at the first opportunity - in other words, before the enhanced conviction is entered - or forever waive the ability to challenge the validity of the prior conviction.”<sup>28</sup>)

The Court agreed with the Commonwealth that “there is no practical difference in challenging a prior conviction the Commonwealth seeks to use for enhancement purposes whether the prosecution occurs under KRS 189A.010 or KRS 532.080.” Finding that Lamberson did not challenge his 2000 conviction at his 2001 case, the Court agreed that “he may not launch such an attack now.”

The Court reversed the Jefferson County decision to suppress and remanded the case for further proceedings.

### Loveless v. Com., 2010 WL 2540179 (Ky. App. 2010)

**FACTS:** On October 25, 2008, Loveless attended a party in Boone County. His friend, Adams, picked him up at about 11:30 p.m. Two cousins followed in another vehicle. As Adams entered the highway, he sped up to avoid being rear-ended. However, Adams’s vehicle lost control and flipped over in a ditch. The vehicle behind them stopped to render aid the occupants observed both men get out of the car but they could not tell which was driving. When police arrived, they “detected the odor of alcoholic beverages on or about Adams.” Loveless appeared intoxicated. Adams stated the Loveless had been driving. Loveless first denied but eventually admitted he had been driving. He failed field sobriety tests and admitted to having taken Adderall.

Loveless was charged with DUI under aggravating circumstances along with a suspended license charge. The two trials were severed with the suspended OL case tried first. However, although the only issue in that trial was whether Loveless was driving, the prosecution introduced evidence as to his “lack of sobriety.” Loveless was convicted and appealed.

**ISSUE:** Is intoxication relevant evidence in a suspended OL charge?

**HOLDING:** No

**DISCUSSION:** Although Loveless’s attorney did not object at the time, Loveless argued that the admission was palpable error. The Court noted that:

KRS 189A.090 provides in relevant part that a person guilty of driving on a revoked or suspended license, third or subsequent offense within a five-year period, shall be guilty of a Class D felony and have his license revoked by the court for two years “unless at the time of the offense the person was also operating or in physical control of a motor vehicle in violation of KRS 189A.010(1)(a), (b), (c), or (d), in which event he shall be guilty of a Class D felony and have his license revoked by the court for a period of five (5) years.” KRS 189.090(2)(c). The indictment charged Loveless with the aggravating circumstance of operating while revoked or suspended while under the influence.

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<sup>28</sup> Howard v. Com., 777 S.W.2d 888 (Ky. 1989).

However, the presentation and instructions did not address the aggravating circumstances. The Court agreed that "evidence of Loveless's lack of sobriety might ordinarily have been admissible to prove the aggravating circumstance (and to prove the DUI charge), but the Commonwealth moved to sever the DUI charge and then forego prosecution of the aggravating factor in the trial of the suspended license charge." The Court found no relevance to the revoked or suspended charge, since they were not pursuing the aggravating circumstances. The Court agreed that the evidence of intoxication may have swayed the jury to find against him on the suspended OL charge, as the "evidence was not overwhelming." (The Court agreed, as well, that it was error to allow a "deputy sheriff to testify as to the effects of Adderall on the body of a person who has ingested it.")

Loveless's conviction was reversed and the case remanded.

**Lee v. Com., 313 S.W.3d 555 (Ky. 2010)**

**FACTS:** On November 28, 2007, at about 6:50 p.m., Lee was stopped in Hardin County. He was arrested for DUI and the Intoxilyzer returned a reading of .209. He requested a blood test and was taken to Hardin Memorial Hospital. The doctor refused to do the blood test as there was "no medical basis" to do so. Lee was returned to jail. Ultimately he took a conditional plea after his motion to suppress was denied, the trial court ruling "that the police officer had made reasonable allowances for [Lee] to have a blood alcohol test and, therefore, was in compliance with the statute."

Lee then appealed and the Circuit Court affirmed the trial court's decision. Lee further appealed.

