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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002629-MR

JAN DUNSON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURANCE VANMETER, JUDGE
ACTION NO. 99-CR-00823

COMMONWEALTH OF KENTUCKY — APPELLEE

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

BEFORE: JOHNSON, McANULTY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a judgment of the Fayette Circuit Court convicting appellant of theft by unlawful taking over $300 and being a first-degree persistent felony offender. As the K-Mart loss prevention officers were not required to give Miranda warnings after detaining appellant, and because the trial court did not err in denying appellant's motions for a continuance and a mistrial, we affirm.

Appellant, Jan Dunson, was indicted by the Fayette County Grand Jury on August 2, 1999 for theft by unlawful taking over $300 and with being a first-degree persistent felony offender (PFO I), as a result of an incident which occurred at a

Lexington, Kentucky K-Mart on June 12, 1999. A jury trial was held on October 13, 1999. On the morning of trial, appellant moved the court to suppress statements he made when detained by K-Mart loss prevention officers, and, after a hearing, the court denied the motion.

At trial, two K-Mart loss prevention officers, Rob Baker and David Self, testified to the following version of events. Appellant was observed in the K-Mart with a Kroger cart which contained a large tote bag sold by K-Mart. Appellant was then observed going down the pantry aisle putting food items in the cart. Appellant eventually made his way to the "Garden Center" part of K-Mart, where he went behind a stack of grills. There he was observed putting the food items in trash bags. Appellant pushed the cart through the Garden Center exit, at which point the Electronic Automated Sensor was triggered. Appellant hesitated, and then continued to push the cart through the exit, at which point he was apprehended by Baker and Self.

Baker and Self testified that appellant then made a statement to the effect that someone had asked appellant to push the cart through the exit to see if the alarms were working. Baker testified that he asked appellant if "somebody in a green shirt" asked appellant to do it, to which appellant replied "it might have been, yeah." Baker testified he then told appellant that K-Mart doesn't have employees who wear green shirts, to which appellant replied that it may have been somebody else or may have been different.

Baker and Self then walked appellant back to the loss control office, where they opened the tote bag and found it full of apparel, along with some other items. After determining the value of merchandise appellant had in the cart, the police were called. Both Baker and Self testified that they only saw appellant putting the food items into the trash bags, and did not see appellant put any apparel or other items into the tote bag. Appellant did not testify, and the defense called no witnesses.

The jury was instructed on theft by unlawful taking over $300, criminal attempt to commit theft by unlawful taking over $300, theft by unlawful taking less than $300, and criminal attempt to commit theft by unlawful taking less than $300. The jury found appellant guilty of theft by unlawful taking over $300, and subsequently found him guilty of PFO I. Appellant was sentenced to five years for the theft conviction, enhanced to fifteen years by the PFO I. This appeal followed.

Appellant first argues that the trial court erred by denying his motion to suppress the statements which he made to the K-Mart loss prevention officers that someone had asked him to push the cart out, along with the statements regarding the color of the shirt that person was wearing, as he had not been given his Miranda warnings when he made the statements. Appellant argues that KRS 433.236 gives police power to store loss prevention officers, therefore, his detention by the K-Mart loss prevention officers was an authorized action by the state. Hence, appellant contends that he was "effectively taken into police custody" when the K-Mart loss prevention officers detained

him. Having been subjected to a custodial interrogation, he argues that he should have been advised of his rights against self-incrimination per Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and, as he was not, the statements should have been suppressed.

KRS 433.236, "Detention and arrest of shoplifting suspect", states:

> (1) A peace officer, security agent of a mercantile establishment, merchant or merchant's employee who has probable cause for believing that goods held for sale by the merchant have been unlawfully taken by a person may take the person into custody and detain him in a reasonable manner for a reasonable length of time, on the premises of the mercantile establishment or off the premises of the mercantile establishment, if the persons enumerated in this section are in fresh pursuit, for any or all of the following purposes:
>
> . . . .
>
> (c) To make reasonable inquiry as to whether such person has in his possession unpurchased merchandise . . .

(d) To recover or attempt to recover goods taken from the mercantile establishment by such person . . .

(e) To inform a peace officer or law enforcement agency of the detention of the person and to surrender the person to the custody of a peace officer . . .

(2) The recovery of goods taken from the mercantile establishment by the person detained or by others shall not limit the right of the persons named in subsection (1) of this section to detain such person for peace officers or otherwise accomplish the purposes of subsection (1).

(3) Any peace officer may arrest without warrant any person he has probable cause for believing has committed larceny in retail or wholesale establishments.

