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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000354-MR

BENJAMIN SENSEMAN — APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JAMES R. SCHRAND II, JUDGE
ACTION NO. 09-CR-00520

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND
REMANDING

** ** ** ** **

BEFORE: COMBS AND MOORE, JUDGES; LAMBERT,[1] SENIOR JUDGE.

COMBS, JUDGE: Benjamin Senseman appeals from his conviction of manslaughter and criminal abuse in the Boone Circuit Court. We have reviewed

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

the record and studied the law carefully, and we are compelled to affirm in part, reverse in part, and remand.

This is a tragic and mystifying case involving the death of a child. On the morning of July 12, 2009, Senseman, his wife, Laura, his 34-month old son, and his two-month old daughter, Chloe, went to a park near their home in Hebron. When they returned home, Chloe slept while Senseman, Laura, and their son ate lunch. After lunch, Senseman and Laura put their little boy down for a nap. At 1:40 p.m., Laura left for work. Senseman took Chloe downstairs to the TV room. He placed Chloe in her playpen while he napped on the sofa. Around 3:00 p.m., Senseman awakened his son so that the two of them could watch a Formula One race. Senseman then fell back asleep during the race and was awakened by the screaming of both children.

Chloe was lying in the playpen with her arms extended above her head. Senseman picked her up, and she was limp. He laid her on the floor and began attempting to administer CPR while calling 911. Paramedics arrived within minutes and rushed Chloe to the hospital. Medical personnel were unable to revive her, and she died soon after 4:30 p.m. The emergency room physician suspected that Chloe had died as a result of Sudden Infant Death Syndrome (SIDS).

An autopsy was performed on the following day by Dr. Wanger of the state Medical Examiner's office. Dr. Wanger found that Chloe had sustained a severe brain injury. He determined that the cause of death was blunt force trauma to the head. He also discovered that Chloe had some old injuries that were in the process

of healing at the time of her death. There were broken ribs, a broken radius, broken tibias, and evidence of bruising in her brain. Dr. Wanger estimated that the fatal injury occurred within minutes to two hours before the time that Senseman discovered her in distress.

Based on Dr. Wanger's findings, Detective Robert Wilson of the Boone County Sheriff's office contacted Senseman to come to the sheriff's office for questioning, saying that he wanted to discuss the results of the autopsy. Senseman was on his way to make funeral arrangements for Chloe, but he agreed to come later. On his way back from the funeral home, Senseman arrived at the sheriff's office accompanied by Laura and their son.

Detective Wilson took Senseman alone into an interrogation room and left his family in a waiting area. He proceeded to tell Senseman about the findings of the autopsy. Detective Wilson then told Senseman that Chloe's injuries had been incurred close to the time of her death and that because Senseman was the only adult with Chloe, he ***must have caused*** her death. Senseman expressed distress and confusion, but Detective Wilson persisted. Senseman consistently denied that he had done anything to hurt his daughter. The detective pressed on, stating that "the science is 100%" that Senseman had caused the head injury to Chloe.

Detective Stahl then entered the interrogation room. He aggressively leaned into Senseman's face, pointed his finger, hit the table, yelled at Senseman, and left. Finally, Senseman speculated that maybe he had pushed Chloe's head into the side of the playpen and that he was afraid that perhaps he may have handled her too

roughly. Detective Wilson then asked Senseman to make a written statement so that Laura would know what happened in Senseman's own words. Only after Detective Wilson had obtained this statement did he read Senseman a *Miranda* warning to inform him of his rights. He immediately placed Senseman under arrest.

Senseman was indicted for murder on September 15, 2009. On October 25, 2010, the court held a suppression hearing regarding Senseman's statement to Detective Wilson. The motion was denied. On November 2, 2010, Senseman was indicted for criminal abuse in the first degree. The wording of the indictment was amended by motion of the Commonwealth on November 17, 2010. Even though she had been at work at the time of Chloe's death, Laura was also indicted for murder and criminal abuse. Senseman and Laura were jointly tried in a 5-day jury trial that began on December 6, 2010. The jury acquitted Laura but found Senseman guilty of second-degree manslaughter and criminal abuse in the second degree. He received a fifteen-year sentence. This appeal follows.

Senseman first argues that the court erred in denying his motion to suppress the statement that he gave to Detective Wilson. After careful analysis of the facts and the law in this case, we agree.