**ISSUE:** Must an officer take a subject for an independent test when the first location refuses to do the test, if the individual does not ask to be taken to another location?

**HOLDING:** No

**DISCUSSION:** The issue before the Court was whether the "actions of the police officer were sufficient to accommodate [Lee's] right under KRS 189A.103(7) to have an independent blood test performed by 'a person of his own choosing.'" In Com. v. Long, the court had "adopted the 'totality of the circumstances' approach to determine whether the officer made a reasonable effort to accommodate the request for independent testing."<sup>29</sup> The Long Court had also approved five factors that were developed in a non-Kentucky case: "(1) availability of or access to funds or resources to pay for the requested test; (2) a protracted delay in the giving of the test if the officer complies with the accused's requests; (3) availability of police time and other resources; (4) location of requested facilities; and (5) opportunity and ability of accused to make arrangements personally for the testing." In this case, the court noted, there was no indication that Lee "requested a particular medical provider for the test." Nothing suggested that the officer "had reason to suspect that that hospital or that doctor would refuse to perform the test."

The Court continued:

Two pivotal facts loom over this case>

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<sup>29</sup> 118 S.W.3d 178 (Ky. App. 2003).

First, there is no evidence that [Lee] requested a second test. Had he done so, then the five factors in Long would have been implicated.

Secondly, there was no evidence of bad faith of the officer. More particularly, there was no showing that the officer knew, or even had reason to know, that the doctor at Hardin Memorial would refuse to administer the test. Obviously, the officer had no authority over the refusing physician.

The Court also agreed that a subject charged with DUI is 'required to be informed of their right to an independent test at least two different times.' But that was not an issue in this case, because Lee "obviously knew of his rights by requesting an independent test."

The decision of the lower court was upheld.

### **Sigretto v. Com., 2010 WL 1508166 (Ky. App. 2010)**

**FACTS:** On August 29, 2008, an Owen County deputy saw Sigretto driving erratically and stopped her. She was ultimately arrested for DUI and taken to the Owen County Hospital for a blood test. Sigretto was given 15 minutes to try to contact a lawyer and was unsuccessful, although she did talk to her brother. She was then asked to consent to a blood test and refused.

About 5 minutes later she got a call back from an attorney, who advised her to take the test. She then told the deputy she would take the test, but he did not allow her to do so. Sigretto argued at a subsequent hearing that she changed her mind within five minutes and that they were still at the hospital. When the trial court denied the motion, she took a conditional guilty plea and appealed. The Circuit Court upheld the trial court's ruling and Sigretto further appealed.

**ISSUE:** Does a single refusal invoke the additional penalty?

**HOLDING:** Yes

**DISCUSSION:** The Court reviewed the statute and noted that "a single refusal triggers the adverse consequences which are intended to promote compliance." Nothing in the statute provided for a second chance. The Court agreed that the trial court "noted that if Sigretto were allowed to change her mind after 5 minutes, the question would be raised whether 7 or 9 or 11 minutes would also be close enough to allow for a recantation of an initial refusal." The Court found requiring an officer "to wait for an accused to change his or her mind" ... "would led to an absurd result by rendering the statutory language meaningless."

The court upheld the decisions of the lower courts.

### **Com. v. Rhodes, 308 S.W.3d 720 (Ky. App. 2010)**

**FACTS:** On September 11, 2008, Officer Felinksi (Lexington PD) stopped Rhodes and arrested her for DUI. As he was putting her in the car, "she became combative," and fought against the seat belt. It took two officers to secure her. She was taken to the jail and into the Intoxilyzer room. Rhodes became

belligerent and broke free from the officers holding her and they had to chase her down. She refused to walk back and fought being put into a chair. At one point, a third officer had to assist.

“Officer Felinski testified that it was impossible for him to complete a reading of the implied consent warning to Rhodes despite trying on multiple occasions.” He stated that he “felt” that she would refuse to take the test even though he was never able to actually make the request. The trial court ruled that her actions constituted a refusal but the Circuit Court reversed that decision.

The Commonwealth appealed.

