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THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: AUGUST 25, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2003-SC-0089-MR

DATE 9/15/05 ELAGRAVE D.C.

MICHAEL ANTHONY HOLLOWAY — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. McDONALD-BURKMAN, JUDGE
2001-CR-1646

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from a judgment based on a jury verdict which convicted Holloway of intentional murder, kidnapping, and first-degree robbery. He was sentenced to life without parole on the murder conviction, life without parole for twenty-five years on the kidnapping conviction, and twenty years on the robbery conviction.

The questions presented are whether the trial judge erred in refusing to strike several jurors for cause; whether the pretrial destruction of the paper-based qualification forms of jurors who were disqualified, excused, or deferred from service requires a new trial; whether the trial judge erred in allowing the mother of the victim to watch the entire guilt phase before testifying in the penalty phase; whether the prosecution was allowed to impermissibly bolster its case with testimony about the process of obtaining a search warrant and with testimony about the character of another witness; whether the trial judge erred in ruling that the prosecution could

introduce evidence that the accused pointed a gun at his mother shortly after the murder; whether the death penalty should have been excluded as a sanction for a hoax letter sent from the Commonwealth to defense counsel during pretrial discovery; and, whether the trial judge erred in failing to suppress evidence seized at Holloway's residence as well as statements by the accused made after he was arrested.

The evidence at trial indicated that on July 1, 2002, two witnesses found the then unidentified body of a young white woman in Iroquois Park in Jefferson County. The subsequent autopsy determined that the cause of death was a single gunshot wound to the head. Among the items police found on the victim's body was a high school class ring bearing a year of graduation, name, and high school. Police investigated this person and contacted friends and family of her. They learned that she lived in Barren County and she met a man on the Internet named Michael Lockhart who lived in Louisville. This woman drove her green Plymouth Neon to Louisville to meet Lockhart. Police found the same green car in a Park Hill housing project in Jefferson County where Holloway lived. Upon further investigation, they discovered that Lockhart had changed his name to Holloway.

Based on the forgoing information, police obtained a search warrant of Holloway and of his home. During the search of his home, police discovered a handgun wrapped in a towel placed in a closet in the apartment. They also discovered a piece of paper containing the first name and last initial of the victim. Holloway was not at the home when they executed the search, but his mother told police he was at his cousin's house. They found Holloway there, and asked if he would come to the station house for questioning. Holloway agreed and was searched before he was placed in the police car. Police found Holloway to be in possession of marijuana. At the station house, he

was advised of his Miranda rights, signed a waiver form, and began to talk. He gave several conflicting accounts of his relationship with the victim and his activities on the night of the murder. Eventually, he gave a taped statement in which he admitted that he met the victim on the night of the murder but had conspired with another man, Mark Belt, to kidnap the victim for the purpose of using her car for a planned robbery. He further stated that it was Belt's idea to murder the victim, that Belt pulled the trigger, and he himself merely acted as the lookout.

At trial, Belt testified that he knew Holloway through his cousin, Ricky Thomas, but that he had only seen him twice before and had not gone to his house on June 30. Belt also stated that he had never planned a robbery with Holloway and did not shoot the victim.

Ricky Thomas and his girlfriend, Madonna Biggers, also testified. Both saw Holloway in a green Plymouth Neon on or about the time of the murder. Additionally, Biggers testified that she and Thomas had received a series of letters from Holloway outlining a plan to avoid the death penalty. Those letters were admitted into evidence. One of the letters asked for Thomas to confess to the murder and then disappear to Georgia, at which point Holloway planned to turn himself in and plead guilty to reckless homicide in the hope of receiving a lighter sentence. In other letters, Holloway plainly admitted that he killed the victim. Holloway later sent letters to Biggers asking her to get someone to kill Thomas. He told her it needed to look like a suicide, and explained how to fake a note from Thomas confessing the murder.

The jury found Holloway guilty of all charges. This appeal followed.

I. Challenges to Jurors

Holloway argues that the failure to strike seven jurors for cause violated his right to a fair and impartial jury under both the federal and state constitutions. He asserts that the motion to strike the jurors for cause was based on reasonable grounds to believe that they held views that would prevent or substantially impair the performance of their duties as jurors in accordance with their instruction and oath, all in violation of RCr 9.36(1). The denial of the motions required the defense to exercise all 18 of its allotted challenges. None of the subject jurors served on the panel.

