# *IMPORTANT NOTICE*

## *NOT TO BE PUBLISHED OPINION*

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***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: MAY 18, 2006
NOT TO BE PUBLISHED

# Supreme Court of Kentucky

FINAL

DATE 6-8-06 [illegible]

2005-SC-0017-MR

BURLEY HUGHES, JR. APPELLANT

V.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
03-CR-170

COMMONWEALTH OF KENTUCKY APPELLEE

## MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Burley Hughes, Jr., was convicted by a Knox Circuit Court jury of one count of first-degree assault, KRS 508.010, one count of attempted murder, KRS 506.010(1); 507.020(1), one count of attempted first-degree robbery, KRS 506.010(1); 515.020(1), and of being a persistent felony offender in the second-degree, KRS 532.080(2). He was sentenced to a total of thirty years in prison and appeals to this Court as a matter of right, Ky. Const. § 110(2)(b), asserting that the trial court committed reversible error in failing to suppress inculpatory statements made by him during an interrogation by Kentucky State Police Detective K. Y. Fuson. Finding no error, we affirm.

On October 21, 2003, Larry Taylor opened the front door of his Knox County residence to find a figure standing outside, disguised in a toboggan and bandana. The

individual announced his intention to rob Taylor, then displayed a .22 rifle that had been hidden behind his back. Taylor was shot in the leg while attempting to escape through the back door of his home. Upon hearing the noise, Taylor's mother, Dorothy Thomas, who lived next door to Taylor, walked toward Taylor's home and encountered the gunman. The gunman shot Thomas twice, once in the stomach and once in the leg. The gunman then crossed the street, entered a parked car, and departed.

On October 22, 2003, Appellant was arrested for burglarizing an elementary school in Knox County. While incarcerated, he telephoned his domestic companion, Linda Hinkle, and told her that the .22 rifle was hidden nearby. Hinkle discovered the rifle hidden under their mobile home and notified Appellant's father, who owned the rifle, to "come get the gun." Appellant's father refused. Hinkle's husband, who was present and overheard this conversation, called the Kentucky State Police, who did come and retrieve the gun.

On October 27, 2003, Detective K. Y. Fuson, of the Kentucky State Police, interrogated Appellant. After reading Appellant his rights, Fuson began questioning Appellant about the shooting. Appellant's initial denials gave way to concessions with each additional piece of incriminating evidence Fuson revealed to him. By the end of the interrogation, Appellant had admitted that he was involved in shooting Taylor, but claimed self-defense. Appellant stated during the interrogation that he did not remember exactly what had transpired because he had been under the influence of Klonopin, a pharmaceutical sedative, which caused his memory to be impaired. However, he did claim that he had gone to Taylor's residence with his cousin to purchase some marijuana and, after Taylor threatened to harm him because of a previous dispute, his cousin shot at Taylor. Appellant alone was indicted for the

attempted robbery and shootings (apparently because neither Taylor nor Thomas claimed that other persons were present at the time they were shot).

Prior to trial, Appellant made an oral RCr 9.78 motion to suppress the statements he made during the October 27, 2003, interrogation on grounds that he did not knowingly and voluntarily waive his right against compelled self-incrimination. The trial court conducted a suppression hearing during which it heard testimony from both Appellant and Fuson and listened to the audiotape of the interrogation. The court found that Fuson had both advised Appellant of his Miranda rights, Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and inquired of Appellant whether he understood those rights; and, though Appellant did not respond to that inquiry, he indicated an understanding of his rights. Thus, the trial court held that Appellant's subsequent statements were knowingly, voluntarily, and intelligently made and overruled the motion to suppress. We review this finding for clear error and will overturn it only if it is unsupported by substantial evidence. RCr 9.78; Crawford v. Commonwealth, 824 S.W.2d 847, 849 (Ky. 1992); Harper v. Commonwealth, 694 S.W.2d 665, 668 (Ky. 1985); Edwards v. Commonwealth, 500 S.W.2d 783, 784 (Ky. 1973).

When a defendant challenges the admission of statements made during custodial interrogation, the Commonwealth bears the burden of establishing a voluntary Fifth Amendment waiver by a preponderance of the evidence. Tabor v. Commonwealth, 613 S.W.2d 133, 135 (Ky. 1981); see also Colorado v. Connelly, 479 U.S. 157, 168, 107 S.Ct. 515, 522, 93 L.Ed.2d 473 (1986); United States v. Matlock, 415 U.S. 164, 178 n.14, 94 S.Ct. 988, 996 n.14, 39 L.Ed.2d 242 (1974); Lego v. Twomey, 404 U.S. 477, 483, 92 S.Ct. 619, 623, 30 L.Ed.2d 618 (1972). Under Miranda,

a person may waive the Fifth Amendment privilege against self-incrimination, but the waiver must be knowing, voluntary, and intelligent. 384 U.S. at 444, 86 S.Ct. at 1612; Tabor, 613 S.W.2d at 135. Due to the inherently coercive nature of custodial interrogation, law enforcement officials must inform the accused of his or her rights in a manner that can reasonably be understood before a valid waiver may occur. Miranda, 384 U.S. at 444, 86 S.Ct. at 1612.

> The inquiry whether a waiver is coerced "has two distinct dimensions." Moran v. Burbine, 475 U.S. 412, 421, 106 S.Ct. 1135, 1141, 89 L.Ed.2d 410 (1986): First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived. Ibid. (quoting Fare v. Michael C., 442 U.S. 707, 725, 99 S.Ct. 2560, 2572, 61 L.Ed.2d 197 (1979)).

Colorado v. Spring, 479 U.S. 564, 573, 107 S.Ct. 851, 857, 93 L.Ed.2d 954 (1987) (quotations omitted).