**ISSUE:** Is a full reading of the implied consent required?

**HOLDING:** Yes

**DISCUSSION:** The Commonwealth sought an exception for a full reading of the implied consent warning for officers faced with unruly, belligerent subjects. The Court noted that the language of the statute made it mandatory to read the warning, but also noted “there is no statutory requirement that the defendants understand or acknowledge the reading of the implied consent warning.”

The Court continued:

In defending the decision not to read the implied consent warning to Rhodes, Officer Felinski stated that given Rhodes’ conduct, he feared for his safety and that of the other officers. While [the Court] certainly sympathize[d] with the officers and under[stood] that their safety is of utmost importance, Rhodes was in handcuffs with three officers present, and [the Court did] not see how reading the warning to a handcuffed defendant would put the officers at any further risk.

The Court found the argument to be without merit, and ruled that given that she “was never presented with the implied consent warning, she simply could not have refused to submit to the exam.” The Court reversed the ruling against Rhodes.

**Steen v. Com., 318 S.W.3d 116 (Ky. App. 2010)**

**FACTS:** On May 4, 2007, Steen gave Lyle a ride home from work in Jefferson County. “That ride ended abruptly and tragically” with Lyle dead and Steen badly injured. At the hospital, Steen’s blood alcohol was tested. The first sample was taken about an hour and twenty-five minutes after the wreck, and the results were between .083 and .089. A second test by KSP was based on a sample taken 2 hours and ten minutes after the wreck, with a result of .07. The Medical Examiner extrapolated, using three different methods, what she believed Steen’s BA was at the time of the collision, finding it to be somewhere between .10 and .11. She acknowledged that the calculations do not reflect the possibility that he ingested the alcohol just prior to the wreck and continued to absorb it afterwards, but that it was the best she could do because they didn’t have a more timely sample.

Steen was charged, and ultimately convicted, of Manslaughter. He appealed.

**ISSUE:** Is the actual level of intoxication critical for a charge under the wanton state of mind?

**HOLDING:** No

**DISCUSSION:** The Court found that despite the ME's ability to be more specific, that there was sufficient evidence to support a conviction for wanton conduct. Further, the Court noted, the "per se level of intoxication is not to be introduced in any case outside a prosecution for driving under the influence."<sup>30</sup> The Court noted that "there is no magic number for intoxication, the jury must determine based upon the facts and circumstances of the case if the driver was 'under the influence' sufficiently to have constituted wanton conduct."<sup>31</sup>

Steen's conviction for Manslaughter 2<sup>nd</sup> was affirmed.

**Craig v. Com., 2010 WL 2976898 (Ky. App. 2010)**

**FACTS:** On the day in question, Sgt Sumner (unidentified Christian County agency) saw a car pull out of a driveway and stop abruptly. He followed it and saw that it had improper tags. As the car circled the block, he activated his lights and siren – the car then pulled back into the driveway it had exited. Sgt. Sumner saw Craig get out of the driver's side and Melcher from the passenger's side – Melcher was holding a beer. "Craig failed several field sobriety tests, and while in custody, blew a .089 on the breathalyzer." He was charged with several offenses, including DUI – 4<sup>th</sup> offense. At trial, Melcher testified he had been driving and that they had actually both gotten out of the driver's side door since the passenger door did not open from the inside.

Craig was convicted and appealed.

**ISSUE:** Is a witness statement sufficient to prove operation of a vehicle for DUI?

**HOLDING:** Yes

**DISCUSSION:** Craig claimed that the prosecution failed to prove beyond a reasonable doubt that he was operating the vehicle. Sgt. Sumner, however, had testified that he "recognized Craig behind the wheel of the car and saw him exiting the driver's side of the car." He also stated that "though Melcher initially said he was driving the car, Melcher later told Sgt. Sumner he only said that in order to keep Craig out of trouble." The evidence was before the jury, which was free to believe which side it wished to believe.

Craig's conviction was affirmed.

