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RENDERED: AUGUST 21, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-000794-MR

KENYATTA CARRELL MOORE — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONFLIFFE, JUDGE
NO. 05-CR-002775

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND
REVERSING AND REMANDING IN PART

Kenyatta Moore appeals as a matter of right[1] from his conviction for two counts of robbery in the first degree. We affirm one of Moore's robbery convictions. But we reverse Moore's other robbery conviction because the trial court erred in denying Moore's motion for a directed verdict. We also reverse the trial court's imposition of a fine and court costs since Moore was indigent.

I. FACTUAL AND PROCEDURAL HISTORY.

In July 2005, two men approached James Burch on foot and followed Burch to his van. Once Burch got into the van, one of the men grabbed the door and prevented Burch from closing it. The other man entered the van through a passenger door. Both men struck Burch in the face and dragged him out of the van. The men took Burch's

[1] *See* Ky. Const. § 110(2)(b).

keys and wallet and left in the van. Burch eventually borrowed a cell phone and called his son. Burch's son then drove his father back to the scene of the robbery to look for Burch's glasses. Then they went to a gas station where some police vehicles were parked. Burch told an officer what had happened to him, whereupon the officer took photos of Burch and called EMS. The officer also broadcast over the police radio information about Burch's attackers and the stolen van. Burch was eventually taken to a hospital where he was treated for a broken nose, swollen ear, a cut above one eye, and dizziness. After receiving stitches and a tetanus shot, Burch was released from the hospital.

Around the same time of Burch's call to his son, a man entered a convenience store, located near the scene of the robbery, and brought an item to the counter. As the store clerk, Mackson Moselus, was scanning the item, the man passed the clerk a note that read, "Bitch I have a gun give me all the money or else." Moselus stepped back from the cash register. The man reached across the counter in an unsuccessful attempt to open the register himself. At one point, the man lifted his shirt; and Moselus saw an object in the waistband of the man's pants. The robber continued to demand money. When a customer entered the store, the robber grabbed the customer and threatened to shoot both the customer and Moselus if he was not given money. Eventually, the robber took the customer's cell phone and left the store.

An assistant manager, Ernest Jean, who had seen what happened from another area of the store, followed the robber. Jean encountered Officer Curtis Lipsey outside. Officer Lipsey was investigating Burch's stolen van and had noticed a van matching its description in the alley behind the convenience store. Officer Lipsey had confirmed that

the empty van was Burch's by checking the license plate when he was interrupted by the commotion coming from inside the convenience store.

Lipsey pursued the robber on foot down an alley. But Lipsey slipped as he saw the robber run between two houses. Officer Brent Mattingly observed the chase and continued the pursuit while radioing other officers to surround the area. Eventually, Moore emerged from a nearby yard and was arrested.

Later that day, Moselus and Jean both identified Moore as the would-be robber of the convenience store. Later, Burch picked Moore's photo from a photo pack prepared by the police. Additionally, a DNA sample from Burch was found to be a match with blood that was found on the shorts and shoes worn by Moore at the time of his arrest.

Moore consented to be interviewed by the police. The transcript of that interview revealed that Moore confessed to attempting to rob the convenience store. But Moore contended that he was armed only with a flashlight, not a firearm.

Moore was eventually indicted for two counts of first-degree robbery (one count stemming from the robbery of Burch and one count stemming from Mac's Convenience Store) and one count of first-degree assault (stemming from kicking and striking Burch). The charges against Moore proceeded to jury trial. The trial court granted Moore's motion for a directed verdict on the assault charge because of the lack of evidence to support a finding that Burch suffered a serious physical injury. The jury found Moore guilty of both robbery counts and recommended that Moore be sentenced to concurrent twenty and fifteen year prison terms. Moore was sentenced in accordance with the jury's recommendation. Additionally, although Moore had been deemed indigent and

entitled to the services of a public defender, the trial court ordered Moore to pay a $5,000 fine and $125 court costs. Moore then filed this appeal.

