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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001382-MR

MATTHEW FORE

APPELLANT

v. APPEAL FROM CAMPBELL COUNTY CIRCUIT COURT
HONORABLE FRED STINE V, JUDGE
ACTION NO. 06-CR-0563

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, MOORE, AND TAYLOR, JUDGES.

MOORE, JUDGE: This is an appeal by Matthew Fore from a judgment and sentence on a plea of guilty to First-Degree Assault before the Campbell County Circuit Court. Upon review of the record, we affirm.

I. PROCEDURAL BACKGROUND

This case is before us on remand from the Kentucky Supreme Court in light of *Dickerson v. Com.*, 278 S.W.3d 145 (Ky. 2009). *Dickerson* stands for the proposition that an appellate court can consider issues on appeal from a conditional guilty plea if, among other things, (i) the issues upon which appellate review are sought were expressly set forth in the conditional guilty plea documents or in a colloquy with the trial court or (ii) the issues upon which appellate review is sought were brought to the trial court's attention before the entry of the conditional guilty plea even if the issues are not specifically reiterated in the guilty plea documents or plea colloquy. *Id.* at 149.

Pursuant to *Dickerson*, we will address the merits of Fore's appeal regarding Fore's motion to suppress his confession and Fore's objection to the disclosure of the presentence investigation report (PSI) to the Commonwealth. Upon our initial review of this case, we affirmed the trial court's denial of Fore's motion to withdraw his guilty plea. We dismissed both Fore's claim that he was denied the right to counsel and his claim of pro se representation without a *Faretta*¹ hearing. Because we find no error at the trial court level regarding the issues on remand to our Court, those issues will not be addressed on remand. We, therefore, lay out the facts that are pertinent to the two issues preserved for appeal under *Dickerson*.

II. FACTUAL BACKGROUND

¹ *Faretta v. California*, 422 U.S. 806, 819-820, 95 S. Ct. 2525, 2533, 45 L. Ed. 2d 562 (1975).

On September 2, 2006, Officer Michael Dietz was dispatched to 48 Holly Woods Drive, Fort Thomas, Kentucky, to investigate an injury to a ten-month-old infant. The appellant, Matthew Fore, was living at that address with the infant and the infant's mother when the injury occurred. Shortly after Officer Dietz arrived, Fore approached Officer Dietz and stated that he was aware the police wanted to speak with him. Prior to his arrival at the apartment, Fore had spoken on the telephone with Sergeant Casey Kilgore of the Fort Thomas Police. Sergeant Kilgore informed him that police were waiting for Fore at Fore's apartment. Fore acquired transportation to the apartment in order to speak to the police.

After Fore made contact with Officer Dietz, Fort Thomas Police Detective Ray Metz arrived at the apartment. Detective Metz was wearing street clothes rather than a police uniform when he met Fore. He introduced himself to Fore and asked Fore to accompany him to the police station for an interview. Fore agreed. Detective Metz transported himself and Fore to the police station in an unmarked police vehicle.

At the Fort Thomas Police Department, Detective Metz conducted a four-hour interview of Fore, spanning approximately from 1:00 a.m. until 5:00 a.m. At the start of the interview, Detective Metz informed Fore that he was neither under arrest nor in custody. Detective Metz told Fore that he was free to leave at any time. At no time during the interview was Fore placed in handcuffs or told that he could not leave. Throughout the entire interview, Fore never asked to leave and continued to voluntarily answer questions. Detective Metz did not read Fore his

*Miranda*² rights. Toward the end of the interview, Fore confessed to causing the infant's injuries. Although additional facts are pertinent to this case, they will be developed in detail later in this opinion.

Fore conditionally pleaded guilty to First-Degree Assault. At the trial level, he filed a motion to suppress the confession he made during the interview outlined above, arguing that the confession was obtained in violation of *Miranda*. He contended he was in custody at the time of the confession. Additionally, Fore filed an Objection for Presentence Investigation Report – Order, arguing that the information obtained in the PSI was privileged and may not be disclosed except as allowed by statute. Fore asserted that disclosure of the PSI to the Commonwealth was a violation of his Kentucky and United States Constitutional rights to privacy. We now consider these issues on appeal.

