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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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NOT TO BE PUBLISHED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

DATE 11-9-06 Elva Grant P.C.

2006-SC-0050-MR

JAE PARK — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
2003-CR-03004

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from a judgment of conviction based on a conditional guilty plea to one count of murder. Park was sentenced to serve 20 years in prison and fined $1,000. He reserved the issue of whether the trial judge improperly did not suppress a taped confession Park provided shortly after the crime was committed.

The sole issue is whether the trial judge erred and should have suppressed the taped statement.

Park and his wife were experiencing marital and financial difficulties. They were contemplating a divorce. Park is a native of South Korea but has been living in the United States for at least 18 years. English was a second language for him but he was able to use that as a primary language while he lived in the United States. He speaks with an accent and like many people who speak a second language; his idiomatic usage of English can be at times peculiar or non-standard.

Park shot his wife in the head and killed her. This was all witnessed by his wife's 11 year old daughter from a prior relationship. Police arrived almost immediately and Park stated he did not know why he had killed his wife. He was taken into custody and questioned by a police detective. That interview was recorded on video tape and is the subject of the motion to suppress.

During the initial moments of the interview the police detective read what are commonly referred to as Miranda rights from a standard form. See Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). At the conclusion of reading the form letter, the detective asked Park if he understood those rights. Park responded that he did. The detective then asked Park if he wanted to talk to the police. Park's response is difficult to distinguish at this point on the video tape and is the primary question on appeal. The detective then attempted to clarify that response and asked again if Park wanted to talk to the police. Park responded that he was going to talk to the detective. The detective then handed Park the form and asked him to sign it which Park did. From there the interview continues for approximately 45 minutes during which Park confessed to the murder.

At a suppression hearing, the trial judge heard testimony from both the detective and Park. The detective first asked Park if he wanted to talk to the police. The detective then asked again attempting to clarify the answer. Park's testimony at trial was that he said he did not want to talk to police thereby invoking his right to remain silent. The trial judge reviewed the video tape and said from the bench that she thought Park's first response was a gasp and that he shrugged. Our own review of the interview leads us to conclude that Park mumbled. It was entirely reasonable for the detective to again ask in an attempt to get a clear answer.

During a continuation of the suppression hearing, the trial judge heard testimony from two psychologists who had both met with Park on two occasions subsequent to the murder. One determined that Park adequately understood English and the other testified that Park's limited command of English would interfere with his ability to knowingly waive his rights and speak with the police. The trial judge also viewed the taped interview to see for herself how Park was able to communicate in English.

The trial judge found that Park's waiver was knowingly, voluntarily and intelligently made. See Mills v. Commonwealth, 996 S.W.2d 473 (Ky. 1999). The confession was given without any police coercion. See Colorado v. Connelly, 479 U.S.157 (1986). Our own review of the testimony and video tape lead to the conclusion that the findings of the trial judge were supported by substantial evidence. See Owens-Corning Fiberglass Corp. v. Golightly, 976 S.W.2d 409 (Ky. 1998). Park has the burden of showing that the trial judge's ruling was clearly erroneous. Harper v. Commonwealth, 694 S.W.2d 665 (Ky. 1985). He has not met that burden.

The one point on the tape that caused so much confusion was found to be a gasp or a shrug and not an invocation of the right to remain silent. Our own review of the tape shows it is difficult to determine exactly how Park responded to the detective's initial question. An invocation of the right to remain silent must be unambiguous. Cf. Davis v. U.S., 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). The detective was well within the boundaries established by law to clarify his question. Id. Absent a showing that the findings of the trial judge were clearly erroneous we will not substitute our judgment for that of the trial judge who can most effectively observe the witnesses.

A careful review of the forty-three minute video tape reflects a soft-spoken speaker of English as a second language. Although Park has a noticeable accent, he

appeared to understand the Miranda rights which Detective Williamson presented to him on the video tape, nodding his head and readily signing. His subsequent statement reflected a command of the English language.

The rulings of the trial judge unquestionably conform to the evidence. There is no credible evidence of police coercion of any kind which would render the statement involuntary or inadmissible. There was no error.

The decision of the trial judge to not suppress the evidence was proper.

The judgment of conviction is affirmed.

All concur.

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