Appellant does not allege coercion by Detective Fuson during the interrogation; his argument only infers coercion from his own allegedly intoxicated condition. However, "the Fifth Amendment privilege is not concerned with moral and psychological pressures to confess emanating from sources other than official coercion. The voluntariness of a waiver of this privilege has always depended on the absence of police overreaching, not on 'free choice' in any broader sense of the word." Connelly, 479 U.S. at 170, 107 S.Ct. at 523 (citations and quotations omitted); see also Oregon v. Elstad, 470 U.S. 298, 308, 105 S.Ct. 1285, 1293, 84 L.Ed.2d 222 (1985) ("[T]he absence of any coercion or improper tactics undercuts the twin rationales—trustworthiness and deterrence—for a broader rule. Once warned, the suspect is free to

exercise his own volition in deciding whether or not to make a statement to authorities."). Whether Appellant felt his will was somehow overborne because his faculties were impaired by his own voluntary intoxication, he was unable to show that Fuson committed any specific acts of coercion because he could recall only "bits and pieces" of the interrogation. Furthermore, a review of the audiotaped interrogation reveals no such conduct on Fuson's part.

As to the second inquiry, i.e., awareness of the rights abandoned and the consequences, "[t]he inquiry is not whether a criminal suspect knows and understands every possible consequence of a waiver of the Fifth Amendment privilege." Clark v. Mitchell, 425 F.3d 270, 283 (6th Cir. 2005) (quotations omitted) (holding that defendant's borderline retardation did not preclude voluntary waiver of rights). However, at the suppression hearing, Appellant argued only that Fuson failed to elicit from Appellant that he understood his Miranda rights, not that he did not understand those rights in fact. Moreover, Appellant could not say how he responded to Fuson's inquiry as to whether he understood his rights but could only point to the absence of his response as support for his claim that he did not understand them.

When the Commonwealth cross-examined Appellant during the suppression hearing, he conceded that he could not refute Detective Fuson's recollection that he "indicated" that he understood his rights.

Pros: And, at that time, the officer asked you—he read you your rights, told you your rights—and you said you understood them. Is that correct?

App'ant: I don't remember.

Pros: You don't remember whether you did or didn't?

App'ant: I remember speaking to Mr. Fuson but I don't remember what all I've said to him. I don't remember if I said "yes."

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| Pros: | If the officer said that you said "yes, I understand my rights, and yes, I've had my rights read to me before," then you're not in a position to dispute his testimony, is that correct? |
| App'ant: | I can't—what's on my statement is what's there. |
| Pros: | Okay, okay. And you can't dispute what he has just testified about the fact that you said you understood. |
| App'ant: | I can't call him a liar, sir. |
| Pros: | Okay. |

(Emphasis added.) Thus, Appellant did not claim that his waiver and subsequent statements were involuntary due to his state of intoxication. He argued only that his state of intoxication rendered him unable to remember anything about the interrogation and that, even absent evidence of coercion by Fuson, there must be proof that Appellant specifically articulated his understanding of his Miranda rights or the incriminating statements must be excluded. We disagree.

Substantial evidence supports the trial court's finding that Appellant understood his Miranda rights at the time he gave his statements. Detective Fuson read Appellant his rights, Appellant indicated that he understood them, and Appellant did not appear to be intoxicated in any way. The interview was not exceedingly long—less than two hours—and the audiotape reveals no coercive, deceptive, or even abrasive questioning techniques. Appellant exhibited normal comprehension in responding to Fuson's questions. He never claimed that he did not understand his rights. Furthermore, contrary to the trial court's determination during the suppression hearing, Appellant can be perceived in the audio recording of the interrogation affirmatively responding to Fuson's inquiry as to whether he understood his rights. "[G]iving the [Miranda] warnings and getting a waiver has generally produced a virtual ticket of admissibility; maintaining

that a statement is involuntary even though given after warnings and voluntary waiver of rights requires unusual stamina, and litigation over voluntariness tends to end with the finding of a valid waiver." Missouri v. Seibert, 542 U.S. 600, 608-09, 124 S.Ct. 2601, 2608, 159 L.Ed.2d 643 (2004); see also Berkemer v. McCarty, 468 U.S. 420, 433 n.18, 104 S.Ct. 3138, 3147 n.18, 82 L.Ed.2d 317 (1984) ("[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of Miranda are rare.").

Although an accused may be so intoxicated that he is unable to act with volition, "[l]oss of inhibitions and muscular coordination, impaired judgment, and subsequent amnesia do not necessarily (if at all) indicate that an intoxicated person did not know what he was saying when he said it." Britt v. Commonwealth, 512 S.W.2d 496, 500 (Ky. 1974); see also Soto v. Commonwealth, 139 S.W.3d 827, 846-47 (Ky. 2004) (showing that defendant was under the influence of PCP, cocaine, and amphetamines at time of confession does not require suppression absent showing that he lacked sufficient possession of his faculties to give a reliable statement); Halvorsen v. Commonwealth, 730 S.W.2d 921, 927 (Ky. 1986) (self-induced intoxication through ingestion of marijuana and alcohol does not render subsequent confession involuntary). Beyond Appellant's self-serving statements made during the suppression hearing and at trial, there is no evidence that he was intoxicated during the interrogation.

There is substantial evidence to support the trial court's finding that the Commonwealth met its burden to prove that Appellant knowingly, voluntarily, and intelligently waived his Fifth and Sixth Amendment rights, and Appellant has failed to

offer any evidence to the contrary. Accordingly, the judgment of the Knox Circuit Court is affirmed.

All concur.

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