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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001228-MR

TRAVIS L. JACKSON

APPELLANT

v.

APPEAL FROM BARREN CIRCUIT COURT
HONORABLE PHIL PATTON, JUDGE
ACTION NO. 08-CR-00236

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, KELLER, AND MAZE, JUDGES.

CLAYTON, JUDGE: Travis L. Jackson appeals from a judgment of Barren Circuit Court following his conditional plea to fifty (50) counts of possession of matter portraying a sexual performance by a minor. When Jackson entered his conditional guilty plea, he reserved the issue regarding the Barren Circuit Court's denial of his motion to suppress the statements made by him during his police interrogation. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In summer of 2007, Jackson was living in the Addiction Deliverance Outreach House (hereinafter “ADO House”) in Barren County. According to Jackson, the ADO House is a faith-based recovery home run by Caveland Baptist Church. Following a police interview and an arrest, Jackson made a motion to suppress statements made by him to the Barren County Sherriff’s Department. On April 30, 2009, the trial court held a hearing on Jackson’s motion to suppress these incriminating statements.

At the suppression hearing, Detective Rusty Anderson and Jackson testified regarding the charges and interview. Detective Anderson stated that on August 15, 2007, Pastor David Pitcock contacted the Barren County Sheriff’s Department and informed him that child pornography was on the home’s computer and that residents of the home had seen Jackson looking at the child pornography. Detective Anderson then went to the ADO House where Pitcock showed him the pornographic pictures on the computer. The pictures were accessed by using Jackson’s password. Ultimately, Jackson was indicted on November 25, 2008, for fifty (50) counts of possession of matter portraying a sexual performance by a minor.

According to the testimony by Detective Anderson and Jackson at the suppression hearing, the events surrounding the event occurred as follows:

Detective Anderson went to Crystal Onyx Cave, where Jackson was working as a tour guide. When Jackson was finally available to speak with the detective, the

tourist attraction was closing. Detective Anderson asked Jackson to come to the sheriff's office and offered him a ride since Jackson did not have an automobile. Jackson consented to go to the sheriff's department, but he contends that, at this time, he was not aware that he was the subject of the questioning.

Detective Anderson drove Jackson, who rode in the back of his police cruiser, to the sheriff's office. Upon arrival at the sheriff's office, Detective Anderson explained the reason that Jackson was there was to question him regarding child pornography found on the ADO House computer. Detective Anderson also read him his *Miranda*¹ rights, and had him sign a "waiver of rights" form. Jackson agreed to the interview but observed that upon learning that images had been discovered on the ADO House computer and that other residents had seen him looking at them, he did not feel free to leave.

After some conversation about the reason that Jackson was being interviewed, Jackson made some admissions. Both parties indicated that they had been talking for about an hour. When queried as to the nature of Jackson's admissions, the detective said that he could not recall them specifically. But Detective Anderson stated that he wanted to record Jackson's statements, and according to him, Jackson said at that point "I think I might want an attorney." Jackson disputes this rendition and says that he explicitly asked for an attorney. Then, apparently, even though the testimony is somewhat convoluted, upon Jackson's request for an attorney, Detective Anderson testified that he said the

¹ *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S. Ct. 1602, 1630, 16 L. Ed. 2d 694 (1966).

request was fine, it was Jackson's right, and got up to leave. But Detective Anderson also said that "we are just trying to help you, if you don't want help, that's fine." Jackson then stopped Detective Anderson from leaving and denied that he wanted an attorney present.

Following Jackson's insistence that he wanted to talk without an attorney, Detective Anderson again read him his rights and then asked if he still wanted to talk. Subsequently, Jackson made a statement in which he admitted to the allegations in this case. An audio recording was made of this discussion. In his testimony at the suppression hearing, Jackson maintains that Detective Anderson explained that if Jackson admitted he was responsible for the pornography, the detective could arrange a two-year sentence rather than the possible ten years he might face in prison. In contrast, Detective Anderson, while admitting that he told Jackson that he faced a possible ten-year prison sentence, denied offering him a reduced sentence for making a statement.

Following the hearing and after considering both parties' briefs, on May 18, 2009, the trial court denied Jackson's motion to suppress the statements. On May 22, 2009, Jackson entered into a conditional guilty plea to fifty (50) counts of possession of matter portraying a minor in a sexual performance but reserved the right to appeal the denial of his motion to suppress. On July 28, 2009, the trial court entered a final judgment of conviction and sentenced Jackson to five years of imprisonment for each conviction with the sentences to run concurrently. The trial court also imposed a \$1,000 fine.

Even though the trial court had denied the motion to suppress, it did not make findings of fact or conclusions of law to support this decision so that the Commonwealth, on August 4, 2010, made a motion to remand the case to the trial court for findings and conclusions. Our Court, on April 22, 2011, granted the Commonwealth's motion, vacated the trial court's order, and remanded. On May 12, 2011, the trial court entered another order denying Jackson's motion to suppress with the concomitant findings and conclusions. Based on the conditional guilty plea in which Jackson reserved the right to appeal the suppression issues, he now appeals.

