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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: AUGUST 24, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2005-SC-000098-MR

DATE 9-14-06 Elizabethtown, P.C.

JOEY DAMONT PERRY — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
NO. 04-CR-00280-001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Joey Perry, entered a conditional guilty plea to two counts of second degree robbery, one count of first-degree robbery, one count of first degree criminal facilitation to robbery, and being a second degree persistent felony offender. Appellant was sentenced to twenty years imprisonment. This appeal is as a matter of right.[1] Appellant asserts that the trial court erred when it refused to suppress his statements to police, contending that they were made while he was intoxicated and while the police were engaging in coercive tactics.

Appellant and James Jett pulled into PDQ Market around 11:00 p.m. driving a dark blue Chevy Tahoe. Helen Caywood, the store clerk, became suspicious while observing the vehicle backing into a parking spot. She noticed that the licensed plate had three sixes in it. Appellant and Jett entered the store and one of them bought

[1] Ky. Const. § 110(2)(b).

a pack of gum. While Caywood was ringing up the order, one of the perpetrators shoved her, drew a gun, and took money from a cash drawer. Appellant and Jett fled the store, jumped in their vehicle, and drove away.

After Appellant and Jett left the PDQ Market, Caywood's co-worker called 911, informing dispatch that the perpetrators were driving a black Ford Explorer. The dispatcher notified police officers about the robbery, and Officer Curtsinger saw a dark blue Chevy Tahoe parked at a gas station. During this time, Officer Johnson notified other officers via radio that the dark blue Chevy Tahoe, license plate number 6667LA, may have been involved in the robbery. Curtsinger pulled into the gas station and Appellant and Jett drove away in the Chevy Tahoe. While Curtsinger was following the Tahoe, the driver exceeded the speed limit and then came to a stop in the middle of the road. Appellant opened the door and fled into an alley.

By this time, other police officers had arrived. They heard a noise in the alley and ordered Appellant to put his hands up. Appellant advised that he had his hands up, but was trapped in a bin of aluminum cans. Appellant was extricated from the bin and placed in custody. Appellant was arrested and charged with reckless driving and unauthorized use of a motor vehicle.

After Appellant was placed in custody, the police officers attempted to determine if Appellant was involved in the PDQ robbery. Store clerk Ms. Caywood could not identify Appellant, but was able to identify the vehicle driven by Appellant as the vehicle that Appellant and Jett were driving when they left the PDQ. The officers took Appellant to the police station to be interviewed. Appellant waived his rights and

was interviewed by the police officers. Appellant admitted to robbing the PDQ and various banks during December 2003 and January 2004.

Appellant claims that he was intoxicated at the time of the interview. He testified at the suppression hearing that on the day of his arrest he had consumed $300.00 worth of crack cocaine, and that he was placed on suicide watch after the interview due to his intoxication. Both of the interviewing officers denied that Appellant seemed intoxicated during the interview; however, one of the officers did admit he heard Appellant sniffling, a common side effect of cocaine usage, repeatedly throughout the interview. Appellant also claims he was coerced by the police. Appellant was in the holding cell for three hours before his interview. While in the holding cell, the police officers told him that a certain family member had something to do with the PDQ robbery. A police officer also made promises to Appellant that he would be able to help him.

Appellant was indicted for four counts of first degree robbery, two counts of a handgun possession by a felon, second degree fleeing and evading, reckless driving, and being a second degree persistent felony offender. Appellant filed a motion to suppress his confession, contending that it was a product of intoxication and coercion. The trial court overruled this motion, holding that Appellant's statement was voluntary, that he was in sufficient control of his faculties, and that his statement was not coerced. The issue presented is whether Appellant's admission was voluntary

under the following standard: "The trial court's ruling that the confession was voluntary cannot be disturbed on appeal unless clearly erroneous."[2]

Appellant contends that the inculpatory information divulged by him while in police custody was a result of intoxication and should have been suppressed.

> In short, the basic question is whether the confessor was in sufficient possession of his faculties to give a reliable statement, the burden being on the prosecution to show that he was.
>
> It is only when intoxication reaches the state in which one has hallucinations or 'begins to confabulate to compensate for his loss of memory for recent events' that the truth of what he says becomes strongly suspect. Loss 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.[3]

From the record, it can not be said that Appellant's condition was one of having hallucinations or of a person unable to confabulate. Appellant gave accurate and detailed information about the robberies, his speech was coherent, he indicated that he understood his rights, and he indicated that he was not under the influence of any drugs or alcohol. Appellant was able to give the detectives his address, phone number, date of birth, social security number, and his educational level. Thus, even if he consumed drugs earlier that day, Appellant's actions during the interview did not approach the level required to render his statements involuntary.

Appellant also contends that his statement was the product of police coercion. The trial court found that the three hour wait between the arrest and the

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[2] Halvorsen v. Willoughby, 730 S.W.2d 921, 927 (Ky. 1986) (citing Sampson v. Commonwealth, 609 S.W.2d 355 (Ky. 1980)).

[3] Britt v. Commonwealth, 512 S.W.2d 496, 500 (Ky. 1974) (citing Marshall and Steiner, The Confessions of a Drunk, 59 ABAJ 497 (1973)).

interview did not violate the Constitution and that the detectives' inquiry about Appellant's sister's role in the robbery was legitimate. "To determine voluntariness the 'totality of the circumstances' surrounding the confession must be considered."[4] "The status of the accused includes such factors as his youth, education, intelligence, linguistic ability, sanity, etc."[5] A confession is deemed voluntary unless a defendant's "will has been overborne and his capacity for self-determination critically impaired."[6]

Here, there was no unreasonable interrogation and no indication of physical abuse.[7] Appellant was informed of his constitutional rights and said he understood them. [8] Appellant was twenty-six years old and possessed a GED. He was not an impressionable youth, nor was he lacking in intelligence or knowledge of the criminal process.[9] Appellant's sister was not mentioned until ten minutes after Appellant confessed to the bank robbery.

As there is evidence in the record to support the trial court's finding that the confession was voluntarily given, we cannot conclude that there was an abuse of discretion. Under the totality of the circumstances, the Commonwealth met its burden of proving the voluntariness of the confession.

The judgment of the Fayette Circuit Court is affirmed.

Lambert, C.J., and Graves, McAnulty, Minton, Roach, Scott, and Wintersheimer, JJ, concur.

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[4] Allee v. Commonwealth, 454 S.W.2d 336, 341 (Ky. 1970) (citing Fikes v. Alabama, 352 U.S. 191, 197, 77 S.Ct. 28, 1 L.Ed.2d 246 (1957)).
[5] Allee, 454 S.W.2d at 341.
[6] Soto v. Commonwealth, 139 S.W.3d 827, 847 (Ky. 2004) (citing Schneckloth v. Bustamonte, 412 U.S. 218, 225-26, 93 S.Ct. 2041, 2046, 36 L.Ed.2d 854 (1973)).
[7] See Henson v. Commonwealth, 20 S.W.3d 466, 470 (Ky. 2000).
[8] See id.
[9] See id.

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