

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2002-CA-002172-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM ALLEN CIRCUIT COURT  
HONORABLE WILLIAM R. HARRIS, JUDGE  
INDICTMENT NO. 01-CR-00068

JOSHUA W. BAILEY

APPELLEE

### OPINION

### REVERSING

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BEFORE: EMBERTON, Chief Judge; McANULTY, Judge and HUDDLESTON, Senior Judge.<sup>1</sup>

HUDDLESTON, Senior Judge: The Commonwealth of Kentucky appeals from an Allen Circuit Court order suppressing a series of incriminating statements that Bailey made on March 1, 2001, based upon its conclusion that "[b]ecause of [Josh's]

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<sup>1</sup> Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Ky. Rev. Stat. (KRS) 21.580.

substantial intellectual limitations, based upon the totality of the circumstances, his will was overborne by his limited intellect and therefore[,] the statements" were not voluntary.

Sometime prior to March 1, 2001, Detective Steve Woods spoke with Bailey while investigating an allegation of sexual abuse against a child. During their initial conversation, Bailey denied any involvement and agreed to undergo a polygraph examination. Detective Woods arranged for Bailey to be examined in Madisonville, Kentucky, a couple of weeks later. However, when Detective Woods went to Bailey's residence a couple of days prior to the date of the scheduled examination (March 1, 2001), Bailey told him that he had changed his mind and no longer wanted to take the examination at which point Detective Woods returned to his office. Approximately thirty to forty-five minutes later, Bailey called Detective Woods and agreed to go to Madisonville and take the examination.

On March 1, 2001, Bailey arrived at the Allen County Sheriff's Department at the designated time. Sheriff Bill Foster then transported Bailey to Madisonville<sup>2</sup> where John Bruner, a civilian employee of the Kentucky State Police, administered the examination to Bailey twice after explaining

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<sup>2</sup> Both parties agree that the drive from Allen County to Madisonville takes approximately two hours.

the process and informing him of his rights pursuant to Miranda v. Arizona.<sup>3</sup>

Upon being questioned regarding his rights, Bailey gave responses indicating that he did not fully comprehend their meaning. Although Sheriff Foster was not present during the examination, he witnessed Bruner inform Bailey of his rights before exiting the premises.<sup>4</sup> It is undisputed that Bailey had not incriminated himself prior to the examination.

Immediately following the examination, Bruner informed Bailey that he had failed both tests and explained the implications of negative test results to him.<sup>5</sup> Bruner then proceeded to question Bailey. Upon being confronted with the accusation that he did not tell the truth, Bailey made incriminating statements, admitting to sexual abuse of the minor victim for the first time. Bruner informed Sheriff Foster that Bailey had not performed well on the examination outside of Bailey's presence before their departure but did not elaborate.

On the ride back to Allen County, Bailey was pensive for quite awhile but ultimately asked Sheriff Foster what he

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<sup>3</sup> 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966).

<sup>4</sup> According to Sheriff Foster, Bruner goes into great detail in explaining an individual's rights.

<sup>5</sup> In the court's view, Bruner became an "accusatory cop" at that point and the examination became a non-custodial interrogation.

should do next. In response, Sheriff Foster advised Bailey that he did not know because "only you know the truth" but, "apparently, you did not do well on the polygraph" and if you have "something more to tell" then you should "get with" Detective Woods when we return to Scottsville and "get this thing straightened out" because apparently, "there's something in your mind that's still there." Sheriff Foster then radioed Detective Woods at the Sheriff's Department and, using police radio jargon, told him to stand by until they returned because he needed to meet with him.<sup>6</sup> Following a lengthy silence, Bailey volunteered that he might have "laid it on her leg," but still denied penetrating the victim as alleged.

Upon their arrival at the parking lot of the Sheriff's Department, Bailey, who was still not in custody, followed Sheriff Foster into the building without further discussion and took a seat in the lobby. Detective Woods then emerged from behind the front counter and spoke with Sheriff Foster in private. At that time, Sheriff Foster informed Detective Woods that Bailey had failed the polygraph examination, relayed the incriminating statement that Bailey made to him en route back

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<sup>6</sup> Detective Woods had called Bruner to inquire as to whether Bailey had passed the polygraph examination and learned that Bailey had failed both of the tests.

and indicated that Bailey seemed to want to talk to him. Sheriff Foster then left the premises.

