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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001694-MR

GREGORY DEWAYNE EDMONDS

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 05-CR-00135

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: THOMPSON AND VANMETER, JUDGES; HENRY,¹ SENIOR JUDGE.

HENRY, SENIOR JUDGE: Gary Dewayne Edmonds entered a conditional guilty plea pursuant to Kentucky Rules of Criminal Procedure (RCr) 8.09 in Fayette Circuit Court to one count of second-degree robbery and one count of being a persistent felony offender in the second degree. He was sentenced to five years'

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

imprisonment on the robbery count enhanced to fifteen years by the PFO conviction. On this appeal he contends that the Fayette Circuit Court committed reversible error when it denied his motion to suppress his confession, finding that the confession was made freely, voluntarily and knowingly and that it was not the product of coercion. On review, we affirm.

FACTS

At the outset we note that the issues presented in this appeal were previously considered by a different panel of this court in a not-to-be-published opinion; *see Edmonds v. Commonwealth*, 2005-CA-001738, 2007 WL 29400 (Ky. App., rendered January 5, 2007). That earlier case incorporated the trial court's factual summary, which is set out below as it appeared in our previous opinion:

On or about November 27, 2004 [Officer Mark] Brand and [Officer Aaron] Noel were on patrol duty when they received a call regarding a robbery that had just occurred at a Store located in the Waller Avenue Shopping Center in Lexington. The officers responded to the call and, while in route to the location, they observed a person (later identified as [Edmonds]) who matched the description and clothing of the person involved in the robbery. The officers stopped [Edmonds], placed him in handcuffs, and read the Miranda warnings to him. [Edmonds] replied that he had been to prison and understood his rights. [Edmonds] vehemently denied that he was the robber of the store. The officers transported [Edmonds] back to the store for a "show-up". The clerk of the store that had just been robbed identified [Edmonds] as the person who had just robbed him. The time between the robbery and the "show-up" where the clerk identified [Edmonds] was estimated to be no more than 30 to 45 minutes. [Edmonds] was arrested and then taken to Police Headquarters by the officers.

The officers notified [Detective Andy] Cain about the situation and their arrest of [Edmonds] because Detective Cain was the detective on call at the time of the incident. Detective Cain met with [Edmonds] in an interrogation room at Police Headquarters. Officers Brand and Noel were not in the interrogation room with [Edmonds] and Detective Cain. Rather, officers Brand and Noel were outside the interrogation room completing their “paper work” on their investigation and arrest of [Edmonds]. The officers were in a position to over hear certain statements coming from the interrogation room even though they could not see [Edmonds] or Detective Cain. Officers Brand and Noel never heard [Edmonds] make a request for an attorney, state that he wanted to remain silent or any admissions made by [Edmonds]. The interview between [Edmonds] and Detective Cain lasted about ten minutes or so which ended in raised voices by both participants. [Edmonds] alleged that Cain called him a liar and a derogatory name and thereafter pushed [him] backwards causing his head to hit a wall of the interrogation room. [Edmonds] further alleged that Cain made other derogatory comments and made threatening statements to him in the interrogation room. Neither Brand nor Noel were able to hear the details of any dialogue between [Edmonds] and Cain except to hear their voices raised and the obvious anger exhibited between them.

Thereafter, Brand and Noel transported [Edmonds] to the Detention Center where he was lodged on the charge of robbery. [Edmonds] made no statements in route to the Detention Center and requested no medical attention. There is no contention that [Edmonds] made any incriminating statements to either Cain or to Brand and Noel on the date of the robbery and his arrest.