Juror 41077 did not state that he would automatically vote for the death penalty or that mitigating factors would be irrelevant to him. The juror stated that the minimum penalty could be appropriate depending upon the evidence and that he would consider all the penalties. His views would not have prevented or substantially impaired the performance of his duties as a juror. See Caudill v. Commonwealth, 120 S.W.3d 635 (Ky. 2003).

Holloway complains that Juror 27471 had been a police officer for 22 years and had indicated that if he were on trial for capital murder, he would not want a jury of his peers deciding his fate (presumably other police officers). However, the juror did state that he could consider mitigating facts and the entire penalty range. He also indicated that he would not automatically impose the death penalty. Again, the views of this juror would not prevent or substantially impair the performance of his duties. Caudill, supra.

Juror 18434 was challenged because he allegedly leaned strongly toward the death penalty despite the fact that his mind could be changed. The juror did state that he could be fair and impartial and that he would consider all the evidence and mitigating

circumstances and an appropriate penalty while considering the entire range of penalties.

Holloway complains about a huge vacillation in regard to Juror 31319. The juror ultimately said that she could consider the full range of penalties as well as all the mitigating evidence. Although the trial judge noted a huge vacillation on the part of this juror, she concluded that it would not be proper to strike the juror because of the overwhelming answers that she could consider all the appropriate factors. The juror explained that the problem was that she had not heard all of the facts and obviously reserved judgment until all of the facts were exposed. She clearly stated that any penalty would depend on the evidence presented.

Juror 35111, as observed by the trial judge, could clearly consider the entire range of penalties. She would not automatically choose the death penalty and stated she hated to see anyone put to death. A review of the entire proceedings indicates that the views of this juror did not prevent or substantially impair her performance as a juror.

Holloway complains that Juror 43520 should have been removed because he stated that the death penalty was appropriate in most murder cases. The juror ultimately stated that he would listen to all of the evidence before determining if the death penalty was appropriate and that he would consider the entire penalty range. He also indicated that he would absolutely consider the aggravators and mitigators as well as all of the evidence supporting conviction and sentencing. Although the trial judge said that there was no doubt that the juror leaned toward the death penalty and that it was close, she still believed that the juror could consider the entire range of penalties as well as the mitigating factors.

Finally, Holloway argues that Juror 21778 was not qualified because she was not certain that she could consider a twenty-year penalty for a murder conviction. This juror stated that she would have to hear all the evidence before she could select a penalty and she specifically said that she would consider mitigating evidence. She said that she would have to hear what was going on before she could make a decision.

In every case of the challenged jurors, it is clear that the trial judge did not abuse her discretion in denying the motions to remove the jurors for cause. The views of the various jurors as expressed did not prevent or substantially prevent any of them from performing their duties. It is the trial judge who is best situated to know whether a juror is competent to serve impartially. Caudill. The failure to strike the seven jurors for cause did not violate the right of the defendant to a fair and impartial jury under either the federal or state constitution.

II. Destruction of Juror Qualification Forms

Holloway contends that the pretrial destruction of the paper version of the juror qualification forms made it impossible for the trial defense counsel to review the actions of the trial judge as to whether there was compliance with the rules, statutes and administrative procedures relating to jury selection.

There were approximately 600 individuals summoned as jurors for this case and over a hundred jurors were excused or deferred for a variety of reasons. It is of interest to note that the motion by Holloway for the disqualification information acknowledges the fact that such information is entered into the computer in Jefferson County. Apparently the paper form of the juror qualification form is routinely destroyed once the information on that paper is entered into the computer. The trial judge properly refused to allow the defense counsel any extension of time which would have delayed the trial

while such an examination was conducted. The claim that the trial judge categorically deferred college students and thus the jury selection process is subject to substantial deviation is without foundation. There is no proof in the record of such a categorical deferral. No computer records were included in this record on appeal and thus there is nothing for this Court to review. Without any such records, Holloway cannot conceivably demonstrate any prejudice. There has been no abuse of discretion by the trial judge, no substantial deviation in the jury selection process and no prejudice resulting from any of the actions taken or not taken.