II. ANALYSIS.

Moore raises four arguments on appeal. He contends that the trial court erred (1) by denying his motion to suppress statements he gave to officers while seated in a police cruiser, (2) by failing to suppress what Moore deems to have been suggestive and unreliable show-up identifications, (3) by refusing to direct a verdict of acquittal on the robbery charge stemming from Mac's Convenience Store, and (4) by assessing a fine and court costs against him despite his indigency. We reject both of Moore's suppression-related arguments. But we agree that he was entitled to a directed verdict on the convenience store robbery-related charge, and we agree that the trial court erred when it imposed a fine and court costs against him. So we affirm in part and reverse in part.

A. The Trial Court Did Not Err in Denying Moore's Motion to Suppress Statements He Made While in the Police Cruiser.

When Moore was arrested, he was not immediately advised of his rights under Miranda v. Arizona.[2] When Moore was placed in the back of the police car, another officer approached and asked, "Is this the guy that did the robbery?" The arresting officer testified at the suppression hearing that the question was not directed to Moore. Nevertheless, following the question Moore blurted out three statements: "I didn't rob a store," "All I was in was a car," and "All I did was kick him." At the close of the suppression hearing, the trial court concluded that Moore was in custody but that he

[2] 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

was not being interrogated because the officer's question was not directed toward Moore. So the trial court concluded that Moore's statements were voluntary and, accordingly, admissible.

Miranda requires that an individual must be informed of his rights after being taken into custody and before questioning.[3] Interrogation includes not only express questioning, but conduct that is the "functional equivalent" of questioning, such as any conduct that the police should know is "reasonably likely to elicit an incriminating response from the suspect."[4] Upon appellate review of a motion to suppress, the factual findings of the trial court are conclusive if they are supported by substantial evidence.[5]

Moore contends that the trial court erred by concluding that he was not subject to interrogation. Emphasizing the fact that he was handcuffed in the back seat of a police cruiser at the time of the question, Moore contends that the question contained an implicit accusation that was likely to elicit an incriminating response. We disagree.

The trial court's finding that the question was not directed at Moore is supported by substantial evidence and is, therefore, conclusive. Officers are not required to cease routine discussions among themselves simply because a suspect has been arrested. For example, we have affirmed the denial of a motion to suppress incriminating statements blurted out by an already arrested suspect in apparent response to a detective's request that two other officers inform jail personnel that additional charges

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3 384 U.S. at 478-79, 86 S.Ct. at 1630.

4 Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689-90, 64 L.Ed.2d 297 (1980) (footnote omitted).

5 Kentucky Rules of Criminal Procedure (RCr.) 9.78.

would be forthcoming against the suspect.[6] Similarly, one can reasonably conclude that the officer's statement in the case at hand was only a general question about the suspect—not a question directed toward the suspect—meaning that Moore was not being interrogated at the time he blurted out the incriminating statements while seated in the police cruiser.[7] So we affirm the trial court's denial of Moore's motion to suppress the statements he made while in the police cruiser.

B. The Issue of the Out-of-Court Identifications is Moot or, at Most, Harmless Error.

Moore contends that the trial court erred by denying his motion to suppress out-of-court identifications made by Moselus and Jean.[8] Moore contends that the identifications were made subject to impermissibly suggestive "show-up" identification techniques.[9]

A detective working on the convenience store robbery testified that he did conduct show-up identifications with both Moselus and Jean following Moore's arrest. Both Moselus and Jean identified Moore as the would-be robber of the convenience store.

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6 Wells v. Commonwealth, 892 S.W.2d 299, 302 (Ky. 1995) ("In the present case, the Detective's statement to other officers concerning additional charges cannot be considered the functional equivalent of questioning. Those statements may well be considered normally attendant to arrest and custody. Furthermore, such a statement does not evidence a functional equivalent to interrogation which would require suppression. The trial court correctly determined this to be a voluntary statement and we affirm that ruling.") (quotation marks and citation omitted).

7 Indeed, if the question had been directed toward Moore, it logically follows that the question would have been, "Are you the guy who did the robbery" instead of "Is that the guy who did the robbery?"

8 The trial court did preclude Moselus and Jean from making any in-court identifications of Moore because Moore was the lone African-American male at the defense table.

9 A show-up (or showup) identification is "[a] pretrial identification procedure in which a suspect is confronted with a witness to or the victim of a crime. Unlike a lineup, a showup is a one-on-one confrontation." BLACK'S LAW DICTIONARY (8th ed. 2004) (defining *showup*).

