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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court Of Appeals

NO. 1998-CA-001753-MR

JEREMY BRADY — APPELLANT

v.

APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN HAYDEN, JUDGE
ACTION NO. 98-CR-00050

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: DYCHE, GUIDUGLI AND JOHNSON, JUDGES.

GUIDUGLI, JUDGE. Jeremy Brady (Brady) appeals the judgment of conviction and sentence entered by the Henderson Circuit Court on July 7, 1998. Brady was found guilty of the offense of second-degree unlawful transaction with a minor (UTWM) (KRS 530.065) following a jury trial and sentenced to one (1) year imprisonment. We affirm.

On September 26, 1997, Henderson City Police Officer Jason Short (Officer Short) observed appellant and another individual, later identified as Billy Rigdon (Rigdon), walking across private property of a local Henderson business. As the

two were walking the officer observed Rigdon place something in a meter box located on the property. Officer Short stopped the two to investigate and look inside the meter box, wherein he found a small baggie of marijuana. Both Brady, age 21, and his friend, Rigdon, age 16, were taken into custody and transported to the police station. At the station, Rigdon waived his Miranda rights[1] and in the presence of his mother, stated that Brady had given him the marijuana and that they had smoked marijuana together at Brady's house approximately thirty minutes earlier. Based upon these facts, Brady was indicted by the Henderson County Grand Jury on February 3, 1998, on charges of UTWM, second degree (KRS 30.065) and trafficking in marijuana, less than eight counts (KRS 218A.1421)). The trafficking in marijuana charge was subsequently dismissed on motion of the Commonwealth.

At the jury trial on June 10,1998, Rigdon changed his story and denied he and Brady had smoked marijuana together or that Brady had given him the marijuana he had placed in the meter box. Brady testified that he knew Rigdon to be a juvenile, but denied he provided Rigdon with the marijuana and further denied that they had smoked marijuana earlier. Officer Short testified as to what he observed at the scene and what statements were made by the two at the police station. Brady was found guilty and sentenced to one (1) year in prison. This appeal followed.

On appeal Brady raises only one issue. Brady alleges that the trial court erred by not granting a mistrial when

[1]Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Officer Short, in response to a question from the Commonwealth, commented that "[Brady] refused to answer any question." Although the officer did make the statement objected to, that is not the complete picture. During direct testimony, the following exchange took place:

> Q (C.A.) Did you inform Mr. Brady what subject matter you were going to ask him questions about? What was the purpose of him being at the station, did you do that?
>
> A (P.O.) Yes, sir.
>
> Q (C.A.) What basically did you tell him?
>
> A (P.O.) I advised him of his Miranda rights as well, [pause]...and asked him questions about the substances, [pause]... and he refused to answer any questions, he said he didn't know what we were talking about.

At this point, defense counsel objected and the attorneys approached the bench. Counsel for Brady indicated that the part of the testimony that "he [Brady] refused to answer any questions" should not have come into evidence. The Commonwealth agreed and indicated he didn't know where that came from because Brady had, in fact, given a statement to police. Both counsel agreed that Brady had given a statement and they were surprised by the officer's response. The trial judge asked if defense counsel wanted the court to admonish the jury. Counsel then requested a mistrial and stated that an admonition would not "cure" the situation. The trial court overruled the motion for a mistrial and again requested of defense counsel if she wanted him to give an admonition to the jury. Again, defense counsel declined the court's suggestion of an admonition stating that

such would not "cure" the problem but only make it worse. Thereafter, the court was again made aware that Brady had, in fact, given a statement to Officer Short. The court then suggested the Commonwealth specifically ask the officer if Brady did make a statement to him.

When the Commonwealth resumed questioning the officer, the following exchange occurred shortly thereafter:

> Q (C.A.) During the time you were with him at the police station, did he [Brady] made any statement to you with regard to the subject matter of the marijuana?
>
> A (P.O.) Yes, sir, he did make a statement.
>
> Q (C.A.) What was the statement he made to you on the subject of marijuana?
>
> A (P.O.) That he didn't know what we were talking about.

