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RENDERED: AUGUST 21, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2006-SC-000810-MR

DATE 9-11-08 EJA Gracy D.C.

DAVID JAMES VAN DIVER — APPELLANT

V.

ON APPEAL FROM BOONE CIRCUIT COURT
HONORABLE ANTHONY FROHLICH, JUDGE
NO. 05-CR-000149

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, David James Van Diver, was convicted of first-degree robbery and found to be a first-degree persistent felony offender. For these crimes, Appellant was sentenced to thirty-five (35) years imprisonment. He now appeals as a matter of right pursuant to Ky. Const. § 110(2)(b).

On appeal, Appellant argues (1) that improper and prejudicial show-up identification procedures rendered the victim's in-court identification of him inadmissible and (2) that the trial court erred in granting his motion to withdraw the guilty plea. For the reasons set forth herein, we affirm Appellant's convictions.

I. Facts

After midnight on February 17, 2005, James Johnson, a cashier at a Meijer store in Florence, observed from a distance, a man – who would later be

identified as Appellant – pick up two DVD players and put them in his cart. Johnson thought the man's behavior was suspicious because he picked up two different brands of DVD players without browsing.

Meijer has a store policy that employees should not confront a suspected shoplifter, but only follow the suspect in hopes that they will realize they are being observed and abandon the attempt. His suspicion aroused, Johnson followed the man and watched him from a distance. Johnson then temporarily lost sight of the man and asked another employee, Gary Purnell, to help locate him.

Subsequently, Johnson located the individual as he was approaching the exit doors of the store. As he exited, Johnson directed him to stop. However, the individual ignored Johnson and continued walking outside. Johnson followed the man out of the store to a car, which was parked a short distance away. As Johnson approached the car, he saw that the trunk was open, whereupon he observed the man placing the DVD players in the trunk.

Johnson then stepped alongside the man and attempted to retrieve the DVD players from the trunk. At first, he verbally threatened Johnson, but as Johnson reached into the trunk, the man struck him in the back two to three times. When Johnson turned around, he saw the man holding what appeared to be a mallet. Meanwhile, the struggle was witnessed by Purnell, who had followed the two outside and had seen the man strike Johnson.

After Johnson retrieved one of the DVD players, the man got in the car and attempted to start it. Johnson called for assistance on a cell phone and gave the police dispatcher a description of the man, the car, and the license plate

number, which was registered to Appellant. When the car started, the individual drove off to a nearby Best Buy parking lot, where he remained for several minutes, eventually driving away. Thereafter, Johnson went inside the store and returned the DVD player as recovered property.

Subsequently, the police arrived and began searching for the car, a blue Lincoln. The police located the car in the parking lot of a nearby Bigg's store. At the parking lot, the police observed Appellant, who fit the description given, walk out of the store. Upon making visual contact with the police, Appellant turned around and walked back inside. The police then went into the store and arrested Appellant.

After placing Appellant in the back of a patrol car, the police drove him back to Meijer, and asked Johnson if he was involved in the theft, whereupon Johnson identified Appellant as the assailant. The police also took photographs of Johnson's back, which showed redness. Johnson suffered mild pain for several days.

After his arrest, Appellant's car was impounded. During a search of the car, a DVD player was found in the trunk, and a mallet was found in the floorboard between the driver's seat and the door. Also, a small plastic bag containing cocaine was found under the passenger seat, and a crack pipe was found under the middle of the seat.

Appellant was charged with first-degree robbery, first-degree possession of a controlled substance, and for being a first-degree persistent felony offender. A competency hearing was held on December 8, 2005, at which time the circuit court found Appellant competent to stand trial.

Prior to trial, Appellant entered into plea negotiations with the Commonwealth and on February 6, 2006, Appellant entered a guilty plea to second-degree robbery and first-degree possession of a controlled substance. In return for the guilty plea, the Commonwealth agreed to reduce the first-degree robbery charge to second-degree robbery and dismiss the first-degree persistent felony offender charge. The Commonwealth further agreed to recommend a sentence of ten (10) years. On March 9, 2006, Appellant was sentenced pursuant to his guilty plea.

Thereafter, Appellant filed a pro se motion to withdraw his guilty plea, wherein he claimed, in part, that defense counsel was ineffective during the guilty plea proceedings. At the hearing on the motion, which was held on May 11, 2006, Appellant's defense counsel orally moved to withdraw from representing Appellant. The trial court granted both motions, reinstated the original charges, and appointed new counsel.

