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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: NOVEMBER 21, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-000145-MR

ROY LEE CLEM — APPELLANT

V.

ON APPEAL FROM LEE CIRCUIT COURT
HONORABLE WILLIAM W. TRUDE, JR., JUDGE
NO. 04-CR-000047

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Roy Lee Clem entered a conditional guilty plea in Lee Circuit Court to murder and was sentenced to thirty years' imprisonment. Appellant now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

Appellant raises three claims of error: (1) that the trial court should have suppressed statements made to police based on involuntariness due to Appellant's intoxication and limited intelligence; (2) that the trial court should have compelled the Commonwealth to honor a plea agreement; and (3) that the trial court improperly denied Appellant's motion for change of venue. Finding no error, the judgment of the Lee Circuit Court is affirmed.

I. Background

On November 11,2003, Michelle Moore was found stabbed to death in her trailer. Three months later, on February 12, 2004, Appellant called a local police officer, Detective Jack DeVasher claiming he could solve the Moore murder case, guarantee a conviction, and tell the location of the murder weapon. In exchange, he wanted his brother, Tim Clem, released from jail. An arrangement was made with the Commonwealth Attorney, Tom Hall, and DeVasher took the written deal to Appellant's house.

After Appellant reviewed the deal, he confessed to the murder of Michelle Moore. He was taken to the police department and formally interviewed, repeating his confession. Appellant was unable to remain focused, and his words were slurred and rambling.

DeVasher interviewed Appellant again after he had been in jail for 18-20 hours without drugs or alcohol. In this interview, Appellant recanted his confession and said he falsely confessed to get his brother out of jail. In fact, the police were unable to corroborate certain parts of Appellant's confession, including the location of the murder weapon.

Defense counsel filed a motion to suppress Appellant's statements to the police. At the hearing, Dr. Paul Ebben, a clinical psychologist, testified on his behalf, while DeVasher testified that Appellant knew what he was doing even though he appeared to be under the influence. The trial court denied the motion to suppress.

After the adverse ruling, Appellant attempted to accept a plea deal he thought had been offered by the Commonwealth Attorney, Tom Hall, but Hall denied making a firm offer or even having a conversation with defense counsel. Counsel then made an

oral motion to enforce the plea bargain offer, but after hearing testimony from both Hall and defense counsel, the trial court denied the motion.

On the morning of the scheduled trial, the court took up Appellant's change of venue motion. Appellant attached newspaper articles dealing with the victim, Appellant, Appellant's family, and/or the pervasive drug abuse in Lee County and the suspect treatment of drug offenders by the trial court, but failed to submit signed affidavits to verify his petition. Appellant's change of venue motion was overruled, and his conditional guilty plea followed, with the trial court eventually sentencing him to thirty years.

II. Analysis

A. Motion to Suppress Statements

At the motion to suppress, Detective DeVasher testified that Appellant contacted him, claiming he could provide information about the murder of Michelle Moore. Appellant did have some knowledge of the crime: he knew where the victim was found, some of the drugs involved, and the other people who were present.

DeVasher then went to Appellant's house, where Appellant said he would provide the murderer's name, show him where the murder weapon was, and tell him how the murder happened, if his brother were released from jail. DeVasher obtained a "letter of understanding" regarding the release of Appellant's brother from the Commonwealth Attorney, Tom Hall. Appellant reviewed the letter, said it sounded good, and then confessed to the murder, saying now was a good time because he could get his brother out of jail.

DeVasher then took Appellant to the police station, read him his rights, and conducted a formal interview wherein Appellant gave a full confession. DeVasher

testified that Appellant was under the influence of intoxicants, but that he seemed to know what he was talking about and that they had an intelligent conversation. However, the next day, when DeVasher did a second interview, Appellant recanted his confession and claimed he had only confessed to get his brother out of jail. Appellant was allegedly rambling during this interview and had to be redirected back to the subject by DeVasher.

On behalf of Appellant, Dr. Ebben testified that he conducted a forensic neuro-psychological review of Appellant in February 2005. He described a lengthy history of drug abuse and stated that Appellant's current IQ was 69, which is in the mild retardation range. Dr. Ebben testified that Appellant had some problems when questioned about his understanding of his Miranda rights, but that his comprehension was within normal limits. The same was true for his understanding of the function of rights and interrogation, and comprehension of the right to remain silent. Dr. Ebben's opinion was that Appellant knew what he was saying on the tape of his confession, but that it was not voluntarily given with a clear mind and that Appellant was not intellectually capable of giving information in his own best interest. After considering the testimony, the trial court denied Appellant's motion to suppress.