That was the last question the Commonwealth asked the police officer on direct examination. Thereafter, on cross-examination, the following exchange occurred between counsel for Brady and the officer as it related to the interview with Brady at the police station:

> Q (D.A.) He [Brady] told you he didn't know anything about the marijuana in the pole.
>
> A (P.O.) No, he didn't say that. He said he didn't know what we were talking about.
>
> Q (D.A.) Did you ask him, "what do you know about the marijuana in the pole?"
>
> A (P.O.) I probably did.
>
> Q (D.A.) And he said, "I don't know what you are talking about." Right?

A (P.O.) That is the only statement he would make to me, and I don't know if we went any further after that.

Appellant alleges that he was "clearly penalized by evidential use of his refusal to submit to police interrogation after [being read] his Miranda warnings." We do not agree. From the record it is clear that, despite the officer's initial statement that Brady "refused to answer any question," he quickly added, "He [Brady] said he didn't know what we were talking about." Later in his testimony, on two separate occasions, the police officer clearly pointed out to the jury that Brady had made a statement in response to his questions about the marijuana. On each occasion the officer repeated that Brady said "he didn't know what we [the police] were talking about." Even the defense attorney in cross-examining Officer Short used the word statement in describing Brady's responses to the police interview.

The cases of Hall v. Commonwealth, Ky., 826 S.W.2d 321 (1993), and Renfro v. Commonwealth, Ky., 893 S.W.2d 795 (1995), cited by appellant, deal with whether or not the alleged improper comment on the defendant's silence can be viewed as harmless error. The case of Green v. Commonwealth, Ky., 815 S.W.2d 398 (1991), cited by the Commonwealth, actually deals with the situation of a defendant's right to remain silent. In Green, the Kentucky Supreme Court stated:

> The giving of a Miranda warning does not suddenly endow a defendant with a new constitutional right. The right to remain silent exists whether or not the warning has been or is ever given. The warning is required not to activate the right secured, but to enable citizens to knowingly exercise or waive it. Recognizing that the right to

> remain silent does not truly exist if one may be penalized for its exercise, the Supreme Court of the United States has held, "The prosecution may not therefore use at trial the fact that [the accused] stood mute or claimed his privilege in the face of an accusation." Miranda, 86 S.Ct. At 1624 n. 37 (1966). Kentucky authority is fully in accord. Jackson v. Commonwealth, Ky. App., 717 S.W.2d 511 (1986); Salisbury v. Commonwealth, Ky. App., 556 S.W.2d 922 (1977); and Bradley v. Commonwealth, Ky., 261 S.W.2d 642 (1953). This principle is manifestly logical in view of the ambiguous circumstances often surrounding an arrest. Whether an innocent or guilty person feels the need to speak or remain silent at the time of arrest depends on a vast array of confusing factors including unique personal characteristics of the accused. The Supreme Court recognized this in United States v. Hale, 422 U.S. 171, 95 S.Ct. 2133, 45 Led.2d 99 (1975), and concluded that it is difficult or impossible to identify the reason one may chose to remain silent at the time of his arrest and that no reliable conclusion could be drawn therefrom.

Green, Id. at 400.

However, in Green, the Supreme Court, after determining that the comments by the prosecutor as to the defendant's silence amounted to error, proceeded to affirm the case because the error was harmless error.

Similarly, as stated above, the issue raised in the cases of Hall, supra, and Renfro, supra, cited by Brady, is whether or not the error was harmless or not. In Renfro, the Court set forth the standard for harmless error as follows:

> Although the trial court improperly allowed testimony by the expert as to the causation of the accident, the error was harmless. The test for harmless error is whether there is any reasonable possibility that absent the error the verdict would have been different. Crane v. Commonwealth, Ky., 726 S.W.2d 302, cert. denied, 484 U.S. 834,

> 108 S.Ct. 111, 98 L.Ed.2d 70 (1987); Commonwealth v. McIntosh, Ky., 646 S.W.2d 43 (1983). An error of constitutional proportions must be shown to be harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

Renfro, supra, at 797.

In light of the minimal reference to Brady's silence, which was immediately followed by the statement actually made by Brady to the officer, and the fact that the correct statement was thereafter twice again presented to the jury (once by defense on cross-examination), we find that if, in fact, there was error, it was harmless. Therefore, we affirm the judgment and sentence entered by the Henderson Circuit Court.

ALL CONCUR.

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