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RENDERED: APRIL 25, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000640-MR

ALEXANDER L. RUFF — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCH PERRY, JUDGE
NO. 08-CR-003686

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Alexander Ruff appeals as a matter of right from a Judgment of the Jefferson Circuit Court convicting him of wanton murder and first-degree robbery. Ky. Const. § 110(2)(b). Finding an aggravating factor of first-degree robbery, the jury recommended a sentence of life imprisonment without the benefit of parole or probation for twenty-five years, and the trial court sentenced him accordingly. Ruff raises three issues on appeal: (1) the Commonwealth's peremptory strike of an African-American juror constituted a *Batson* violation; (2) the trial court erred in denying his motion to suppress evidence seized from Ruff and statements made during a traffic stop; and (3) the trial court erred in denying his motion to suppress statements made to officers after the arrest. For the reasons stated herein, we affirm the Judgment of the Jefferson Circuit Court.

RELEVANT FACTS

On November 24, 2008, Alexander Ruff entered the New York Fashions clothing store in Louisville, Kentucky, with the intent to rob the store and its customers. Ruff was accompanied that day by John Benton and Kendrick Robinson. With tee-shirts tied around their faces and armed with handguns, Ruff and Benton entered the store while Robinson waited in a nearby vehicle. Ruff fired a single shot into the ceiling and ordered the people inside to get on the ground and surrender their wallets and cash. Ruff fired the gun again, this time striking store owner Mohamed Abderlrahman in the abdomen. Ruff and Benton then collected the customers' wallets and fled in Robinson's car. Abderlrahman died as a result of internal bleeding caused by his injury.

Four days later, Louisville Metro Police Department ("LMPD") Officers Christopher Sheehan and Benjamin Lunte, while on narcotics patrol, stopped a vehicle driven by Ruff's girlfriend, Chesica White, for an unreadable temporary tag. Ruff happened to be seated in the passenger seat when the officers approached the vehicle. After White and Ruff exited the vehicle, Ruff suddenly fainted and fell to the street. The officers testified that, suspecting that Ruff had swallowed narcotics, they obtained consent from White to search the vehicle. White disputed that she gave consent. Officer Sheehan found a 45-caliber handgun and a garbage bag full of clothing under the passenger seat of the car. Ruff admitted ownership of the gun and clothing. He was then arrested on unrelated charges and transported to an LMPD substation for questioning.

That evening, Ruff was questioned and placed in jail on the unrelated charges. Five days later on December 3, Ruff was transported to the LMPD homicide office for further questioning. He once again returned for questioning on December 5. Over the course of his interviews with LMPD detectives, Ruff admitted to being involved in the New York Fashions robbery, and implicated Benton and Robinson as co-conspirators.

Ruff was indicted by a Jefferson County Grand Jury on one count of murder and three counts of robbery. His motions to suppress evidence found and statements made during the vehicle stop and subsequent statements at the LMPD office were denied. At trial, Ruff took the stand in his own defense. He confessed to his involvement in the robbery and shooting, including taking customers' wallets and firing his weapon in Mohamad Abdelrahman's direction. The jury convicted Ruff of wanton murder and first-degree robbery.[1] Finding an aggravating factor of first-degree robbery, the jury returned a sentence of life without the benefit of parole or probation for twenty-five years. The trial court sentenced in accord with the jury's recommendation, and this appeal followed.

ANALYSIS

I. The Trial Court Did Not Violate *Batson* When it Upheld the Peremptory Strike of an African-American Juror.

Ruff challenges the Commonwealth's use of a peremptory strike to dismiss an African-American juror as violative of the United States Supreme

[1] John Benton was found guilty of second-degree manslaughter and first-degree robbery. Kendrick Robinson was found guilty of reckless homicide and first-degree robbery. Both Benton and Robinson were sentenced to fifteen years imprisonment and have waived their appeals.

Court's holding in *Batson v. Kentucky*, 476 U.S. 79 (1986). Specifically, Ruff asserts that the trial court erred when it accepted the Commonwealth's race-neutral reason for striking the African-American juror when his answers were substantially similar to those offered by Caucasian jurors who were not stricken. *See Snyder v. Louisiana*, 552 U.S. 472, 483 (2008) (the disparate treatment of similarly situated jurors may give rise to a *Batson* challenge). We review a trial court's denial of a *Batson* challenge for clear error. *Chestnut v. Commonwealth*, 250 S.W.3d 288, 302 (Ky. 2008).