III. Separation of Witnesses – Mother of the Victim

Holloway argues that the decision of the trial judge to allow the mother of the victim to watch the guilt phase of the trial and then testify in the penalty phase violated the separation of witnesses required by KRE 615. He asserts that the separation of witnesses is discretionary pursuant to RCr 9.48, but is mandatory under KRE 615. In support of this argument, he cites Mills v. Commonwealth, 95 S.W.3d 838 (Ky. 2003). That case clearly states that contrary to the language of RCr 9.48, the use of the word "shall" in KRE 615 makes exclusion mandatory and removes the separation of witnesses from the discretion of the trial judge.

A party has a right to separation of witnesses upon a timely request. KRE 615 states in pertinent part, "At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses and it may make the order on its own motion." Prior to trial, Holloway requested all witnesses to be excluded, including the mother. The trial judge made a finding that the mother was not a witness contemplated by KRE 615 and allowed her to stay, but excluded all other witnesses.

It is acknowledged that the mother of the victim was not a witness to the crime or any of the facts surrounding its commission. She testified concerning her daughter's age; that her daughter was employed as a hospital emergency room clerk; and that her daughter had a 9-year-old daughter. She also identified a picture of the deceased victim. Her testimony served the purpose of only bringing to the attention of the jury that the victim was a living person. See Port v. Commonwealth, 906 S.W.2d 327 (Ky. 1995). It is obvious from the testimony of the mother that her statements could not have resulted from, been influenced, tainted or changed in any way by the testimony she may have heard at trial. The error here is harmless pursuant to RCr 9.24.

IV. Police Testimony – Search Warrants – Belt

Holloway claims that the prosecution was impermissibly permitted to bolster its case when a police officer testified regarding the process for obtaining a search warrant. He also believes the testimony was not relevant.

At trial, defense counsel objected to a question by the prosecution to a detective to explain the process of obtaining a search warrant. The Commonwealth argued that the jury had a right to know that the entry was lawful. The defense objection was overruled.

The testimony only indicated to the jury that the police must make a request that a court recognize that there is reasonable ground to believe that evidence may exist at a certain location. It says nothing about the guilt of the defendant. The testimony was relevant because the jury was entitled to know what the police did while conducting their investigation. Even if the testimony was improper, considering the entire record, any error was certainly harmless. RCr 9.24.

Holloway also complains about the testimony of the detective that the police had let Mark Belt go because it was their opinion that Belt had been forthcoming and truthful with them. The defense motion for a mistrial was denied, but the trial judge gave an admonition to the jury that they should disregard the statements by the detective about his opinion or impression of the other officer's opinion about Belt. The admonition is presumed to have cured any possible error. Maxie v. Commonwealth, 82 S.W.2d 860 (Ky. 2002). The detective did not testify as to what Belt actually told police, he only stated that they took a taped statement from him and after speaking with him, he and the other detective believed that Belt had been truthful. The content of the statement was not explained by the testifying detective and his testimony did not bolster the testimony of the Belt statement. The jury was free to decide the credibility of Belt because Belt did testify. The error, if any, was harmless. RCr 9.24.

Holloway also raises the issue that the trial judge should have included the evidence that Belt had failed a polygraph examination. The trial judge was correct when she stated that the evidence of the polygraph examination was not admissible. Cf. Phillips v. Commonwealth, 17 S.W.3d 870 (Ky. 2000); Morgan v. Commonwealth, 809 S.W.2d 704 (Ky. 1991).

V. Gun Pointing at Mother

Holloway argues that during the penalty phase, the trial judge erred in ruling that the prosecution could introduce evidence that the defendant pointed a gun at his mother shortly after the murder. Holloway wanted to call his mother as a witness during the penalty phase. His defense counsel sought to exclude the fact that the mother had given a statement to police telling them that Holloway had pointed a gun at her on the morning of June 30, 2001, the day following the murder.