III. CONFESSION

A. Standard of Review

The proper standard of appellate review on a suppression issue is found in *Commonwealth v. Neal*, 84 S.W.3d 920, 925 (Ky. App. 2002):

An appellate court's standard of review of the trial court's decision on a motion to suppress requires that we first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. Kentucky Rules of Criminal Procedure (RCr) 9.78. Based on those findings, we must then conduct a de novo review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law.

² *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1996).

B. Analysis

Pursuant to the familiar dictates of *Miranda*, the authorities must inform a person to whom they are speaking of certain constitutional rights, provided that the interviewee “has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Miranda*, 384 U.S. at 444. The crucial question to be determined in situations where a criminal defendant contends that the authorities failed to timely comply with the warnings required by *Miranda* is whether the defendant was “in custody.” *Commonwealth v. Lucas*, 195 S.W.3d 403, 405 (Ky. 2006).

Miranda warnings do not come into play until “there has been such a restriction on a person's freedom as to render him ‘in custody.’” *Stansbury v. California*, 511 U.S. 318, 322, 114 S. Ct. 1526, 1528, 128 L. Ed. 2d 293 (1994); *Emerson v. Commonwealth*, 230 S.W.3d 563, 568 (Ky. 2007). Custody does not occur until police, by some form of physical force or show of authority, have restrained the liberty of an individual. *Lucas*, 195 S.W.3d at 405 (citing *Baker v. Commonwealth*, 5 S.W.3d 142, 145 (Ky. 1999)).

To determine whether Fore was in custody, this Court must examine all of the circumstances surrounding the interrogation. However, “the ultimate inquiry is simply whether there [was] a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest.” *Stansbury*, 511 U.S. at 322 (quoting

California v. Beheler, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 3520, 77 L. Ed. 2d 1275 (1983)).

The Kentucky Supreme Court has held that the test is whether, considering the surrounding circumstances, a reasonable person would have believed he or she was free to leave. *Lucas*, 195 S.W.3d at 405 (citing *Baker*, 5 S.W.3d at 145). “A reviewing court must be careful to use an objective standard in determining whether a person was in custody because ‘the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned.’” *Beckham v. Com.*, 248 S.W.3d 547, 551 (Ky. 2008) (quoting *Stansbury*, 511 U.S. at 323).

Some of the factors to consider in a custody determination are the threatening presence of several officers, physical touching of the person, or use of a tone or language that might compel compliance with the request of the police. *Lucas*, 195 S.W.3d at 405-06 (citing *Baker*, 5 S.W.3d at 145). Additional factors demonstrating custody include the purpose of the questioning, whether the place of the questioning was hostile or coercive, the length of the questioning, and other indicia of custody. *United States v. Crossley*, 224 F.3d 847, 861 (6th Cir. 2000). Other indicia of custody encompass whether the suspect was informed at the time that the questioning was voluntary or that the suspect was free to leave, whether the suspect possessed unrestrained freedom of movement during questioning, and whether the suspect initiated contact with the police or voluntarily admitted the

officers to the residence and acquiesced to their requests to answer some questions.

Id.

Weighing heavily on our assessment of custody presently is the holding of the Kentucky Supreme Court in *Beckham*. In that case, our High Court determined that Beckham was not in custody for *Miranda* purposes and, therefore, the confession was admissible. The facts of *Beckham* are pertinent to the case at bar.

The police approached Beckham and asked if he would speak with them while three other officers were nearby. Beckham apparently agreed to speak to the officers, and the officers transported him in a police vehicle to a local probation and parole office. The two lead investigators met Beckham at the probation and parole office. They questioned Beckham for approximately two hours in an office behind a closed door. Beckham then took thirty minutes to write a statement alone in the room. Shortly after he signed his written statement, Beckham gave the police permission to retrieve the clothes he claimed he was wearing at the time of the crime. Beckham was then driven in a police vehicle to where the clothes were located. Beckham was returned to the probation and parole office, where the police taped a thirty-minute interview with Beckham. At that time, they informed him for the first time that they had a search warrant. The police then took Beckham to the hospital so they could obtain physical evidence pursuant to the warrant. There is no indication that Beckham objected to going to the hospital or to the process required to obtain the evidence specified in the search warrant. After the evidence was obtained at the hospital, Beckham agreed to submit to