During individual voir dire, the trial court asked an African-American potential juror ("Juror #475406") if he could "consider the entire range of possible punishment" for the defendants. He replied that he could not. When the trial court asked him what punishment he could not consider, Juror #475406 responded that he could not consider the death penalty.[2] The trial court went on to ask Juror #475406 if "regardless of what the evidence or the law might be" if he would not consider the death penalty, and he replied: "I would have to consider it, but I wouldn't want to." The Commonwealth then continued the individual voir dire, eventually asking Juror #475406 directly if he could consider the death penalty. Juror #475406 replied, "Like I said, man, I'm a firm believer in second chances, and the death penalty is not one of them." The Commonwealth then moved to strike Juror #475406 for cause,

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[2] Juror #475406 explained: "I am a firm believer of second chances, so I guess you can say, being a man of faith that I am, I do know that, no matter what. So even, you know, that's why, according to the Bible, what it says talking about no sin's greater than the other—killing, you know, getting someone pregnant, you know, drinking, it's pretty much all the same. That's according to what I believe in."

arguing that he was "substantially impaired" in that he could not consider the death penalty as a possible punishment. The trial court deemed it a "close call," but ultimately denied the Commonwealth's motion to strike for cause, finding that "[Juror #475406] could, if directed, follow the evidence and law." The Commonwealth exercised a peremptory strike against Juror #475406.

As provided in *Batson v. Kentucky*, the Equal Protection Clause of the Fourteenth Amendment prohibits the racially discriminatory use of peremptory strikes. 476 U.S. at 89; *see also Snyder*, 552 U.S. at 478 (citing *United States v. Vasquez-Lopez*, 22 F.3d 900 (9th Cir. 1994)) ("[T]he constitution forbids striking even a single prospective juror for a discriminatory purpose."). When a *Batson* challenge is raised, a three-step process is undertaken to address the alleged violation:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race[; s]econd, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question[; and t]hird, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

552 U.S. at 476-77 (citations and internal quotation marks omitted).

Ruff joined Benton's *Batson* challenge to the Commonwealth's use of a peremptory strike against Juror #475406. Defense counsel remarked that before the exercise of peremptory strikes, the percentage of African-Americans in the venire had been decreased from nine-percent to five-percent. In striking Juror #475406, the number of African-Americans remaining in the pool was reduced to one. Defense counsel reasoned that with the possibility of the

random draw-down removing the final African-American from the venire, there was a "substantial chance of having an all Caucasian jury" in a case with three African-American defendants. The trial court found that this established a prima facie showing of purposeful discrimination under *Batson*.[3]

We now turn to the second step in the *Batson* inquiry: the Commonwealth's race-neutral explanation for exercising the peremptory strike. The Commonwealth maintained that Juror #475406's views on the death penalty, particularly the fact that he was not rated "death-qualified" per the prosecutor's system of rating jurors, led to his peremptory strike. His occupation as a minister was also offered as a race-neutral basis for exercising the peremptory strike. The Commonwealth's explanation was sufficient to allow the trial court to consider it in light of Ruff's *Batson* challenge. *Rice v. Collins*, 546 U.S. 333, 338 (2006) ("Although the prosecutor must present a comprehensible reason, the second step of this process does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices."). The trial court reviewed its notes on Juror #475406, again remarking that he was a "close call" in reference to the

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[3] The Commonwealth urges this Court to abandon our *Batson* analysis at this juncture, maintaining that the defense failed to meet its burden in establishing a prima facie case. However, despite the Commonwealth's objection to the trial court's finding of a prima facie showing, the prosecutor proffered a race-neutral explanation for his use of a peremptory strike on Juror #475406, and the trial court ruled on the ultimate issue. As such, we continue our inquiry. *Commonwealth v. Snodgrass*, 831 S.W.2d 176, 178 (Ky. 1992) (citing *Hernandez v. New York*, 500 U.S. 352, 359, 111 S. Ct. 1859, 1866, 114 L.Ed.2d 395 (1991)); *see also Harris v. Commonwealth*, 134 S.W.3d 603, 611 (Ky. 2004) ("Generally, numbers alone are insufficient to satisfy this step, but if the prosecution offers a race-neutral reason and the trial judge rules on the issue, the issue of whether a prima facie showing was made is, as here, mooted.").

