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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000600-MR

ROBERT BYRD — APPELLANT

v.

APPEAL FROM CLARK CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, JUDGE
ACTION NO. 01-CR-00001

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON, KNOPF AND McANULTY, JUDGES.

JOHNSON, JUDGE: Robert Byrd has appealed from the final judgment and sentence entered by the Clark Circuit Court on March 14, 2001, following his conditional plea of guilty[1] to the charge of theft by unlawful taking over $300.00.[2] Byrd claims that certain incriminating statements he made to his neighbor, Ernest Estes, were required as part of an agreement with police,

[1] Kentucky Rules of Criminal Procedure (RCr) 8.09.

[2] Kentucky Revised Statutes (KRS) 514.030.

and therefore, use of them to incriminate him would be violative of the Fifth and Fourteenth Amendments to the United States Constitution.[3] Having concluded that the statements made by Byrd to Estes were independent of any agreement with the police, that the statements did not involve state action, and that the statements were freely and voluntarily given, we affirm.

The evidence at the suppression hearing showed that on July 11, 2000, Robert Byrd stole a John Deere lawn tractor from Estes's yard in Winchester, Kentucky.[4] On the same day, several firearms were reported missing from Dennis Tankersley's residence in Clark County, Kentucky. Shortly thereafter, the Clark County Sheriff's Department began investigating the missing firearms. During the course of the investigation, Detective Arlen Horton of the Clark County Sheriff's Department received information suggesting that Byrd and Joey Johnson may have been involved in the theft of the firearms. Johnson was already in custody due to his involvement in an unrelated burglary. Det. Horton then decided to contact Byrd in an effort to solidify his case against Johnson and to obtain further information related to the Tankersley burglary.

[3] The due process clauses of the Fifth and Fourteenth Amendments prohibit the use at trial of any statements obtained from a suspect as a result of police coercion. See, e.g., Spano v. New York, 360 U.S. 315, 79 S.Ct. 1202, 3 L.E.2d 1265 (1959). Moreover, the Fifth Amendment privilege against self-incrimination contains a similar prohibition. See, e.g., Dickerson v. United States, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000).

[4] The tractor was valued at over $2,000.00.

On Friday, September 8, 2000, Det. Horton attempted to locate Byrd at his aunt's house. Byrd's aunt, Mattie Byrd, informed Det. Horton that Byrd was working with his father and that she would be happy to accompany him to Byrd's place of employment. Det. Horton then proceeded to Byrd's place of employment and when he arrived he asked Byrd if he would be willing to speak with him. Det. Horton then read Byrd his Miranda[5] rights and Byrd orally agreed to waive his rights.[6] Byrd was placed in the front seat of Det. Horton's vehicle and his aunt was placed in the back of the vehicle. Byrd's father was also present during the interview.

Det. Horton asked Byrd what he knew about the Tankersley burglary and Byrd told him that he was not present when the firearms were stolen. Byrd did, however, state that on July 7, 2001, Johnson called him and informed him that he had two guns and that he needed some help selling the guns. Byrd further stated that after speaking with Johnson he picked him up and they sold the guns. Det. Horton informed Byrd that he would not charge him as an accomplice if he came into the Sheriff's office on Monday, September 11, 2000, gave a written statement, and agreed to testify against Johnson at trial. More precisely, Det. Horton testified that he told Byrd that "since you just

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

[6] Byrd also signed a written waiver.

gave him [Johnson] a ride and stuff; took him up there so he could get rid of them; I'm not going to charge you. I can charge you as an accomplice or for complicity, but I'm not going to if you're willing to testify." Det. Horton also informed Byrd that if he was involved in any other crimes, "this was the time to tell [him]."