Jackson initially argues that the trial court erred in its determination that he was not in custody when he made incriminating statements. Because he maintains that he was in custody, his *Miranda* rights had attached. Next, Jackson contends that the trial court erred when it did not consider whether he had properly invoked his right to counsel. He contends that he did invoke this right, and thus, the interrogation should have been stopped. Hence, for both reasons, Jackson maintains that the trial court erred in not granting the motion to suppress. Finally, Jackson claims that the violation of his rights is not harmless error and requests that his conviction be vacated with the case remanded for new proceedings.

The Commonwealth counters that the trial court did not err when it denied Jackson's motion to suppress his statements. First, he was not in custody when he made the incriminating statements, and his request for an attorney was not unequivocal. Supporting the unequivocality of his request for an attorney is the

fact that Jackson initiated further conversation after he mentioned that he might want an attorney and then rescinded the request for an attorney. Lastly, his contention that his confession was coerced is not preserved. We will address these issues individually.

STANDARD OF REVIEW

Our standard of review of a trial court's denial of a motion to suppress is two-fold as set out in *Ornelas v. U. S.*, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996), and adopted by Kentucky in *Adcock v. Commonwealth*, 967 S.W.2d 6 (Ky. 1998). First, we determine whether the findings of fact are supported by substantial evidence. *Id.* at 8. If the findings are supported by substantial evidence, they are conclusive and will not be disturbed. *Commonwealth v. Harrelson*, 14 S.W.3d 541, 549 (Ky. 2000). Secondly, we conduct a de novo review of the trial court's application of the law to the established facts to determine whether its ruling was correct as a matter of law. *Adcock*, 967 S.W.2d at 8. Under de novo review, we afford no deference to the trial court's application of the law to the established facts. *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998). With this standard in mind, we review the case at bar.

ANALYSIS

1. Custodial interrogation

It is axiomatic that if a suspect is in custody, he must receive a warning regarding his Fifth Amendment rights before being questioned. *Miranda*, 384 U.S. at 479, 86 S. Ct. at 1630; *Commonwealth v. Lucas*, 195 S.W.3d 403, 405

(Ky. 2006). And without the warning, any incriminating statements that may be elicited cannot be admitted at trial. *See Miranda, supra*. A custodial interrogation has been defined as “questioning initiated by police after a person has been taken into custody or otherwise deprived of freedom of action in any significant way.” *Rankin v. Commonwealth*, 265 S.W.3d 227, 234 (Ky. App. 2007). A *Miranda* warning is necessary if, under the circumstances, a reasonable person would believe that he is not free to leave. *Id.*

Courts use several factors to discern whether suspects were “in custody” prior to receiving *Miranda* warnings. These factors include:

(1) the purpose of the questioning; (2) whether the place of the questioning was hostile or coercive; (3) the length of the questioning; and (4) other indicia of custody such as whether the suspect was informed at the time that the questioning was voluntary or that the suspect was free to leave or to request the officers to do so; whether the suspect possessed unrestrained freedom of movement during questioning; and whether the suspect initiated contact with the police[.]

U.S. v. Salvo, 133 F.3d 943, 950 (6th Cir. 1998). In addition, the inquiry into whether Jackson was in custody turns on whether a reasonable person in a similar situation would have believed that he or she was free to leave. *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S. Ct. 457, 465, 133 L. Ed. 2d 383 (1995).

In the instant case, given that Detective Anderson informed him that child pornography had been discovered on the ADO House computer and that other residents had seen him view it, a reasonable person, here Jackson might not believe that he was free to leave. Furthermore, although Detective Anderson stated

that, in his opinion, during the questioning Jackson was free to leave, nothing on the record shows that this information was articulated to Jackson during the interview. Indeed, in the case at hand, we deem that a careful examination of these facts confirms that Jackson was in custody when he was questioned at the sheriff's office.

The facts show that prior to his arrival at the sheriff's office, Jackson did not sense that he was in custody. But, after his arrival, upon being informed of the purpose for the interview, Jackson testified that he no longer felt free leave. Detective Anderson and Jackson testified that the detective provided Jackson with his *Miranda* rights and had him sign a written waiver of his rights prior to any questioning. In sum, it does not matter that Jackson was in custody since he was read his *Miranda* warning before Detective Anderson questioned him. Hence, based on the *Miranda* warning, any incriminating statements made by him are not subject to suppression.

Our review of the trial court's findings of fact is complicated because the findings are sparse. Some of the testimony by Detective Anderson and Jackson at the suppression hearing differs substantially. We believe, however, that the trial judge had the ability and the authority to ascertain which testimony was credible. Thus, we conclude that substantial evidence existed to support the findings.