Commonwealth's earlier motion to strike for cause. Ultimately, the trial court accepted the Commonwealth's race-neutral explanation and denied the *Batson* challenge.

In evaluating the *Batson* challenge, a trial court must consider all circumstances bearing on racial animosity, including "inconsistencies in the treatment of the stricken juror and similarly situated jurors outside the suspect class." *Brown v. Commonwealth*, 313 S.W.3d 577, 602 (Ky. 2010) (citing *Snyder*, 552 U.S. at 478). Ruff now claims that the trial court's finding was clearly erroneous in light of the Commonwealth's refusal to strike similarly situated Caucasian jurors. The Commonwealth's comparative treatment of jurors was not presented for the trial court to consider. In fact, the defendants only objected to the number of African-Americans remaining in the venire as the basis for their *Batson* challenge. While the United States Supreme Court has cautioned appellate courts against engaging in a juror comparison inquiry when the argument was not presented to the trial court, we may proceed if the issue has been "thoroughly explored and made part of the record." *Id.* at 483; *Clay v. Commonwealth*, 291 S.W.3d 210, 215 (Ky. 2008). Here, the record is fully developed regarding the jurors' responses to death penalty related questions. We may, therefore, move forward and examine the similarities between Juror #475406's answers and the responses of Caucasian venirepersons to determine if the Commonwealth engaged in intentional discrimination.

Upon review of the Caucasian jurors' responses to questions about the death penalty, we cannot say that the Commonwealth's race-neutral explanation for exercising a peremptory strike on Juror #475406 was based on racial discrimination. On appeal, Ruff compares Juror #475406's responses to those of six other jurors, all of whom expressed varying degrees of reluctance when asked if they could impose the death penalty. None of those jurors, however, unequivocally stated that they *could not* consider the death penalty.[4] Juror #475406, on the other hand, repeatedly expressed an inability to consider the death penalty as a potential punishment. At the conclusion of the Commonwealth's voir dire, Juror #475406 conceded that he could fairly consider the death penalty in a case where there is a murder with aggravating circumstances. Prior to that final response, however, Juror #475406 reiterated that he was "a firm believer in second chances . . . and the death penalty is not one of them." One Caucasian female juror, like Juror #475406, explained that her reluctance was partially based on her religious background. She, however, explained that while "hesitant," she was capable of considering the full range of penalties, including the death penalty.

Here, we cannot say that the trial court erred in accepting the Commonwealth's death-qualification explanation for exercise of the peremptory

[4] Juror #475537, a Caucasian female, stated that she believed that the death penalty is "really sad," but she "could consider it" and fairly impose the death penalty "once [she] heard all of the facts." A Caucasian male, Juror #474962, expressed that he was "morally not a big fan of [the death penalty]," but would not be prevented from considering it as a penalty. Another Caucasian male, Juror #475495, stated that he "does not support [the death penalty], but would not have a problem applying it to a case." Juror #475395 indicated that she would have to be "100%" convinced of a defendant's guilt before she could consider the death penalty as a punishment.

challenge. Juror #475406 clearly explained that he could not consider the death penalty when assessing potential punishments for intentional murder and robbery. In fact in ruling on the motion to strike for cause, the trial court stated that Juror #475406 was a "close call." Further, in reviewing the juror comparison argument, we find that none of the similarly situated Caucasian jurors expressed the same level of reluctance toward considering the death penalty as Juror #475406. In addition, the Commonwealth stated that Juror #475406's occupation as a minister was another factor in the decision to use a peremptory strike. No information about the similarly situated Caucasian jurors' occupations was presented on appeal. Finally, we cannot ignore the fact that Ruff failed to present the trial court with these comparisons, and therefore denied the Commonwealth an opportunity to address its treatment of the similarly situated jurors. *See Brown*, 313 S.W.3d at 603 (the Court found no error in the peremptory strike of an African-American juror even in light of a juror comparison argument that was not presented for the trial court to consider). In sum, the trial court did not commit clear error when it denied Ruff's *Batson* challenge.