After greeting him in the lobby, Detective Woods led Bailey through the "half door" and into his office. When Bailey confirmed that he wanted to talk with Detective Woods, he read Bailey his rights directly from the "Miranda rights form" used by the Allen County Sheriff's Department and Bailey signed a waiver of those rights.<sup>7</sup> Detective Woods then obtained Bailey's consent to record the interview on audio tape. Although Detective Woods read Bailey's rights to him directly from the form again once the tape began, he failed to read the waiver portion of the form a second time. Based on his experience, Detective Woods viewed Bailey's responses and demeanor as appropriate given the circumstances. During the interview,<sup>8</sup> Bailey made incriminating statements, as a result of which Detective Woods placed Bailey under arrest, charged him with first-degree sexual abuse and took him into custody.

In an indictment handed up on June 12, 2001, the Allen County Grand Jury charged that "on or about October 8th 2000, in Allen County, Kentucky, [Bailey] committed the offense of First-

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<sup>7</sup> Detective Woods admitted knowing that Bailey could not read.

<sup>8</sup> Detective Woods conducted the interview while sitting in his desk chair with Bailey sitting across from him in the visitor's chair.

degree Sexual Abuse by having sexual contact with a minor less than 12 years of age, . . . ." On June 12, 2002, Bailey filed a "motion to suppress and to schedule hearing" seeking to suppress "any and all statements, oral or written, or recorded by audiotape, made by Joshua Bailey without [the] benefit of having counsel present." As grounds for his motion, Bailey asserted that he has "an extremely diminished mental capacity, was a special education student in the Allen County School System, and functions on a 1st grade level." Consequently, "there is absolutely no way in which [he] understood his Miranda rights on or about March 1, 2001, or would have understood the implications of statements made by him while traveling to and from Madisonville, Kentucky for purposes of undergoing a polygraph examination."

At the suppression hearing on September 20, 2002, the testimony of Sheriff Foster and Detective Woods was consistent with the foregoing factual summary. Bailey presented expert testimony from Patricia Guthrie who was formerly employed as the Assistant Superintendent for Student Services of Warren County Schools.<sup>9</sup> According to her report, Bailey has an IQ of 50 and is

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<sup>9</sup> Guthrie has a B.A. in Social Studies/English from the George Peabody College for Teachers, an M.A. in Education/Counseling from Western Kentucky University and an Ed.S. from WKU in Education/Psychology. She currently works as a consultant.

properly classified as "moderately mentally disabled." His overall functioning is "equal to or better than .07 percent of individuals his age" and his achievement test scores "indicate that for the most part, he is working academically at a first grade level." With respect to adaptive behavior, Bailey was rated "as being only slightly deficient in all measured areas compared to age peers." Based on her experience and professional judgment, Guthrie concluded that Bailey "does not have the mental capacity to understand the Miranda [r]ights, nor does he have the personal reasoning and social judgment required to make an informed decision of this nature."

Prior to the hearing, the court viewed the video tape of the polygraph examination and listened to the audio tape of the confession. In an order entered on October 9, 2002, the court made the following findings of fact regarding whether the confessions at issue were voluntary:<sup>10</sup>

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<sup>10</sup> Before addressing the coercion issue, the court found that Bailey was not in custody and his "freedom of movement was not curtailed" at any point prior to his arrest on the day in question and, therefore, Miranda did not apply. As Bailey has not appealed from this ruling, we need not address the Miranda issue. "Thus, for purposes of this appeal, [Bailey's] understanding of his Miranda rights is relevant only as part of the totality of the circumstances relevant to questions of due process." Rogers v. Commonwealth, Ky., 86 S.W.3d 29, 35 (2002).

In addition to the court's written findings of fact, we have also viewed the video tape of the hearing including the more detailed verbal findings made by the court at its conclusion.

1. Josh Bailey is a young man of 19 years of age with no prior criminal experience who is substantially limited. His limited intellectual functioning [is] borne out by the Court's observation of his behavior in court and on the polygraph video, and is confirmed by the testimony of Mrs. Pat Guthrie and the contents of his psychological evaluation and school records. Josh Bailey functions essentially at the level of a first grade child who cannot read or write.

2. At no time on March 1, 2001, was Josh Bailey subjected to any kind of physical duress or coercion, there was no deprivation of food or water, there were no threats of physical harm, there was no sleep deprivation, and his limited capacity, whatever that might be, was not influenced by any drugs or alcohol.

3. During preliminary conversations between the polygraph examiner and Josh Bailey, he consistently denied touching the young girl sexually. When explaining how the entire process of the exam would work[,] Josh's heart [rate would increase], his palms would sweat, and his muscles would clench. When confronted with the results and the accusation by the examiner that Josh did not tell the truth, the



polygraph exam change[d] to an accusatory police interrogation.

4. When confronted with the accusation by an authority figure coupled with limited intellect, Josh Bailey began to adapt his behavior in conformity with the testimony by Mrs. Guthrie as to how someone with limited intellectual functioning behaves in such situations.

