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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-002086-MR

COMMONWEALTH OF KENTUCKY APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 12-CR-000264

DAQWONTAYE D. ROBINSON APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, KRAMER, AND VANMETER, JUDGES.

CLAYTON, JUDGE: The Commonwealth of Kentucky appeals from the Jefferson Circuit Court's order granting Daqwontaye D. Robinson's motion to suppress the statement he made to police on the grounds that the statement was obtained through custodial interrogation without Robinson first being read his *Miranda* rights. For the following reasons, we affirm the decision of the trial court.

In January 2012, Robinson was indicted on two counts of first-degree sodomy for engaging in deviant sexual intercourse with a child under 12 and two counts of first-degree sexual abuse for subjecting a child less than 12 to sexual contact. Robinson was a juvenile when the crimes were committed, but was an adult when the criminal complaint was filed against him, so he stipulated to transfer to circuit court as a youthful offender. Robinson subsequently filed a motion to suppress statements he made during a police interview, claiming he was subjected to custodial interrogation without being informed of or waiving his constitutional rights.

The court held a hearing on Robinson's motion. The lead detective in Robinson's case, Detective Jeff Alexander, testified concerning Robinson's questioning. Detective Alexander testified that after being made aware of the victim's claims, he first reached Robinson by telephone in November 2011. Robinson agreed to voluntarily come into the police station the following day, and arrived with his mother and another man. Robinson was not handcuffed, but he was lead alone to an interview room. Once seated, Detective Alexander told Robinson that after they were done talking, he could leave. Detective Alexander closed the door to the interview room since the room was located near a common area. The door was not locked.

The interview lasted about an hour and was recorded. Detective Alexander was the only officer present throughout the interview and wore plain clothes. Robinson was never placed under arrest, and was never read his *Miranda*

rights. Detective Alexander explained more than once that no matter what was discussed that day, Robinson would be free to leave at the end of the interview. However, the recording shows that Detective Alexander never explicitly told Robinson that he was free to leave at any time.

Detective Alexander left the room multiple times during the interview, and each time, he told Robinson to wait in the room. Throughout the interview, Detective Alexander's tone was mostly calm and polite, although after he left the room and returned for the second time, for about three minutes he elevated his tone of voice and stood over Robinson as he questioned him. Robinson was cooperative throughout the interview, and talked often. At no point did he ask to leave or indicate that he no longer wished to talk. He appears to have understood the questioning, and he shook Detective Alexander's hand at the end of the interview. Detective Alexander escorted Robinson out to the waiting area where his mother and the other man who had accompanied him were waiting. Detective Alexander explained that due to the confusing nature of the building's layout, he walked Robinson out as he does with all witnesses and victims. Robinson left, and was ultimately arrested over a month later.

The trial court found that Robinson's statements were made during a custodial interrogation. Since Robinson was not read his *Miranda* rights prior to making those statements, the trial court granted Robinson's motion to suppress those statements. From that order, the Commonwealth appeals, arguing that the

trial court erred by finding that Robinson was in custody during his interview and consequently suppressing his statement.

In *Commonwealth v. Jones*, 217 S.W.3d 190, 193 (Ky. 2006), the Kentucky Supreme Court clearly described the standard of review applicable to motions to suppress:

> Motions to suppress are governed by Kentucky Rules of Criminal Procedure (RCr) 9.78. That rule provides that a court facing a motion to suppress "shall conduct an evidentiary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling." When reviewing an order that decides a motion to suppress, the trial court's findings of fact are "conclusive" if they are "supported by substantial evidence." Using those facts, the reviewing court then conducts a *de novo* review of the trial court's application of the law to those facts to determine whether the decision is correct as a matter of law.