Defense sought to exclude the evidence because it did not come within any of the categories provided in KRE 404(b)(1), and because it was not offered during the case-in-chief, it was not inextricably intertwined with the crime and was not admissible pursuant to KRE 404(b)(2). The trial judge ruled that the evidence was admissible because it was relevant to the character of the defendant. Holloway maintains that the ruling was erroneous because the evidence was not admissible to rebut a pertinent trait of the defendant's character or his general moral character under KRE 404(a)(1).

Holloway did not call his mother to testify. Consequently, the alleged error is not properly preserved for appellate review and will not be considered. Crawley v. Commonwealth, 107 S.W.3d 197 (Ky. 2003). A reviewing court is not required to speculate as to whether there was any prejudice or to assume that an adverse ruling was the sole motivation for a witness not testifying. Cf. Hayes v. Commonwealth, 58 S.W.3d 879 (Ky. 2001).

VI. Hoax Letter – Death Penalty Exclusion

Holloway contends that the death penalty should have been excluded because of the hoax letter that one of the prosecutors faxed to defense counsel. The hoax letter recited information about the "real killer" and subsequently, one of the prosecutors advised defense counsel that the letter was "a joke." The trial judge convened a short hearing and stated that she had reviewed the motion of the defense counsel and the hoax letter and the letter did not rise to the level of prosecutorial misconduct. The trial judge did advise that the letter was tasteless and insensitive, but the exclusion of the death penalty would not be an appropriate sanction. Holloway did not receive the death penalty, thus the exclusion of the death penalty as a possible penalty is of no consequence. The letter did not rise to the level of prosecutorial misconduct because it

did not affect the fairness of the trial. See Smith v. Commonwealth, 734 S.W.2d 437 (Ky. 1987), *citing* United States v. Young, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985).

We must agree with Holloway's counsel that the death penalty is not a joking matter. A high standard of conduct is expected of prosecutors. The hoax letter was unacceptable. Clearly, it is an embarrassment to the prosecution; however, we do not find any violation of either the federal or state constitutions for due process. There is no need to vacate the judgment or remand the case.

VII. and VIII. Search Warrant and Fruits of an Illegal Detention

A number of issues stem from Holloway's assertion that a search warrant for Holloway's residence and person was not supported by probable cause. In particular, he states that certain facts cast aspersions on the certainty of Holloway's criminal involvement with the victim.

Our review of a search warrant must give great deference to the issuing judge's findings of probable cause. The standard for reviewing an issuing judge's finding of probable cause is that so long as the magistrate had a substantial basis for concluding that a search warrant would uncover evidence of wrongdoing, the Fourth Amendment requires no more. Moore v. Commonwealth, 159 S.W.3d 325 (Ky. 2005). We have consistently held that Section 10's guarantee against unreasonable searches does not exceed the federal one. See e.g., Colbert v. Commonwealth, 43 S.W.3d 777 (Ky. 2001). Thus, Section 10 of our constitution requires no more.

Whether probable cause exists is determined by examining the totality of the circumstances. Furthermore, the test for probable cause is whether there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Probable cause does not require certainty that a crime has been committed or that evidence will be present in the place to be searched. See Moore, supra.

Here, the affidavit supporting the warrant stated that Louisville Police found the victim's body in Iroquois Park. The resulting autopsy and investigation found that a ring recovered from the victim's hand bore her name, high school and year of graduation. It states the information gained from further investigation, naming the victim's place of work, home address, and statements from her friends that on Saturday, June 30, 2001, she said she was going to Louisville to meet a guy she met on the Internet. The informant also identified Holloway by his alias, "Michael Lockhart", and described his physical characteristics as a tall thin black male who has a tattoo of "Lockhart" on his arm.

Further investigation with family and other co-workers corroborated that on June 30, 2001, she reported to others that she was traveling from Glasgow to Louisville to meet Lockhart whom she met on the Internet. It also revealed that she had been in contact with him for some time over e-mail and had met him on previous occasions. Finally, the investigation revealed that Lockhart had legally changed his name to Holloway and gave Holloway's correct address. The warrant sought to find any evidence linking the victim to Holloway including a "black handbag type purse", weapons and ammunition, computers and storage media, and an address book. The warrant described Holloway particularly including his tattoo and physical characteristics, as well as his residence.