On Monday, September 11, 2000, Byrd went to the Clark County Sheriff's office. Det. Horton then informed Byrd of his rights, and Byrd's aunt, who was present throughout the interview, informed Det. Horton that she would like to speak with her attorney, Larry Roberts, on Byrd's behalf. Upon discussing the situation with Byrd's aunt, Roberts asked to speak with Det. Horton, who informed Roberts that he intended to use Byrd as a state's witness against Johnson and that Byrd would not be charged with burglary in the first degree[7] if he cooperated. Det. Horton also informed Roberts that as a part of the agreement Byrd was required to divulge everything he knew about the Tankersley burglary and/or any other crimes he may have been involved in.

Upon the advice of counsel, Byrd waived his right to remain silent and proceeded to give a written statement describing what he purported at that time to be his part in the Tankersley burglary. In addition to admitting that he had

[7] KRS 511.020.

helped Johnson sell the stolen firearms, Byrd confessed to having stolen two loads of lumber from Kroger and to having stolen a concrete saw from a construction site. Byrd also admitted that he had received $50.00 from Johnson for his part in the fencing of the firearms and he agreed to testify against Johnson at trial. Det. Horton informed Byrd that this was his last chance to "come clean" about everything he knew. Byrd again denied being present with Johnson at the Tankersley residence when the firearms were stolen. Det. Horton then told Byrd that he would not charge him for any of the offenses Byrd admitted to committing in his written statement.

On Wednesday, September 13, 2000, Byrd returned to the Clark County Sheriff's office and spoke with Detective Don Bellamy.[8] Det. Bellamy advised Byrd of his rights and Byrd again agreed to waive his rights. Byrd then proceeded to tell Det. Bellamy that he had in fact participated in the Tankersley burglary with Johnson and that he drove the getaway car and served as the lookout while Johnson burglarized the Tankersley residence. Byrd also informed Det. Bellamy that on July 7, 2000, he had stolen a John Deere lawn tractor from his neighbor, Ernest Estes, and that he had dumped the tractor in the Kentucky River. Det. Bellamy testified at the suppression hearing that

[8] Byrd claims that he originally paged Det. Horton who returned his call and instructed him to go to the Sheriff's office and to ask to speak with Det. Bellamy.

he was not aware of any "deal" Byrd had with Det. Horton when he interviewed Byrd. Det. Bellamy immediately called Det. Horton and advised him of Byrd's confessions. Det. Bellamy also contacted Det. Steve Caudill of the Winchester Police Department and informed him that Byrd had confessed to stealing Estes's lawnmower.[9]

Det. Horton then came to the Sheriff's office to speak with Byrd. Det. Horton asked Byrd why he lied to him about his involvement in the Tankersley burglary. Byrd told him that he was scared and that he was afraid of going to jail. Det. Horton then informed Byrd of his rights and Byrd once again waived his rights via a written waiver. Byrd then provided a written statement detailing his involvement in the Tankersley burglary and the theft of his neighbor's lawnmower. Det. Horton informed Byrd that he was going to charge him as an accomplice in the burglary, i.e., criminal facilitation, because he had missed the deadline for "coming clean" and because he had lied to him on two previous occasions. Det. Horton did not charge Byrd for the crimes he admitted to committing in the written statement he provided on September 11, 2000, i.e., fencing and theft.

On October 11, 2000, Det. Caudill contacted Byrd's parents and informed them that he would like to speak with Byrd at the Winchester Police Department. Byrd and his parents met

[9] Since the theft of the lawnmower occurred in the City of Winchester, the Winchester Police Department had jurisdiction over the crime.

with Det. Caudill that day and Byrd informed the detective that he would like to speak with his attorney prior to any questioning. Det. Caudill acquiesced in Byrd's request and his attorney, Larry Roberts, subsequently asked to speak with the detective over the phone. Det. Caudill then informed Roberts that he was unwilling to grant Byrd immunity and that any incriminating statements he made would be used against him. Byrd declined to speak any further with Det. Caudill and he was subsequently charged with the theft of Estes's lawnmower based upon the statements he had made to Det. Horton and Det. Bellamy at the Clark County Sheriff's office. Shortly thereafter, Byrd approached his neighbor, Ernest Estes, and apologized for stealing his lawnmower.[10] Byrd told Estes that he was high on drugs when he stole the lawnmower and he promised Estes that he would make restitution.

