

RENDERED: JULY 12, 2013; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001639-MR

SHERMAN KEYSOR

APPELLANT

v. APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 08-CR-00268

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, MOORE, AND NICKELL, JUDGES.

CLAYTON, JUDGE: This is an appeal from a suppression motion filed with the Graves Circuit Court. Based upon the following, we will affirm the decision of the circuit court.

BACKGROUND INFORMATION

This appeal arises out of two sets of charges against the appellant, Sherman Keysor. The first charge arose on October 14, 2008, in Graves County. On October 29, 2008, Keysor requested and was appointed counsel to represent him on the Graves County charges. Keysor was indicted on these charges on December 18, 2008.

On January 6, 2009, Deputy Harrison, Detective Matt Hillbrecht and social worker Jodey Baumen interviewed Keysor regarding incidents which occurred in Marshall County concerning the same victim involved in the Graves County charges. Without advice of counsel, Keysor talked to the above members of law enforcement and agreed to take a polygraph test. Keysor later took a polygraph test and was questioned further by law enforcement without his counsel present. At trial, Keysor's attorney moved for suppression of the statements made by Keysor arguing that he was represented by counsel at the time of the questioning and that counsel had not been notified of the questioning.

The trial court originally suppressed Keysor's statements based on *Linehan v. Commonwealth*, 878 S.W.2d 8 (Ky. 1994). The Commonwealth asked that it be reconsidered, however, based upon the holding in *Montejo v. Louisiana*, 556 U.S. 778, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009), and the trial court agreed, reversing its prior decision.

Keysor then brought this appeal.

STANDARD OF REVIEW

We review the circuit court's application of law *de novo*. *Peter Garrett Gunsmith, Inc. v. City of Dayton*, 98 S.W.3d 517, 520 (Ky. App. 2002).

DISCUSSION

Keysor first argues that *Linehan, supra*, is still the ruling precedent in Kentucky. In *Linehan*, the defendant was charged with breaking and entering the residence of his estranged wife as well as sexually assaulting her. Five months after he was indicted on these charges, he was arrested and charged with abducting his wife and raping her. Linehan had been appointed a public defender in the original action, but was questioned without counsel regarding the second set of charges. After being questioned, Linehan was arraigned and appointed counsel on the second set of charges. The cases were consolidated and Linehan argued that the statements made during the second attack could not be used against him because it violated his right to counsel. The Kentucky Supreme Court held that using the statements would violate Linehan's right to counsel even though the Commonwealth argued that the two indictments involved the same victim and set of circumstances.

Keysor argues that the rationale behind *Linehan* is present in his case as well. He contends that the Marshall and Graves charges are intertwined and that his statements incriminate him in both actions. He asserts that while the police and prosecutor may question a willing subject on new offenses, the evidence may not be used to incriminate him on the pending charges unless his counsel is present.

In *Montejo, supra*, the defendant was appointed counsel at arraignment. Prior to arraignment, however, Montejo had cooperated with the police without asking for appointment of counsel. While Montejo disputed what was said to him while he was in prison, there was a letter he wrote apologizing to the victim's widow that had nothing to do with his police interrogation.

Keysor also argues that we should reject *Montejo, supra*, in favor of the holding in *Michigan v. Jackson*, 475 U.S. 626, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986). In *Michigan*, the Supreme Court held that “a defendant who has been formally charged with a crime and who has requested appointment of counsel at his arraignment” must have counsel present while he is being interrogated unless he initiates the conversation with the police. *Id.* at 626, S.Ct. at 1406.

The Graves Circuit Court held that since the Kentucky Supreme Court had relied on federal law in making its decision in *Linehan*, it would speculate that the court would once again go with federal law and use *Montejo* for future decisions. We believe that the trial court is correct. The Kentucky Supreme Court held in the case of *Cardine v. Commonwealth*, 283 S.W.3d 641, 647 (Ky. 2009):

Ultimately, the United States Supreme Court's interpretation of the federal constitution, as the supreme law of the land, trumps any competing interpretation by this Court....

Linehan is no longer controlling. Kentucky courts have not extended greater protections to criminal suspects and defendants mandated by the U.S. Supreme Court, and that sound principle remains applicable to the present circumstances.

Here, Keysor was interrogated at the initiation of police officers regarding Marshall County incidents which were incriminating in the Graves County charges. Pursuant to *Montejo*, the evidence obtained was admissible in the Graves County trial. Thus, we affirm the decision of the Graves Circuit Court.

ALL CONCUR.

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