II. The Trial Court Properly Denied Ruff's Motion to Suppress Items Found in the Vehicle and His Ensuing Statements.

Ruff argues that the trial court erred when it denied his suppression motions relating to items found in his girlfriend's car, a statement he made to the police during the investigative stop admitting ownership of those items, and statements made to police officers after his arrest. The Commonwealth erroneously maintains that any error in failing to suppress evidence and

statements was rendered harmless beyond a reasonable doubt by Ruff's ultimate admission of guilt before the jury.[5]

When this Court reviews an order on a motion to suppress, the trial court's findings of fact are conclusive if supported by substantial evidence. Kentucky Rule of Criminal Procedure ("RCr") 9.78; *Adcock v. Commonwealth*, 967 S.W.2d 6 (Ky. 1998); *Peyton v. Commonwealth*, 253 S.W.3d 504 (Ky. 2008). We then review the trial court's application of the law to those findings *de novo* to determine if the trial court's ruling was correct as a matter of law. *Owens v. Commonwealth*, 291 S.W.3d 704 (Ky. 2009).

The trial court orally denied the motions and stated that a written order to that effect would be issued, but no such written order containing specific findings of fact appears in the record. A lack of specific findings of fact may impair this Court's ability to undertake a meaningful review of the record. *Commonwealth v. Jones*, 217 S.W.3d 190 (Ky. 2006). Nevertheless, appellate review is possible if the trial court's legal conclusions are adequately adduced

[5] Despite the Commonwealth's argument that Ruff's subsequent admission of guilt at trial rendered any alleged suppression error harmless, it is axiomatic that our review must focus on the findings of fact from the suppression hearing and not the proof adduced at trial. *See* RCr 9.78 ("If at any time before trial a defendant moves to suppress, or during trial makes timely objection to the admission of evidence consisting of (a) a confession or other incriminating statements alleged to have been made by the defendant to police authorities, (b) the fruits of a search, or (c) witness identification, the trial court *shall conduct an evidentiary hearing outside the presence of the jury* and at the conclusion thereof shall enter into the record *findings resolving the essential issues of fact raised by the motion or objection* and necessary to support the ruling.") (Emphasis supplied).

and there is little disagreement as to the facts.[6] *Coleman v. Commonwealth*, 100 S.W.3d 745 (Ky. 2002). In the instant case, the trial court denied Ruff's motions to suppress by stating the following from the bench:

> I will respectfully deny all of those motions to suppress. In the court's view, there were four. The statements to the police were all knowing, intelligently and voluntarily done, and at the scene—there were a couple of things kind of mixed together: both the seizure of the weapon, Ruff's alleged statements at the scene after the so-called fainting spells or whatever happened with that, and then the stop itself. I do believe that the police officers had reasonable suspicion to stop the automobile at the moment it was stopped by, I forget his name, the Special Agent Sheehan, and would respectfully deny that. And then the separate issue, kind of interesting, at one point Mr. Ruff asked for an attorney and then there was a delay in questioning and then it resumed. So, just referring to that—the resumption of that testimony – the court finds that that was done voluntarily and it was upon his insistence that that resumed, and he had then waived his right to be, well he was *Mirandized*, but waived his right. So I will respectfully deny all those.

This was a very cursory set of findings and conclusions, particularly for a death-penalty eligible case. Nevertheless, we believe that these statements document the trial court's findings and legal conclusions. *See Jones*, 217 S.W.3d at 194 (a trial court's oral findings of fact sufficiently documented its legal conclusions allowing adequate appellate review). We may, therefore, proceed with our review.

Ruff moved to suppress the items found in the vehicle, arguing that the items were seized as a result of an unconstitutional detention. A suppression

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[6] While there was some disagreement as to the facts surrounding the traffic stop, the trial court's findings, while dismally brief, give some insight as to the factual basis for the legal conclusions.

