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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001234-MR

RONALD HARRIS — APPELLANT

v.

APPEAL FROM JACKSON CIRCUIT COURT
HONORABLE OSCAR GALE HOUSE, JUDGE
ACTION NO. 13-CR-00099

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, D. LAMBERT, AND VANMETER, JUDGES.

COMBS, JUDGE: Following a trial in Jackson Circuit Court, a jury found Ronald Harris guilty of first-degree trespass and sentenced him to ninety-days' imprisonment. On appeal, he contends that the Jackson Circuit Court erred in denying his pre-trial motion to dismiss his indictment based on the Commonwealth's alleged violation of his Fifth Amendment privilege against self-

incrimination and his Sixth Amendment right to counsel. After our review, we affirm.

On September 7, 2013, Harris entered the residence of Kathy Hodges without permission. He was arrested and charged with second-degree burglary. He was released on his own recognizance on September 9, 2013.

Harris was arraigned on September 23, 2013, and he invoked his right to counsel and requested to have an attorney appointed. The Department of Public Advocacy was appointed to represent him. On October 7, 2013, he appeared at a preliminary hearing and waived his case to the grand jury.

On December 3, 2013, Harris appeared before the grand jury.[1] After he was sworn, he testified that he was in Hodges's residence when she returned home but that he was only there in order to purchase tools. He stated that after he had knocked on the door of the residence, he heard a noise. So naturally he let himself inside. He testified that he had been to the house to purchase tools before and had let himself inside the residence on other occasions. Ms. Hodges also testified to the grand jury and gave her differing account of events.

The grand jury returned an indictment charging Harris with second-degree burglary. Before his jury trial, Harris filed a motion to dismiss the indictment, arguing that his Fifth Amendment privilege against self-incrimination and his Sixth Amendment right to counsel were violated by Commonwealth's questioning him before the grand jury. After a hearing, the circuit court denied the

[1] Harris claims that he was subpoenaed by the Commonwealth; however, the record is silent as to whether he was subpoenaed by the Commonwealth or the grand jury.

motion to dismiss but offered Harris the option to suppress the statement that he made to the grand jury. Harris declined the court's offer, and the case proceeded to trial on June 19, 2014.

At trial, Harris testified on his own behalf. He related to the petit jury the same story that he had told the grand jury. After hearing the evidence, the jury found Harris not guilty of second-degree burglary – but guilty of the lesser – included charge of first-degree criminal trespass. Harris was sentenced to ninety-days' imprisonment. He has completed his ninety days. However, he has filed this appeal to challenge the trial court's order overruling his motion to dismiss the indictment.

On appeal, Harris argues that his indictment should have been dismissed because the Commonwealth Attorney was guilty of "grossly improper" conduct in subpoenaing him to the grand jury and questioning him under oath without notifying his attorney, violating both the Fifth and Sixth Amendments to the United States Constitution as well as Section 11 of the Kentucky Constitution. The issue was preserved for appellate review by Harris's pretrial motion to dismiss the indictment and the Jackson Circuit Court's order overruling that motion.

A trial court's decision concerning the dismissal of an indictment is reviewed pursuant to the standard of abuse of discretion. *Commonwealth v. Baker*, 11 S.W.3d 585 (Ky. App. 2000). Thus, we must determine whether the trial court's decision was arbitrary, unreasonable, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941 (Ky. 1999).

We first address Harris's argument that he was compelled to testify before the grand jury in violation of the Fifth and Fourteenth Amendments of the United States Constitution and Section 11 of the Kentucky Constitution. The Fifth Amendment provides, in part, that no person "shall be *compelled* in any criminal case to be a witness against himself . . . ." U.S. Const. Amend. V. (emphasis added). The Amendment prevents an individual from being ***forced*** "to answer official questions put to him in any . . . proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). "[A] State may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself." *Lefkovitz v. Cunningham*, 431 U.S. 801, 805, 97 S.Ct. 2132, 2136 (1977).

In responding to a subpoena, Harris appeared before the grand jury to give his account of the events that led to his arrest. After he was sworn, the prosecutor informed him that he was the subject of an investigation; that he had the right to remain silent; that anything he said could be used against him at trial; and that he did not have to answer any questions if he did not wish to do so. Harris stated that he wanted to answer the Commonwealth's questions, and he proceeded to give his testimony.

The Fifth Amendment privilege against self-incrimination only protects a witness from being ***compelled*** by the government to give self incriminating testimony. "The test is whether, considering the totality of the circumstances, the

free will of the witness was overborne." *United States v. Washington*, 431 U.S. 181, 188, 97 S.Ct. 1814, 1819 (1977). "[I]f a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not 'compelled' him to incriminate himself." *Minnesota v. Murphy*, 465 U.S. 421, 427, 104 S.Ct. 1136, 1142 (1984) (*quoting Garner v. United States*, 424 U.S. 648, 654, 96 S.Ct. 1178, 1182 (1976)). "Indeed, it seems self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled." *Id*.

In this case, the Commonwealth made no threats -- explicit or implicit -- that Harris would be penalized if he did not testify. Harris was informed of his constitutional right to remain silent and the consequences of relinquishing it. Nonetheless, he voluntarily waived his privilege against self-incrimination and offered his testimony to the grand jury. Based on these circumstances, we cannot conclude that Harris's free will was overborne compelling him to speak.

However, Harris argues that the grand jury setting is inherently coercive because the grand jury would have taken his silence as an admission of guilt if indeed he had elected to remain silent. Thus, the simple fact that he was subpoenaed compelled him to testify in violation of his Fifth Amendment privilege. We disagree, and the United States Supreme Court has unequivocally rejected this very argument.

