RENDERED: June 5, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 97-CA-0412-MR

JAMES E. LITTLE — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 96-CR-940

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

* * * * * * * *

BEFORE: GUDGEL, CHIEF JUDGE; GARDNER and SCHRODER, Judges.

GARDNER, JUDGE: James Little (Little) appeals from his conviction in Jefferson Circuit Court for theft by unlawful taking of property valued over $300. On appeal, he maintains that an oral incriminating statement he made to a police officer should have been suppressed and that evidence regarding the general practice of police officers' roles in settlement discussions in Jefferson District Court should have been admitted. This Court affirms the circuit court's judgment.

Little and a companion allegedly took a leather coat from a Louisville J. C. Penney's store without paying in January 1996. Little was arrested and made his first appearance in Jefferson

District Court on February 7, 1996. His request for a public defender apparently was denied at that time, and the case ultimately was passed until March 4, 1996.[1] Little on that date requested a continuance in order to hire an attorney. Little apparently proceeded pro se and waived the case to the grand jury.

In April 1996, Little was indicted on charges of theft by unlawful taking of property valued at $300 or more and first-degree persistent felony offender (PFO I). In September 1996, Little moved to suppress out-of-court and an in-court identifications made by Pearson. The court suppressed the out-of-court identification by Pearson but found there had been no in-court identification. The Commonwealth moved the circuit court to reconsider its ruling. In an affidavit accompanying this motion, the Commonwealth maintained that Pearson was capable of identifying Little as a result of an encounter between Little and Person outside the district courtroom on March 4, 1996. Apparently for the first time, Pearson claimed that during a conversation between the two, Little spontaneously and voluntarily stated that he had taken the coat.

Little through counsel moved the circuit court to preclude introduction of Little's statement to Pearson primarily because of the Commonwealth's alleged failure to earlier comply

[1]On that day, Little was waiting in district court when Officer Richard Pearson (Pearson), the off-duty police office who was working at Penney's on the night of the alleged theft, arrived. Little followed Pearson out of the courtroom and the two subsequently conversed. Pearson later claimed that Little made an incriminating statement to him. This conversation and resulting statement were the subject of a suppression motion.

with discovery orders. Little in a separate motion asked the court to suppress his statement to Pearson based upon a violation of his sixth amendment rights as well as other grounds. In orders of December 20, 1996, the circuit court denied Little's motions regarding his statement to Pearson. In January 1997, Little entered a conditional guilty plea to the theft by unlawful taking of property valued over $300. Pursuant to an agreement with the Commonwealth, the PFO I charge was dismissed. Little received a one year sentence on the theft charge, with the sentence to run consecutively with a two year sentence that Little was serving on a separate charge. Little reserved the right to appeal the suppression issue, and has now brought this appeal.

Little argues to this Court that his oral incriminating statement to Pearson was obtained in violation of his right to counsel pursuant to the Sixth Amendment to the United States Constitution and Section Eleven of the Kentucky Constitution. Specifically, he maintains that he was unrepresented when he spoke with Pearson outside the courtroom and that he perceived the conversation as a settlement discussion. He maintains his rights were violated, and thus any incriminating statements should be suppressed. We have carefully reviewed the record and the applicable law and have found no error by the trial court.

The right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been instituted against him or her. Maine v. Moulton, 474 U.S. 159, 106

S.Ct. 477, 484, 88 L.Ed.2d 481 (1985), quoting Brewer v. Williams, 430 U.S. 387, 398, 97 S.Ct. 1232, 1239, 51 L.Ed.2d 424 (1977). See also Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 1202, 12 L.Ed.2d 246 (1964). The Sixth Amendment guarantees the accused after the initiation of formal charges the right to rely on counsel as a medium between him or her and the state. Maine v. Moulton, 106 S.Ct. at 487. See also Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404, 1408, 89 L.Ed.2d 631 (1986). This guarantee includes the state's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right. Maine v. Moulton, 106 S.Ct. at 487. The Sixth Amendment is not violated when by luck or happenstance, the state obtains incriminating statements from the accused after the right to counsel has attached. Id. The knowing exploitation by the state of an opportunity to confront the accused without counsel is as much a breach of the state's obligation not to circumvent the right to assistance of counsel as is the intentional creation of such an opportunity. Id. The state has the burden of establishing a valid waiver. Michigan v. Jackson, 106 S.Ct. at 1409. If police initiate interrogation after a defendant's assertion at an arraignment or similar proceeding of the right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid. Id. After the sixth amendment right to counsel attaches and is invoked, any statements obtained from the accused during subsequent police initiated custodial questioning regarding the charge at issue are inadmissible.