hearing was held where the trial court heard testimony from LMPD officers and detectives including Special Agent Sheehan, as well as Ruff's girlfriend, Chesica White. Officer Sheehan testified that he and Officer Lunte stopped a vehicle driven by White for an unreadable temporary tag. Ruff was seated in the passenger seat of the car when the officers approached the vehicle. Officer Sheehan said that he asked Ruff if there was anything in the car that would "get anybody in trouble." Ruff said "no," and exited the vehicle without any instruction from the officers to do so. Placing his hands on the hood of the vehicle, Ruff told Officer Sheehan that he could search him. After conducting a pat-down search of Ruff and finding no weapons or contraband, Officer Sheehan testified that he and Ruff moved towards the rear of the vehicle. Suddenly, Ruff fainted and struck his head on the concrete, rendering him unconscious. Officer Sheehan asked White if Ruff had ingested narcotics, and White said that she did not see him swallow anything. Officer Sheehan then asked White if he could search the vehicle, and she consented. While Officer Lunte tended to Ruff, Officer Sheehan searched the passenger side of the vehicle where he found a black garbage bag containing clothes on the floorboard and a 45-caliber handgun underneath the front passenger seat. By this point Ruff had regained consciousness and was being helped into a seated position on the curb by Officer Lunte. Officer Sheehan asked White if the gun belonged to her, and she said no. Officer Sheehan then asked Ruff if the gun belonged to him, and Ruff admitted to owning the gun. Ruff was placed in handcuffs and transported to a police substation seven blocks away.

White testified to a much different version of the events. According to White, the officers asked her and Ruff to exit the vehicle. She claimed that she explained to the officers that the vehicle did not belong to her, and refused to give consent to a search. White stated that five to seven officers were present at the scene, and that they used flashlights to look through the windows of the car. White testified that she was handcuffed and placed in the back of the police cruiser after refusing to allow the officers to search the vehicle.

The trial court denied Ruff's motions to suppress, finding that the officers had reasonable suspicion to stop White's vehicle.[7] On appeal, Ruff maintains that the trial court's denial of his motion to suppress the seized items was erroneous. More specifically, Ruff argues that the officers' continued detention of Ruff after the initial traffic stop was unsupported by a reasonable suspicion of additional criminal activity, and that this illegal detention led to the seizure of the handgun and garbage bag filled with clothing.

A traffic stop for the purposes of issuing a citation becomes unlawful if the detention continues beyond the time required to effectuate the purpose of the initial stop. *Illinois v. Caballes*, 543 U.S. 405 (2005); *see also Epps v. Commonwealth*, 295 S.W.3d 807 (Ky. 2009). Items discovered as a result of the illegally prolonged stop are considered products of an unconstitutional seizure,

[7] As to the stop and seizure of the items in the vehicle, the trial court stated: "I do believe that the police officers had reasonable suspicion to stop the automobile at the moment it was stopped by, I forget his name, the Special Agent Sheehan, and would respectfully deny that." Based on these conclusions, we discern that the trial court's findings would have been that the officers had reasonable suspicion justifying both the initial stop and the subsequent search and seizure of evidence. *See Jones*, 217 S.W.3d at 194-95.

and such evidence must be suppressed. *Id.; Segura v. U.S.*, 468 U.S. 796 (1984); *Wilson v. Commonwealth*, 37 S.W.3d 745 (Ky. 2001).

Having carefully examined the record of the suppression hearing, we are convinced that the trial court's finding that Ruff's seizure was legal was supported by substantial evidence. First, we do not find that the length of the stop was unreasonably prolonged. Testimony from the suppression hearing revealed that Ruff exited the vehicle as soon as Officer Sheehan approached the passenger side door after being asked if there was anything in the car that would "get someone in trouble." After the pat-down, Ruff fainted. He was unconscious for roughly two minutes while Officer Sheehan conducted a search of the vehicle, which lasted no more than one minute. The handgun was found approximately one minute after Ruff regained consciousness, at which point he admitted to owning the gun and was transported to the LMPD substation for questioning. According to Officer Sheehan's account of the stop, the entire episode appears to have lasted no longer than ten to fifteen minutes. This, in our view, does not constitute an unreasonably prolonged detention. *See Ward v. Commonwealth*, 345 S.W.3d 249, 253 (Ky. App. 2011) (a thirty-three minute delay between the initial stop and arrest was not reasonable); *Johnson v. Commonwealth*, 179 S.W.3d 882, 885 (Ky. App. 2005) (a stop with a dog sniff lasting fifteen minutes was reasonable); *but cf. Epps*, 295 S.W.3d at

813 (ninety-minute delay for a traffic stop where drug-sniffing dogs are dispatched was unreasonable under *Caballes*).[8]