**Williams v. Com., WL 3927733, Ky. App. 2010**

**FACTS:** On November 6, 2005, Officer McLeod (Radcliff PD), saw a vehicle stopped in the road. He turned on his in-car camera and stopped to investigate. He learned the vehicle was registered to Williams. Because he had received no complaints about the car, Officer McLeod believed it had been there for only a short time. He found the car empty, but Williams was standing outside the driver's side door.

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<sup>30</sup> Cormney v. Com., 943 S.W.2d 629 (Ky. 1996); Walden v. Com., 805 S.W.2d 102 (Ky. 1991).

<sup>31</sup> Overstreet v. Com., 522 S.W.2d 178 (Ky. 1975).

Young was standing outside the car on the passenger side. They admitted having been at a club, but explained they were arguing when the Officer McLeod arrived.

Officer McLeod saw that the car was not running, but the key was in the ignition. Williams sat in the driver's seat while the officer talked to Young. Eventually he gave Williams a PBT and field sobriety tests. When Williams failed both, he was arrested for DUI. He did not agree to Young (who was apparently sober enough to drive) having his car keys, but did agree she could wait in the car for a ride. While the officer was booking Williams, he also watched the video and noticed that while the officer had been talking to Young, Williams had "reached into his front pocket and tossed an object into a nearby field." Officers subsequently found a small bag of marijuana where Williams had tossed the unknown object.

Williams was indicted and requested suppression. When that was denied, he took a conditional guilty plea and appealed.

**ISSUE:** May someone standing outside a car when first observed be shown to have been in sufficient control for a DUI charge?

**HOLDING:** Yes

**DISCUSSION:** Williams argued that the Commonwealth could not prove that he was "actually in control of the car." He focused on the four elements laid out in Wells v. Com.:

... whether the person in the vehicle was asleep or awake; whether the vehicle's motor was running; the location of the vehicle and the circumstances surrounding how the vehicle arrived at the location; and the intent of the person behind the wheel.<sup>32</sup>

The Court, however, noted that the factors in Wells are not exclusive, but "merely suggestive and exhibit the need for a totality of the circumstances analysis." The Court agreed that in this situation, there was a "fair probability" that Williams was driving the car. The Court found that although the "evidence may not amount to proof of DUI beyond a reasonable doubt, it certainly establishes a reasonable inference that Williams drove the car while intoxicated."

The Court affirmed the denial of Williams' suppression motion.

**Com. v. Brewer, 2011 WL 2693574 (Ky. App. 2011)**

**FACTS:** On August 27, 2008, Brewer was charged with DUI 1<sup>st</sup>. Before the first arrest had been adjudicated, he was arrested for DUI 2<sup>nd</sup>. Both offenses occurred in Christian County. On October 2<sup>nd</sup>, he pled guilty to the first charge. The second charge was then amended to a DUI 2<sup>nd</sup>. Brewer took a conditional guilty plea and appealed on the DUI 2<sup>nd</sup>.

**ISSUE:** Is it necessary to be convicted of the first DUI to be charged under the enhancement for a second DUI?

**HOLDING:** Yes

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32709 S.W.2d 847 (Ky. App. 1986).

**DISCUSSION:** Upon initial appeal, the Circuit Court ordered the District Court to treat the later DUI as a DUI 1<sup>st</sup>, as a result of the decision in Com. v. Beard.<sup>33</sup> The Commonwealth then appealed, arguing that because he was actually convicted of the first offense before being convicted of the second, the second could stand as a 2<sup>nd</sup> offense for penalty enhancement. It argued that the General Assembly intended that the date of the first DUI offense – not the date of the conviction – should be used in deciding if a subsequent offense should be enhanced.”

The Court upheld the Circuit Court’s ruling that directed that the DUI 2<sup>nd</sup> guilty plea be vacated.