further questions, at which time, he was taken to the local police department. About six and a half hours after police first began speaking with Beckham, the police told Beckham that there had been a “dramatic turn of events” or a “dramatic discovery” and asked him if he had anything he needed to say to them. Beckham then said something about needing help, after which the police first read him his *Miranda* rights. After the police informed Beckham of his rights, Beckham exercised his right to counsel, thereby ending the interrogation at 11:16 p.m., nearly seven hours after the police first encountered Beckham.

The Kentucky Supreme Court held that although the case presented some factors suggesting that Beckham was in custody, primarily the length of the interrogation and the presence of multiple officers, the weight of the evidence tended to show that Beckham was not in custody. Specifically, the Court noted that the officers testified that they informed Beckham he was free to leave and that Beckham never showed any inclination to leave or otherwise to stop speaking and cooperating with them. Beckham offered nothing at the suppression hearing to rebut the officers' testimony. So, on balance, the Court concluded that the trial court correctly determined that Beckham was not in custody.

In the case before us, the findings of fact of the Campbell County Circuit Court are supported by substantial evidence. The trial court's determination that Fore was not in custody was based on facts established by direct testimony of the police officers and Fore himself. Credibility determinations are the province of the trial court which we will not disturb on appeal. *See Uninsured Employers' Fund v.*

Garland, 805 S.W.2d 116, 118 (Ky. 1991). As such, the findings of fact of the trial court are conclusive. RCr 9.78.

The trial court found that Fore initiated contact with the Fort Thomas Police. Having heard from Sergeant Kilgore that the police were wanting to speak with him at the apartment, Fore obtained transportation to the apartment. Fore approached Officer Dietz to ask what the police wanted. While Officer Dietz secured the entranceway, he asked Fore to sit on the steps leading to the apartment because the apartment was being secured as a potential crime scene. Fore's line of egress was not obstructed, he was not handcuffed, placed under arrest, or told he could not leave. At some point, Fore voluntarily agreed to be searched.

When Detective Metz arrived at the apartment, wearing street clothes rather than a police uniform, Fore voluntarily agreed to accompany him to the police station to talk about the infant's injuries. Detective Metz transported Fore to the police station in an unmarked police vehicle. Prior to entering the building, Fore smoked a cigarette in the parking lot.

Detective Metz was the only police officer conducting the interview when it began. Detective Metz informed Fore that Fore was neither under arrest nor in custody. He told Fore that Fore was free to leave at any time. Fore was not placed in handcuffs during the interview. He was never told that he could not leave, and he never asked to leave. Sergeant Kilgore explained during the suppression hearing that there would be nothing to prevent an individual who was located in the interview room of the Fort Thomas Police Department, where Fore was, from

moving around the two floors of the police station. The interview room was off of a hallway at the end of which were open doors.

As the trial court pointed out, Detective Metz testified that he spoke in a normal tone during the interview and that on various occasions Fore used other facilities at the police station. Fore was offered beverages during the interview. Although Detective Metz testified that he did not give Fore a *Miranda* warning nor was he certain that a crime had occurred, Detective Metz did testify that Fore would be the only likely suspect if such were the case as he knew Fore was supposed to be alone with the child when the child sustained the injuries. Fore told Detective Metz that he was with the child that evening, and Sergeant Kilgore knew that Fore was alone with the infant when the injuries supposedly occurred.

Prior to the interview, Detective Metz was unaware of any outstanding warrants issued against Fore. Fore, however, knew that there were outstanding warrants for his arrest. As he explained at the suppression hearing, Fore assumed that he would be arrested that evening and that he was not free to leave.

Fore described the interview room as six by six with a mirror. He confirmed that he did use other facilities at the police station, but an officer walked him to the restroom and waited at the end of the hallway until he returned. Fore testified that the door was open at the beginning of the interview, but Sergeant Kilgore closed the door behind him when he joined Fore and Detective Metz in the interview room. Because of the outstanding warrants and the fact that he could not drive

from the police station, Fore testified that he did not believe he was free to leave, even though he was expressly told so.