5. The entire process: the trip to and from Madisonville, Kentucky, the polygraph examination and accusatory interrogation, and the interrogation by Det. Woods, was coercive given [Bailey's] limited intellectual capacity.

Based on these findings, the court concluded that all of the incriminating statements Bailey made on March 1, 2001, were coerced and therefore involuntary, acknowledging that the facts presented a "close question." In a motion to reconsider filed on September 26, 2002, the Commonwealth argued that the court had erred by applying a subjective standard in reaching this determination, citing the "objective standard" set forth in Henson v. Commonwealth<sup>11</sup> in support of its position. Further, "whether [Bailey] actually confessed, rather than just adapting

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<sup>11</sup> Ky., 20 S.W.3d 466 (1999).

his answers to please the police, goes to the weight of the evidence instead of its admissibility." In its view, application of an objective standard would result in a "different decision on the coercion factor," leaving Bailey's limited intellect as the remaining factor upon which the court relied and "mental condition alone is not enough of an obstacle" to prevent "the Commonwealth from meeting its burden considering the totality of the circumstances."

Having considered the Commonwealth's motion and Bailey's response, the court remained convinced that it had "properly applied the law" in both its verbal ruling and written order and, accordingly, denied the motion in an order entered on October 9, 2002. On appeal, the Commonwealth's arguments echo those made below.

Our standard when reviewing a circuit court decision on a suppression motion following a hearing is twofold. First, "the factual findings of the circuit court are conclusive if they are supported by substantial evidence."<sup>12</sup> "Substantial evidence is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people. 'It is within the province of the fact-finder to determine the credibility of witnesses and the weight to be

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<sup>12</sup> Commonwealth v. Whitmore, Ky., 92 S.W.3d 76, 79 (2002); Ky. R. Crim. P. (RCr) 9.78.

given the evidence.'"<sup>13</sup> Second, "when the findings of fact are supported by substantial evidence, the question then becomes whether the rule of law as applied to the established facts is violated."<sup>14</sup>

However, the "issue of voluntariness is a mixed question of law and fact."<sup>15</sup> When the trial court is faced with conflicting testimony regarding whether a confession is voluntary, "its determination, including its evaluation of credibility, if supported by substantial evidence, is conclusive."<sup>16</sup> Here, the testimony and reports of the parties' respective witnesses, if believed, as well as the video tape of the polygraph examination and the audio tape of Bailey's confession, constitute substantial evidence to support the court's factual findings. Because the Commonwealth is arguing that the court misapplied the law to those facts, our review is de novo.<sup>17</sup>

To determine whether a confession is the result of coercion, one must look at the totality of the

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<sup>13</sup> Cole v. Gilvin, Ky. App., 59 S.W.3d 468, 472 (2001)(citation omitted).

<sup>14</sup> Whitmore, supra, n. 12, at 79.

<sup>15</sup> Henson, supra, n. 11, at 469.

<sup>16</sup> Id.

<sup>17</sup> Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth of Kentucky, Transp. Cabinet, Ky., 983 S.W.2d 488, 490 (1998).

circumstances to assess whether police obtained evidence by overbearing the defendant's will through making credible threats. The three criteria used to assess voluntariness are 1) whether the police activity was "objectively coercive;" 2) whether the coercion overbore the will of the defendant; and 3) whether the defendant showed that the coercive police activity was the "crucial motivating factor" behind the defendant's confession.<sup>18</sup>

As correctly observed by the Commonwealth, the first inquiry is dispositive and each confession must be analyzed separately. Absent "objectively coercive" activity, the analysis ends and, particularly significant here, "low IQ alone is an insufficient basis for finding the statement was involuntary."<sup>19</sup> Said another way:

"[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment,"; and although a defendant's mental condition is a significant factor to consider in determining voluntariness, "this fact does not

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<sup>18</sup> Henson, supra, n. 11, at 469 (internal citations omitted).

<sup>19</sup> Holloman v. Commonwealth, Ky., 37 S.W.3d 764, 769 (2001).

justify a conclusion that a defendant's mental condition by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional 'voluntariness.'"<sup>20</sup>

Rather, the relevant inquiry is whether the investigating officers coerced the confession by "'physical violence or other deliberate means calculated to break the suspect's will.'"<sup>21</sup> Despite specifically finding that none of the traditional, objective indications of coercion were present in the instant case, the court concluded that the "entire process" was coercive given Bailey's "limited intellect." In reaching this conclusion, the court deemed the first interrogation pivotal, observing that Bailey initially denied any wrongdoing and did not incriminate himself until he was confronted with the accusation that he had not been truthful by "an authority figure" (Bruner), which was consistent with the adaptive behavior characteristic of someone with his disability.