Linehan v. Commonwealth, Ky., 878 S.W.2d 8, 10 (1994), quoting McNeil v. Wisconsin, 501 U.S. 171, 179, 111 S.Ct. 2204, 2209, 115 L.Ed.2d 158, 169 (1991). Whether a valid waiver of the right occurred and thus, whether evidence should be suppressed depends upon the totality of the circumstances. Haynes v. Commonwealth, Ky., 657 S.W.2d 948, 951 (1983), quoting Edwards v. Arizona, 451 U.S. 477, 485, n.9, 101 S.Ct. 1880, 1885, n.9, 68 L.Ed.2d 378 (1981). Generally, a trial court's ruling in suppression matters is conclusive if supported by substantial evidence. Canler v. Commonwealth, Ky., 870 S.W.2d 219, 221 (1994); Crawford v. Commonwealth, Ky., 824 S.W.2d 847, 849 (1992).

In the case at bar, the record reveals that the trial court correctly decided not to suppress Little's statement to Pearson. On the day of the encounter between Pearson and Little, Little followed Pearson out of the courtroom, and Little initiated the conversation. Little asked whether the case could be taken care of that day. Little suddenly and without questioning from Pearson told Pearson that he had indeed taken the coat from Penney's. Pearson asked Little whether he had counsel to which he replied negatively. Pearson apparently told Little that he did not mind if the case was taken care of that day, but they would have to check with the prosecutor. He told Little that he did not think the court would allow the case to be dealt with that morning, because Little had no counsel. Pearson later did ask Little if he knew the whereabouts of the woman that had entered the Penney's store with him. Little's statement regarding the coat was clearly

made voluntarily without coaxing from Pearson. While Pearson could have handled the situation differently, we do not believe his actions could have been perceived as settlement negotiations by Little. The factual scenario in the instant case is fundamentally different from those in Michigan v. Jackson, supra; Maine v. Moulton, supra; Massiah v. United States, supra, and other cases cited by appellants.[2]

Little finally contends that the circuit court committed error by denying defense counsel's request to call an attorney to testify about plea bargaining practices in Jefferson District Court. Counsel sought to demonstrate that Little's incriminating statement to Pearson was obtained in violation of Kentucky Rule of Evidence (KRE) 410. Little's counsel below attempted to introduce the testimony of Mr. Neal, an attorney, regarding the practice by police officers in Jefferson District Court of talking to defendants attempting to settle cases with them and then advising the prosecutor about an agreement. The circuit court denied the

[2]Little argues secondarily in his brief that the Jefferson District Court erred by not appointing counsel to represent him prior to his exchange with Pearson. The Commonwealth argues that this argument was not preserved adequately below, and should not be considered now by this Court. We decline to address the merits of this issue for two reasons. First, Little has failed to show that this issue was adequately raised below during his suppression motion. See Skaggs v. Assad, By and Through Assad, Ky., 712 S.W.2d 947 (1986), Loew v. Allen, Ky., 419 S.W.2d 734 (1967); Elwell v. Stone, Ky. App., 799 S.W.2d 46 (1990). See also Stuart v. Capital Enterprise Ins. Co., Ky. App., 743 S.W.2d 856 (1987). Second, because we have concluded that Little's statements to Pearson were made voluntarily and did not resemble those in cases cited by Little, it is not necessary to address the merits of this issue.

defense's request to introduce this evidence. This Court has uncovered no error.

A trial court must determine whether the proffered evidence is relevant and whether the prejudice resulting from introducing the evidence outweighs the probativeness. Partin v. Commonwealth, Ky., 918 S.W.2d 219, 222 (1996); KRE 401, 403. A trial court's decision to exclude evidence will not be disturbed absent an abuse of discretion. Partin v. Commonwealth, 918 S.W.2d at 222. See also Glens Falls Ins. Co. v. Ogden, Ky., 310 S.W.2d 547 (1958); Transit Authority of River City [TARC] v. Vinson, Ky. App., 703 S.W.2d 482 (1985).

In the case at bar, this Court has found no abuse of discretion by the circuit court in excluding the evidence offered by the defense. Neal was not familiar with the specific facts of Little's case. He was not privy to the conversation between Little and Pearson. He simply was to testify about the general practices in district court regarding police officers discussing possible settlements with defendants. The potential relevance and probativeness of the evidence appeared marginal. The evidence also did not seem to have much bearing on the applicability of KRE 410. The cases cited by Little on appeal are distinguishable from the case at bar. We decline to disturb the trial court's ruling.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Frank W. Heft, Jr.
Daniel T. Goyette
Louisville, Kentucky

BRIEF FOR APPELLEE:

A. B. Chandler III
Attorney General

Dana M. Todd
Assistant Attorney General
Frankfort, Kentucky