Our standard of review of a motion to suppress is twofold. We may not disturb the trial court's findings of fact if they are supported by substantial evidence. Kentucky Rule[s] of Civil Procedure (CR) 52.01. However, we must

apply a *de novo* review of its legal conclusions. *Commonwealth v. Marr*, 250 S.W.3d 624, 626 (Ky. 2008).

If a suspect is ***in custody***, he ***must receive*** a warning regarding his Fifth Amendment rights before being questioned. *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602, 1630 (1966); *Commonwealth v. Lucas*, 195 S.W.3d 403, 405 (Ky. 2006). Without the warning, any incriminating statements that may be elicited cannot be admitted at trial. *Miranda, supra*. A *custodial interrogation* is "questioning initiated by police after a person has been taken into custody or otherwise deprived of freedom of action in any significant way." *Rankin v. Commonwealth*, 265 S.W.3d 227, 234 (Ky. App. 2007). A *Miranda* warning is necessary if, under the circumstances, a reasonable person would believe that he is not free to leave. *Id.* Our standard of review for determining whether a person was in custody at the time of questioning is *de novo*. *Lucas, supra.*

Courts utilize several factors when analyzing whether suspects were "in custody" prior to receiving *Miranda* warnings. These include:

> (1) the purpose of the questioning; (2) whether the place of the questioning was hostile or coercive; (3) the length of the questioning; and (4) other indicia of custody such as whether the suspect was informed at the time that the questioning was voluntary or that the suspect was free to leave or to request the officers to do so; whether the suspect possessed unrestrained freedom of movement during questioning; and whether the suspect initiated contact with the police . . . .

U.S. v. Salvo, 133 F.3d 943, 950 (6th Cir. 1998).

Salvo Factor Number One

A careful examination of the facts in this case indicates that Senseman was indeed "in custody" and was undergoing interrogation – but that the *Miranda* warning had not yet been given as required. The purpose of the questioning was admittedly to elicit a confession from Senseman. Detective Wilson testified at the suppression hearing that Senseman was a suspect in Chloe's death. He stated that he believed that Senseman had either caused the injuries or that he was concealing information about the perpetrator. Either act – causing or concealing – is a criminal offense. Detective Wilson admitted (and so testified) that he did not know whether Senseman would be allowed to leave **when the interview began**.

***Salvo* Factor Number Two**

The place of the questioning was hostile, intimidating, and coercive. Detective Wilson had contacted Senseman under the guise of discussing the autopsy results. However, instead of making a visit to the Sensemans' home at a critical time before the child could be laid to rest, he summoned the parties to the sheriff's department. Under the circumstances, the sheriff's department was undoubtedly a hostile environment. Furthermore, although his wife and son had accompanied Senseman to the sheriff's office, Detective Wilson separated him from his family and placed him in a small, windowless "criminal investigation" room.

Significantly, Detective Wilson, who initiated the contact, did not advise Senseman that he was free to leave or that the interview was voluntary. The Commonwealth argues that Senseman voluntarily went to the sheriff's office.

However, Detective Wilson testified that he did not advise Senseman that he had a choice. He never offered to postpone the interview until after Chloe's funeral. He also did not inform Senseman that he was free to leave after arriving or at any point in the questioning. Moreover, at two different points during the interview, Detective Wilson stepped out of the room. Both times he instructed Senseman "to stay put" in the room.

We have sought guidance in this difficult case by revisiting the source of the *Miranda* warning – the compelling language and reasoning of Chief Justice Earl Warren's opinion in the *Miranda* case itself. We note that the original *Miranda* opinion emphasized the weight of this factor of isolated, hostile interrogations. *Miranda* actually was a consolidated case involving four appellants. It described the faulty interrogations in the following terms:

> In each, the defendant was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world. In none of these cases was the defendant given a full and effective warning of his rights ***at the outset*** of the interrogation process. In all of the cases, the questioning elicited oral admissions, and in three of them, signed statements as well which were admitted at their trials. They all thus share salient features – incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights.
>
> An understanding of the nature and setting of this in-custody interrogation is essential to our decisions today. (Emphasis added.)

Miranda at 445. The congruence with the Senseman scenario is manifest.