The next day, namely November 28, 2004, Brand and Noel went to the Detention Center to meet with [Edmonds] at approximately 7:00 p.m. They met in a “break room” where, again, [Edmonds] was given his Miranda warnings and again [Edmonds] replied that he understood these rights. [Edmonds] was relaxed and calm. Noel was dispatched to obtain a soft drink for

[Edmonds]. Unbeknownst to [Edmonds], Brand was secretly recording the conversation with a tape recorder inside his coat pocket. Brand prefaced the discussion with an “apology” to [Edmonds] for Detective Cain’s behavior the night before. In truth and in fact, Brand’s “apology” was a subterfuge and was intended to establish rapport with [Edmonds] “to get a confession.” [Edmonds] indicated that he did want to talk with an attorney, but NOT about his rights involving the criminal charge of robbery arising out of the incident the day before, but about filing charges against Cain because of the alleged physical pushing, coercion and threatening statements made to [him] by Cain in the interrogation room the night before. During the course of the remainder of the conversation between Brand and [Edmonds], there was no statement made by [Edmonds] about sustaining any injury in the interrogation by Cain and no request by [Edmonds] to stop the interview with Brand for any reason or to stop the questioning for any reason or to request an attorney in regard to the robbery charge or for any reason other than wanting to file charges against Cain because of the allegations involving the interrogation the night before. The statements made by [Edmonds] to Brand in this “second interview” at the Detention Center on November 28, 2004, which were secretly tape recorded, are the subject of the pending Motion to Suppress.

(Footnote omitted).

PRIOR OPINION AND REMAND

In our previous opinion we disagreed with the trial court’s findings that the lapse of 24 hours between the first and second interviews, the fact that the second interview was conducted in a different location, and the fact that Edmonds was given Miranda warnings before the second interview along with the court’s finding that his rights had been ‘scrupulously honored’ by [Officers] Brand and Noel, served to dispel any taint arising from any alleged improprieties in the first interview,

and remanded the case to the trial court “for findings of fact as to what occurred during the interrogation by Detective Cain on November 27, 2004, and application of the law thereto.” *Id.*, slip opinion at pp. 13-14.

Upon receiving the case on remand, the trial court duly reviewed the videotape of the suppression hearing and made additional factual findings. This time the trial court made more specific factual findings regarding what had transpired in the interview room between Detective Cain and Edmonds. The trial court specifically found that: 1) Detective Cain called Edmonds “a liar or a lying son of a bitch”; 2) Detective Cain challenged Edmonds to “stand up and say that,” presumably referring to some insult that had passed between Edmonds and Cain during their heated exchange; 3) Edmonds stood up to repeat the statement, whereupon Cain shoved Edmonds back against the wall; 4) contrary to Edmonds’ assertion this push or shove did not cause Edmonds’ head to strike the wall; 5) Cain told Edmonds something to the effect that Cain could take his own gun and shoot Edmonds with it and Cain would be believed because he is a police officer and Edmonds is a convicted felon; and 6) as Detective Cain was leaving the interview room he made a statement to the effect that he was through with Edmonds, and that he would just send Edmonds to prison where he would be sodomized, although Cain used much coarser language. The trial court stated that the foregoing findings were based upon the court’s personal observation of the live testimony of both witnesses at the suppression hearing, a review of the videotape of that hearing and the court’s notes taken at the suppression hearing.

At this juncture we observe that we also reviewed the videotape of the suppression hearing and find no basis to disagree with or criticize the trial court's findings. It is perhaps noteworthy that Detective Cain testified that he was unable to remember specifics of the interview while Edmonds was quite definite in his testimony. Detective Cain denied shoving Edmonds or calling him names. He admitted that both parties raised their voices. Detective Cain could not remember Officer Brand coming to the door of the interview room during the heated exchange, an occurrence that both Brand and Edmonds recalled. In any event, as to factual matters it is the trial court's findings, not ours, that are determinative. In hearings on motions to suppress evidence the factual findings of the trial court are conclusive if they are supported by substantial evidence in the record, as they are here. RCr 9.78; *Davis v. Commonwealth*, 795 S.W.2d 942, 948-49 (Ky. 1990). In its "Supplemental Findings of Fact and Conclusions of Law on Remand from Kentucky Court of Appeals" the trial court adopted and reaffirmed the Findings of Fact and Conclusions of Law from its previous (June 7, 2005) Opinion and Order except insofar as the findings and conclusions therein differed from those contained in the Supplemental Findings. The court reaffirmed its finding that Officers Brand and Noel "scrupulously honored" Edmonds' constitutional rights in the second interview the day after Detective Cain's interview. The court then turned to our directive to apply the law to those findings.

