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RENDERED: NOVEMBER 26, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2007-SC-000706-MR

JESSIE WAYNE BYRD — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA GOODWINE, JUDGE
NO. 07-CR-00585

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Jessie Wayne Byrd, alleges that his trial was unfair because testimony was introduced at his trial that he refused or failed to answer certain police questions and because the judge identified his attorney as a public defender during voir dire. Neither error requires reversal, thus Appellant's conviction and sentence are affirmed.

I. Background

When Bruce Reed stopped at a gas station on March 17, 2007, he left the keys in the ignition of his car while he went inside. A moment later, as he was leaving the gas station, Reed saw his car backing out of the parking lot. He ran up to the car and tried to grab the driver, who pulled away and sped down the road. A friend who happened to be at the gas station offered to give Reed a ride in pursuit of his stolen car.

As they chased the car, Reed called 911. They quickly lost the car, however, and then returned to the gas station, where they met the police. Reed described what happened and the man, who he thought was "Mexican" because of his dark complexion. The officer called the dispatcher to put out an "attempt to locate" on the car.

Another officer, Jeremy Cliffson, quickly found the stolen car sitting still and occupied by one person. When Officer Cliffson turned on his cruiser's emergency lights, the driver quickly pulled away. Officer Cliffson followed the stolen car, and several other officers soon joined the chase, which wound through the Lexington streets and onto the interstate, where their speeds reached between 80 and 100 miles per hour.

Several minutes later, the driver lost control of the stolen car and spun out on the side of the road. When the police caught up, they ordered the driver out of the car. The driver, who turned out to be Appellant, followed the orders and began yelling that the Devil was chasing him. He then tried to get back in the car. At that point, the officers grabbed him, handcuffed him, and searched him for weapons. Appellant was very intoxicated, with an officer describing him as "manifestly under the influence of alcohol." The officers arrested him and took him to the University of Kentucky Medical Center to have his blood tested for intoxicants.

Bruce Reed was never asked to identify Appellant as the man who took his car, despite the fact that he was not Hispanic.

At trial, Appellant was convicted of theft by unlawful taking over $300, driving under the influence, fleeing and evading, and reckless driving, and

being a first-degree persistent felony offender. He was sentenced to twenty years in prison, and now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

II. Analysis

Appellant raises two issues on appeal.

A. Comment on Silence

Appellant first claims that the prosecution improperly commented on his silence in its opening statement and by eliciting testimony from Officer Cliffson that Appellant did not respond to questions from police, emergency personnel, and medical staff.

1. Opening Statement

During her opening statement, the prosecutor stated that Appellant refused to answer questions from a paramedic and refused to speak to the staff of the UK emergency room when he first arrived there. The defense raised no objection to this part of the prosecutor's opening.

Because no objection was raised to these comments, any error related to them can only be addressed as palpable error under RCr 10.26. Even assuming that the prosecutor erred in making the statements, they simply did not create a "manifest injustice" and therefore were not palpable error.

2. Officer Cliffson's Testimony

During the Commonwealth's case, Officer Cliffson testified about the car chase and its aftermath. The following exchange took place between the prosecutor and the officer:

Q: After you got him out of the car, he was unable to walk on his own and he had slurred speech. What did you do at that point?

A: At this point we called EC—Emergency Care was already en route. And at this point he decided to become uncooperative and unresponsive to any questions or anything that was asked of him.

Q: Emergency Care? Is that the ambulance?

A: Yes, ma'am.

Q: Okay. So the ambulance was called?

A: Yes, ma'am.

Q: And what do you mean he was uncooperative?

A: He wouldn't answer any questions—

Defense counsel interrupted the answer by objecting that Appellant was not compelled to give any evidence against himself and asked that the jury be admonished about the officer's answer. The prosecutor responded that the testimony was an attempt to show Appellant's drunken state at the time, noting that Appellant had not even given his name to the police. The trial judge stated that Appellant did not have a right not to identify himself. The prosecutor then appeared to concede that any evidence about Appellant's failure or inability to identify himself was properly limited and that she could not get into any other failure to speak. After some more discussion, the court overruled any objection regarding that issue, reiterating that Appellant had no right not to identify himself.

When the prosecutor resumed questioning the officer, the following exchange occurred:

Q: At this point the defendant's out of the car?

A: Yes, ma'am.

Q: And you start to ask him questions?

A: Yes, ma'am.

Q: Okay. Would he respond as to who he was or where he lived?

A: No, ma'am.

Q: Okay. Did he make statements about the devil chasing him?

A: Yes, ma'am.

