

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001606-MR

ANTHONY R. SAYLOR

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE LEWIS HOPPER, JUDGE
ACTION NOS. 96-CR-00125 AND 98-CR-00088

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: EMBERTON, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a judgment of the Laurel Circuit Court convicting appellant of various offenses.

Appellant argues that he suffered substantial prejudice and was denied his constitutional rights to a fair trial and due process of law when the trial court overruled his motion for a continuance. Appellant further argues that the trial court erred when it admitted appellant's confession at trial without holding a suppression hearing. We disagree with appellant's arguments and affirm the decision of the trial court.

The facts are as follows: On June 16, 1996, appellant, Anthony Saylor, was observed by London police officer Derek House

driving a car with the headlights off. Officer House followed the car, and appellant turned the headlights on shortly thereafter. The officer observed the car weaving, and activated his siren and attempted to pull the car over. Appellant did not pull over, but continued to drive. Appellant turned into an open field and began doing "donuts" with his car. The officer, in his cruiser, followed appellant into the field. Appellant stopped doing "donuts" and came to a stop facing the officer's cruiser. Appellant then hit the cruiser with his car. The officer exited the cruiser, and as he approached appellant's car, appellant moved the car, striking the officer, and breaking his ankle. Appellant then drove away. The injured officer got back in the cruiser and pursued appellant as other police units arrived on the scene. A witness to the incident informed the police of appellant's whereabouts. Appellant was then located and apprehended. At the police station, appellant was read and invoked his Miranda rights. Subsequently, appellant asked an officer who it was he was supposed to have hit. When told that it was Officer House, appellant stated that if he had known it was this officer, he wouldn't have done it. This statement was admitted at trial over appellant's objection.

Appellant was arrested on June 16, 1996. The trial, first set for November 20, 1996, was repeatedly delayed, due in part to illness of appointed defense counsel. The trial court appointed new counsel for appellant on May 6, 1998 and set the trial date for May 12, 1998. On the morning of the trial, new counsel moved for a continuance, which was denied by the trial court. Appellant was tried by jury on May 12, 1998 and convicted

of one count of second-degree assault, one count of second-degree wanton endangerment, one count of driving under the influence - first offense, and one count of being a first-degree persistent felony offender. Appellant was sentenced to 14 years' imprisonment.

Appellant's first contention is that the trial court erred in denying his motion for a continuance. Appellant asserts that his new counsel did not have sufficient time to prepare for trial, causing appellant to suffer substantial prejudice and denying him his right to a fair trial and due process of law.

Pursuant to RCr 9.04, a trial court, upon motion and sufficient cause shown by either party, may grant a postponement of the trial. A motion for a continuance is directed to the sound discretion of the trial court and the action of the court will not be disturbed on appeal absent an abuse of that discretion. Eldred v Commonwealth, Ky., 906 S.W.2d 694 (1995), cert. denied, 516 U.S. 1154, 116 S. Ct. 1034, 134 L. Ed. 2d 111 (1996); Snodgrass v. Commonwealth, Ky., 814 S.W.2d 579 (1991); Rosenzweig v. Commonwealth, Ky. App., 705 S.W.2d 956 (1986).

The Kentucky Supreme Court has set forth the following factors which a trial court should consider in exercising its discretion to grant or deny a continuance: 1) length of delay; 2) previous continuances; 3) inconvenience to litigants, witnesses, counsel, and the court; 4) whether the delay is purposeful or is caused by the accused; 5) availability of other competent counsel; 6) complexity of the case; and 6) whether denying the continuance will lead to identifiable prejudice. Snodgrass, 814 S.W.2d at 581.

From our review of the record, we cannot say the trial court abused its discretion in denying appellant's motion for a continuance. Appellant was appointed new counsel at 9:00 a.m. on May 6, 1998, six days before the trial date, May 12, 1998. The Kentucky Supreme Court has found less time to be adequate for preparation for trial. Harris v. Commonwealth, Ky., 869 S.W.2d 32 (1993). In Harris, appellant was appointed new counsel five days before trial. New counsel immediately moved for a continuance, and the trial court denied the motion, noting that new counsel would have four days in which to confer with the defendant and review the case, with benefit of materials accumulated by withdrawing counsel. Harris, 869 S.W.2d at 34. On the day of the trial, the motion was renewed, and was again denied. Id. The Court held that the trial court did not abuse its discretion, as the defense did not demonstrate sufficient cause to require a continuance. Id.

As in Harris, appellant asserts no reasons for the continuance other than a general statement that his counsel had inadequate time to prepare. In Harris, the Court found four days adequate time for preparation. Appellant's counsel had six. Appellant's trial had been repeatedly delayed, and appellant did not move for a continuance until the morning of the trial. Appellant's case was not particularly complex. Appellant provided no examples of identifiable prejudice, nor did he specify how the continuance would have aided in the preparation of his defense. For the above reasons, we believe the trial court did not abuse its discretion in denying appellant's motion for a continuance.

Appellant's second argument is that the trial court erred when it overruled appellant's objection to the introduction of his confession at trial without holding a suppression hearing on the issue. At the police station, after having been read and invoking his Miranda rights, appellant asked Officer Doug Gregory, "Who was it I was supposed to have run over?" After being told it was Officer Derek House, appellant replied, "I know Derek, when he worked at the jail and I was an inmate there. I like Derek. If I'd knowed it was Derek I wouldn't have done it." Appellant objected at trial when the prosecutor sought to introduce these statements. The trial court overruled the objection and did not conduct a suppression hearing.

RCr 9.78 states:

If at any time before trial a defendant moves to suppress, or during trial makes timely objection to the admission of evidence consisting of (a) a confession or other incriminating statements alleged to have been made by the defendant to police authorities . . . the trial court shall conduct an evidentiary hearing outside the presence of the jury

RCr 9.78 required the trial court to conduct an evidentiary hearing. However, the Kentucky Supreme Court has held the failure to hold an evidentiary hearing to be harmless error where the facts clearly establish that the evidence was admissible. Moore v. Commonwealth, Ky., 634 S.W.2d 426, 433 (1982).

Appellant's statement was admissible. The facts show that appellant initiated the discussion with the police and his statements were voluntary. Appellant offered no evidence to the contrary other than the fact that he made the statements after

invoking his rights. The Kentucky Supreme Court has held that volunteered statements of any kind are not barred by the Fifth Amendment, and, thus, they are admissible. Campbell v. Commonwealth, Ky., 732 S.W.2d 878, 881 (1987); Miranda v. United States, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Furthermore, the Court has stated when an accused initiates a conversation with the police, nothing in the Fifth and Fourteenth Amendments prohibits the police from listening to the voluntary statement and later using it at trial. Campbell, 732 S.W.2d at 881; Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981).

The facts clearly establish that the statement made by appellant was admissible at trial, and therefore its admission over appellant's objection resulted in no prejudice to appellant's rights. Applying the Court's holding in Moore, the failure of the trial court to conduct a suppression hearing was, therefore, harmless error.

Appellant's final argument is that the cumulative effect of the preceding alleged errors requires that the conviction be set aside. As we adjudge there were no errors by the trial court, other than harmless error, this argument is moot.

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

ALL CONCUR.

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