Those conclusive facts set out by the trial court establish as a matter of law that Fore was not in custody for the purpose of determining whether a *Miranda* warning was required. The police did not restrain Fore's liberty by some form of physical force or show of authority. There was no formal arrest or restraint of Fore's freedom of movement to the degree associated with a formal arrest. Fore was never placed in handcuffs or locked in a room. The most restraint Fore experienced was having the door of the interview room shut for only a short amount of time. A closed door is not analogous to a formal arrest.

Considering the surrounding circumstances, a reasonable person would have believed that he was free to leave. It is irrelevant what Fore subjectively thought. Likewise, the subjective thoughts of the police officers are irrelevant. The determination of custody is based on an objective standard. *Beckham*, 248 S.W.3d at 551. Consequently, the existence of outstanding warrants (especially given that Detective Metz testified that he did not know of them), lack of transportation, and Fore's status as the primary suspect do not influence the Court's determination that Fore was not in custody.

Factors that this Court does consider in its determination of custody include the fact that, at times during the interview, two officers were present; Detective Metz spoke in a normal conversational tone; the interview lasted for approximately four hours; Fore was told he was free to leave at the beginning of the interview;

Fore voluntarily agreed to answer questions at the police station; Fore was free to walk around and use other facilities at the police station; and Fore initiated contact with Officer Dietz and acquiesced to a search of his person.

Analogous to *Beckham*, Fore's communications with the police were voluntary. In *Beckham*, the interview was conducted at a probation and parole office with the door closed. Here, the interview was conducted at a police station with the door open most of the time and only closed for short periods of time. Beckham's contact with the police lasted almost seven hours, while Fore's contact with the police lasted approximately four hours. In both cases, the presence of multiple officers might suggest that the interviewee was in custody. However, both Beckham and Fore were informed that they were free to leave and neither showed any inclination to leave. In fact, unlike Beckham, Fore had only one officer conducting the interview for about half of it, when a second officer participated in the interview.

Examining all of the circumstances surrounding the interrogation, it is clear that a reasonable person would believe that he was free to leave. Therefore, Fore was not in custody, and a *Miranda* warning was not required. We affirm the trial court's denial of Fore's motion to suppress his confession.

IV. DISCLOSURE OF PSI TO COMMONWEALTH

A. Standard of Review

Fore claims that disclosure of the PSI to the Commonwealth violated his constitutional rights to privacy as guaranteed by the Kentucky and United States

Constitutions. Neither before the trial court nor on appeal did Fore support with any authority his claim that his constitutional rights were violated. He bases this claim on a mere conclusory statement. Kentucky Rule of Civil Procedure (CR) 76.12(4)(c)(v) states, in part, that an appellant's brief shall contain “[a]n ‘ARGUMENT’ conforming to the Statement of Points and Authorities, with ample supportive references to the record and citations of authority pertinent to each issue of law” Because Fore’s brief lacks any citations of authority pertinent to the issue of constitutional privacy rights violations, it does not comply with CR 76.12(4)(c)(v). Rather than ordering the brief stricken for this deficiency, a more appropriate penalty in this instance is to refuse to consider Fore’s contentions regarding the alleged violation of privacy. *See Cherry v. Augustus*, 245 S.W.3d 766 (Ky. App. 2006). Therefore, we need not address the merits of Fore’s claim that the circuit court violated his constitutional rights by disclosing the PSI to the Commonwealth.

Fore did make an argument that disclosure of the PSI to the Commonwealth was a statutory violation. At the trial level, Fore objected to the Commonwealth’s access to the PSI, citing KRS³ 439.510, KRS 532.050, and RCr 11.02. The construction and interpretation of statutes are matters of law; therefore, our standard of review is de novo. *Lexington-Fayette Urban County Health v. Lloyd*, 115 S.W.3d 343, 347 (Ky. App. 2003). When interpreting a statute, we must “ascertain and give effect to the intention of the Legislature and that intention must

³ Kentucky Revised Statutes

be determined from the language of the statute itself if possible.” *Id.* at 347. “We have a duty to accord to words of a statute their literal meaning unless to do so would lead to an absurd or wholly unreasonable conclusion.” *McElroy v. Taylor*, 977 S.W.2d 929, 931 (Ky. 1998). When reviewing a statute, we must give “significance and effect . . . to every part of [an] Act.” *Id.* at 931. However, where the language of a statute is plain and unambiguous, we should not resort to the legislative record in order to interpret the statute. *City of Vanceburg v. Plummer*, 275 Ky. 713, 122 S.W.2d 772, 775 (1938).

