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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-000985-MR

DAVID MICHAEL BAXTER — APPELLANT

v.

APPEAL FROM CARTER CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
ACTION NO. 02-CR-00087

COMMONWEALTH OF KENTUCKY — APPELLEE

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

BEFORE: BARBER, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: In March 2003, David Baxter pled guilty to second-degree rape[1] and second-degree sodomy.[2] By judgment entered April 15, 2003, the Carter Circuit Court sentenced him to concurrent terms of imprisonment totaling seven years. Baxter was accused of having engaged in sexual relations with

[1] KRS 510.050.

[2] KRS 510.080.

his twelve-year-old step-daughter, and he admitted to a Kentucky State Police officer that he had done so. His guilty plea reserved his right to appeal the trial court's denial of his motion to have the confession suppressed. He contends that the trial court erred by failing to hold a hearing on the motion and by finding that his confession was not the product of undue police coercion. We affirm.

As Baxter correctly points out, when a defendant moves to suppress a confession, RCr 9.78 requires the trial court to conduct an evidentiary hearing on the matter. In this case, however, the parties agreed to forego a hearing and to submit the question to the trial court based only on a transcript of Baxter's interview with the police officer and the parties' briefs. Notwithstanding Baxter's participation in this arrangement, our Supreme Court has held that a trial court's failure to conduct a suppression hearing is an error.[3]

The Court has also held, however, that a defendant is entitled to a remedy for this error only if he can show

> that his version of events, if true, would require the conclusion that his confession was involuntary; *i.e.,* he must allege *facts* which would, if proven true, indicate the involuntariness of his confession.[4]

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[3] Mills v. Commonwealth, Ky., 996 S.W.2d 473 (1999).

[4] Lewis v. Commonwealth, Ky., 42 S.W.3d 605, 611 (2001) (citation and internal quotation marks omitted).

Baxter relies on the transcript of his police interview, which, he claims, demonstrates that the interview was unduly coercive. As he correctly notes, a coerced confession violates the Fifth Amendment's protection against self incrimination and the Fourteenth Amendment's guarantee of due process,[5] as well as KRS 422.110, our anti-"sweating" statute. An admission is deemed to be coerced when (1) the police activity was objectively coercive, (2) the coercion overbore the defendant's will, and (3) the coercion was the "crucial motivating factor" behind the admission.[6] As evidenced by the transcript, Baxter's police interview was not objectively coercive.

Apparently, the Department of Social Services learned of Baxter's alleged abuse on or about August 7, 2002. Baxter met with a police officer at the DSS office the next day. He came to the interview voluntarily, although at his wife's urging. The interview began at about 10:15 a.m. The officer explained to Baxter that he was not under arrest and read his Miranda rights to him.[7] He then told Baxter that his step-daughter had described numerous acts of abuse beginning several

[5] Ledbetter v. Edwards, 35 F.3d 1062 (6th Cir. 1994).

[6] Rogers v. Commonwealth, Ky., 86 S.W.3d 29, 36 (2002) (citing Henson v. Commonwealth, Ky., 20 S.W.3d 466 (1999).

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

years previously and still continuing. Her descriptions were accurately detailed, the officer explained, and seemed to be borne out by the other evidence that had so far been gathered. He asked Baxter if these allegations were true, and if not if Baxter could account for them. Baxter denied the allegations and said that he had no idea why his step-daughter would make them.

Several times the officer repeated the allegations and each time Baxter denied them. The officer pointed out that the step-daughter had not been physically examined yet, but would be soon. He also pointed out that Baxter was in effect calling her a liar. Several times he asked if that was the message Baxter wanted to send to her. He wondered whether Baxter wanted to go to trial, where his calling the step-daughter a liar would be public. Still Baxter denied the allegations, so at about 10:45 a.m., only a half-hour after beginning, the officer ended the interview.

The transcript does not indicate when the officer resumed the interview, but he did resume it and again repeatedly emphasized the insult implicit in Baxter's denial:

> If you love [her] as much as you tell me you do, then answer, answer truthfully. Is [she] telling us the truth? Or should I go back and tell her that she's lying? What should I do? Do I tell her she is lying? Is that what you want me to do?

When Baxter asked if he could see his step-daughter, the officer told him he could not, "not until you clear this all up. You can't have any contact with her." Baxter then asked if he could be alone for awhile, and at 11:50 a.m. this second part of the interview ended.

The interview resumed at 12:07 p.m. with Baxter's admission that he had had sexual relations with his step-daughter. There were a few questions eliciting specific acts and times, but Baxter apparently broke down and at 12:10 p.m. the interview ceased.

Baxter does not allege that the officer threatened him physically or subjected him to physically harsh conditions. He contends, however, that the officer's numerous repetitions of the same questions, his threat to tell the step-daughter that Baxter accused her of lying, and his assertion that Baxter could have no contact with her until the matter was "cleared up" amounted to unduly coercive psychological pressure. We disagree.

Police officers may not elicit admissions by manufacturing harsh consequences for denials,[8] but they are free to confront a suspect with the consequences that will occur or

[8] Lynumn v. Illinois, 372 U.S. 528, 9 L. Ed. 2d 922, 83 S. Ct. 917 (1963).

that are apt to occur in the ordinary course of events.[9] There was nothing wrong with pointing out to Baxter that his denial implied his step-daughter's untruthfulness or that he was not apt to be allowed to see her until her allegations had been resolved.

Nor was Baxter's interview unduly persistent and repetitive. An officer is free to confront a suspect with the fact that he disbelieves the suspect's statement and to seek, repeatedly if necessary, further information to resolve his doubts.[10] It is true that an officer's extreme persistence may at some point cross the line between persuasion and coercion,[11] but Baxter's interview came nowhere near that point. He was not in custody and was questioned for no more than an hour-and-a-half. Our Supreme Court has deemed an eight-hour interrogation not unduly persistent.[12]

In short, Baxter has not alleged facts tending to show that his will was overborne or that his decision to confess was not the product of his own balancing of legitimate factors for

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[9] Henson v. Commonwealth, Ky., 20 S.W.3d 466 (1999).

[10] United States v. Wolf, 813 F.2d 970 (1987).

[11] Ashcraft v. Tennessee, 322 U.S 143, 88 L. Ed. 1192, 64 S. Ct. 921 (1944) (Thirty-six-hour interrogation was unduly coercive); Brown v. Commonwealth, Ky., 275 S.W.2d 928 (1955) (Persistence is unlawful if extreme.)

[12] Morgan v. Commonwealth, Ky., 809 S.W.2d 704 (1991).

and against it. Baxter, therefore, is not entitled to relief for the trial court's failure to hold a suppression hearing, and the trial court's denial of the suppression motion was not erroneous. Accordingly, we affirm the April 15, 2003, judgment of the Carter Circuit Court.

ALL CONCUR.

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