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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: NOVEMBER 22, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 12-13-06 E.W. Brown P.C.

2005-SC-0649-MR

DEMONTRELL TEVONE SCOTT — APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
2005-CR-00213

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is based on a conditional plea of guilty to first-degree rape and two counts of first-degree sexual abuse. Scott was sentenced to 20 years in prison for the first-degree rape and two years in prison for each count of the first-degree sexual abuse. The sentences were ordered to be served consecutively for a total of 24 years.

He reserved the option to appeal based on two issues: Was the taking of the blood samples to test for sexually transmitted diseases improper; and, secondly, should his confession resulting from a custodial interrogation have been suppressed.

The evidence presented at the suppression hearing established that the 18-month old female child had been seen at a family care center for a vaginal discharge. She was examined by medical personnel and tested positive for gonorrhea and chlamydia. The mother indicated that there were only two men who had contact with

the child: her mother's boyfriend and Scott who was a cousin. The mother disclosed to the police that Scott had been involved with a young female in another state and had been incarcerated for that offense. He had been arrested at the age of 14 for a charge of sexual assault and was listed in the national crime data base as being a sexual offender who was required to register for life. It was later learned that the charge involved another male.

Scott was incarcerated in another county during the investigation into the sexual assault of the young child. Because of her age, she was not able to communicate with the police and could not provide any information regarding how she may have possibly contracted the sexually transmitted diseases.

The police presented the information to a judge and obtained a search warrant authorizing the extraction of bodily fluids so that they might be tested for gonorrhea and chlamydia. The search warrant was faxed to the detention center where Scott was incarcerated and the warrant was executed by detention center personnel. The results of the tests showed Scott was positive for gonorrhea but negative for chlamydia. Police then visited the detention center and interviewed Scott who was represented by counsel regarding other charges that had caused his incarceration. Counsel was not notified that the interrogation was to be conducted. Scott was read his Miranda rights and signed a card indicating he understood and waived his rights. He then gave a statement to the police and confessed.

I. Suppression Of The Search Warrant Results.

Scott contends that it was error for the trial judge to deny the motion to suppress the products of the search warrant. We disagree. The trial judge acted properly in

overruling the motion to suppress because there was probable cause supporting the search warrant.

Scott first claims that there were insufficient grounds for the issuance of the search warrant. Provided there is no indication that the warrant was issued in an arbitrary manner, we give great deference to the decision of the trial judge. Moore v. Commonwealth, 159 S.W.3d 325 (Ky. 2005). It is the totality of the circumstances that determines whether the judge acted in an arbitrary manner. See Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). The standard for the issuance of a warrant is probable cause. Probable cause does not require a certainty that evidence will be present. See Illinois v. Caballes, 543 U.S. 405, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005). The purpose of the Fourth Amendment is to constrain against intrusions that are not justified under the circumstances, not against all intrusions. Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

The officer made a proper application for a search warrant to secure the blood samples. There is nothing in the record to suggest that the judge reached an arbitrary decision when the warrant request was approved. Our review of the facts used to secure the warrant indicates that the threshold of probable cause was exceeded and the warrant was proper. Suppression of the fruits of that search and seizure of bodily fluid samples would not have been proper. There was no error.

Next, Scott argues that the Fourth Amendment also limits intrusions that "are not made in a proper manner". Schmerber, supra. Although he claims that a proper manner requires the use of a hospital and medical personnel, we disagree. We find nothing in the record to indicate there were any problems with blood samples being drawn by detention center employees at the detention center. Scott complains that the

jail was dirty and alludes to the fact that the samples were obtained by persons not qualified, but we can find no indication of infection or undue pain or suffering caused by the extraction of the blood samples. Rather, the record is silent regarding any problems. Suppression of the samples because of a possibility that something could have gone awry is not sufficient grounds to make a determination that there was error that rises to the level of a Fourth Amendment violation. There was no error.

II. Custodial Interrogation.

Scott alleges that the trial judge erred when he denied the motion to suppress the custodial statements made to the police. It is not questioned that Scott was in custody on other charges at the time of the questioning. The police officer who interrogated Scott did so without his Christian county lawyer present. Scott failed to file a motion to suppress in the record, but at the suppression hearing he raised two issues, the first was the matter of the warrant and the second was the custodial interrogation.

The Sixth Amendment right to counsel is offense specific. McNeil v. Wisconsin, 501 U.S.171, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991). There was no requirement that the police contact Scott's attorney who represented him on unrelated charges prior to investigating the possible sexual assault. See Linehan v. Commonwealth, 878 S.W.2d 8 (Ky. 1994); Skaggs v. Commonwealth, 694 S.W.2d 672 (Ky. 1985). Scott was experienced with the legal system. He was presented his Miranda rights and signed a statement indicating that he understood and waived those rights. There was no indication of coercion. Suppression of the confession was not required. There was no error.

Scott received a fundamentally fair review of his claims at the suppression hearing. He was not denied any constitutional right under either the federal or state constitutions.

The convictions and sentences were proper. There was no error. The judgment is affirmed in all respects.

All concur except Scott, J., who dissents without opinion.

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