RENDERED: NOVEMBER 16, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000322-MR

MARK ANTHONY WILLIAMS APPELLANT

v.

APPEAL FROM MASON CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NO. 10-CR-00200

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, TAYLOR AND THOMPSON, JUDGES.

KELLER, JUDGE: Mark Anthony Williams appeals from a circuit court judgment imposing a sentence of eighteen years after a jury found him guilty of second-degree burglary and being a first-degree persistent felony offender. He argues that the trial court erred in denying his motions to suppress evidence obtained from a

police interview and his motion for a directed verdict on the burglary charge. We affirm.

FACTS

On August 30, 2010, Williams drove to Maysville with his friend, Bryan Turner. The men hoped to get a job doing some yard work for Williams's brother, Allen, who resides in Maysville. According to Williams, they got lost and began to run out of gas trying to find Allen's house. For some reason, they stopped at the home of Vickie Doyle and eventually went inside.

While Williams and Turner were at the Doyle home, Alan Wallingford drove by in a school bus to pick up another driver. Wallingford's passengers included his stepdaughter, Amanda Borgmann, Tauna Doyle, and Tauna's son, Dillon. Tauna and Dillon resided in Vickie Doyle's home at that time. Wallingford and his passengers observed the strange car in the driveway and two men at the door of the house. Wallingford picked up the other bus driver as planned, and then returned to the Doyle house. Wallingford and his passengers noticed that the strange car had now been backed into the driveway and that the trunk was open. They went into the house. Williams and Turner came through the kitchen door. After being confronted, they said they were looking for a buddy named "Howard." They quickly drove off in the car that was backed into the driveway. The residence was in a state of disarray, with drawers and closets open and items strewn about on the floor. Doyle's computer monitor was moved from the computer room into a hallway. A pillowcase full of Doyle's jewelry was found

by the back door in the kitchen. Wallingford and his passengers recorded the license number of the getaway car and telephoned the police. The police determined that the car was registered to Williams's mother.

After being shown a photopak, Tauna Doyle identified Williams as one of the men, and Dillon identified Bryan Turner as the other. Williams and Turner were arrested a few days later.

While he was in custody at the Mason County Detention Center, Williams made an audiotaped statement to Officer Dodge. He later moved to suppress the statement on the grounds that he was impaired by the symptoms of substance abuse withdrawal. He argued that the questioning should not have taken place until he received medical assistance to ensure that he was capable of understanding his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). He also argued that he had sought the assistance of counsel and that all questioning should have ceased with his request. He further moved the court to exclude a portion of his statement to police on the grounds that it constituted plea negotiations pursuant to Kentucky Rules of Evidence (KRE) 410. The trial court denied the motions and the case proceeded to trial. At the conclusion of the trial, Williams moved for a directed verdict on the burglary charge. The trial court denied the motion. The jury found Williams guilty of burglary in the second degree and being a persistent felony offender in the first degree. He received a total sentence of eighteen years. This appeal followed.

THE SUPPRESSION MOTION

STANDARD OF REVIEW

The standard of review on a suppression motion is twofold. First, the trial court's findings of fact are conclusive if supported by substantial evidence and should only be reviewed for clear error. Kentucky Rules of Criminal Procedure (RCr) 9.78; *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky.App. 2002). Second, when the findings of fact are supported by substantial evidence, the question is "whether the rule of law as applied to the established facts is or is not violated." *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998) (quoting *Ornelas v. United States*, 517 U.S. 690, 697, 116 S.Ct. 1657, 1662, 134 L.Ed.2d 911 (1996)).

ANALYSIS

Williams argues that his confession should have been suppressed because (1) he was under the influence of drugs, or affected by withdrawal from drugs, to such an extent that his statements were involuntary; (2) that he continued to be questioned after he had invoked his right to counsel; and (3) a portion of his statements constituted plea negotiations.

As to his first argument, the standard for determining whether a confession was involuntary due to intoxication is as follows:

> It is only when intoxication reaches the state in which one has hallucinations or "begins to confabulate to compensate for his loss of memory for recent events" that the truth of what he says becomes strongly suspect. Loss of inhibitions and muscular coordination, impaired judgment, and subsequent amnesia do not necessarily (if at all) indicate that an intoxicated person did not know what he was saying when he said it.

Hamilton v. Commonwealth, 580 S.W.2d 208, 210 (Ky. 1979) (quoting *Britt v. Commonwealth*, 512 S.W.2d 496 (Ky. 1974)).

The trial court made detailed findings regarding Williams's condition prior to his interrogation, which started at 4:00 p.m., noting that he was placed in a detox cell at 7:45 a.m.; that he took Tylenol and Gatorade at 11:10 a.m.; that he ate lunch; that he napped periodically and conversed with his cellmate and the guard. The trial court also noted that Williams had been physically ill and had vomited.