Recently, the Kentucky Supreme Court rejected the argument that an interrogation constituted impermissible coercion merely because a "mentally retarded" defendant was

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<sup>20</sup> Price v. Commonwealth, Ky., 31 S.W.3d 885, 890 (2000), citing Colorado v. Connelly, 479 U.S. 157, 167, 107 S. Ct. 515, 522, 93 L. Ed.2d 473 (1986).

<sup>21</sup> Rogers, supra, n. 10, at 35 (citation omitted).

confronted by officers with the questionable "fact" that he had "lied" during a polygraph examination.<sup>22</sup> As the same circumstances are presented here, the same outcome necessarily follows. Further, it is unreasonable for a suspect to assume that he will not be informed of polygraph readings and asked to explain any unfavorable results.<sup>23</sup> While the burden is on the Commonwealth to prove that Bailey's waiver was voluntary, "where the defendant initiated contact with the examiner, did not request any restrictions upon the questioning, and waived [his] right to counsel (along with other constitutional rights) in a written and signed form, that burden has been met."<sup>24</sup> Such is the case here.

Again emphasizing his limited intellect, the court went on to observe that Bailey began "to slide down the slope at that point." However, the court is required to consider "not only factors surrounding the mental status of the accused, but also how those factors relate to the police tactics utilized during the interrogation."<sup>25</sup> As applied to confessions and for purposes of due process, then, "the term 'involuntary' should be construed to refer not to some *property* a defendant's confession

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<sup>22</sup> Id. at 36.

<sup>23</sup> Powell v. Commonwealth, Ky. App., 994 S.W.2d 1, 3 (1997).

<sup>24</sup> Rogers, supra, n. 10, at 36.

<sup>25</sup> Id. at 35.

may be said in itself to have or lack, but rather to a certain *relation* between the confession and the method or conduct of law enforcement officials in procuring it."<sup>26</sup> In the instant case, that relationship is lacking.

Bailey does not contend nor did the court find that Burner, Sheriff Foster or Detective Woods coerced his confession by physical intimidation or threats. To the contrary, the court explicitly found that "in no way" did any of the aforementioned authority figures act improperly. Instead, Bailey essentially relies upon the "psychological coercion" inherent in the polygraph examination and interrogations, and the court agreed that, under the "totality of the circumstances," specifically Bailey's limited intellect, his "will was overborne" meaning his incriminating statements were coerced. Absent the required "objectively coercive behavior," however, it is necessarily impossible to satisfy the second and third criteria. With respect to the conversation Bailey initiated with Sheriff Foster and his subsequent confession to Detective Woods, the fact that he re-opened the dialogue with authorities while not in custody, although not determinative, is among the circumstances to be considered and weighs in favor of the Commonwealth's position.<sup>27</sup>

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<sup>26</sup> United States v. Newman, 889 F.2d 88, 95 (6th Cir. 1989).

<sup>27</sup> See Haynes v. Commonwealth, Ky., 657 S.W.2d 948 (1983), and Denny v. Commonwealth, Ky., 670 S.W.2d 847 (1984).

To summarize:

Threshold to the determination that a confession was "involuntary" for due process purposes is the requirement that the police "extorted [the confession] from the accused by means of coercive activity." . . . Once it is established that the police activity was objectively coercive, it is necessary to examine [Bailey's] subjective state of mind to determine whether the "coercion" in question was sufficient to overbear the will of the accused. . . . Finally, [Bailey] must prove that his will was overborne because of the coercive police activity in question. If the police misconduct at issue was not the "crucial motivating factor" behind [Bailey's] decision to confess, the confession may not be suppressed. . . .<sup>28</sup>

Bailey does not allege, let alone demonstrate, that his confession was in any way attributable to police misconduct. While his mental capacity is a factor to consider in assessing the voluntariness of his confession, standing alone, it is not determinative.<sup>29</sup> A review of the record does not reveal any attempt by the investigating officers to "take advantage" of

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<sup>28</sup> Newman, supra, n. 26, at 95 (citation omitted).

<sup>29</sup> Rogers, supra, n. 10, at 37.



Bailey's low intelligence.<sup>30</sup> "Even if all doubts regarding [Bailey's] mental condition were resolved in his favor, that conclusion would still be legally insufficient to establish that [his] statements were involuntary."<sup>31</sup>

Because the "necessary predicate" of "coercive police activity" is lacking, the court erred in concluding that Bailey's "subjective state of mind" rendered the "coercion" sufficient to overbear his will. Although we agree that it is a close question, there is nothing inherently or objectively coercive about the police activity at issue. In light of this determination, the order suppressing Bailey's confession is reversed and this case is remanded to Allen Circuit Court for further proceedings consistent with this opinion.

ALL CONCUR.

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<sup>30</sup> Id.

<sup>31</sup> Newman, supra, n. 26, at 95.