As an initial matter, Robinson argues that the Commonwealth's appeal is moot since Robinson's indictment has since been dismissed by the trial court. Since Robinson is not presently indicted for the alleged crimes, he argues that reversal of the trial court's order to suppress will provide the Commonwealth no relief in this matter. Mootness, a scenario in which the court is unable to grant meaningful relief to either party, deprives an appellate court of jurisdiction and is thus a threshold matter for the court to resolve. *Ky. Bd. of Nursing v. Sullivan Univ. Sys., Inc.*, 433 S.W.3d 341, 343-44 (Ky. 2014). Following entry of the trial court's order suppressing Robinson's statement, and following the filing of this

appeal, the Commonwealth moved the trial court to dismiss the indictment against Robinson without prejudice. This court previously ordered the Commonwealth to show cause why the appeal should not be dismissed as moot, and ultimately accepted the Commonwealth's argument and ordered that the appeal continue.[1] This court found that since the Commonwealth may obtain a new indictment and proceed against Robinson if it prevails in this appeal, the appeal was not moot. *See Commonwealth v. Blincoe*, 33 S.W.3d 533 (Ky. App. 2000) ("*Blincoe I*"); *Commonwealth v. Blincoe*, 34 S.W.3d 822 (Ky. App. 2000) ("*Blincoe II*").

In *Blincoe I*, this court held that "a new indictment may properly be obtained should the Commonwealth prevail in its appeal of the interlocutory order [,]" when the underlying indictment was dismissed during the pendency of an interlocutory appeal. *Blincoe I*, 33 S.W.3d at 536. The court held that if the indictment were not dismissed, delaying trial until the interlocutory appeal was decided would violate a defendant's right to a speedy trial. *Id*. In *Blincoe II*, this court ruled upon the Commonwealth's interlocutory appeal even after the underlying indictment had been dismissed. *Blincoe II*, 34 S.W.3d 822. Robinson argues that *Blincoe I* is distinguishable because in *Blincoe I*, the trial court dismissed the indictment on its own, despite the Commonwealth's protests; here,

[1] We address this argument, despite the fact that this court has already held that the Commonwealth has already demonstrated sufficient cause to prevent dismissal of this appeal, because Robinson's reply to the Commonwealth's response to the show cause order was initially rejected by this court as an "unauthorized pleading" and the order permitting the appeal to continue was issued prior to Robinson's reply being accepted by the clerk of this court. The mootness issue was therefore decided without taking into consideration Robinson's arguments for dismissal, and we will consider those arguments herein.

the Commonwealth itself requested dismissal of the underlying action. He further claims that the issue of mootness was not raised in *Blincoe II*, so *Blincoe II* does not actually support the Commonwealth's argument that an interlocutory appeal may be decided after the underlying indictment has been dismissed.

Consistent with this court's previous ruling in this appeal, we believe that *Blincoe I* and *Blincoe II* authorize this court to decide the Commonwealth's interlocutory appeal despite the dismissal of the underlying indictment. As this court has already ordered, the Commonwealth's appeal is not rendered moot because the Commonwealth may obtain another indictment should it prevail in this appeal. Had the Commonwealth proceeded to trial, double jeopardy would have attached, and the Commonwealth would have had no means of retrying Robinson even if the interlocutory appeal were successful.[2] Thus, the Commonwealth's only option was to have the indictment dismissed.

The Commonwealth argues that the evidence showed that Robinson was not in custody when he was questioned, and therefore, his statement should not have been suppressed. *Miranda* warnings are only necessary prior to custodial interrogations. *Callihan v. Commonwealth*, 142 S.W.3d 123, 126 (Ky. 2004) (citing *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.E.2d 694 (1966)). The parties agree that Robinson was interrogated, so the only issue is whether Robinson was in custody during the questioning. Custody does not occur until

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[2] Robinson cites *Windstream Ky. West v. Pub. Serv. Comm'n*, 362 S.W.3d 357, 360 (Ky. App. 2012), in which the underlying action had been dismissed and this court held that the appeal was moot. This case is not applicable since it does not involve a criminal indictment as the underlying action.

police, by some form of physical force or show of authority, have restrained the liberty of an individual. *Smith v. Commonwealth*, 312 S.W.3d 353, 358 (Ky. 2010). To determine whether someone is in custody, the court employs a totality of the circumstances test to ask "whether, considering the surrounding circumstances, a reasonable person would have believed he or she was free to leave." *Id*.