The trial court acknowledged that Williams may have been under the influence of drugs when he was brought to the Detention Center, but concluded that Williams's statements were nonetheless voluntary.

> The interview, which took place at about 4:00 p.m., clearly indicates that the Defendant responded appropriately and without delay to questions asked. Defendant's responses were coherent. Although Defendant was shaking, he was also standing up and walking. Defendant was alert and oriented; knew his social security number and date of birth; and talked about his mother, and about the co-defendant. He also mentioned his prior criminal history. Based upon the totality of the circumstances, the Court finds that the statement made by the Defendant was voluntary, knowing and intelligent.

The trial court's findings are supported by substantial evidence in the record, and the court properly applied the law to the facts in ruling that Williams's statements were voluntary. There was absolutely no evidence that Williams suffered from hallucinations or was untruthful in his statements, such as to cast doubt on the voluntary nature of his statements to police.

Williams's second argument concerns his invocation of his right to counsel. At his interview with Officer Dodge, Dodge reviewed Williams's rights under *Miranda*. The following dialogue then ensued:

> Dodge: With these rights in mind do you want to talk to me about what happened?
>
> Williams: Uh, I mean you can talk to me. I mean . . . let's . . . hear me . . . off the record. I mean I'm your friend, you're my friend . . . nothing was stolen from the house.
>
> Dodge: Nothing was stolen from the house?
>
> Williams: Nothing was stolen from the house. I understand what we did was wrong. We was out of gas. Hear me? We pulled up and knocked on the door. Nobody ans . . . the door was open. There wasn't no forced entry . . . was there. I did not break in no doors or nothing, sir. I just opened the door. It was unlocked. I knocked. I yelled. Hear me?
>
> Dodge: I hear you. Now what was the stuff bagged up for?
>
> Williams: Huh?
>
> Dodge: There was stuff bagged up like in pillowcases and stuff.
>
> Williams: I just was there. Hear me? I just . . . look, I just want to talk to an attorney and then me or an attorney can get down . . . set down . . .
>
> Dodge: If you, if you request an attorney at this point I can't talk to you anymore okay? I mean, are you requesting an attorney?
>
> Williams: No.

Dodge: I just need you to initial each one I've read to you okay?

"If at any time during a police interrogation the suspect has 'clearly asserted' his right to counsel, the interrogation must cease until an attorney is present." *Dixon v. Commonwealth*, 149 S.W.3d 426, 431 (Ky. 2004) (citing *Edwards v. Arizona*, 451 U.S. 477, 485, 101 S.Ct. 1880, 1885, 68 L.Ed.2d 378 (1981). Although Williams initially appeared to invoke his right to counsel, he unequivocally answered in the negative when Dodge asked if he wanted an attorney. The trial court did not err in finding that Williams had knowingly, intelligently and voluntarily waived his right to counsel.

Thirdly, Williams argues that the trial court erred in denying his motion to suppress a portion of his statement to the police on the basis that it constituted plea negotiations pursuant to KRE 410. KRE 410(4) prohibits the admission at trial of "any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn."

During his interview with Officer Dodge, Williams admitted that he was guilty. He offered to plead guilty and accept a sentence of five to six years in exchange for entry into a drug treatment program. Dodge informed Williams that he was not able to make any deals. Williams pleaded with Dodge to help him, and Dodge responded that all he could do was "talk to the attorneys." Williams sought to have this portion of the interview suppressed, on the grounds that it constituted

plea negotiations. To be inadmissible at trial under KRE 410(4), "the statements must have been made in the course of 'plea discussions' and those discussions must be 'with an attorney for the prosecuting authority.'" *Clutter v. Commonwealth*, 364 S.W.3d 135, 138 (Ky. 2012) (internal citations omitted).

> As to the first requirement, a conversation constitutes "plea discussions" when (1) the accused exhibits an actual subjective expectation to negotiate a plea at the time of the discussion and (2) the accused's expectation is reasonable given the totality of the objective circumstances. As to the second requirement, plea discussions "with an attorney for the prosecuting authority" include discussions with the prosecutor as well as discussions with law enforcement officials who are either acting with the express authority of the prosecutor or who state they are acting with such authority.

Id.

Williams does not meet these two requirements. Even if he subjectively expected to negotiate a plea, his expectations were not reasonable under the circumstances. Although Williams and Dodge knew each other, Dodge gave absolutely no indication that he was empowered to enter into plea negotiations, and immediately stopped Williams when he tried to make a deal by telling him that he had no such authority. As the trial court observed, Williams had spontaneously raised the subject of pleading guilty, and Dodge made no attempt to negotiate with him. "It is a well-settled principle of Kentucky law that a trial court ruling with respect to the admission of evidence will not be reversed absent an abuse of discretion." *Commonwealth v. King*, 950 S.W.2d 807, 809 (Ky. 1997).

