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Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001932-MR

JOSEPH BETHEL — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 05-CR-00207

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; WINE, JUDGE; PAISLEY,[1] SENIOR JUDGE.

PAISLEY, SENIOR JUDGE: Joseph Bethel appeals from a judgment of conviction and final sentence entered by the Campbell Circuit Court on August 25, 2005. After a jury trial, Bethel was convicted of possession of a controlled substance in the first degree and theft by unlawful taking under $300.00. The trial court sentenced Bethel to serve a total of four years in prison. On appeal, Bethel argues that an incriminating statement that he made to a police officer should have been suppressed since he was in custody at the time

[1] Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

and the officer did not inform him of his *Miranda* rights prior to interrogating him. Bethel also claims that his conviction was tainted because, during the suppression hearing, a police officer, who was on the stand, mouthed silently to the prosecutor, "What do I say?" Finally, Bethel claims that the trial court erred by not instructing the jury on possession of drug paraphernalia because, according to Bethel, such an instruction was crucial to his defense. Finding that the trial court erred when it refused to suppress Bethel's incriminating statement, we reverse and remand.

On March 30, 2005, Bethel entered a Meijer retail and grocery store in Cold Springs, Campbell County, Kentucky. While in the store, Bethel stole a phone charger by removing it from its package and placing it in his coat pocket. He then left the store. Prior to stealing the charger, Bethel had caught the attention of Angela Ford, one of Meijer's loss prevention officers, because he was wearing a large, bulky coat. Ford decided to keep an eye on Bethel and watched him steal the charger. She followed Bethel as he left the store and stopped him, identifying herself as store security. She asked Bethel to accompany her back into the store, but he initially refused. After several minutes, Ford convinced Bethel, and he voluntarily accompanied her to the store's loss prevention office. At approximately the same time, the police were contacted.

While in the loss prevention office, Ford asked Bethel for identification, but he claimed that his wallet had been stolen. Fearing that Bethel may have been armed, Ford asked for his coat, but he refused. Ford asked Bethel to empty his pockets, and he produced two wallets, a knife, some papers and the charger. Bethel then returned the

items to his pockets. Shortly thereafter, Les Caudell, an officer with the Cold Springs Police Department, along with another officer, arrived.

After Officer Caudell and the other officer entered the small loss prevention office, Officer Caudell positioned himself between Bethel and the door and asked Bethel if he had any dangerous items on his person. After Bethel denied having any dangerous objects, Officer Caudell searched Bethel's person and found a metal spoon, a glass vial containing an unknown liquid and two syringes. Officer Caudell then asked Bethel for what purpose he used these items, and Bethel replied to ingest heroin. Officer Caudell then arrested Bethel.

Later, Bethel was indicted and charged with possession of a controlled substance in the first degree since heroin residue had been found on the spoon and with theft by unlawful taking under $300.00. Bethel proceeded to a jury trial on August 1, 2005, and, prior to the trial, Bethel moved the trial court to suppress the incriminating statement he made to Officer Caudell regarding his use of heroin. At the suppression hearing, Angela Ford testified to the previously mentioned facts and claimed that Bethel voluntarily accompanied her to the store's loss prevention office. At the suppression hearing, Officer Caudell also testified about the previously mentioned facts and stated that, upon entering the loss prevention office, he decided that he was going to arrest Bethel for shoplifting. He admitted that he did not inform Bethel of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) but claimed that he did not interrogate Bethel regarding any criminal charges. According to Officer

Caudell, he searched Bethel because he was concerned that Bethel might be armed, and the officer claimed that after the search, he recognized the syringes found upon Bethel's person as diabetic syringes. Since Bethel possessed diabetic syringes, Officer Caudell testified that he asked Bethel for what purpose he used the items purely out of concern for Bethel's health because he thought Bethel may be diabetic. Although the officer admitted that Bethel was not free to leave, he insisted that Bethel was not in custody at the time and that he did not subject Bethel to a custodial interrogation.

After hearing the testimony, the trial court found that Bethel had voluntarily returned to the store at Ford's request. Based on Ford's testimony and demeanor regarding how she asked Bethel to accompany her back into the store, the trial court found that Bethel could have refused. The trial court found that Bethel never asked to leave the loss prevention office. Furthermore, the trial court found that when Officer Caudell questioned Bethel, he was merely asking for information that police officers normally request prior to an arrest. The trial court stated that it did not think that Bethel would have thought that he was in custody at the time. Thus, the trial court denied Bethel's suppression motion.

After the suppression motion was denied, Bethel's jury trial was held, and he was convicted of possession of a controlled substance in the first degree and theft by unlawful taking under $300.00.