To determine whether Edmonds' confession was voluntary the court assessed the facts in light of the three criteria set out in *Henson v. Commonwealth*,

20 S.W.3d 466, 469 (Ky. 1999): 1) whether the police activity was “objectively coercive;” 2) whether the coercion overbore the will of the Defendant; and 3) whether the Defendant made a showing that the coercive activity was the “crucial motivating factor” resulting in the confession. The court found that Detective Cain’s interaction with Edmonds was indeed “objectively coercive,” but concluded that under the totality of the circumstances Edmonds’ will was neither overborne by Cain’s actions and statements, nor were they the “crucial motivating factor” behind Edmonds’ confession the next day.

Edmonds now argues that suppression of his confession is required in view of the trial court’s finding on remand that Detective Cain’s behavior was “objectively coercive,” because as he says at page 11 of his brief, “the Court of Appeals has already stated that if the ‘objectively coercive’ police behavior occurred, it would be grounds for suppressing the evidence.” We believe that this is a misinterpretation of our earlier opinion. In our view the statement in our earlier opinion cited by Edmonds primarily refers to the trial court’s conclusion that the passage of 24 hours between the first and second interviews along with the other named occurrences “served to dispel the taint arising from any alleged improprieties in the first interview,” a conclusion which we felt could have been in error to the extent that it affected the court’s determination of whether Detective Cain’s conduct was indeed “objectively coercive.” *See Edmonds v. Commonwealth*, slip opinion at p. 14. As noted above, upon remand the trial court applied the *Henson* factors after finding additional facts, just as we directed. And

“[w]hen the trial court is faced with conflicting testimony regarding the voluntariness of a confession, its determination, including its evaluation of credibility, if supported by substantial evidence, is conclusive.” *Henson*, 20 S.W.3d at 469 (citations omitted).

APPLICABLE LAW

Our Supreme Court adopted federal due process standards regarding voluntariness of confessions in *Morgan v. Commonwealth*, 809 S.W.2d 704 (Ky. 1991), citing *McCall v. Dutton*, 863 F.2d 454 (6th Cir. 1988). *Henson*, 20 S.W.3d at 469. We find the *McCall* case very instructive. It was through that case that the three factors used to determine the voluntariness of an allegedly coerced confession – objectively coercive police activity, overbearing of the will of the declarant, and whether coercive activity was the crucial motivating factor resulting in the statement – made their way into Kentucky law through *Morgan* and later *Henson*. In *McCall*, the declarant was suspected of having been in an altercation in which a police officer was killed. McCall’s statement was made as he lay on the ground handcuffed and covered in blood, surrounded by officers holding weapons who had been shouting at him. *McCall*, 864 F.2d at 457. The federal district court failed to find this activity “coercive” because there was no proof that the activity was intended to extract a confession from McCall, but was rather for security purposes. The 6th Circuit affirmed the district court, holding that the district court’s findings were not clearly erroneous. *Id.* at 458-59. But the court went on to say that in view of the totality of the circumstances, even if McCall had proved that the

police activity was coercive, he would still not prevail because he failed to prove that his will was overborne or that any coercion was causally related to his confession. *Id.* at 460.

Clearly, whether or not police behavior is “objectively coercive” is only one of three *Henson* factors to be considered in assessing the voluntariness of a confession. We did not instruct the trial court to disregard the other two factors in determining whether or not Edmonds’ confession was voluntary. To the contrary we directed the trial court to find additional facts and apply the law to those facts. Our directions were followed to the letter; hence, we affirm.

CONCLUSION

The order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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