"The voluntariness of a confession is assessed on the totality of the circumstances surrounding the making of a confession." Mills v. Commonwealth, 996 S.W.2d 473, 781 (Ky. 1999), see also Schneckloth v. Bustamonte, 412 U.S. 218, S.Ct. 2041, 36 L.Ed.2d 854 (1973). A trial court's conclusion regarding the voluntariness of a confession is a mixed question of fact and law and is conclusive if supported by substantial evidence. Henson v. Commonwealth, 20 S.W.3d 466, 469 (Ky. 1999); Bailey v. Commonwealth, 194 S.W.3d 296, 300 (Ky. 2006). Therefore, Appellant has

the burden of showing that the ruling of the trial court was clearly erroneous. Harper v. Commonwealth, 694 S.W.2d 665, 668 (Ky. 1985); Halvorsen v. Commonwealth, 730 S.W.2d 921, 927 (Ky. 1986).

In the order denying Appellant's motion to suppress, the court did not expressly find that Appellant's behavior failed to rise to a level that would cause the voluntariness of his statement to come into question. However, it can clearly be inferred that the court's opinion was that Appellant made his confession knowingly and voluntarily. Among the trial court's stated reasons were: Appellant, although intoxicated, was coherent during his interview; Appellant understood his Miranda rights; Appellant performed at average or above average level on the tests administered by Dr. Ebben; and Appellant was able to respond to DeVasher and provide answers to the questions asked of him. Most significant to the court was the fact that Appellant made sure to secure his brother's release before he came forward with information, which demonstrated to the court that Appellant was coherent.

It is of particular importance to this Court that it was Appellant who set these events in motion. It was Appellant who called the police and volunteered information in return for his brother's release. Ultimately, in looking at the voluntariness of a confession, the question becomes, "is the confession the product of an essentially free and unconstrained choice by its maker?" Schneckcloth, 412 U.S. at 225, 93 S.Ct. at 2047. The record and the court's findings clearly reveal that Appellant's confession was by his own choosing. The trial court's findings were not clearly erroneous, thus there was no error.

B. Plea Agreement

Appellant alleges that Commonwealth Attorney Hall offered him a twenty-year sentence in exchange for a guilty plea to murder and promised to hold the offer open until after Appellant's motion to suppress his statements to police. Defense counsel, John Nelson, claimed that he received a call from Hall saying he had spoken to the victim's mother and that he was willing to make the offer. Since the offer was made over the phone, it was not put in writing, a practice Nelson claimed was routine. Nelson did, however, make contemporaneous notes that were filed with the court.

At the hearing on Appellant's motion to enforce the plea agreement, Hall claimed he had never made a firm offer to Appellant and did not even recall calling Nelson or having a conversation with him. Hall testified that it would not have made sense for him to hold the offer open until after the suppression hearing because Appellant would not have been interested in the offer if he had prevailed on the motion. The victim's mother testified that Hall had never discussed a possible plea negotiation with her. The trial court overruled the motion to enforce the plea agreement, finding that there had been no "meeting of the minds." Based on the evidence at the hearing, it was the trial court's conclusion that Nelson and Hall may have spoken, but that they had different interpretations of what was said in their conversation. It is difficult to determine how the court could have found otherwise. Although Nelson claimed there was a firm offer, the testimony of both Hall and the victim's mother were to the contrary. On these facts, the trial court's findings were not clearly erroneous and thus there was no error.

C. Motion for Change of Venue

Appellant filed a petition for change of venue on July 5, 2005, and attached over twenty newspaper articles in support thereof. The Commonwealth initially objected to

the motion because Appellant had failed to include affidavits. The court held the matter in abeyance to give Appellant time to supplement his motion.

Subsequently, Appellant informed the court that he had been unable to find anyone in Lee County who would be willing to sign an affidavit or get involved in the case. Appellant contended that in spite of the lack of affidavits, he had a due process right to a fair and impartial trial. The court overruled the motion but stated that if publicity impeded the selection of the jury, the court would revisit the issue.

"In order for a change of venue to be granted, there must be a showing that: (1) there has been prejudicial news coverage, (2) it occurred prior to trial, and (3) the effect of such news coverage is reasonably likely to prevent a fair trial." Wilson v. Commonwealth, 836 S.W.2d 872, 888 (Ky. 1992) overruled in part on other grounds by St. Clair v. Roark, 10 S.W.3d 482 (Ky. 1999). An examination of the record reveals news coverage that was substantial and prejudicial enough for Appellant to make a strong case for a change of venue under Wilson. However, under KRS 452.220(2), a petition for change of venue must be supported by an affidavit. Welborne v. Commonwealth, 157 S.W.3d 608 (Ky. 2005). "A failure to file the affidavit is fatal to the petition because compliance with KRS 452.220(2) is mandatory." Id. at 615; see also Caine v. Commonwealth, 491 S.W.2d 824 (Ky. 1973). Unfortunately for Appellant he was unable to submit an affidavit, thus it was proper for the trial court to deny his petition.

Appellant contends that he should have received a change of venue regardless of the absence of an affidavit. However, Appellant has suffered no injury. The court stated that it would revisit Appellant's request for change of venue if and when problems

were encountered in the jury selection process. Appellant's decision to accept a conditional guilty plea rendered the court's offer moot. There was no error.

III. Conclusion

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

All sitting. All concur.

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