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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001343-MR

COMMONWEALTH OF KENTUCKY APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES L. CUNNINGHAM, JR., JUDGE
ACTION NO. 16-CR-000111

AUSTIN PATTON APPELLEE

OPINION
REVERSING & REMANDING

** ** ** ** **

BEFORE: COMBS, J. LAMBERT, AND THOMPSON, JUDGES.

LAMBERT, J., JUDGE: The Commonwealth appeals from the Jefferson Circuit Court's August 9, 2017, order granting Austin Patton's motion to suppress his statement from the police interrogation. We reverse the trial court and remand.

Patton was a suspect in a homicide investigation. His mother contacted their family attorney by phone and told him her son was innocent and described the shooting as self-defense or defense of others. The attorney instructed

Patton's mother to bring money to retain his legal services and to have Patton meet him in person the next day to confirm the facts of the defense. In the meantime, the attorney contacted the local police and reported he had been in contact with Patton and after they spoke, the attorney would bring Patton in to give a statement.

The following day, after waiting two hours for Patton to show up for their meeting, the attorney discovered the police were holding a person of interest. During the homicide investigation, the police fugitive unit located Patton. As soon as he realized Patton might have been in custody already, the attorney contacted the officer he had spoken with the day before. By the time he confirmed Patton was in custody, the police had already given *Miranda*[1] warnings, Patton had waived his rights in writing, and he had given a recorded statement.

After giving his statement, the police charged Patton with murder,[2] possession of a handgun by a convicted felon,[3] and tampering with physical evidence.[4] He was later indicted by the grand jury. Patton moved to suppress his statement and argued it was taken in violation of his Fifth and Sixth Amendment rights because his statement was taken without the presence of his attorney and,

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

[2] Kentucky Revised Statute (KRS) 507.020, a capital offense.

[3] KRS 527.040, a Class C felony.

[4] KRS 524.100, a Class D felony.

therefore, his waiver was not made voluntarily, knowingly, or intelligently. After a suppression hearing, the trial court granted the motion to suppress. This appeal followed.

The standard of review for an order on a suppression motion is twofold. *Cummings v. Commonwealth*, 226 S.W.3d 62, 65 (Ky. 2007). First, we determine whether the trial court's findings of fact are clearly erroneous or supported by substantial evidence. RCr[5] 8.27; *Commonwealth v. Banks*, 68 S.W.3d 347, 349 (Ky. 2001). Second, if properly supported, we submit the trial court's conclusions of law to a *de novo* review. *Milam v. Commonwealth*, 483 S.W.3d 347 (Ky. 2015).

The material facts in this case are undisputed and our review of the record reveals no error. Accordingly, the trial court's findings of fact are supported by substantial evidence and are, therefore, conclusive.

Next, we apply a *de novo* review of the law as applied to the facts. The Commonwealth contends the sole issue is whether the trial court erred and applied the wrong constitutional[6] standard to reach its ruling when it suppressed Patton's statement as taken in violation of his right to counsel. The Fifth and Sixth Amendments of the U.S. Constitution and Section 11 of the Kentucky Constitution

[5] Kentucky Rules of Criminal Procedure.

[6] Here, in using "constitutional," we refer to both the United States and Kentucky Constitutions.

safeguard the right to counsel. The Commonwealth argues the trial court applied the wrong legal standard when it granted Patton's motion to suppress under Sixth Amendment principles. Patton asserts the trial court applied the correct standard when it found he did not waive his right to counsel voluntarily, intelligently, and knowingly. Instead, the trial court found Patton's decision to talk to the police was "mistaken, voluntary, and unintelligent." We disagree.

The Kentucky Constitution[7] and the law interpreting it strongly support the U.S. Constitution's Sixth Amendment right to counsel. *Keysor v. Commonwealth*, 486 S.W.3d 273, 281 (Ky. 2016). However, these protections do not attach until formal prosecution commences. *Commonwealth v. Terrell*, 464 S.W.3d 495, 502 n.27 (Ky. 2015). Here, the parties do not dispute that Patton was not charged until after he gave his statement to the police. Accordingly, his right to counsel under the Sixth Amendment did not attach and there could be no violation of this right. To the extent the trial court relied on the Sixth Amendment or Section 11 of the Kentucky Constitution right to counsel, its ruling is unsupported by the law.

The Fifth Amendment of the U.S. Constitution "applies to the States by virtue of the Fourteenth Amendment," *Maryland v. Shatzer*, 559 U.S. 98, 103,

[7] "In all criminal prosecutions the accused has the right to be heard by himself and counsel[.]" KY. CONST. § 11.

130 S.Ct. 1213, 1219, 175 L.Ed.2d 1045 (2010), and ensures no person "shall be compelled in any criminal case to be a witness against himself[.]" U.S. CONST. amend. V. Likewise, Section 11 of the Kentucky Constitution provides "[i]n all criminal prosecutions the accused . . . cannot be compelled to give evidence against himself[.]" To ensure protection of the right against compulsory self-incrimination, the United States Supreme Court in *Miranda* established the rule requiring police officers to warn suspects of their right to have an attorney present before beginning interrogation if in police custody. 384 U.S. at 444, 86 S.Ct. at 1612.