Second, while we agree that the search of the vehicle went beyond the scope of the purpose of the traffic stop, Ruff's behavior gave rise to a reasonable articulable suspicion of criminal activity independent of the facts justifying the initial traffic stop. *See Terry v. Ohio,* 392 U.S. 1, 18-19 (1968) (a seizure becomes unlawful when it is no longer justified by reasonable suspicion). Officer Sheehan was on narcotics patrol when the stop occurred and he testified that based on his experience in narcotics investigation, Ruff's sudden loss of consciousness was suspicious, as it is common for individuals to pass out after ingesting narcotics. Therefore, it appears that Officer Sheehan's decision to continue the seizure of Ruff and search the car was based on a reasonable suspicion that contraband might be found inside the vehicle. *See* 392 U.S. at 18. Further, Officer Sheehan testified that White consented to the search that yielded the discovery of the garbage bag filled with clothing and the .45 caliber handgun. *United States v. Watson,* 423 U.S. 411 (1976) (consent constitutes an exception to the warrant requirement). Though White denied consenting to the search of the vehicle, we cannot say that the trial court erred in adopting Officer Sheehan's version of events. *See Moore v. Asente,* 110 S.W.3d 336, 354 (Ky. 2003) (a reviewing court must give deference

[8] The recent Kentucky cases applying *Caballes* involve the use of drug-sniffing dogs during routine traffic stops. However, the application of the general rule from *Caballes* is not limited to instances where the use of drug dogs prolongs a traffic stop.

to the trial court's determination of witness credibility and the weight of the evidence, as such decisions are in the sole discretion of the trial court).

Finally, we address the suppression of Ruff's statements to Officer Sheehan admitting ownership of the handgun and clothing. Ruff asserts that the trial court's denial of his motion to suppress was clearly erroneous because his statements to Officers Sheehan and Lunte were the product of an unlawful seizure. Having established the legality of the stop, we must conclude that Ruff's statement admitting ownership of the gun cannot constitute "fruit of the poisonous tree." *Colorado v. Spring*, 479 U.S. 564, 571-72 (1987) ("A confession cannot be "fruit of the poisonous tree" if the tree itself is not poisonous."); *Cf. Williams v. Commonwealth*, 213 S.W.3d 671, 679 (Ky. 2006) (statements derived from illegal detentions are subject to exclusion).[9]

The trial court's conclusion that the stop of the vehicle and the subsequent seizure of incriminating items was lawful is supported by substantial evidence. Officer Sheehan's testimony revealed that Ruff's suspicious behavior, fainting, gave rise to an independent articulable suspicion sufficient to justify a slightly prolonged stop as well as the consensual search. Therefore, the items discovered as a result of that search were lawfully seized, and the trial court's denial of Ruff's motion to suppress was not clearly erroneous.

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[9] Ruff also argues that White's consent, if it was given, was the product of the unlawful detention and was not sufficiently attenuated from the primary illegality as to purge the taint of the illegal seizure. *Wilson*, 37 S.W.3d at 748, (evidence need not be excluded if the connection between the illegal conduct and discovery of evidence if "highly attenuated."). Having determined that the stop was lawful, we need not address this particular argument. *See Spring*, 479 U.S. at 571-72.

III. The Trial Court Properly Denied Ruff's Motion to Suppress the Statements to Police.

Finally, Ruff contends that the trial court erred in denying his motion to suppress the statements he made to police officers while in custody. Ruff complains of two incidences, the first on December 3, 2008, and the second on December 5, 2008, where he alleges that officers interrogated him after he had asserted his Fifth Amendment rights. The trial court held a hearing on the motion to suppress in which Detective Rick Arnold, Sergeant Denny Butler, and Detective Chris Middleton testified.[10] The trial court denied the motions, finding that all of Ruff's statements to the police were knowingly, intelligently and voluntarily made, and that in the case of the December 5, 2008 statements, he voluntarily resumed communication with officers and waived his *Miranda* rights after invoking his right to counsel.

a. Ruff's December 3rd Statements Were Properly Admitted.