On January 11, 2001, Byrd was indicted by a Clark County grand jury for criminal facilitation to commit first degree burglary[11] and theft by unlawful taking over $300.00. On April 20, 2001, Byrd filed a motion to suppress the incriminating statements he had made to Det. Horton and Det. Bellamy and a motion to dismiss the indictment. A hearing was

[10] The record is unclear as to the day and time Byrd spoke with Estes, however, it appears this conversation took place sometime in October after Byrd spoke with Det. Caudill.

[11] KRS 506.080(1).

held on May 11, 2001, after which the trial court granted Byrd's motion to suppress and denied his motion to dismiss the indictment.[12] The trial court reasoned that the statements made by Byrd to Det. Horton and Det. Bellamy "were voluntary only to the extent that [Byrd] believed he would not be charged for the crimes to which he confessed." The trial court further reasoned that since the Commonwealth had failed to prove that Byrd's confession was voluntary and knowing, that it was tainted and therefore inadmissible. The trial court did, however, conclude that Byrd's statements to Estes were independent of his confessions to the police. Consequently, on February 5, 2002, Byrd entered a conditional plea of guilty on the theft charge and the Commonwealth recommended that the facilitation charge be dismissed.[13] On March 14, 2001, the trial court entered its final judgment and sentence. Byrd was sentenced to prison for one year and ordered to pay court costs of $108.00. This appeal followed.

Byrd claims on appeal that the trial court erred by denying his motion to dismiss the indictment as the statements he made to Estes were involuntarily given and therefore

[12] The order granting Byrd's motion to suppress his confession and denying his motion to dismiss the indictment was entered on June 27, 2001.

[13] On February 7, 2002, Byrd filed a supplemental motion to dismiss the indictment, claiming that "[his] offer of restitution and apology to [Estes] was not an independent act, but rather an action instituted and demanded by the police." The trial court entered an order denying Byrd's motion on February 8, 2002.

violative of his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and his Fifth Amendment right to remain silent.[14] Byrd claims that his "offer of restitution and apology to Estes was not an independent act, but rather an action instituted and demanded by the police" as a condition of the agreement not to prosecute him.

The proper standard of review of a trial court's ruling on a motion to suppress was stated in Commonwealth v. Neal:[15]

> An appellate court's standard of review of the trial court's decision on a motion to suppress requires that we first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. Based on those findings of fact, we must then conduct a de novo review of the trial court's application of the law to those facts to determine whether its decision is correct as matter of law [footnotes omitted].[16]

Thus, we begin our analysis with the trial court's findings of fact.

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[14] Byrd's motion to dismiss the indictment was essentially a motion to suppress the incriminating statements he made to Estes and it will be treated as such for purposes of this appeal.

[15] Ky.App., 84 S.W.3d 920, 923 (2002).

[16] Id. (citing Adcock v. Commonwealth, Ky., 967 S.W.2d 6, 8 (1998); and Commonwealth v. Opell, Ky.App., 3 S.W.3d 747, 751 (1999)).

After holding a suppression hearing on the admissibility of Byrd's confessions to Det. Horton and Det. Bellamy, the trial court found these incriminating statements to be inadmissible. However, the trial court subsequently found that the incriminating statements Byrd had made to Estes were voluntary, that they were in his own self-interest, and that they were not made as part of an agreement with the police. Therefore, the trial court concluded that the incriminating statements made by Byrd to Estes were independent of the taint associated with the confessions Byrd had given to Det. Horton and Det. Bellamy. The trial court relied on several factors in making this finding. First and foremost, Byrd failed to offer any testimony at the suppression hearing suggesting that he was directed by any of the detectives working on his case as part of an agreement to contact Estes and to apologize or to offer restitution. Although Estes testified at the suppression hearing that on the same afternoon he spoke with Byrd he was contacted by one of the detectives and informed that he would get full restitution for his mower within a week, it is significant that Byrd's confessions to Det. Horton and Det. Bellamy occurred on September 8th, 11th, and 13th, and Estes's conversation with the police took place in October, at least three weeks later.[17]