This "'right to counsel' refers to the right to have counsel present during questioning [and is protected by] the Fifth Amendment right to silence[.]" *Terrell*, 464 S.W.3d at 502 n.27. A suspect must clearly assert his right to counsel to be protected. *Ragland v. Commonwealth*, 191 S.W.3d 569, 586 (Ky. 2006) (citing *Edwards v. Arizona*, 451 U.S. 477, 485, 101 S.Ct. 1880, 1885, 68 L.Ed.2d 378 (1981)). Further, a waiver of the Fifth Amendment right to counsel must be made knowingly, intelligently, and voluntarily. *Cummings*, 226 S.W.3d at 65 (citing *Miranda*, 384 U.S. at 444, 86 S.Ct. at 1612). The court must consider the totality of the circumstances when determining these factors. *Id.* at 66. When determining the totality of the circumstances, we will consider "the particular facts and circumstances surrounding [this] case, including the background, experience,

and conduct of the accused." *Oregon v. Bradshaw*, 462 U.S. 1039, 1046, 103 S.Ct. 2830, 2835, 77 L.Ed.2d 405 (1983) (quoting *North Carolina v. Butler*, 441 U.S. 369, 374-75, 99 S.Ct. 1755, 1758, 60 L.Ed.2d 286 (1979)).

The first factor of Fifth Amendment analysis is the voluntariness of the person's waiver of his right to counsel. The trial court observed, and the parties do not now contest that, the police officers involved in the investigation and interrogation acted professionally and appropriately:

> Broadly stated, the work of the lead detective and interrogator . . . was exemplary in this case. He tracked down a suspect in a homicide case quickly, got him to the police station without incident, engaged him in a discussion of the events, and procured a statement from Patton which provided important (but perhaps not critical) evidence on how the homicide occurred. He explained to Patton his right to counsel and his right to remain silent, got him to sign a waiver form, and avoided coercive conduct in doing so. Indeed, Patton even shared with [the detective] that "my lawyer told me to talk to y'all." Despite the constitutional imperative that the statement be suppressed, one must recognize that [the detective] did his job professionally and competently.

The parties agree voluntariness is not at issue here. Accordingly, it is undisputed Patton waived his right to counsel prior to giving his statement to the police voluntarily – free of coercion or intimidation by any police officers he encountered.

Patton's only remaining allegation is he did not waive his right to counsel intelligently and knowingly due to misunderstanding his attorney's

instructions to him about speaking with the police. However, the record refutes this. "When a suspect has been advised of his rights, acknowledges an understanding of those rights, and voluntarily responds to police questioning, he may be deemed to have waived those rights." *Ragland*, 191 S.W.3d at 586 (citation omitted). Patton was read his *Miranda* rights and acknowledged he understood those rights. This is all that is required for an intelligent and knowing waiver, which must be made "with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." *Mills v. Commonwealth*, 996 S.W.2d 473, 482 (Ky. 1999) (citation omitted), *overruled on other grounds by Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010). Based on the totality of the circumstances, Patton waived his *Miranda* rights and he was fully aware of the nature and consequences of abandoning his rights. The trial court's finding that Patton waived his right to counsel unintelligently and mistakenly was unsupported by the law.

In his final argument, Patton reasons the trial court's ruling relied on protections provided under RCr 2.14, which grants:

> (1) A person in custody shall have the right to make communications as soon as practicable for the purpose of securing the services of an attorney.
>
> (2) Any attorney at law entitled to practice in the courts of this Commonwealth shall be permitted, at the request of the person in custody or of some one acting in that person's behalf, to visit the person in custody.

However, "RCr 2.14(2) provides an individual with access to an attorney—nothing more, nothing less." *Terrell*, 464 S.W.3d at 501. "It could be accurately described as a visitation rule that prevents an attorney from being barred from meeting with the attorney's client." *Id.* The constitutional right to counsel is a personal right, it does not force counsel on a person by preventing him from talking to the police if he chooses to waive his rights, and the person is still required to expressly invoke his right by requesting counsel. *Id.* at 502.

Here, Patton attempts to invoke the reasoning for RCr 2.14 as described in *Terrell* to offer relief when the police intentionally act with bad faith to prevent accused access to counsel. However, in the case at bar, the facts do not support his position. As previously noted above, Patton voluntarily, intelligently, and knowingly waived his right to counsel. The police did not interfere with his access to his attorney or commit any wrongdoing. Therefore, this argument is unpersuasive.

For the foregoing reasons, we reverse the Jefferson Circuit Court's August 9, 2017, order granting Patton's motion to suppress his statement from the police interrogation and remand for further proceedings consistent with this opinion.

COMBS, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS.

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