Detective Arnold testified that Ruff was transported to the LMPD homicide office on December 3, 2008 to discuss his possible involvement in the New York Fashions robbery and shooting.[11] Arnold stated that Ruff refused to sign the standard LMPD waiver of rights form after he read Ruff his *Miranda* rights. Although he refused to sign the form, Arnold testified that Ruff seemed to understand his rights when they were read to him. Arnold explained that

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[10] Over the course of the two-day suppression hearing, the trial court also heard testimony from Special Agent Sheehan, Chesica White, and Detective Roy Stalvey regarding separate motions to suppress. Their testimonies were discussed earlier in this opinion and are not germane to our analysis of this issue.

[11] Ruff was being held at Louisville Metro Corrections on unrelated charges.

Ruff's general demeanor and his willingness to speak with detectives indicated that he understood his rights and voluntarily waived them. Additionally, Arnold testified that it was not unusual for witnesses to refuse to sign the waiver of rights form and nevertheless waive their rights.

Ruff claims that the trial court erred when it refused to suppress his December 3rd statements. Suppression was warranted, Ruff argues, because Arnold continued to interrogate him after he sought to invoke his Fifth Amendment right to remain silent. Ruff complains that he did not waive his rights, as indicated by his refusal to sign the waiver of rights form, and therefore the continued interrogation was a constitutional violation under *Miranda v. Arizona,* 384 U.S. 436 (1966).

Under the United States Supreme Court's seminal *Miranda* decision, suspects must be advised of their Fifth Amendment right to remain silent and to the assistance of counsel before law enforcement officers may proceed with questioning. 384 U.S. at 471-72; *Soto v. Commonwealth,* 139 S.W.3d 827 (Ky. 2004). If a suspect invokes his right to remain silent, the interrogation must cease, and any statement taken after is presumed to be the product of compulsion. 384 U.S. at 474. Of course, a suspect may voluntarily, knowingly, and intelligently waive his or her Fifth Amendment rights. *Spring,* 479 U.S. at 572-73l; *Matthews v. Commonwealth,* 168 S.W.3d 14 (Ky. 2005). Any waiver must be voluntary and not the product of coercion; a waiver must also be given with the knowledge of the full nature of the rights being waived, as well as the consequences of waiving those rights. *Matthews,* 168 S.W. 3d at

21 (citing *Moran v. Burbine*, 475 U.S. 412 (1986)). Only when the "totality of the circumstances surrounding the interrogation" supports a finding of voluntariness and knowingness will the suspect's rights be deemed waived for *Miranda* purposes. *Id.* at 22 (citing *Fare v. Michael C.*, 442 U.S. 707 (1979)).

In the instant case, we cannot say that the trial court erred in concluding that Ruff voluntarily waived his right to remain silent. The Commonwealth presented substantial evidence in the form of Arnold's testimony to support the conclusion that Ruff understood and knowingly waived his *Miranda* rights. Despite his seemingly inconsistent statements regarding "waiving" and "wanting all" of his "rights," Ruff clearly acknowledged understanding his *Miranda* rights as Arnold explained them to him. When asked by Detective Arnold if he understood what *Miranda* rights are, Ruff replied, "Yeah." Detective Arnold also explained that they could not talk if Ruff refused to be read his *Miranda* rights. Ruff then stated, "I'm just trying to help you guys out, so we don't have to keep going through this." He went on to reference his previous questioning from the night of the arrest. When Detective Arnold repeated that he had to read the *Miranda* rights, Ruff replied "I've already read my *Miranda* rights many times, I understand it."

In light of his acknowledgment of his rights and general demeanor, the refusal to sign the rights waiver form did not indicate to Arnold that Ruff intended to exercise his right to remain silent. The Court faced a similar set of facts in *Campbell v. Commonwealth*, 732 S.W.2d 878 (1987), where a suspect was read his *Miranda* rights but refused to sign the rights waiver form. Finding

no evidence of coercion, the trial court admitted the suspect's statements. 732 S.W.2d at 880-81. In affirming the trial court's decision to deny the suppression motion, the *Campbell* Court noted that the suspect proceeded with questioning even after he was read his rights and refused to sign the waiver of rights form. *Id.* at 881. Like the suspect in *Campbell*, Ruff allowed the interrogation to continue even after he refused to sign the rights waiver form. Given the substantial evidence of Ruff's voluntary waiver of his Fifth Amendment rights, we conclude that the trial court did not err in denying the suppression motion as to the December 3rd statements.

b. Ruff's December 5th Statements Were Properly Admitted.