**Hadaway v. Com., 2011 WL 2937233 (Ky. App. 2011)**

**FACTS:** In February, 2008, Officers Gardner and Davis (unidentified Trigg County agency) stopped Hadaway for erratic driving. Given his appearance and other indicators, including his failure on FSTs, they arrested Hadaway for DUI. At the station, prior to the Intoxilyzer, Officer Grace observed Hadaway for 26 minutes. At trial, however, Hadaway argued that the officer was “in and out” of the room and did not have continuous control of him, pursuant to 500 KAR 8:030. He also stated he’d been allowed to use an inhaler and that the alcohol in the inhaler contaminated his breath sample. Officer Dill denied that, and Officer Grace testified he did not leave the room during the observation period.

Hadaway’s motion was denied and he was ultimately convicted of DUI and related offenses. The Trigg Circuit Court affirmed that conviction and he further appealed.

**ISSUE:** Is it necessary for an officer to watch a subject continuously during the observation period prior to the Intoxilyzer?

**HOLDING:** No (but see discussion)

**DISCUSSION:** The Court noted that Officer Grace testified that he had been in the room the entire time and the Court noted that the observation period is not intended to be an “eyeball to eyeball requirement.” In Tipton v. Com., the Court had ruled that the operator was not required to “stare at the arrestee for 20 minutes.” Further, the Court noted that Officer Grace and Officer Dill both denied Hadaway had used an inhaler during the relevant period of time.

On a related note, Hadaway argued on appeal that the paperwork on the machine was not introduced as required.<sup>34</sup> However, because he failed to preserve the error, the Court noted that the evidence supported the conviction even without the breath test result, the error did not cause a “manifest injustice.”

The Court upheld the conviction.

**Com. v. Bilbrey, 2011 WL 5105376 (Ky. App. 2011)**

**FACTS:** On June 13, 2008, Deputy Guffey (Clinton Co SO) testified that he responded to a complaint about a vehicle behind down the center of the road that had “almost run at least tow other

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<sup>33</sup> 275 S.W.3d 205 (Ky. App. 2008).

<sup>34</sup> Com. v. Roberts, 122 S.W.3d 524 (Ky. 2003).

vehicles off the road.” He provided information about the truck and noted that it has trying to turn around at a specific location. He located a vehicle matching the description some 0 minutes later and found “Bilbrey slumped over in the driver’s seat with his head down.” He saw an open beer can and Bilbrey, apparently asleep. The engine was running and parking lights were on. Deputy Guffey pounded on the truck’s window and Bilbrey finally responded, getting out and appearing unsteady and dazed. Deputy Guffey tried to do an HGN but Bilbrey said he was “too drunk” to do a balancing test. He was arrested and refused an Intoxilyzer.

Bilbrey moved for suppression, arguing he was not in control or operating the vehicle at the time of the arrest. The Court denied his motion and he was ultimately convicted. He was denied further motions at the time, and he appealed. The Court of Appeals reversed the conviction, find that the Commonwealth had not proved that he was in control at the time. The Commonwealth moved for discretionary review.

**ISSUE:** Can a sleeping subject be found guilty of DUI?

**HOLDING:** Yes (but see discussion)

**DISCUSSION:** The Court found the Deputy Guffey’s “testimony was clear, concise and thorough” and found no reason to doubt his veracity. The Court looked to previous cases, in particular Wells v. Com., in which courts have found that the defendant had not been proven to be in control.<sup>35</sup> Looking to the Wells factors, the Court noted that the first was “whether the defendant was asleep or awake.” Deputy Guffey had indicated he believed Bilbrey was asleep. However, the second factor, that the engine was running, suggested he had operated the vehicle was intoxicated. The evidence indicated the vehicle had been driven just minutes before and the Court found it “improbable that in the nine minutes Bilbrey was parked at the Spring Creek Bridge he consumed so much alcohol that he was unable to perform or failed multiple standard field sobriety tests.” Logically, he was intoxicated prior to arriving at the location where he was arrested. “Bilbrey was the only person in the vehicle and no other persons were in the vicinity.”

The Court agreed that “Deputy Guffey had a reasonable believe that Bilbrey had operated his truck while intoxicated.” The court reversed the Circuit Court’s decision and reinstated the District Court’s decision.