On appeal, Bethel first contends that the trial court erred when it failed to suppress the incriminating statement he made to Officer Caudell. According to Bethel,

the test to determine whether he was in custody and was subjected to a custodial interrogation is whether a reasonable person, in his situation, would have felt free to end the interrogation and leave. *Thompson v. Keohane,* 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995). Bethel avers that he had been caught for shoplifting; had been placed in a small room; and, once the police arrived, Officer Caudell stood directly between him and the door, thereby blocking the only exit. Based on these facts, Bethel insists that a reasonable person in that situation would not have felt that he was free to leave. Bethel concludes that he was in custody and had been subjected to a custodial interrogation without the benefit of the *Miranda* warnings. In addition, Bethel argues that, at the suppression hearing, Officer Caudell testified that he had no intentions of allowing Bethel to leave, and, while Bethel acknowledges that the officer never told him that, Bethel argues that Officer Caudell's body language clearly indicated that Bethel was not free to leave.

When we review suppression issues, we initially examine the trial court's findings of fact to determine if they are supported by substantial evidence. If so, then the findings are conclusive. Next, we review *de novo* the trial court's application of the law to the facts. *Commonwealth v. Neal,* 84 S.W.3d 920, 923 (Ky.App. 2002).

Regarding the issue of police custody, the United States Supreme Court held:

> [A] person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples

> of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

U.S. v. Mendenhall, 446 U.S. 544, 554-555, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980) (citations omitted). In this case, the record discloses that Bethel was caught shoplifting. He voluntarily accompanied Ford into the store's loss prevention office, which was a small room with a door that was always kept shut. After Bethel had been in the office for a short time, the police officers arrived, and Officer Caudell positioned himself between Bethel and the door, the only means for leaving the office. And, most importantly of all, Officer Caudell thoroughly searched Bethel, engaging in "physical touching of the person of the citizen[.]" *Id*. Given the totality of these circumstances, a reasonable person in Bethel's situation would not have believed that he was free to leave. On the contrary, he would expect to be arrested for shoplifting. Thus, the trial court erred when it found that Bethel was not in custody at the time he made his incriminating statement.

The Commonwealth relies on *Bedell v. Commonwealth,* 870 S.W.2d 779 (Ky. 1993) to support its argument that Bethel was not in custody. In *Bedell*, the defendant voluntarily accompanied police to the police station for questioning. *Id*. at 782. The police informed the defendant of his rights. Furthermore, they did not physically touch or restrain him nor did they engage in coercive displays of authority. *Id*.

In contrast, in the present case, Officer Caudell did not inform Bethel of his rights. He physically blocked Bethel's only means of exiting the room, and he searched Bethel, which was a clear display of the officer's authority. Given these differences, we find *Bedell* to be distinguishable from the present case. The Commonwealth also relies on *Baker v. Commonwealth,* 5 S.W.3d 142 (Ky. 1999), *Taylor v. Commonwealth,* 182 S.W.3d 521 (Ky. 2006), and *Dennis v. Commonwealth,* 464 S.W.2d 253 (Ky. 1971). However, these cases fail to support its position. In *Baker*, there was no questioning at all but an order for the suspect to remove his hands from his pockets. In *Taylor*, the officers specifically advised the suspect that he was not under arrest and there was no interrogation. In *Dennis*, the court found that the defendant's statement was a voluntary comment. At the time he made the incriminating statement, Bethel had been seized and was in custody.

However, even though Bethel was in custody at the time does not automatically mean his statement should have been suppressed. It is well settled that whenever a person who is in police custody is subjected to interrogation, the police must first advise that person of his *Miranda* rights. *Rhode Island v. Innis,* 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). For *Miranda* purposes, "interrogation" means any express questioning by the police that will elicit an incriminating response or any words or actions by the police that the police should reasonably know will elicit an incriminating response. *Id*. An "incriminating response" is any response, either inculpatory or exculpatory, that the prosecution might later seek to introduce at trial. *Id*.

Turning back to the record, we find that Officer Caudell searched Bethel and found a metal spoon, a glass vial which contained an unknown liquid, and two syringes. Without informing Bethel of his *Miranda* rights, the officer asked Bethel for what purpose he used these items. Officer Caudell testified that he asked this question because he thought that Bethel may have been diabetic. However, despite this claim, Officer Caudell's question to Bethel constituted words spoken by a police officer that the officer should have reasonably known could elicit an incriminating response. *Rhode Island v. Innis, supra*. In fact, Officer Caudell's question did elicit an incriminating response. Although the questioning of Bethel was brief, Officer Caudell subjected Bethel to a custodial interrogation without first informing Bethel of his *Miranda* rights, thus violating *Miranda*. Therefore, the trial court erred when it did not suppress Bethel's incriminating statement.

The Commonwealth argues that introduction of Bethel's incriminating statement at trial if it was error, was harmless. We recognize that the Commonwealth had a relatively strong case against Bethel even without his statement. However, Bethel's incriminating statement helped the Commonwealth to establish one of the elements of possession of a controlled substance: knowledge. Under these facts, we do not believe that the introduction of the statement was harmless error.