Holloway asserts several points about the case facts, namely: the exact distance of the victim's car from Holloway's apartment was not mentioned in the affidavit; the affidavit does not explicitly state that the victim had been with Holloway;

and, that there is only one name connecting Holloway to the victim. In short, Holloway argues that the statement of facts fails to provide probable cause. His recitation of the affidavit fails to mention that the affidavit provides that the victim had met Holloway on several other occasions, that her car was within a few blocks of Holloway's home after traveling from Glasgow, and that many of the victim's acquaintances informed the police that she was making the trip for the purpose of being with Holloway.

Rather than accepting Holloway's hyper technical view of the affidavit, we see that a common sense reading of the facts in the affidavit provides a substantial basis for the warrant-issuing magistrate to conclude that a fair probability exists that evidence related to the victim's murder would be uncovered in Holloway's apartment or on his person. Neither the Fourth Amendment, nor Section 10, requires any more. *cf.* Moore, supra. Thus, under the totality of the circumstances, we hold that this search warrant was supported by probable cause.

Holloway complains that the search of his person was unconstitutional and therefore taints statements he made to police thereby requiring suppression. He cites Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), for his analysis of the search of his person. Terry, supra, protects citizens from warrantless searches. The search warrant obtained by police authorized a search of his apartment and of his person. Thus, the search of his person that uncovered marijuana was constitutional. Accordingly, there is no taint to his statements made at the station house caused by this search.

Next, Holloway asserts that his statements made to police at the station house were tainted by an illegal arrest. Two uniform citations exist in the record. One lists arrest for marijuana possession and the other lists arrest for murder, kidnapping, first-

degree robbery, and possession of a handgun by a convicted felon. Both arrest slips list the same time and date and cross-reference each other. Two forms were used because only four charges can be listed properly on each form. Thus, the fifth charge of possession of marijuana was listed on a continued form. Holloway only mentions the form listing possession of marijuana in his brief. A brief review of the record reveals that Holloway was charged with all the crimes at the time of his arrest.

Police first asked Holloway if he would accompany them to the station. He agreed, and then the search revealing the marijuana occurred. Then Holloway was transported to the station house, read his constitutional rights, and subsequently signed a waiver form and gave the statements. Holloway asserts that these statements were tainted by involuntariness and by an illegal arrest. He cites a host of cases including Kaupp v. Texas, 538 U.S. 626, 123 S.Ct. 1843, 155 L.Ed.2d 814 (2003); Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975); and Martin v. Commonwealth, 592 S.W.2d 134 (Ky. 1979). These cases deal with improper custodial interrogation, however. Here, Holloway was properly advised of his constitutional rights, and he accordingly waived them by signing a form. His statements were neither coerced nor given under circumstances violating his constitutional rights.

Finally, Holloway states that because he was searched at a location other than the address listed on the search warrant, Michigan v. Summers, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981); Guth v. Commonwealth, 29 S.W.3d 809 (Ky. App. 2000); Coker v. Commonwealth, 811 S.W.2d 8 (Ky. App. 1991); Commonwealth v. Smith, 898 S.W.2d 496 (Ky. App. 1995); and Commonwealth v. Hubble, 730 S.W.2d 532 (Ky. App. 1987), support his assertion that he was illegally arrested. He

amalgamates the holdings of these cases into an argument that the search warrant did not authorize a search of his person at any location other than his home.

Unlike those cases, police had a valid warrant for the search of the person of Holloway, and his physical characteristics were listed with particularity. Those cases considered the legality of searching a person in addition to a place where the warrant was issued for the search of a place. Further, Coker, supra, dealt with the issue of procedural difficulties encountered where police altered information on the warrant. None of the cases cited by Holloway stand for the principle that a warrant issued for the search of a person authorizes the search in a particular place alone. Rather, they deal with police searching people found in a place warranted to be searched or searching a place other than that warranted to be searched. Here, police did not act outside of the authority of the warrant issued for the search of Michael Holloway. Thus, the resulting search and subsequent arrest did not violate his constitutional rights.

Holloway received a fundamentally fair trial. He was not deprived of any of his due process rights under the state or federal constitutions.

The judgment of conviction is affirmed.

All concur.

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