Jaggers v. Commonwealth, Ky., 439 S.W.2d 580 (1969), rev'd on other grounds, 403 U.S. 946, 91 S. Ct. 2282, 29 L. Ed. 2d 856 (1971), held that statements made to a person other than a law enforcement officer were not subject to Miranda protection. Cooper v. Commonwealth, Ky., 899 S.W.2d 75, 76-77 (1995); See

also, Hood v. Commonwealth, Ky., 448 S.W.2d 388 (1969) (Miranda rights do not apply to a citizen arrest.) "'State action' is required before any claim of suppression on grounds of compelled testimony will be entertained." Cooper, 899 S.W.2d at 76. Absent compelling circumstances, feelings of coercion or intimidation are insufficient to overcome the requirement of state action. Id. at 79-80.

Although the K-Mart loss prevention officers had the power to detain appellant per KRS 433.236(1), this power does not confer "law enforcement officer" status upon them, hence, per the aforementioned case law, they were not required to give Miranda warnings. Further, the record indicates that no law enforcement officials whatsoever were present when the statements were made, as appellant made them when he was first apprehended at the Garden Center, before the police had even been called. Accordingly, we conclude that appellant was not being subjected to a custodial interrogation when he made the statements, thus, no Miranda warnings were required, and the trial court did not err in admitting the statements.

Appellant next argues that the court erred in denying his motion for a continuance. Appellant contends that the continuance was needed in order to have time to sufficiently review new discovery provided by the Commonwealth on the Monday before the Wednesday, October 13, 1999, trial date. Appellant further contends that, because his appointed counsel was assigned to his case on September 15, 1999, less than a month before the

trial date, the continuance was necessary to give counsel further time to prepare.

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 7) whether denying the continuance will lead to identifiable prejudice. Snodgrass, 814 S.W.2d at 581.

With regard to the first two Snodgrass factors, appellant states that he was not asking for a long delay, and that there had been no previous continuances. With regard to the third factor, appellant did not move for a continuance until the morning of the trial, just prior to voir dire. The jurors and witnesses were present, and the attorneys were prepared for trial. Applying the fourth and fifth factors, appellant's counsel indicated that appellant felt like things were moving "a little bit quick for him", and appellant states he is not

questioning the competency of his counsel. Sixth, the case was not complex. Finally, we conclude that there was no identifiable prejudice to appellant. Although appellant does not state in his brief what the new discovery was, the videotape record indicates that it was "K-Mart summary forms", which appellant's counsel stated were not significant. The record indicates that counsel was prepared for trial. It appears that appellant wanted the continuance simply because appellant thought things were moving too quickly, as counsel had been recently assigned to the case, and because appellant himself had just received the K-Mart forms the day before the trial. As stated previously, appellant's counsel considered these forms insignificant. In light of the above analysis, we conclude that the trial court did not abuse its discretion in denying appellant's motion for a continuance.

Appellant's final argument is that the trial court erred by denying appellant's motion for a mistrial after it made statements to the jury referring to appellant's motion to suppress. When the jury returned after the suppression hearing, the court explained to the jury that ". . . what just happened is . . . . we had a quick motion about whether or not we were going to exclude certain evidence. I decided not to exclude it. . . ." Appellant moved for a mistrial on the basis of the court's comments. The court denied the motion.

Appellant contends that the court's comments left the jury with the belief that appellant was trying to hide evidence from them, thus implying that appellant was guilty. A mistrial should only be granted by the trial court if there is a manifest,

urgent, or real necessity for such action. Skaggs v. Commonwealth, Ky., 694 S.W.2d 672 (1985), cert. denied, 476 U.S. 1130, 106 S. Ct. 1998, 90 L. Ed. 2d 678 (1986). The Kentucky Supreme Court has stated:

> It is universally agreed that a mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice. The occurrence complained of must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way.

Gould v. Charlton Co., Inc., Ky., 929 S.W.2d 734, 738 (1996). The decision of a trial court whether or not to grant a mistrial will not be disturbed absent an abuse of discretion. Jones v. Commonwealth, Ky. App., 662 S.W.2d 483 (1983).

A judge "should refrain from making comments that tend to create prejudice to the litigants, the witnesses or the subject matter of the litigation." Transit Authority of River City v. Montgomery, Ky., 836 S.W.2d 413, 415 (1992). We do not believe the judge's comments caused any prejudice to appellant. The comments were for the purpose of explaining the reason for the recess to the jury. Further, the judge did not say which side wanted to exclude the evidence. Accordingly, we conclude

that the judge did not abuse his discretion in denying appellant's motion for a mistrial.

For the aforementioned reasons, the judgment of the Fayette Circuit Court is affirmed.

JOHNSON, JUDGE, CONCURS.

McANULTY, JUDGE, CONCURS IN RESULT ONLY.

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