The case proceeded to trial on August 21, 2006, where a jury found Appellant guilty of first-degree robbery and of being a first-degree persistent felony offender. The trial court sentenced Appellant to thirty-five (35) years imprisonment.

II. Analysis

A. In-court Identification

Appellant first contends that the trial court erred in permitting Johnson's in-court identification of him because the identification was tainted by an impermissibly suggestive show-up. Shortly after Appellant's arrest, the police transported him back to Meijer. The police told Johnson that they found

someone who fit the description, and Johnson looked through the window of the patrol car and identified Appellant as the assailant.

Prior to trial, Appellant moved to suppress the pretrial and any in-court identification. Although a hearing on the motion was held on January 26, 2006, no ruling was made since the parties reached a plea agreement during a recess. Following Appellant's withdrawal of his guilty plea, another hearing was held on August 10, 2006, where the motion was denied.

At trial, none of the Commonwealth's witnesses testified that Johnson, prior to trial, had identified Appellant as the assailant. Instead, Johnson identified Appellant during the trial, without objection.

We first address the issue of preservation. Although Appellant did not object to the in-court identification at trial, he raised the issue in his motion to suppress identification. Consequently, this issue is preserved for our review. See Hilsmeier v. Chapman, 192 S.W.3d 340, 345 (Ky. 2006) (holding that claims must be presented to the trial court in order to be preserved for appellate review).

The law on the admissibility of identification evidence is well-settled. An out-of-court identification may be challenged as a violation of due process, which excludes a pretrial identification if it is "unnecessarily suggestive and conducive to irreparable mistaken identification." Stovall v. Denno, 388 U.S. 293, 302, 87 S.Ct. 1967, 1972, 18 L.Ed.2d 1199 (1967). If the pretrial confrontation violated due process, then not only is proof that the defendant was identified at the pretrial confrontation inadmissible, but also the witness may not identify the defendant at trial.

The United States Supreme Court, in its decision in Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), set forth the test for determining whether a pretrial confrontation violates due process. In Neil, the Court held that even though a show-up may have been suggestive, the in and out-of-court identifications are still admissible where there was "no substantial likelihood of misidentification." Id. at 201, 93 S.Ct. at 383. An out-of-court identification was held not to violate due process if under the "'totality of the circumstances' the identification was reliable." Id. at 199, 93 S.Ct. at 382. Therefore, the emphasis in Neil was on the reliability of the identification itself. The test was set forth in the following language from the opinion:

> We turn, then, to the central question, whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive. As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Id. at 199-200, 93 S.Ct. at 382; see also Savage v. Commonwealth, 920 S.W.2d 512, 513-14 (Ky. 1995).

Thus, there is a two-part test for determining whether a pretrial confrontation violates due process. First, we ask whether the pretrial identification procedure was impermissibly suggestive. If it was not, then evidence of the out-of-court identification is admissible. However, if the pretrial confrontation was suggestive, then we proceed to the second part of the test. In the second part, we must "assess the possibility that the witness would make an irreparable misidentification [at trial], based upon the totality [of] the

circumstances and in light of the five factors enumerated in [Neil]." Wilson v. Commonwealth, 695 S.W.2d 854, 857 (Ky. 1985).

Here, although the show-up procedure was unduly suggestive, see Sweatt v. Commonwealth, 550 S.W.2d 520, 522 (Ky. 1977) (a show-up is not a generally approved method of securing an identification), we find that, under the five factors set out in Neil, the identification was nonetheless reliable. Johnson had ample opportunity to view Appellant, both at a distance and face-to-face, from the point the DVD players were removed from the store shelf to the time Appellant drove off from the well-lit parking lot. See Savage, 920 S.W.2d at 514 (finding the first Neil factor was satisfied even though the robber was wearing a bag over his head); Neil, 409 U.S. at 200, 93 S.Ct. at 382 (a full moon was more than sufficient to determine the identity of the assailant). Johnson's presence of mind was shown by his ability to remain calm during and after the attack, when he provided a description of Appellant, his car, and the license plate number. Although Johnson gave an inaccurate estimate of Appellant's height, he did adequately describe his car and his other physical characteristics. Moreover, Johnson positively identified Appellant in the back seat of the patrol car and at trial. Finally, the time between the crime and the show-up identification was a matter of mere minutes. Based on these factors, we conclude that the identification was proper.

B. Motion to Withdraw Guilty Plea

Appellant further argues that it was error to grant his motion to withdraw the guilty plea. As previously noted, before the trial began, Appellant pled guilty to second-degree robbery and first-degree possession of a controlled substance.