The Supreme Court of the United States has held that coercion is a factor that can render inadmissible a defendant's statements made without benefit of a *Miranda* warning. *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985). Coercion can be either physical or psychological. *Bailey v. Commonwealth*, 194 S.W.3d 296, 302 (Ky. 2006) (*citing Arizona v. Fulminante*, 499 U.S. 279, 287, 111 S.Ct. 1246, 1252-53, 113 L.Ed.2d 302, 316 (1991)). Although it is not the only factor in determining whether a statement was coerced, the mental condition of the suspect is a factor that police and courts must consider. *Colorado v. Connelly*, 479 U.S. 157, 165, 107 S.Ct. 515, 520-21, 93 L.Ed.2d 473 (1986). Extreme grief has been held to be capable of tainting the interrogation. *State v. Pickar*, 453 N.W.2d 783 (N.D. 1990).

After reviewing the police interview, we are persuaded that Senseman was indeed coerced. He was in a vulnerable state of mind, returning home from arranging the funeral of his infant daughter. He revealed in his statement that he felt guilty because his attempt to render CPR had failed. He repeatedly hung his head, wringing it in anguish. Without any supporting authority, Detective Wilson told Senseman that "the science is one-hundred percent"[2] that Chloe had died from an injury received within two hours of her death. Although it is within the permissible scope of the law for police to lie to a suspect, this particular context renders the act of deception harsh and **coercive** – thus, another factor tainting the interrogation. *Pickar, supra.*

[2] As discussed in more detail later in this opinion, Detective Wilson's statement that "the science is one-hundred percent" was actually inaccurate.

Detective Wilson emphasized his point by asking Senseman if he watched CSI, a *fictional* television program. When Senseman said that he was familiar with it, Detective Wilson analogized the so-called "scientific findings" involving Chloe to those of CSI. On CSI, the scientific evidence is *always* perfect and conclusive, a far cry from reality. Detective Wilson repeatedly told Senseman – mantra style – that he had done something accidental to cause Chloe's death. Detective Wilson also attempted to question Senseman regarding Laura. He repeatedly urged Senseman to admit that he was "not a monster but a father who had made a mistake." Obviously emotionally shaken, Senseman eventually succumbed to the pressure to provide an answer for the seemingly unexplained death of his daughter.

We turn again to *Miranda*, which admonishes that "the modern practice of in-custody interrogation is psychologically rather that physically oriented." *Miranda* at 448. Thus, *Miranda* is focused on the atmosphere of the interrogations which it was examining. *Id.* at 456. It held that:

> It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity.

Id. at 457 (footnote omitted).

The Commonwealth argues that any error resulting from denial of the motion to suppress was harmless because of the strength of other evidence against Senseman. We wholly disagree. His questionable statement was **the only**

incriminating evidence presented at trial. And it essentially consisted of Senseman's vague speculation – almost self-questioning – that maybe he had injured Chloe by pushing her head against the side of her padded playpen, that maybe he had handled her too roughly. It was undisputed that he was the only adult with her in the two hours prior to her death.

All other trial evidence served to create reasonable doubt rather than to constitute even the lesser criminal standard of preponderance of the evidence. Two experts – one for the Commonwealth and one for Senseman – both testified at trial that Chloe's fatal injury could have occurred "minutes to weeks" prior to her death – not necessarily within the two-hour window upon which the accusation against Senseman was based – as starkly distinguished from Detective Wilson's pronouncement that "the science is 100%" that Senseman caused the injury. Experts who testified disagreed as to whether the fatal injury could have occurred as a result of Chloe's head's being pushed into the corner of a playpen.

A tragic twist to this case is the possibility that Chloe's brother might have been responsible for Chloe's injury. The defense presented credible evidence that he could have indeed inflicted Chloe's old injuries. Many friends and relatives of the Sensemans testified that the boy was a very strong and very rambunctious two-year old. Testimony revealed incidents of the child's headbutting, hitting, kicking, and tackling – both of children and of adults – including inflicting a black eye on one adult and breaking the nose of another woman. One babysitter had been physically unable to dress the child in his pajamas by herself.

Repeatedly, relatives recounted that they had witnessed Senseman's son hitting Chloe or other children and that they had not reported the behavior to Senseman and Laura. They also related that the boy's favorite activity with other children was wrestling. He would initiate rough behavior with other children of all sizes – even if they were several years older.

Even Detective Wilson testified that the boy had kicked him **three times** during his short encounter with him at the hospital. There was testimony that this child was easily able to climb into and out of Chloe's playpen. One of the doctors who testified as an expert witness opined that it would have been possible for a strong toddler to have caused Chloe's injuries.