Q: Okay. And once he made those statements, is that when EC arrived? The ambulance?

A: Yes, ma'am.

Q: Okay. And what happened once the ambulance arrived?

A: We hadn't got any information out of him. Name, address, anything of that sort. EC, they need the information as well, so they'll attempt—and a lot of times people will talk to EC and not the police for some reason.

Defense counsel again objected, asking that the officer testify only to what his knowledge was. The judge overruled the objection, saying he could testify as to his experience. The examination then continued:

Q: So sometimes they will answer the ambulance but not you all?

A: Yes, ma'am.

Q: Okay. And what happened at that point?

A: He still continued on if he would answer anything about Jesus and the devil chasing him.

Q: Okay. And where did you all go at that point?

A: To the EC buggy that was staged on the side of the highway itself

Q: Okay, so the ambulance on the side of the highway?

A: Yes, ma'am.

Q: And where did you all go once— Did you ride in the ambulance?

A: Yes, ma'am.

Q: And where did you all go?

A: We went to UK ER.

Q: Okay. And when you got to the University of Kentucky Emergency Room, did you request that the defendant's blood be taken?

A: Yes, ma'am.

Q: Okay. Tell us about that process.

A: It's standard implied consent form. We're to read it whether the person is cooperative or not. And then part of the implied consent is if they are unresponsive, acting unresponsive, the state of Kentucky implies consent, so therefore we can—in this situation we opted to take the blood test.

Q: Okay. And implied consent, that just, is that like a form that tells you you have the right not to take the test?

A: Yes, ma'am.

Q: And the consequences of not taking the test?

A: Yes, ma'am.

Q: Okay. So you read that to the defendant?

A: Yes, ma'am.

Q: Okay. And after you read him the implied consent, what happened at that point?

A: He was still playing the unresponsive game.

Q: Okay. And is—

Defense counsel interrupted by objecting to characterizing Appellant's behavior as a "game." A bench conference ensued in which defense counsel called the answer prejudicial, noting that Appellant simply said nothing, which was irrelevant. Counsel continued to state, "So I think the response was, if he didn't say anything, 'He didn't say anything.' And to say that he was playing the game, a game, I think that's prejudicial." He then moved for a mistrial and an admonition in the alternative. The prosecutor replied that she thought the answer was fair because the officers did not at that point believe Appellant was so intoxicated that he could not answer their questions, which went to show that he knew what he was doing the night of the theft. Defense counsel denied

that the officer could testify to such a conclusion. After further discussion along this line, the trial court overruled the objection.

Appellant now claims that the testimony about his refusal or inability to answer questions about his identity and "playing the unresponsive game" were improper comments on his right to silence. A defendant's silence may be used against him for some impeachment purposes. See Jenkins v. Anderson, 447 U.S. 231 (1980) (allowing impeachment use of prearrest, pre-Miranda warnings silence where defendant testified); Fletcher v. Weir, 455 U.S. 603 (1982) (allowing impeachment use of post-arrest, pre-Miranda warnings silence where defendant testified). But see Doyle v. Ohio, 426 U.S. 610 (1976) (disallowing impeachment use of post-Miranda warnings silence where defendant testified). Those cases are not controlling, however, because Appellant did not testify at trial and the evidence of his failure to answer questions was presented during the Commonwealth's case-in-chief. Cf. Combs v. Coyle, 205 F.3d 269, 281 (6th Cir. 2000) ("That use of a defendant's prearrest [but in-custody] silence as substantive evidence of guilt is significantly different than the use of prearrest silence to impeach a defendant's credibility on the stand is clear."); United States v. Velarde-Gomez, 269 F.3d 1023, 1029 (9th Cir. 2001) (distinguishing between use of such silence for purposes of impeachment and case-in-chief).

It is clear that comment by the prosecution on a defendant's failure to testify at trial is forbidden by the Fifth Amendment. Griffin v. California, 380 U.S. 609, (1965). While the U.S. Supreme Court has never directly addressed whether that rule also extends to the use of a defendant's silence while he is in custody, this Court has so extended the privilege. Green v. Commonwealth,

815 S.W.2d 398, 400 (Ky. 1991) (holding that the prosecutor may not comment on post-arrest silence as evidence of guilt).[1]

That said, the Fifth Amendment privilege "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." Schmerber v. California, 384 U.S. 757, 761 (1966). However, "in order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against himself." Doe v. United States, 487 U.S. 201, 210 (1988). For this reason, the Court has held that the Fifth Amendment is not ordinarily implicated by questions about a person's identity. Hibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County, 542 U.S. 177, 191 (2004). While Appellant stood silent rather than give answers (voluntarily or otherwise) about his identity, and most of the Fifth Amendment cases deal with compelled answers, it is not clear that a meaningful distinction can be made between such answers and silence in determining whether a Fifth Amendment violation occurred in this case because the same interest is involved. In one case, the interest is