[17] Moreover, Estes was not even sure which detective he spoke with. If Estes

In addition, as the Commonwealth amply brings to light, Byrd's own attorney even stated in open court that he was the one who told Byrd to apologize to Estes and to offer restitution. This fact alone negates Byrd's argument on appeal that his "offer of restitution and apology to Estes was not an independent act, but rather an action instituted and demanded by the police." Thus, we hold that the trial court's findings of fact in this regard are supported by substantial evidence and not clearly erroneous. Consequently, the question now becomes, "whether the rule of law as applied to the established facts is or is not violated."[18]

Byrd claims the statements he made to Estes were involuntary as they were a product of an agreement he had entered into with Det. Horton. Specifically, Byrd claims Det. Horton assured him that he would be granted immunity for any statements he made concerning criminal activity.[19] Byrd relies on Canler v. Commonwealth,[20] to support his argument that any statement obtained by law enforcement officials in violation of

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had spoken with Det. Caudill as opposed to Det. Horton or Det. Bellamy, Byrd's argument would be even more suspect as Det. Caudill specifically declined to enter into any immunity agreement with Byrd.

[18] Adcock, 967 S.W.2d at 8. (quoting Ornelas v. United States, 517 U.S. 690, 697, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996)).

[19] While Kentucky does not recognize the concept of "immunity" as promised by the prosecution, it does require the prosecution to honor its agreement not to prosecute. Commonwealth v. Blincoe, Ky.App., 34 S.W.3d 822 (2000).

[20] Ky., 870 S.W.2d 219 (1994).

an express agreement between the police and a defendant will be deemed involuntary and therefore inadmissible. We agree with Byrd's reading of Canler as it is well settled that any statements obtained by police coercion or deception will be deemed involuntary under the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution. However, we do not believe the statements made by Byrd to Estes were the product of any police coercion or deception. Moreover, we are of the opinion that the factual scenario present in Canler is clearly distinguishable from the case sub judice.

Canler involved an involuntary confession that was obtained in violation of an express agreement between the police and the defendant, Jeffery Canler. Canler was suspected of criminal abuse pertaining to a five-month-old infant his wife was babysitting. After consulting with an attorney, Canler agreed to submit to a polygraph examination in an effort to clear his name. The agreement was specifically conditioned on the requirement that "there not be any questions other than the polygraph test itself."[21] Due to a conflict in his schedule, Canler's attorney was not present during the examination. However, prior to the examination, Canler did sign a waiver that included his Miranda rights. Following the actual examination, which lasted approximately seven to ten minutes, the examiner

[21] Id. at 220.

proceeded to question Canler for approximately two hours, and, as a result, Canler admitted to abusing the infant.[22]

The trial court suppressed Canler's confession, but the Court of Appeals reversed in a 2-1 decision. The majority opinion reasoned that since Canler had initiated the interrogation by agreeing to take the polygraph test, he invited the examiner to ask any questions pertaining to the alleged abuse of the child. The Supreme Court of Kentucky disagreed and reversed the Court of Appeals. The Supreme Court concluded that the trial court had properly found that Canler had not assumed at the time he took the polygraph test that any other questions would be asked of him after the examination had ended. The Supreme Court noted that "[Canler's] attorney clearly requested and received a specific agreement to the effect that no questions, other than those relating to the polygraph test, would be asked."[23] The Supreme Court also placed a great deal of emphasis on the fact that one of the detectives involved in the case testified that he intended to obtain a confession from Canler as a result of the polygraph examination. The Supreme Court was simply unwilling to allow a confession that had been obtained in violation of an express agreement with the police to be allowed as evidence.

[22] Id. at 221.

[23] Id.