Other than the self-incriminating statement that Senseman provided to Detective Wilson, there was **no** other evidence to inculpate Senseman or to support his conviction. Multiple witnesses – family members, friends, co-workers, and acquaintances – testified that they had never observed Senseman being violent or hot-tempered. No one testified that they had ever even seen Senseman and Laura argue with each other. Significantly, Detective Wilson admitted that once he had obtained Senseman's statement, he immediately ceased any additional investigation – even though he had considered the boy's involvement a distinct possibility. But other than the statement, all evidence presented at trial tended to indicate an alternative cause or perpetrator of Chloe's injuries.

Therefore, in light of the totality of the circumstances, we hold that it was harmful error for the trial court to deny Senseman's motion to suppress the

statement that was obtained in violation of the requirement that a *Miranda* warning be given. We reiterate, Detective Wilson testified that he knew that Senseman was going to remain in custody once he had obtained the statement that he wanted; nonetheless, he administered the *Miranda* warning only after the fact.

The Supreme Court of the United States has explicitly condemned this very practice of delaying the giving of a *Miranda* warning until after an admission is procured. *Missouri v. Seibert*, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004). We are convinced that *Seibert* is particularly dispositive of this case.

In *Seibert*, the Court explained that providing mid-interrogation warnings "render[s] *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed." *Id.* at 611. It admonished that:

> when Miranda warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and "depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them."

Id. at 613-14 (*quoting Moran v. Burbine*, 475 U.S. 412, 424, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986)).

We note that in *Seibert*, only that portion of the interrogation following the warning was at issue. The Court presumed that the portion **prior to the warning was inadmissible**. In this case, both the oral and written statements obtained prior to the *Miranda* warning were improperly admitted. Nothing of consequence transpired after the *Miranda* warning was finally given.

Miranda addressed the issue of mid-interrogation warnings as follows:

> Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the ***compelling influence of the interrogation finally forced him to do so***. It is inconsistent with any notion of a voluntary relinquishment of the privilege.

Miranda at 476. (Emphasis added.)

Both the letter and spirit of *Miranda* have been violated in this case. *Miranda* is the leading case in our jurisprudence mandating police compliance with the Fifth Amendment right against self-incrimination, an amendment borne of our Founders' awareness of centuries of torture, intimidation, and coercion – from the rack of the Spanish Inquisition to the guillotine of the French Revolution. Our Fifth Amendment is viable and potent thanks to *Miranda*; it has, however, become frighteningly fragile as we diminish its primacy by constructions of case law not warranted, intended, or condoned by *Miranda*. This case highlights the importance of returning to our Constitutional sources and of re-affirming their lasting relevance when they have become ignored, diminished, or abused. Therefore, we hold that the court clearly erred in denying Senseman's motion to suppress his statement. We reverse and remand for a new trial based on this error.

Only one of Senseman's remaining arguments is not rendered moot by our order of a new trial. He contends that it was error for the trial court to deny his motion for separate trials on the murder and criminal abuse charges.

Kentucky Rule[s] of Criminal Procedure (RCr) 6.18 allows for multiple offenses to be charged in one indictment "if the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan." RCr 9.16 allows the offenses to be tried separately if it would be prejudicial to the defendant to try them together. If evidence used in a trial for one of the offenses would be admissible in a trial for another offense, then "joinder of offenses generally will not be prejudicial." *Cohron v. Commonwealth*, 306 S.W.3d 489, 493 (Ky. 2010) (footnote omitted). On appeal, we may only reverse if the court's denial of a motion for separate trials establishes that "a clear abuse of discretion and prejudice to the defendant is positively shown." *Spencer v. Commonwealth*, 554 S.W.2d 355, 357 (Ky. 1977).

In this case, the offenses of murder and criminal abuse stem from injuries that possibly took place within a short period of time. Chloe was only two months of age, and most of the injuries appeared to have occurred within the final two weeks of her life. The offenses were also related in character – physical injury to an infant. The same witnesses would have had to testify in both trials, and the testimony would have been repetitive.

It is appropriate to consider judicial economy when faced with joinder issues. *Cohron v. Commonwealth*, 306 S.W.3d at 494. We conclude that the trial

court did not abuse its discretion and that joinder of the offenses did not prejudice Senseman. Therefore, we affirm the trial court in its denial of Senseman's motion for separate trials.

To recapitulate, we hold that Senseman's Fifth Amendment rights were violated by the denial of his motion to suppress his statement contrary to the strictures of *Miranda.* We reverse his conviction and remand for a new trial with instructions that the trial court suppress the statement of July 13, 2009.