Secondly, after a review of whether substantial evidence supports the trial court's decision, we are mandated to conduct a *de novo* review of the trial court's application of the law to the established facts. Here, our determination is

that the ruling was incorrect as a matter of law because, contrary to the trial court's reasoning, Jackson was in custody at the time he was interrogated. Yet, significantly, regardless of this factor, because Jackson was read his *Miranda* rights and signed a written waiver, the ultimate decision to deny the motion to suppress these statements was legally sound. Jackson's Fifth Amendment rights were not violated. Thus, although the trial court incorrectly concluded that he was not in custody, the error is harmless, and any harm resulting from the trial court's incorrect conclusion of law is obviated.

2. Right to counsel

Having determined that Jackson was in custody but had been appropriately read his *Miranda* rights, we now turn to the issue of whether his invocation of counsel prior to the tape recording of his statement necessitates the suppression of statements made at that point. Jackson's compilation of his request for counsel and Detective Anderson's rendition are quite different. In actions tried before the bench, the trial court acts as the finder of fact and must judge the credibility of all witnesses. Furthermore, it is not bound to accept the testimony of any witness as true. *Dunn v. Commonwealth*, 286 Ky. 695, 151 S.W.2d 763, 764–65 (Ky. App. 1941). And because of this responsibility, the trial court is free to believe all of a witness's testimony, believe part of the witness's testimony, or reject all of it. *Gillispie v. Commonwealth*, 212 Ky. 472, 279 S.W. 671, 672 (Ky. App. 1926).

Therefore, even though we disagree with the trial court's legal conclusion that Jackson was not in custody when the interview began, we have no difficulty accepting the trial court's finding that when Jackson mentioned that he might want an attorney, Detective Anderson stopped the interview. Then, Detective Anderson stated during his testimony, that he told Jackson he was only trying to help him. At this juncture, according to Detective Anderson, Jackson urged him to continue the questioning. Jackson does not dispute that he wanted to continue the interview. Next, before continuing and taping the statement, Detective Anderson read Jackson his *Miranda* rights for a second time during the interview.

Here, the trial court does not make any conclusion of law regarding the invocation of the right to counsel and its impact on the admissibility of the recorded statements. But since we review the legal implications de novo, we will now make such an analysis.

If a suspect speaks after invoking his right to counsel, the two-part test first articulated in *Oregon v. Bradshaw*, 462 U.S. 1039, 103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983), and later re-affirmed in *Smith v. Illinois*, 469 U.S. 91, 105 S. Ct. 490, 83 L. Ed. 2d 488 (1984) (*Smith I*) is applied to gauge the admissibility of the suspect's subsequent statements. *Smith v. Commonwealth*, 920 S.W.2d 514, 517 (Ky. 1995) (*Smith II*). To begin with this two-part test requires the court to determine if "the accused actually invoked his right to counsel." *Smith I*, 469 U.S. at 95, 105 S. Ct. at 492. Next, the court determines whether (a) the accused

“initiated further discussions with the police,” and (b) under the totality of the circumstances, the accused voluntarily, “knowingly and intelligently waived the right he had invoked.” *Smith II*, 920 S.W.2d at 517 (quoting *Smith I*, 469 U.S. at 95, 105 S. Ct. at 493). Thus, if the *Bradshaw/Smith I* test has been satisfied, the defendant’s statements—though made following his initial request for counsel assistance—are deemed voluntary and admissible. *Id.*

Here, it is undisputable that Jackson mentioned the issue of having an attorney upon being asked if his statement could be recorded. Credible testimony was given that the detective stopped and was in the process of leaving in order for Jackson to obtain counsel when Jackson changed his mind about having an attorney and continued the interview. Also, both parties acknowledge that Detective Anderson once again read Jackson the *Miranda* warning. Based on the totality of the circumstances in this case, the trial court’s order to deny the motion to suppress was not in error.

3. Coerced confession

Finally, the Commonwealth objects to Jackson’s argument that his confession was coerced because Detective Anderson promised that he would help him get a two-year sentence rather than a ten-year sentence if he continued with the interview. They argue that this issue was not preserved. The trial court heard the witnesses and reviewed the evidence. It never gave any viability to this assertion. At the hearing, Detective Anderson said he would never make such a statement because he had been trained at the sheriff’s office to never make such a

statement. He made this comment in direct contravention to Jackson's assertion about such a promise. Detective Anderson candidly stated that he did offer to help Jackson, but such a statement is not disallowed. As always, it is the role of the trial court to ascertain the credibility of witnesses and evidence. Here, the trial court found no merit to this claim, and we concur with this assessment that no coercion occurred.

CONCLUSION

Having considered the totality of the circumstances of this case, and having considered application of the law to those facts de novo, we conclude that the trial court's denial of the motion to suppress Jackson's statements was not in error. Accordingly, we affirm the Barren Circuit Court's denial of Jackson's motion to suppress.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Ryan D. Brunson
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky
Frankfort, Kentucky

Courtney J. Hightower
Assistant Attorney General
Criminal Appellate Division
Frankfort, Kentucky