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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: OCTOBER 19, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2001-SC-0400-MR DATE 11-9-06

JOSEPH L. SILVERBURG — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
V. 99-CR-1518

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

Affirming

On March 16, 2000, a jury of the Jefferson Circuit Court convicted Appellant of four counts of robbery in the first degree and of being a persistent felony offender in the first degree. For these crimes, Appellant was sentenced to a total of twenty-five (25) years imprisonment. Appellant now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b). For the reasons set forth herein, we affirm Appellant's convictions.

The crimes for which Appellant was convicted stem from a series of hold-ups at ATM machines throughout Louisville, Kentucky. On May 4, 1999, Appellant and his girlfriend, Cynthia Cheatum, argued and physically fought over Appellant's promise to leave and divorce his wife, Rubie. Following their argument, Cheatum stopped a police cruiser and informed them that Appellant was the person responsible for the recent

hold-ups at ATM machines in the area. Officers subsequently went to Appellant's home to ask him some questions. Appellant attempted to flee out the back door of his apartment when he discovered the police at his door. He was arrested and taken in for questioning.

Appellant was identified by Thadeus Gambill, a victim of the ATM robberies, in a photographic line-up on May 5, 1999. Additionally, upon getting consent from Appellant's wife to search his house, the police found a stolen firearm, a coat matching the description of that worn during the robberies, a toboggan cap also matching that worn during the robberies, and other incriminating evidence. Appellant was subsequently charged and convicted of the crimes set forth above.

The first error claimed by Appellant is that the police did not have probable cause to arrest him, and thus any fruits from that arrest should have been suppressed by the trial court. We disagree.

Whether there was probable cause to arrest is reviewed de novo. Ornelas v. United States, 517 U.S. 690, 691, 116 S.Ct. 1657, 1659, 134 L.Ed.2d 911 (1996). "[A] reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." Id. at 699.

Prior to Appellant's arrest, the evidence revealed that the police had information gathered from four robberies, information from Cheatum indicating similarities between Appellant and the suspect in the four robberies, an address for Appellant that was in proximity to all the ATM's that had been robbed, and, upon knocking on Appellant's door, a suspect who ran out the back door of his apartment in an attempt to evade the

police. Considering these circumstances in their totality, we find that the trial court's conclusion of sufficient probable cause to arrest Appellant was correct.

Appellant claims that the trial court's failure to suppress evidence acquired during the warrantless search of his house violated the Fourth Amendment. Generally, a warrant is required to conduct a search of someone's house. See e.g. Farmer v. Commonwealth, 6 S.W.3d 144 (Ky. App. 1999). Consent, however, is an exception to this rule. Id. The trial court made a finding of fact that Appellant's wife properly consented to the search. The trial judge's findings of fact on a motion to suppress evidence will be overturned only if clearly erroneous. See e.g. Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); Roark v. Commonwealth, 90 S.W.3d 24, 28 (Ky. 2002). We find no clear error. Therefore, since there was a valid consent, there was no error in admitting the evidence acquired in the search and no Fourth Amendment violation.

Appellant also argues that the trial court erred in denying a motion to suppress an in-court identification by Thaddeus Gambill due to an alleged prejudicial presentation of a photo pack in the original identification of Appellant. In Moore v. Commonwealth, 569 S.W.2d 150, 153 (Ky. 1978), this Court held that the question is whether, in light of the "totality of the circumstances," the in-court identification of Appellant was reliable despite any suggestiveness of the out-of-court identification.

It is well settled in this Commonwealth that after a hearing on a defendant's suppression motion, the trial court's findings are deemed to be conclusive if supported by substantial evidence. See e.g. Talbott v. Commonwealth, 968 S.W.2d 76 (Ky. 1998); Canler v. Commonwealth, 870 S.W.2d 219 (Ky. 1994), citing Harper v. Commonwealth, 694 S.W.2d 665 (Ky. 1985) and Crawford v. Commonwealth, 824 S.W.2d 847 (Ky.