In the case sub judice, Byrd claims that "[l]ike Canler, [he] and his counsel were given assurances on which [he] relied when making his apology to Mr. Estes." Thus, Byrd claims his statement to Estes "was involuntary." However, the record is devoid of any evidence indicating that Det. Horton ever informed Byrd that he would be granted immunity for any incriminating statements he made to Estes concerning the theft of the lawnmower.[24] In fact, Det. Horton informed Byrd on September 13, 2001, that he was going to charge him as an accomplice in the burglary, i.e., criminal facilitation, because he had missed the deadline for "coming clean" and because he had lied to him on two previous occasions. Thus, Byrd's reliance on Canler is clearly misplaced as the police coercion and deception that was present in Canler is absent in the case sub judice as there was no agreement between Byrd and Det. Horton concerning the statements he made to Estes.

Byrd argues on appeal that "[t]he underlying, premier question before this Court is to determine whether or not the statement to Mr. Estes was in fact made before or after the confession made to the police." Even if we were to accept Byrd's framing of the issue, there is not overwhelming evidence in support of Byrd's contention that the detectives involved in

[24] The underlying agreement in Canler was critical to the Supreme Court's holding.

this investigation required him to apologize to Estes and to offer him restitution. Similarly, we do not believe the detectives ever informed Byrd that he would be granted immunity for any incriminating statements he made to Estes concerning the theft of the lawnmower. The evidence showed that Det. Horton informed Byrd on September 13, 2001, that he was going to charge him as an accomplice in the burglary, i.e., criminal facilitation, because he had missed the deadline for "coming clean" and because he had lied to him on two previous occasions. Thus, Byrd has failed to demonstrate that the statements he made to Estes were obtained by state action, much less as a result of any coercive conduct on the part of the police.

Byrd's claim also fails because there was not sufficient state action or police coercion so as to render his statements to Estes involuntary. It is a well settled principle that only state action implicates a defendant's rights under the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Section 11 of the Kentucky Constitution.[25] As was stated by the United States Supreme Court in Connelly:

[25] Colorado v. Connelly, 479 U.S. 157, 164, 107 S.Ct. 515, 520, 93 L.Ed.2d 473 (1986). Connelly was adopted for purposes of the Kentucky Constitution in Commonwealth v. Cooper, Ky., 899 S.W.2d 75, 76 (1995). See also Adkins v. Commonwealth, Ky., 96 S.W.3d 779, 790-91 (2003); and Fields v. Commonwealth, Ky., 12 S.W.3d 275, 283 (2000).

> The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause [citations omitted].
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> . . .
>
> We hold that coercive 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. . . .[26]

Moreover, the same result has been reached under the Fifth Amendment privilege against self-incrimination. As was stated by the United States Supreme Court in Oregon v. Elstad:[27]

> "Indeed, far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable . . . [.] Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions."

As was stated by the United States Supreme Court in Brown v. Illinois:[28]

> "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the

[26] Connelly, 479 U.S. at 166-167.

[27] 470 U.S. 298, 305, 105 S.Ct. 1285, 1291, 84 L.E.2d 222 (1985) (quoting United States v. Washington, 431 U.S. 181, 187, 97 S.Ct. 1814, 1818, 52 L.Ed.2d 238 (1977)).

[28] 422 U.S. 590, 599, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975)(quoting Wong Sun v. United States, 371 U.S. 471, 487-88, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963)).

> primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguished to be purged of the primary taint'" [citations omitted].

We believe the incriminating statements Byrd made to Estes are "sufficiently distinguishable to be purged of the primary taint." Byrd spoke with Estes only after consulting with his attorney and his attorney even admitted in open court that he was the one who told Byrd to apologize to Estes and to offer restitution.

For the foregoing reasons, the final judgment and sentence of the Clark Circuit Court is affirmed.

KNOPF, JUDGE, CONCURS.

McANULTY, JUDGE, CONCURS IN RESULT ONLY.

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