B. Analysis

The PSI is prepared and presented by a probation officer. KRS 532.050(2). “All information obtained in the discharge of official duty by any probation or parole officer shall be privileged Such information shall not be disclosed directly or indirectly to any person other than the court . . . unless otherwise ordered by such court” KRS 439.510.

KRS 532.050 provides for the presentence procedure for felony convictions. Included in KRS 532.050(6) is the specification that the court shall advise the defendant or his counsel of the factual contents and conclusions of the PSI and afford a fair opportunity and a reasonable period of time, if the defendant so requests, to controvert them. No mention is made in KRS 532.050(6) of the Commonwealth’s access to the PSI. However, KRS 532.050(4) does specifically grant the Commonwealth access to a copy of a comprehensive sex offender presentence evaluation.

Although privileged, the circuit court did order that the Commonwealth have access to the PSI. Fore argues that, because KRS 532.050(6) specifically provides for disclosure of the PSI to the defendant but does not specifically mention the Commonwealth, the Legislature did not intend for disclosure to be made to the Commonwealth. He furthers his argument by pointing out that KRS 532.050(4) provides for disclosure of comprehensive sex offender presentence evaluations to the Commonwealth. Fore attempts to make the leap that specifically including disclosure to the Commonwealth in subsection (4) means the Legislature intentionally excluded disclosure to the Commonwealth in subsection (6).

Terminal to his argument is that subsection (4) deals with comprehensive sex offender presentence evaluations, while subsection (6) deals with PSIs. The Legislature could have included language regarding the sexual offender evaluation in subsection (6); however, it did not. We believe that the Legislature intended for the sexual offender evaluation to be treated separately from the PSI. *Berg v. Com.*, 20 S.W.3d 475, 477 (Ky. App. 2000). The distinctions in the language of the two subsections evidence the Legislature's intention that the PSI and the sexual offender evaluation be treated differently. *Id.* Therefore, subsection (4) and subsection (6) are to be read independently.

Neither Fore's appellate brief nor his objection to the trial court cite any authority prohibiting disclosure of the PSI to the Commonwealth. KRS 532.050(6) mandates disclosure to the defendant, but it does not deny the Commonwealth access to the PSI. Nothing in case law or statute prohibits the Commonwealth

from receiving the information contained in the PSI. The Legislature left that decision to the sound discretion of the trial court by allowing the trial court to so order the disclosure. KRS 439.510.

Additionally, RCr 11.02 does state that the Commonwealth be allowed to review the PSI.

Before imposing sentence the court shall, if the defendant is guilty of a felony, cause a presentence investigation to be conducted, examine and consider the report, and furnish a copy of the report to the attorney for the Commonwealth and the attorney for the defendant no later than two (2) business days prior to final sentencing.

RCr 11.02(1). Under this rule, the trial court would be affirmed.

Disclosure of the contents of the PSI to the Commonwealth would be necessary in the interests of justice, if the trial court so determines. In order to fairly and accurately recommend a sentence and properly advocate a position before the trial court, the trial court may exercise its discretion to allow the Commonwealth access to the PSI.

Because (i) KRS 439.510 permits the trial court to order disclosure of information obtained in the discharge of the probation officer's official duties, (ii) KRS 532.050 does not prohibit disclosure of the contents of the PSI to the Commonwealth, and (iii) RCr 11.02(1) provides the Commonwealth access to the PSI, we affirm the trial court's order overruling Fore's objection. Therefore, the Commonwealth is entitled access to the PSI.

V. CONCLUSION

This Court being otherwise duly advised, the trial court's orders denying Fore's motion to suppress and overruling Fore's objection to the Commonwealth's access to the PSI are hereby AFFIRMED.

ALL CONCUR.

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