In exchange, the Commonwealth agreed to reduce the first-degree robbery charge to second-degree robbery and dismiss the first-degree persistent felony offender charge. Appellant was sentenced to ten (10) years imprisonment pursuant to his guilty plea.

Thereafter, Appellant moved pro se to withdraw his guilty plea, alleging, in part, ineffective assistance of counsel. Appellant appeared at the hearing on his motion with both his original counsel and conflict counsel. At the hearing, Appellant's defense counsel asked to be removed from the case because of the conflict created by Appellant's ineffective assistance of counsel claim. The trial court permitted Appellant to withdraw his plea, reinstated the original charges, and appointed conflict counsel. There was, however, no ruling on whether Appellant's former counsel was ineffective.

The case proceeded to trial, with Appellant being represented by new counsel, and he was found guilty of first-degree robbery and of being a first-degree persistent felony offender. Appellant received a thirty-five (35) year sentence, significantly harsher than the negotiated guilty plea sentence of ten (10) years.

Appellant's argument has two prongs: first, Appellant contends that the trial court erred in ruling on the motion, after his former counsel requested to withdraw from representation, without appointing conflict counsel at that time. Second, Appellant asserts he was entitled to a hearing pursuant to Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

We first address the issue of preservation. The Commonwealth responds that Appellant's argument is not preserved for appellate review. However,

because the duty to hold a Faretta hearing is an affirmative duty imposed upon the trial court, we will nonetheless review this issue. See Hill v. Commonwealth, 125 S.W.3d 221, 226 (Ky. 2004).

Our resolution of this issue requires a discussion of the law pertaining to the withdrawal of pleas, the right to counsel, and waiver of counsel. A defendant can seek the trial court's permission to withdraw a guilty plea, and have a plea of not guilty substituted before judgment. RCr 8.10. The decision to allow withdrawal is a matter within the sound discretion of the trial court. Anderson v. Commonwealth, 507 S.W.2d 187, 188 (Ky. 1974). If the voluntariness of the plea is in doubt, the court should grant the motion to withdraw the plea. See Edmonds v. Commonwealth, 189 S.W.3d 558, 568 (Ky. 2006) (no abuse of discretion in denying motion to withdraw a guilty plea that was voluntary).

The Sixth Amendment right to counsel attaches upon the commencement of adversary judicial proceedings. Brewer v. Williams, 430 U.S. 387, 398-99, 97 S. Ct. 1232, 1239, 51 L.Ed.2d 424 (1977). A criminal defendant has a right to be represented by counsel at trial and at every critical stage of the proceedings. Stone v. Commonwealth, 217 S.W.3d 233, 237 (Ky. 2007). Conversely, the right to counsel includes the right to represent oneself. Faretta, 422 U.S. at 819, 95 S.Ct. at 2533; Ky. Const. § 11 ("In all criminal prosecutions the accused has the right to be heard by himself and counsel...").

A defendant has a right to waive counsel when he or she voluntarily and intelligently elects to do so. Faretta, 422 U.S. at 835, 95 S.Ct at 2541. While Faretta upholds the right to self-representation, the judge is still required to make certain the defendant understands the possible consequences of his or her

decision. Such a conversation between the defendant and the judge is known as a Faretta hearing, during which the trial court warns of the dangers inherent in self-representation.

Applying these principles, we find that, under these circumstances, the trial court properly exercised its discretion in granting Appellant's unopposed motion to withdraw his guilty plea, bearing in mind that Appellant alleged former defense counsel was ineffective during plea negotiations. See Kotas v. Commonwealth, 565 S.W.2d 445, 447 (Ky. 1978) (the validity of a guilty plea is determined from the totality of the circumstances surrounding it). We further find that because Appellant was still technically represented by former counsel during the hearing on his motion, he was not entitled to Faretta warnings at that time, nor was there error concerning the timing of the appointment. In so finding, we emphasize that both original counsel and conflict counsel appeared at the hearing.

Moreover, we decline to serve as a safety net for a defendant who made a tactical decision that turned out later to be unwise. Appellant got the relief he requested in his motion and, after appointment of new counsel, was represented by counsel throughout the remainder of the proceedings. We thus conclude that Appellant's argument pertaining to the hearing and ruling on that motion is without merit.

III. Conclusion

For the foregoing reasons, we affirm Appellant's convictions.

Minton, C.J., Abramson, Cunningham, Noble, Schroder and Scott, JJ., concur. Venters, J., not sitting.

COUNSEL FOR APPELLANT:

Joseph Brandon Pigg
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Perry Thomas Ryan
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601