In his second argument, Bethel alleges that, at the suppression hearing during cross-examination, Officer Caudell looked around to make sure that neither the judge nor defense counsel was watching and that he then mouthed silently to the

prosecutor, "What do I say?" Based on this, Bethel insists that the prosecutor used prohibited false testimony at the suppression hearing. According to Bethel, Officer Caudell so wanted Bethel to be convicted that he inappropriately sought the prosecutor's advice while on the stand, tainting his conviction.

Since Bethel did not preserve this issue for appeal, we can only review its merits if it rises to the level of palpable error under Kentucky Rules of Criminal Procedure (RCr) 10.26. The Kentucky Supreme Court defines palpable error as an irregularity which affects a party's substantial rights and, if the appellate court does not address the irregularity, it will result in a manifest injustice to the party. *Schoenbachler v. Commonwealth,* 95 S.W.3d 830, 837 (Ky. 2003). In other words, after considering the whole case, if the appellate court does not believe that there is a substantial possibility that the result would have been any different, then the irregularity will be deemed non-prejudicial. *Id*.

After reviewing the videotape of the suppression hearing, we cannot determine what Officer Caudell mouthed silently nor can we determine to whom he was directing this behavior. Moreover, we cannot determine how this behavior negatively affected Bethel's substantial rights; thus, we find no palpable error and decline to address the merits of this claim.

In his final argument, Bethel avers that his defense at trial was that, given the evidence, the jury could find him guilty of possession of drug paraphernalia instead of finding him guilty of possession of a controlled substance. Thus, he tendered a jury

instruction regarding possession of drug paraphernalia which the trial court rejected. Bethel claims that the evidence supported such an instruction, and, since his defense was that he was only guilty of possession of drug paraphernalia, then the trial court was required to so instruct the jury. Bethel admits that possession of drug paraphernalia is not a lesser-included offense of possession of a controlled substance but argues that, given the unique facts of his case, possession of drug paraphernalia was, in fact, a defense to possession of a controlled substance.

The case of *Hudson v. Commonwealth,* 202 S.W.3d 17 (Ky. 2006) is directly on point regarding this issue. In *Hudson*, the defendant was arrested and charged with operating a motor vehicle while under the influence of alcohol, fourth offense (DUI). At the defendant's subsequent trial, he submitted a jury instruction regarding alcohol intoxication (AI) and argued that alcohol intoxication was a defense to DUI. *Id*. at 19. On appeal to the Kentucky Supreme Court, the defendant argued that AI was a lesser-included offense to DUI. *Id*. at 20. However, the Supreme Court held that AI was not a lesser-included offense of DUI since each required proof of an element that the other did not. *Id*. In the alternative, the defendant argued that AI was a "lesser" offense that acted as defense to DUI because a finding of guilt regarding AI would preclude a finding of guilt regarding DUI. *Id*. at 21. Regarding this odd notion, the Supreme Court held:

> That, of course, is incorrect. If alcohol intoxication is not a lesser included offense of DUI, then, if properly charged, the jury could find guilt of both. Further, the fact that the evidence would support a guilty verdict on a lesser uncharged

> offense does not entitle a defendant to an instruction on that offense.

Id. (citations omitted).

Bethel's argument is virtually identical to the defendant's argument in *Hudson*. And, like in *Hudson*, the argument is without merit. While the evidence may have supported an instruction regarding possession of drug paraphernalia, Bethel was not entitled to such an instruction since 1) it was not a lesser-included offense of possession of a controlled substance and 2) a finding of guilt regarding possession of drug paraphernalia would not have precluded a finding of guilt regarding possession of a controlled substance. Thus, the trial court did not err when it refused to instruct the jury regarding possession of drug paraphernalia.

Since the trial court erred when it failed to suppress Bethel's incriminating statement, we reverse the judgment of conviction and remand for a new trial.

WINE, JUDGE, CONCURS.

COMBS, CHIEF JUDGE, DISSENTS AND FILES SEPARATE OPINION.

COMBS, CHIEF JUDGE, DISSENTING: I cannot agree that Bethel's *Miranda* rights were violated. He was not subjected to a custodial interrogation. The police officer's question about the syringes was innocuous on its face. Bethel could have refused to answer differently or not to answer at all. The syringes were diabetic syringes that could have been used for health purposes.

Officer Caudell's explanation of his question was that he was seeking to find out if Bethel were diabetic. That question was legitimate on its face and did not require a *Miranda* warning. The fact that Bethel answered it in an inculpatory manner should not require suppression of his statement. If, on the other hand, Officer Caudell had directly asked if the syringes were drug related, a *Miranda* warning would have been required, and its absence would require suppression of the statement.

Thus, I would affirm the trial court in its ruling to deny suppression and would let the conviction stand.

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