1992). The trial judge's findings of fact on a motion to suppress evidence will only be overturned if clearly erroneous. See e.g. Neil v. Biggers, supra; Roark v. Commonwealth, supra. In light of the totality of the circumstances, we find there was substantial evidence elucidated in a lengthy, multi-day suppression hearing to support the trial court's ruling that the in-court identification was reliable. Therefore, we find no error.

Appellant further argues that he was denied a fair trial and was highly prejudiced when the trial court allowed the Commonwealth to pursue all four robbery charges, which he claims to be "separate and different," within the same trial. RCr 6.18 provides:

> Two (2) or more offenses may be charged in the same complaint or two (2) or more offenses whether felonies or misdemeanors, or both, may be charged in the same indictment or information in a separate count for each offense, if the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan.

Furthermore, RCr 9.16 states:

> If it appears that a defendant or the Commonwealth is or will be prejudiced by a...joinder for trial, the court shall order separate trials of counts...or provide whatever other relief justice requires....

Under RCr 9.16, the granting or denial of a motion for separate trials is a discretionary function of the trial court. A judgment of conviction will be reversed only if the trial court's decision is a clear abuse of discretion and prejudice to the defendant is positively shown. See e.g. Russell v. Commonwealth, 482 S.W.2d 584, 588 (Ky. 1972); Rearick v. Commonwealth, 858 S.W.2d 185 (Ky. 1993). The record contains no positive evidence of prejudice or clear abuse of discretion. Therefore, we find no error.

Additionally, Appellant argues that the trial court erred in introducing his photo mug shot into evidence because its probative value was outweighed by undue

prejudice. See Williams v. Commonwealth, 810 S.W.2d 511 (Ky. 1991). In Redd v. Commonwealth, 591 S.W.2d 704, 708 (Ky.App. 1979), the Court of Appeals adopted a three-prong test to determine the propriety of introducing mug shots at trial:

> (1) the prosecution must have a demonstrable need to introduce the photographs; (2) the photos themselves, if shown to the jury, must not imply that the defendant had a criminal record; and (3) the manner of their introduction at trial must be such that it does not draw particular attention to the source or implications of the photographs.

Appellant argued at trial that he had been so badly injured during his arrest that the Department of Corrections would not accept him. Therefore, the prosecution clearly had a demonstrable need to introduce the mug shot to prove Appellant's true condition the night of his arrest. In addition, the jury knew Appellant was arrested for the current offense, thus its introduction did not violate the second prong. The trial court properly followed the three-prong test, and there was no prejudicial harm. We find no error.

Appellant further argues that the trial court erred in allowing Detective Whobrey's testimony as to how he developed Appellant as a suspect, complaining that it is investigative hearsay. We disagree. A police officer may testify about information furnished to him by an absent witness if that information tends to explain action that was taken by the police officer as a result of the information and the taking of that action is an issue in the case. See Daniel v. Commonwealth, 905 S.W.2d 76, 79 (Ky. 1995); Sanborn v. Commonwealth, 754 S.W.2d 534 (Ky. 1988). The out-of-court statement is not hearsay because it is not offered to prove the truth of the matter asserted but to explain why the officer acted as he did. Appellant made an issue out of the officer's actions and the reasons for those actions. Therefore, the general statements were admissible. We find no error.

We further hold that Appellant's claims of prosecutorial misconduct, ineffective assistance of counsel, and judicial bias are completely without merit and need not be addressed in further detail. Additionally, Appellant's argument that the trial court erred in not granting him a directed verdict fails. There was sufficient evidence, taken in the light most favorable to the Commonwealth, for the trial court to deny the motions for directed verdict and submit the case to the jury.

Finally, Appellant contends that he is innocent and that "new evidence" of his innocence satisfies the standard necessary to reverse his conviction and prohibit retrial. See Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). There is no new evidence. Rather, Appellant merely complains that he was unable to review certain evidence that was previously reviewed by his counsel. This does not meet the standard. Therefore, we find no error.

For the reasons set forth herein, the judgment of the Jefferson Circuit Court is affirmed.

All concur.

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