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[1] The officer's testimony is not clear as to when Appellant was given the Miranda warnings. Some cases addressing use of silence in the prosecution's case-in-chief, rather than in rebuttal, distinguish between pre- and post-Miranda warnings. See United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir.1991). However, most cases that appear consistent with this Court's decision in Green appear to require only that the defendant be in custody. See Combs, 205 F.3d at 285-86; United States v. Whitehead, 200 F.3d 634, 638 (9th Cir. 2000) (holding that "silence in the face of arrest . . . could not be used as substantive evidence of guilt"); see also Miranda v. Arizona, 384 U.S. 436, 468 n.37(1966) (noting in dicta that "[t]he prosecution may not . . . use at trial the fact that [a defendant] stood mute or claimed his privilege in the face of accusation"). Appellant was clearly in custody, having been seized and handcuffed by the police, when he failed to respond to police questioning and was therefore "silent."

undermined directly by forcing a person to answer; in the other, the interest is indirectly affected by a prosecutor's comment on a person's decision to remain silent.

After the first objection, the prosecutor narrowed her examination to focus on whether Appellant would answer questions about his identity or where he lived. However, the initial question and some of the officer's answers generically discussed Appellant's refusal to answer questions posed by the officer and medical personnel. To this extent, the testimony and questioning were an improper comment on Appellant's Fifth Amendment right.

Fifth Amendment violations, however, are not grounds for automatic reversal, as they are subject to review for harmlessness under RCr 09.24. See, e.g., Green, 815 S.W.2d at 400 (finding a Fifth Amendment violation harmless); Wallen v. Commonwealth, 657 S.W.2d 232, 233 (Ky. 1983) (same). This is the rare case where the police literally caught the Appellant red-handed: he was driving the stolen car, was extremely intoxicated, and led police on a high-speed chase. Appellant tries to claim he was prejudiced by arguing that there was some question whether he actually stole the car, since he did not match the description of the thief given by the victim. This argument, however, is immaterial, since Appellant was clearly exercising control over a car that was not his, which is sufficient to satisfy the theft statute. See KRS 514.030. Given the content of the objected-to questioning and testimony, this Court concludes that "there is no reasonable possibility that it affected the verdict." Emerson v. Commonwealth, 230 S.W.3d 563, 570 (Ky. 2007). Thus, any error related to this testimony was harmless.

B. Identifying Lawyer as a Public Defender

Appellant also claims he was denied a fair trial when the trial court informed the venire that his attorney was from the local public defender office, which he claims was prejudicial, and contrary to Goff v. Commonwealth, 241 Ky. 428, 44 S.W.2d 306 (1931).

At the beginning of voir dire, the trial court introduced counsel, noting that Appellant's lawyer "is in our public defender's office." The court followed this by asking whether any members of the venire knew the attorney or the Appellant, or had "any relationship or prior experience with the public defender's office." Approximately one hour later, Appellant's lawyer moved for a mistrial, stating,

> I'm afraid that the jurors might draw a conclusion that he has a public defender because he can't afford anything. If they make some kind of leap that he's got some motive to take something. If this was some wealthy attorney, Robert Shapiro or somebody that's represented only Hollywood people, well then maybe they would come down to it must be more due to the alcohol because he could get anything he wants. So I'm thinking that would kind of prejudice the whole panel in maybe leaning that way to think, yeah, he might have some reason to do it because he doesn't have money, he's just wanting the car.

The prosecutor indicated that an admonition could solve any prejudice, but the defense attorney refused an admonition, claiming it could draw more attention to the issue. The trial judge overruled the objection, stating that she thought it was important for the venire members to know where the attorneys were from to ferret out any possible prejudice.

While Appellant's objection was not contemporaneous with the comments by the judge, because the alleged error and late objection occurred

during the continuing voir dire process and prior to the seating of the jury, the purpose of the contemporaneous objection rule was not thwarted. Under the facts of this case, this Court thus finds that the alleged error was preserved for appellate review. The contemporaneous objection rule is still a part of the law in Kentucky, see RCr 9.22, and it is only in rare situations, such as this one, that it will not be applied strictly.