We have previously stated that we view show-up identifications with caution because of their highly suggestive nature,[10] a position we reiterate today. But this issue is moot because we are reversing Moore's convenience store-related robbery conviction on other grounds. And even if we assumed, only for argument's sake, that the show-up was improper, any error in failing to suppress the show-up was certainly harmless because Moore confessed to the crime.[11] As we stated in a case involving a similar argument, "Appellant claims that the trial court erred by refusing to suppress the victim's 'show-up' identification of him. Without evaluating whether or not there was an error in this regard, we will simply state that any error in this regard would certainly be harmless because Appellant confessed to the robbery."[12]

C. Moore was Entitled to a Directed Verdict on the on the First-Degree Robbery Charge Stemming From the Convenience Store Incident.

Moore contends that he was entitled to a directed verdict on the first-degree robbery charge stemming from the robbery of the convenience store. We agree.

A person commits first-degree robbery "when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft [while] . . . armed with a deadly weapon. . . ." KRS 515.020(1)(b).[13] In Merritt v. Commonwealth, our predecessor court held that "any object that is intended by its user to convince the victim that it is a pistol or other deadly

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[10] Fairrow v. Commonwealth, 175 S.W.3d 601, 608 (Ky. 2005).

[11] Thacker v. Commonwealth, 194 S.W.3d 287, 293 (Ky. 2006).

[12] *Id.*

[13] Although KRS 515.020 provides other methods of committing first-degree robbery, those other methods were contained neither in Moore's indictment nor in the jury instructions. So we express no opinion on whether the flashlight in question could have been, or should have been, considered a dangerous instrument for purposes of KRS 515.020(1)(c).

weapon and does so convince him *is* one."[14] So Moore could have been deemed to have possessed a deadly weapon under the Merritt principle, even though the object he actually possessed apparently was an ordinary flashlight.[15] But the application of Merritt should not have defeated Moore's directed verdict motion because the victim himself was not convinced that the object possessed by Moore was a deadly weapon, as is required by the express language of Merritt.

In the case at hand, Moselus testified that he did not know whether the item in Moore's waistband was a gun. Merritt specifically requires that the victim be convinced that the object is a deadly weapon for the object to be deemed a deadly weapon—"any object that is intended by its user to convince the victim that it is a pistol or other deadly weapon and does so convince him *is* one."[16] So this case does not meet Merritt's requirement for what may be deemed a deadly weapon, meaning that Moore was entitled to a directed verdict on the first-degree robbery of the convenience store because it would have been unreasonable for the jury to have believed the object was a deadly weapon when the victim himself was not convinced.[17]

We purportedly relied upon Merritt for our previous conclusion, heavily relied upon by the Commonwealth, that "[r]eference to a deadly weapon coupled with a contemporaneous demand for money is sufficient to withstand a motion for directed

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[14] 386 S.W.2d 727, 729 (Ky. 1965).

[15] Obviously, an ordinary flashlight would not fall within the statutory definition of a deadly weapon set forth in KRS 500.080(4). So the only way that the flashlight possessed by Moore can be deemed a deadly weapon is by application of Merritt.

[16] *Id.*

[17] Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991) ("On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.").

verdict on a charge of first-degree robbery."[18] But Merritt cannot properly be interpreted so broadly because Merritt clearly requires a victim actually to be convinced that a perpetrator possesses a deadly weapon in order for any object possessed by the perpetrator to be deemed a deadly weapon.[19] So the Commonwealth cannot properly defeat a defendant's motion for a directed verdict unless it presents testimony showing that the victim was actually convinced that the object the robber possessed was a deadly weapon. In other words, if the victim in these types of cases is not convinced that the object is a deadly weapon, the defendant is entitled to a directed verdict.[20]

We are aware that our continuing reliance upon Merritt has been criticized by eminent legal scholars as being contrary to the plain language contained in the statutory definition of what may be a deadly weapon.[21] In fact, the application of Merritt has sometimes led to strange results, including a case in which a mere glove was deemed to be a deadly weapon.[22] And our continuing reliance upon Merritt has caused the

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[18] Shegog v. Commonwealth, 142 S.W.3d 101, 109 (Ky. 2004), *citing* Swain v. Commonwealth, 887 S.W.2d 346, 348 (Ky. 1994) ("In one other instance appellant referred to a gun and demanded money. We believe these acts are sufficient to come within the reasoning of *Merritt v. Commonwealth, supra,* and the motion for directed verdict on the first degree robbery charge was properly overruled.").