The trial court did not abuse its discretion in refusing to suppress this portion of the interview.

MOTION FOR A DIRECTED VERDICT

Finally, Williams argues that the Commonwealth failed to meet its burden of showing that he committed burglary in the second degree.

STANDARD OF REVIEW

> On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.
>
> [T]here must be evidence of substance, and the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence.

Commonwealth v. Benham, 816 S.W.2d 186, 187-188 (Ky. 1991).

ANALYSIS

Kentucky Revised Statutes (KRS) 511.030(1) provides that "A person is guilty of burglary in the second degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a dwelling."

Williams argues that the Commonwealth's witnesses did not establish that he entered the Doyle residence with the intention of committing a crime and that, at most, the evidence showed that he committed trespass. Williams points to Dylan Doyle's testimony that he saw Williams knocking on the door of the residence, which suggests he did not intend to enter the home to commit a crime, and to testimony that Williams thought his friend "Howard" lived in the Doyle

residence. But Dylan's testimony could also suggest that Williams was merely trying to ascertain whether anyone was home before he entered the house to burglarize it, and his references to Howard were implausible at best.

The Commonwealth points out that intent to commit burglary could be inferred from the fact that Williams's car was initially pulled into the driveway, and then later backed into the driveway and the trunk opened, reinforcing the theory that once he ascertained that no one was home, he intended to enter and steal various items; the fact that the house had indeed been ransacked and a pillowcase full of jewelry placed by the back door for removal; the fact that a computer monitor had been placed in the hallway for removal; and the fact that Williams fled from the scene upon discovery and was unable to offer a credible explanation for his actions to the police. Under the *Benham* standard, the jury could reasonably have found that Williams intended to commit a crime when he entered the Doyle house; and the trial court did not err in denying the motion for a directed verdict.

The judgment of the Mason Circuit Court is affirmed.

TAYLOR, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent. I am convinced that Williams's Fifth Amendment rights were violated and, therefore, his statement should have been suppressed.

It is not enough that a suspect be informed of his *Miranda* rights. In *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), the Supreme Court established a bright-line rule: "[A]n accused, … having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id*. at 451 U.S. at 484-485, 101 S.Ct. at 1885. Statements made after a suspect has invoked his *Miranda* rights are presumed involuntary and inadmissible. *Montio v. Louisiana*, 556 U.S. 778, 787, 129 S.Ct. 2079, 2085-2086, 173 L.Ed.2d 955 (2009).

As the majority correctly states, the suspect must clearly and unambiguously assert his or her right to counsel. *Davis v. United States*, 512 U.S. 452, 459, 114 S.Ct. 2350, 2355, 129 L.Ed.2d 362 (1994). However, as stated in *Davis*, "a suspect need not speak with the discrimination of an Oxford don…." *Id*. The test is whether the request for counsel was sufficiently clear that a reasonable officer in the circumstances would understand that the suspect was requesting counsel. *Id*. Furthermore, Fifth Amendment rights may be waived after counsel has been requested but only if the suspect initiates conversations or discussions with authorities. *Minnick v. Mississippi*, 498 U.S. 146, 156, 111 S.Ct. 486, 492, 112 L.Ed.2d 489 (1990).

Applying the law as set forth by the United States Supreme Court, the only conclusion that can be reached is that Williams's statements made after

requested counsel must be suppressed. First, there is no question that Williams unambiguously requested counsel when he stated: "Look, I just want to talk to an attorney..." His request could not have been more direct. The issue of waiver is just as readily decided in Williams's favor.

Officer Dodge did not cease questioning after Williams requested counsel. Instead, he attempted to make Williams doubt his decision by suggesting that there could be adverse consequences. In a case strikingly similar, our Supreme Court applied the rule that once the request for an attorney has been made, further dialogue with the suspect initiated by the authorities must cease. In doing so, it stated: "[T]he authorities cannot continue to cajole or otherwise induce the suspect to continue to speak without first affording the suspect an attorney." *Bradley v. Commonwealth*, 327 S.W.3d 512, 518 (Ky. 2010).

Instead of applying a bright-line rule as required, the majority has blurred the line regarding when questioning must cease. How far can an officer continue questioning until it violates *Miranda*? Is it one more question, three more questions, or five more questions? I submit the bright-line rule is that no further questions be allowed after the request for an attorney.

I would reverse.

BRIEFS FOR APPELLANT:

Erik J. Wilbekin
Covington, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Ken W. Riggs
Assistant Attorney General
Frankfort, Kentucky