In *Smith*, the Kentucky Supreme Court set out several factors for the court to consider:

> The United States Supreme Court has identified factors that suggest a seizure has occurred and that a suspect is in custody: the threatening presence of several officers; the display of a weapon by an officer; the physical touching of the suspect; and the use of tone of voice or language that would indicate that compliance with the officer's request would be compelled. *Mendenhall*, 446 U.S. at 544, 100 S.Ct. 1870; *Cecil v. Commonwealth*, 297 S.W.3d 12 (Ky. 2009). Other factors which have been used to determine custody for *Miranda* purposes 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 or voluntarily admitted the officers into the residence and acquiesced to their requests to answer some questions. *U.S. v. Salvo*, 133 F.3d 943, 950 (6th Cir. 1998).

Smith, 312 S.W.3d at 358-59. Although a police station can sometimes be a coercive or intimidating environment, the fact that this interview took place at a

police station is not necessarily indicative of a custodial interrogation. *Oregon v. Mathiason*, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977).

The Commonwealth relies on *Commonwealth v. Cecil*, 297 S.W.3d 12 (Ky. 2009). In *Cecil*, the court found that the defendant was not in custody when he voluntarily appeared at the police station for the interview; police told him the interview was voluntary and that he could leave at any time; only one officer interviewed the defendant; the defendant was not handcuffed; and the defendant left after the interview ended. *Id*. at 16. The trial court distinguished *Cecil* based solely on the fact that the defendant in *Cecil* was expressly told that he was free to leave at any time.

The trial court did consider the totality of the circumstances of Robinson's interview with Detective Alexander. Robinson was told that he could leave after the interview was over. This statement does not lead a reasonable person to think that he or she could leave at anytime, but instead, indicates to a person that he or she can leave only when the interview is concluded. Further, the fact that Detective Alexander was courteous or that the room was reasonably comfortable does not mean that Robinson was not in custody.

The detective made it clear that he wanted Robinson to talk to him so that he could "tell his story" without interference from a lawyer. The detective stated that "… [i]f something happened you need to tell me. This is your chance to tell me because you're not going to talk to the judge and the lawyer. I am." The detective explained that he will be able to talk to the judge and the lawyer if the

case goes to court and that the lawyer will not let Robinson talk. Robinson replies "I get an attorney or a lawyer?" The detective said "Yeah, if you get an attorney. If we go to court, you'll have an attorney…" Here, the totality of the circumstances included these rather misleading statements and a definitive statement that Robinson could not leave until the Detective said the interview was over. Therefore, Robinson was not free to leave, and hence, he was in custody. Such a determination, as stated above, requires evaluation of the totality of the circumstances, not a focus on one defining factor.

We acknowledge that there are factors which may weigh in favor of a finding that Robinson was not in custody. However, the trial court did consider the totality of the circumstances and did not abuse its discretion.

There was no error committed by the trial court and thus the order of the Jefferson Circuit Court is affirmed.

KRAMER, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

VANMETER, JUDGE, DISSENTING: I respectfully dissent. I agree that the issue is whether the totality of the circumstances indicate that Robinson was "in custody" during his interrogation so as to require *Miranda* warnings. *Smith v. Commonwealth*, 312 S.W.3d 353, 358 (Ky. 2010). As stated by the United States Supreme Court, "[a]lthough the circumstances of each case must certainly influence a determination of whether a suspect is 'in custody' for

purposes of receiving of *Miranda* protection, the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 3520, 77 L. Ed. 2d 1275 (1983) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed.2d 714 (1977)).

In the present case, the majority opinion concedes the presence of "factors which may weigh in favor of a finding that Robinson was not in custody[,]" but impermissibly focuses on one factor, that Detective Alexander failed to explicitly advise Robinson he could terminate the interview at any time. In all other respects, the facts in this case are identical to those in *Commonwealth v. Cecil*, 297 S.W.3d 12 (Ky. 2009). In my view, the totality of the circumstances indicates that Robinson was not under formal arrest or restrained in his movement to a degree sufficiently equivalent to formal arrest. I would reverse the Jefferson Circuit Court's Opinion and Order.

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