[19] Merritt, 386 S.W.2d at 729 ("any object that is intended by its user to convince the victim that it is a pistol or other deadly weapon and does so convince him *is* one.").

[20] *Cf.* Williams v. Commonwealth, 721 S.W.2d 710, 712 (Ky. 1986) (holding that when a deadly weapon is not seen, "an intimidating threat albeit coupled with a menacing gesture cannot suffice to meet the standard necessary for a first-degree robbery conviction.").

[21] *See* ROBERT G. LAWSON & WILLIAM H. FORTUNE, KENTUCKY CRIMINAL LAW § 13-7(c)(3) (1998) (opining that we "ignored the plain language" of KRS 500.080, which defines what may be a *deadly weapon*, when we continued to rely upon Merritt after the adoption of the penal code in the 1970s in cases such as Kennedy v. Commonwealth, 544 S.W.2d 219 (Ky. 1976)).

[22] *See* Whalen v. Commonwealth, 205 S.W.3d 238, 242-43 (Ky.App. 2006) ("Again, we note that there is no indication that Whalen actually possessed a firearm or any other object that one would normally deem a deadly weapon or dangerous instrument. But Whalen did possess a glove, which he pointed at Newman while threatening to shoot her in the head.

Court of Appeals to opine, justifiably, that "[t]he reported cases from our appellate courts involving first-degree robbery charges are so fact-specific as to be, frankly, potentially confusing and, at times, seemingly contradictory."[23] This Merritt-centric confusion is highlighted by the fact that the jury in this case sent a note to the trial judge asking if it had to "decide if the victim was convinced that he may have been harmed with an object."

We recently indicated twice that "Merritt's continuing viability warrants further analysis."[24] But because Moore was entitled to a directed verdict even under a strict and proper application of the Merritt deadly weapon standard, we need not decide in this case whether we should overrule Merritt.

D. The Trial Court Erred in Imposing a Fine and Court Costs Upon Moore.

Fines and court costs may not be levied upon defendants found to be indigent.[25] At the time of his trial and sentencing, Moore was receiving the services of a public defender. And Moore was granted the right to appeal in forma pauperis. So, as the

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Newman further testified that she was frightened and believed that the glove may have been a weapon. Thus, though it is contrary to the normal usage of the term, the glove may constitute a deadly weapon under the theory that any object that is intended by its user to convince the victim that it is a pistol or other deadly weapon and does [so] convince him *is* one.") (quotation marks omitted).

[23] *Id.* at 243.

[24] Fegley v. Commonwealth, 2008 WL 466150 at * 2 (Ky., Feb. 21, 2008). *Accord* McIntosh v. Commonwealth, 2008 WL 2167894 at * 9 (Ky., May 22, 2008) (holding that "our continuing reliance upon Merritt has drawn scholarly criticism . . ., and in a case where the issue is properly preserved would warrant further consideration.").

In both Fegley and McIntosh, the Merritt-related issue was unpreserved.

[25] *See* KRS 534.040(4); KRS 23A.205(2).

Commonwealth concedes, the trial court clearly erred in imposing a fine and court costs upon Moore.[26]

III. CONCLUSION.

For the foregoing reasons, we affirm Kenyatta Moore's first-degree robbery conviction stemming from the robbery of Burch. But we reverse Moore's first-degree robbery conviction stemming from the conduct in the convenience store. Additionally, the trial court's imposition of a fine and court costs against Moore is reversed. This case is remanded to the circuit court for resentencing in accordance with this opinion.

All sitting, except Venters, J. All concur.

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[26] *See, e.g.,* Simpson v. Commonwealth, 889 S.W.2d 781, 784 (Ky. 1994) ("In this connection, we observe that at sentencing in this case, the appellant was represented by an assistant public advocate. Thus, we may assume that the trial judge had already determined that the appellant was indigent. For this reason, imposition of any fine was inappropriate, and accordingly, we vacate such portions of the sentence as pertain thereto.").

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