LAMBERT, SENIOR JUDGE, CONCURS.

MOORE, JUDGE, DISSENTS IN PART AND FILES SEPARATE OPINION.

MOORE, JUDGE, DISSENTING IN PART: Respectfully, I must dissent to that part of the majority's opinion ordering a new trial based upon the majority's finding that Senseman was in custody prior to being read his *Miranda* rights. The Kentucky Supreme Court has noted:

> It has been held by the United States Supreme Court that *Miranda* warnings are only required when the suspect being questioned is "in custody." Custodial interrogation has been defined as questioning initiated by law enforcement after a person has been taken into custody or otherwise deprived of freedom of action in any significant way. *Miranda* warnings are required only where there has been such a restriction on the freedom of an individual as to render him in custody. The inquiry for making a custodial determination is whether the person was under formal arrest or whether there was a restraint of his freedom or whether there was a restraint on freedom of movement to the degree associated with formal arrest. Custody does not occur until police, by some form of physical force or show of authority, have

> restrained the liberty of an individual. The test is whether, considering the surrounding circumstances, a reasonable person would have believed he or she was free to leave. Some of the factors that demonstrate a seizure or custody have occurred 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.

Commonwealth v. Lucas, 195 S.W.3d 403, 405 (Ky. 2006) (citations omitted). The Court has also stated that

> [o]ther factors which have been used to determine custody for *Miranda* purposes include: (1) the purpose of the questioning; (2) whether the place of the questioning was hostile or coercive; (3) the length of the questioning; and (4) other indicia of custody such as whether the suspect was informed at the time that the questioning was voluntary or that the suspect was free to leave or to request the officers to do so, whether the suspect possessed unrestrained freedom of movement during questioning, and whether the suspect initiated contact with the police or voluntarily admitted the officers into the residence and acquiesced to their requests to answer some questions.

Smith v. Commonwealth, 312 S.W.3d 353, 358-59 (Ky. 2010) (citing *United States v. Salvo*, 133 F.3d 943, 950 (6th Cir. 1998)).

Based upon the foregoing, I do not believe that Senseman was in custody before he was read his *Miranda* rights: Senseman voluntarily drove his own vehicle to the Sheriff's Department; he was not told that he could not leave; his freedom was not restrained in any way; and Officer Wilson repeatedly told Senseman that he thought Senseman was a good and loving father and that he thought Chloe's death was an accident. Additionally, although the majority noted

that the *Salvo* case set forth the four factors quoted above in the *Smith* case for determining whether a defendant was in custody, the majority only analyzed the first two *Salvo* factors before deciding that Senseman was in custody.

I agree that the first factor leans in favor of an "in custody" finding because the purpose of the questioning appears to have been to discern the cause of Chloe's injuries. However, I believe that the remaining factors weigh in favor of finding that Senseman was not in custody prior to the *Miranda* warnings.

Regarding the second *Salvo* factor, the questioning in this case occurred at the Sheriff's Department. But, the environment there was not necessarily hostile or coercive. As previously noted, Senseman drove himself to the Sheriff's Department; he was not restrained in any way; he was left alone in the interview room more than once; the officers never asserted any authority over him or threatened to use physical force on him; and Senseman never requested to leave or to terminate the interview, nor did the officers block him from doing so. *See Fugett v. Commonwealth*, 250 S.W.3d 604, 616-18 (Ky. 2008) (discussing how facts such as these suggest that the environment was not coercive). Furthermore, the mere fact that the questioning occurred at the Sheriff's Department does not require Senseman to have been provided his *Miranda* rights before the questioning. *See id.* at 618. Moreover, Officer Wilson repeatedly told Senseman that he thought Senseman was a good and loving father and that Chloe's death was an accident. Therefore, the environment during questioning was not hostile or coercive.

The majority does not discuss the third *Salvo* factor concerning the length of the questioning, but the circuit court found that the *Miranda* warnings were read to Senseman after only about sixty minutes of questioning, which is not an inordinate amount of time. Moreover, regarding the fourth "other indicia of custody" factor from *Salvo*, I reiterate that Senseman voluntarily drove himself to the Sheriff's Department and voluntarily answered Officer Wilson's questions. His freedom of movement was not restrained during that time period. Therefore, it is my opinion that Senseman was not "in custody" prior to the time he was read the *Miranda* warnings.

Accordingly, I believe that Senseman's recorded statement was admissible. I would affirm the trial court's judgment in its entirety.

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