### Hunter v. Com., 2011 WL 5600618 (Ky. App. 2011)

**FACTS:** By February 1, 2010, Hunter had already been convicted of four separate DUI offenses. As such, he was indicted for driving on an OL suspended for DUI and for a 4<sup>th</sup> offense DUI, as well as an aggravator for having refused a breath test. KRS 189A.010 establishes the penalty “by counting the number of DUI offenses for which the defendant has been convicted in the preceding five years.” Hunter argued that the indictment incorrectly used the dates of the actual offenses rather than the dates of his prior convictions. (By doing so, a DUI was included that otherwise would not have been.)

The trial court overruled his motion and he took a conditional guilty plea. He then appealed.

**ISSUE:** For counting prior DUIs, do you count between the first and last offense or the convictions?

**HOLDING:** Offenses

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<sup>35</sup> 709 S.W.2d 847 (Ky. App. 1986).

**DISCUSSION:** The Court reviewed the record and the statute, and noted that the statute specifically stated that the “period shall be measured from the dates on which the offenses occurred.” The Court found the calculation was correct and upheld his plea.

**Hill v. Com., 2011 WL 4633351 (Ky. App. 2011)**

**FACTS:** On July 4, 2009, Sgt. Messer (Cold Springs PD) saw a vehicle “driving erratically.” He stopped the vehicle and asked the driver (Hill) for his OL; Hill responded that his license was suspended. Officer Love arrived and it was decided he would do FSTs to determine if Hill was intoxicated. He did several “in-car” tests and then had Hill get out. Hill refused and took off in his vehicle. Following a short pursuit, he crashed and was quickly captured and arrest. He was given an Intoxilyzer test at the station and he was found to be .175.

Hill was indicted on charges of Wanton Endangerment 1<sup>st</sup>, Fleeing and Evading 1<sup>st</sup>, Operating on a Suspended License and other charges.<sup>36</sup> At the trial, Officer Love was permitted to testify about the testing and maintenance of the Intoxilyzer 5000, to which Hill objected that he should not have been permitted to read what someone else (the KSP technicians) had written. (Love had read this information from the log book kept with the instrument.) The Court disagreed and Hill was convicted. He appealed.

**ISSUE:** Is an Intoxilyzer log testimonial?

**HOLDING:** No

**DISCUSSION:** Hill argued that the “lab technician’s report was testimonial” and because he had not had the chance to cross-examine the technician, who was also not available at trial, that the evidence should have been excluded. That issue had previously been addressed in Com. v. Walther<sup>37</sup> and that Court had agreed that such records were not testimonial, and “thus their admissibility is not governed by Crawford.”<sup>38</sup>

The Court upheld the admission of the testimony as well as his conviction.

**Harris v. Com., 2012 WL 2052100 (Ky. App. 2012)**

**FACTS:** On September 3, 2008, Harris was involved in a minor crash in Louisville. The responding officer reported a strong odor of alcohol and Harris admitted he’d had a beer, along with some sleeping medication, and that “he had been around people who were smoking marijuana.” He also claimed to have been distracted by his cell phone. He was given FSTs and was unsteady, and slurred his speech. He agreed to blood, breath and urine tests. His blood alcohol was zero, but he had Xanax in his blood. His urine test, however, indicated Xanax, hydrocodone and the byproducts of marijuana.

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<sup>36</sup> There was no indication in the record that he was charged or convicted of DUI, however.

<sup>37</sup> 189 S.W.3d 570 (Ky. 2006).

<sup>38</sup> Crawford v. Washington, 541 U.S. 36 (2004).

Harris was charged with DUI. At trial, Dr. Davis testified that he had reviewed all the evidence and believed Davis to have been intoxicated. Davis filed a motion to limit the admission of the urine test, arguing that the marijuana could have been from up to several weeks before, and that the hydrocodone could have been from as much as two days before. Harris contended that it was impossible to conclude he'd been impaired from the urine test and that it was "both irrelevant and unduly prejudicial." The District Court disagreed, as did the Circuit Court. He took a conditional guilty plea and appealed.