In *United States v. Washington*, 431 U.S. 181, 97 S.Ct. 1814 (1977), the appellant argued that warning a defendant of his rights in the presence of the grand

jury undermines his assertion of the Fifth Amendment privilege by placing the witness in fear that the grand jury will infer guilt from the invocation of the privilege. In rejecting this argument, the United States Supreme Court held:

> This argument entirely overlooks that the grand jury's historic role is as an investigative body; it is not the final arbiter of guilt or innocence. Moreover, it is well settled that invocation of the Fifth Amendment privilege in grand jury proceeding is not admissible in a criminal trial where guilt and innocence is actually at stake.

Id. at 191, 1821.

Therefore, Harris cannot claim that he was compelled to incriminate himself merely because he was informed of his right to remain silent in the presence of the grand jury. If he had chosen to invoke the privilege, any possible inference of guilt could have only affected the grand jury proceedings. The fact that he asserted his privilege would not have been admissible at trial. The overbearing compulsion necessary for a Fifth Amendment violation simply did not exist – or was at the least illusory. We hold that Harris voluntarily waived his privilege against self-incrimination and that there was no Fifth Amendment violation as he claims.

Harris also argues that he was deprived of his right to counsel under the Sixth and Fourteenth Amendments of the United States Constitution as well as Section 11 of the Kentucky Constitution. The Sixth Amendment guarantees a defendant the assistance of counsel "at or after the time that judicial proceedings have been initiated against him . . . ." *Brewer v. Williams*, 430 U.S. 387, 398, 97 S.Ct. 1232, 1239 (1977). "This right, fundamental to our system of justice, is

meant to assure fairness in the adversary criminal process." *United States v. Morrison*, 449 U.S. 3612, 364, 101 S.Ct. 665 (1981). The right to counsel exists at every critical stage of the proceedings against a defendant. A critical stage is one "where the results might well settle the accused's fate and reduce the trial itself to a mere formality." *Id*. After the Sixth Amendment right to counsel has attached, "the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Maine v. Moulton*, 474 U.S. 159, 171, 106 S.Ct. 477, 484 (1985).

In order to establish a Sixth Amendment violation, a defendant must demonstrate: 1) that the government knowingly intruded into the attorney-client relationship and 2) that the intrusion demonstrably prejudiced the defendant (*Weatherford v. Bursey*, 429 U.S. 545, 97 S.Ct. 837 (1976)) or that it created a substantial threat of prejudice. *See Morrison*, 449 U.S. 366, 101 S.Ct. at 668-69.

We cannot determine from the record whether or not the Commonwealth knowingly intruded into the attorney-client relationship. The Commonwealth claims to have been unaware at the time of the grand jury proceeding that Harris was represented by counsel, and the trial court made no finding of fact on the matter. To repeat, the Department of Public Advocacy had been appointed to represent him at the time of his arraignment. However, whether or not the Commonwealth knew that Harris was represented is of no consequence in and of itself. Harris has failed to show that there was prejudice or a substantial threat as an arguable result of the Commonwealth's knowledge on this issue.

After an evidentiary hearing was held on Harris's motion to dismiss, the trial judge offered him the opportunity to have his statement to the grand jury suppressed. However, Harris refused the offer and opted to use the grand jury statement at trial to bolster his own testimony that he did not enter the victim's house with the intent to commit a crime. Harris was ultimately acquitted of the more serious felony charge of second-degree burglary. Thus, Harris did not suffer any prejudice or substantial threat of prejudice as a result of his self-serving statement to the grand jury. His declining to have the statement suppressed demonstrates that he himself did not believe that the statement was at all detrimental to his case; on the contrary, he likely believed it to be beneficial. Absent some showing of prejudice to the defense, there can be no basis for imposing a remedy, and no prejudice has been shown.

Even if we were to find that Harris was prejudiced by his statement to the grand jury, dismissal of the indictment is not the appropriate remedy. "Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *Morrison*, 449 U.S. at 364, 101 S.Ct. at 668. When the prosecution improperly obtains information from a defendant in the absence of his retained counsel, "the remedy characteristically imposed is not to dismiss the indictment but to suppress the evidence or to order a new trial if the evidence has been wrongfully admitted and the defendant convicted." *Id*. The trial court offered the only remedy

(suppression) to which Harris could arguably have been entitled, and he refused it. We find no error.

In his brief, Harris cites to *Commonwealth v. Baker*, 11 S.W.3d 585 (Ky. App. 2000), a case in which we affirmed the dismissal of an indictment due to prosecutorial misconduct. He argues that, just as in *Baker*, we should exercise our inherent supervisory powers to dismiss the indictment based on the egregious nature of the Commonwealth's actions. We disagree.

In *Baker*, a police officer testified to the grand jury that Baker struck her children with a deadly weapon when in fact she struck them with a small wooden stick. The false testimony changed the entire character of the offense. Without the testimony, there was insufficient evidence to charge Baker for the crime for which she was indicted. *Id*. at 589. We held that a court may utilize its supervisory powers to dismiss an indictment where a prosecutor knowingly or intentionally presents false, misleading, or perjured testimony to the grand jury resulting in actual prejudice to the defendant. *See also Commonwealth v.Bishop*, 245 SW.3d 733 (Ky. 2008) (discussing the situations in which trial judges are permitted to dismiss criminal indictments in the pretrial stage).

Harris, however, has not shown that the Commonwealth knowingly presented any false evidence to the grand jury, nor has he shown that he was prejudiced in any way. The grand jury had sufficient evidence through the victim's testimony to support the return of the indictment. Absent a showing of actual prejudice, we may not utilize our supervisory powers in order to dismiss an

indictment based on a mere allegation of flagrant abuse of the grand jury process. *Baker*, 11 S.W.3d at 588.

We affirm the judgment and sentence of the Jackson Circuit Court.

ALL CONCUR.

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