Despite having preserved the issue, though barely so, Appellant's substantive legal claim is incorrect. In Goff, the case on which Appellant relies, the defendant, a wealthy stock broker, employed a well-known former judge to defend him against a murder charge. During closing arguments, the prosecutor made a variety of volatile, prejudicial statements, including commenting on the defendant's wealth and employment of an accomplished lawyer and telling the jury that it would border on treason (complete with a comparison of the jury to Judas) not to convict.[2]

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[2] The prosecutor's statement as recounted in Goff was as follows:

> "I know you will object. (Referring to an objection made by attorney for defendant to certain remarks of the Commonwealth's Attorney in his closing argument.) You were born in the objective case. You have your stenographer here to take down my speech, making preparation for an appeal, which you know you will take, as you have no confidence in your case or his defense, and you are trying to get enough errors in the record to reverse this case when you take it to the Court of Appeals after your client is convicted. . . . "
>
> "Judge (meaning Judge Bethurum, attorney for the defendant), why are you fighting so hard? I will tell you: Because of the large fee you are to receive, because you are hired and employed with a big, fat fee. You know according to the evidence that the defendants are stock traders who are able to pay fat fees . . . and, gentlemen, all I ask of you, or at your hands, is the performance of men who have taken a solemn oath to perform a solemn duty and render a verdict that will be just, and may God, the God on the great white throne above, give you power, courage and manhood to return that kind of a verdict into this courtroom, and no other, and that kind of a verdict that will reflect credit to you, to your

Appellant is correct that the Court of Appeals was concerned to some extent with the prosecutor's commentary about the defendant's social standing. To claim that Goff requires reversal here, however, overstates the case. As the Court concluded:

> Generally, the following things which appeared in this argument are regarded as improper if referred to by an attorney for the commonwealth in his closing argument: To state the defendant has a right to appeal. To refer to the wealth and social influence of the accused as contrasted with the poverty of the person injured. To state or contend that a verdict other than that sought by the attorney making the argument will subject the jury to scorn or contempt.

Id. at 309. The prosecutor's comment on the defendant's wealth in Goff was only one of several prejudicial comments that the Court was concerned about. The Court was equally concerned about the reference to the right to appeal and statements that a failure to convict would violate the jury's oath and subject the jurors to scorn, noting: "The tendency of the other remark was to induce the jurors to believe that an acquittal of the defendant would brand them with infamy, and class them as traitors." Id. at 308.

Even if the wealth comment alone had been sufficient in Goff—the Court did state that such an argument was improper—it (along with the other

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> county and to the state. I cannot believe that one of you would sit in the jury box and qualify and take oath that you have no bias or prejudice in this case, and would decide it according to law, and then go out and perpetrate a fraud upon the county and upon the state. If you were to, gentlemen, you would be like the sirens of old, who kissed and caressed their lovers with one hand and administered poison with the other; you would be a traitor to your country, if you were to be influenced, gentlemen, by politics, by religion, by creed, or anything else in rendering a verdict. Gentlemen, you would be in a class with Judas, who betrayed the Saviour for thirty pieces of silver, and with Esau who sold his birthright for a mess of pottage."

44 S.W.2d at 307-08 (omissions and alterations in original).

erroneous comments) was of a decidedly different character, both in content and form, from the judge's comment in this case. First, the "wealth" portion of the Goff argument contrasted the wealth and high social status of the defendant and the relative poverty of the victim so as to intimate that anything less than a conviction would be tantamount to allowing a rich and powerful man to buy his way out of a crime. The comments prejudiced Goff in a very specific way that is not present here. More important is the fact that the statements in Goff were made by the prosecutor. Essentially, the "error" in that case was repeated, extremely prejudicial commentary, to which "objection after objection . . . was fruitless," id. at 309, that amounted to prosecutorial misconduct. The objected-to comment in this case was fleeting and made only by the judge.

Finally, the prejudice alleged by Appellant simply does not exist under the facts of this case. Appellant claims that because the jury knew he had a public defender, it would assume he was impoverished and thus stole the car because he needed it, rather than as a result of his drunkenness. This argument assumes that intoxication is a defense to a charge of theft (or somehow an acceptable motive). It is not. Moreover, motive is not an element of the crime of theft and need not be proven, though prosecutors often introduce evidence of it to present a full narrative to the jury. Even if the judge's passing comment framed any discussion of Appellant's possible motive, it does not change the fact that Appellant was literally caught in the act by the police.

Consequently, in this case, the judge's identification of the lawyer as a public defender was not in error. It in no way prejudiced Appellant and was not improper.

III. Conclusion

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Randall L. Wheeler
Assistant Public Advocate
100 Fair Oaks lane
Suite 302
Frankfort, Kentucky 40601

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

Heather Michelle Fryman
Assistant Attorney General
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601