**ISSUE:** May a urine test support other evidence of intoxication?

**HOLDING:** Yes

**DISCUSSION:** The Court looked to the "balancing test" required by KRE 403. Although in Burton v. Com.<sup>39</sup>, the Court had "held that in the absence of other evidence reliably supporting a conclusion of impairment, the scientific remoteness of urinalysis only encourages juror speculation," in this case, there was other evidence. His blood alcohol level was "inconsistent with his alleged state of intoxication" and not explained by the single beer he admitted to drinking. In this case, the urine test results were highly relevant.

The Court upheld the plea.

## CONTROLLED SUBSTANCES

### Masden v. Com., 2011 WL 1706754 (Ky. App. 2011)

**FACTS:** Masden was arrested for selling pills to an informant working with KSP. KSP's crime lab tested the pills and found them to be methadone and Masden was charged with Trafficking in the First Degree. He then appealed.

**ISSUE:** Is methadone a narcotic under the KRS?

**HOLDING:** Yes

**DISCUSSION:** Masden argued that methadone was a Schedule II non-narcotic drug and that the charge should have been a Second-Degree offense. At trial, a crime lab technician testified that it was a narcotic, justifying the First-Degree. The Court noted that KRS 218A.010(23) defined narcotic and indicated any substance "chemically equivalent" to an opiate (as methadone is) is a narcotic. (The Court noted "if opiates are narcotics, and methadone is an opiate, then methadone is a narcotic by statutory definition.") In addition, in Sanders v. Com., Kentucky had elected to find that even though "cocaine might not scientifically or technically be a narcotic, our legislature has nonetheless exercised its prerogative to treat" it so.<sup>16</sup> The Court also noted that federal law and other states' laws treated methadone as a narcotic.

The Court found that an expert witness was unnecessary and upheld the conviction

### Com. v. Adkins, 331 S.W.3d 260 (Ky. 2011)

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<sup>39</sup> 300 S.W.3d 126 (Ky. 2009).

**FACTS:** On March 16, 2007, Adkins was arrested by an Ohio County deputy sheriff on unrelated charges. He was arrested at his brother's home, which occupies the same parcel of land as Adkins' own home. The deputy found almost 17 grams of methamphetamine on Adkins, along with paraphernalia. He was then arrested for trafficking. Adkins testified at trial that he'd found the sock (in which the items were found) in the driveway and that he'd picked it up to keep it from his young son. He also stated he believed a friend of his brother, who was a drug dealer, had dropped it and that he'd seen that friend earlier in the day. He claimed to have tried to contact the sheriff but was unsuccessful, and that he intended to turn in the drugs to the sheriff's office. He argued for an "innocent possessor" defense to be provided to the jury. The Court denied the request and provided a model instruction to the jury. He was convicted and appealed. The Court of Appeals ruled that he was entitled to "an affirmative instruction encapsulating that defense." The Commonwealth appealed.

**ISSUE:** May a person be in lawful possession of illegal controlled substances?

**HOLDING:** Yes

**DISCUSSION:** The Court looked to other states and noted that several have addressed the issue. The Court noted a number of examples of situations where a "person might take possession of a controlled substance without any unlawful intent." Further, those individuals may pass on the drugs to someone else, a teacher to a principal, for example, again without unlawful intent. The Court was "confident that the General Assembly did not intend to criminalize the possession or transfer of controlled substances in circumstances such as these." Under such circumstances, an instruction to that effect should be given. The Court found that KRS 218A.1412, "by implicitly recognizing that in limited circumstances one might innocently and without unlawful intent possess controlled substances that belong to another person, creates such a defense."

The Court noted that KRS 218A.220 is "meant to encourage persons who find controlled substances or otherwise come innocently into their possession to turn them in and give whatever information they might have about them." The Court agreed he was entitled to the instruction, affirmed the decision of the Court of Appeals and remanded the case for further proceedings.