Ruff was transported to the LMPD homicide office for a second time on December 5th, 2008. As he awaited a polygraph exam, Ruff was handcuffed and seated in a chair in the central area of the homicide office. Detective Chris Middleton, who was completing paperwork on an unrelated case, testified that Ruff began to engage in some "small talk" with him as he sat at his desk. Without the detective speaking to him first, Ruff began to talk to Detective Middleton. Ruff expressed concern for his safety in jail. At some point in the conversation, Ruff stated "I can't believe I'm caught up in this," to which Detective Middleton replied, "If I was innocent, I'd get my side of the story out." According to Detective Middleton's testimony, he explained that Ruff "didn't have to talk" to him, and acknowledged that Ruff had asked for an attorney. Detective Middleton then brought Ruff some pizza and a Coke and left the central area of the homicide office. Sometime later, Ruff rolled his chair into

Sergeant Denny Butler's office and started to talk to him. Sergeant Butler testified that he told Ruff that he couldn't talk to him as he had invoked his right to have counsel present. Ruff stated that he wanted to talk, and specifically, "[f****] the attorney," and that he wanted a "ten-year deal." According to Sergeant Butler, Ruff appeared to unequivocally understand his rights and never asked to cease the questioning after he was reread his *Miranda* rights, although he again refused to sign a waiver of rights form.

Ruff contends that the trial court committed clear error in finding that he made the December 5th statements after knowingly and voluntarily waiving his Fifth Amendment right to counsel. Specifically, Ruff claims that Detective Middleton's comments induced Ruff to reinitiate questioning with Sergeant Butler, and that he did not voluntarily waive his previously invoked right to counsel.

A suspect who has invoked his Fifth Amendment right to counsel shall not be subjected to further police interrogation until a lawyer has been made available or the suspect reinitiates conversation with law enforcement. *Edwards v. Arizona*, 451 U.S. 477 (1981); *Quisenberry v. Commonwealth*, 336 S.W.3d 19 (Ky. 2011). Statements made to law enforcement officers after a suspect has invoked his right to counsel may be admitted only if the court finds that the suspect initiated further questioning and knowingly and intelligently waived the right he had previously invoked. *Smith v. Illinois*, 469 U.S. 91, 95 (1984). An accused's post-invocation reinitiation of questioning must be independently made, and cannot be considered voluntary if it is the

product of police inducement or encouragement. *Bradley v. Commonwealth*, 327 S.W.3d 512, 518 (Ky. 2010) ("Only the suspect may reinitiate dialogue with the authorities; the authorities cannot continue to cajole or otherwise induce the suspect to continue to speak without first affording the suspect an attorney.") (citing *Edwards*, 451 U.S. at 484-85)); *see also Oregon v. Bradshaw*, 462 U.S. 1039 (1983) (holding that the word "initiated" must be construed in its ordinary meaning in determining whether a suspect reinitiated contact with police).

The Commonwealth does not dispute the fact that Ruff invoked his right to counsel while in custody at the LMPD homicide office on December 5, 2008. Therefore, we need only address the trial court's conclusion that Ruff voluntarily resumed questioning and waived his right to counsel. Our analysis is two-fold: we must first determine if Ruff reinitiated questioning, and then separately determine if Ruff knowingly and voluntarily waived his right to counsel. *Smith*, 469 U.S. at 98.

First, there was substantial evidence in the record to conclude that Ruff, not the officers, resumed contact with officers after he had invoked his right to counsel. There was uncontroverted testimony at the suppression hearing that Detective Middleton and Sergeant Butler avoided any conversation with Ruff because they knew that he had asked for an attorney. Even after Ruff approached Detective Middleton, and later Sergeant Butler, both officers reminded Ruff that they could not talk with him because he had invoked his

Miranda rights and asked for an attorney.[12] The question we must address is whether Detective Middleton's comment, "*If I were innocent, I'd want to get my side of the story out,*" subtlety induced Ruff to make statements to Sergeant Butler. After careful review of the record, we find that it did not.

We cannot say that Detective Middleton made a coercive attempt to induce Ruff to speak. *See Bradley*, 327 S.W.3d at 518. Detective Middleton testified that he had no interest in "getting involved in [Ruff's] case" because he was working on an unrelated case, and that he only responded to Ruff's comments in an informal manner. After making the statement that if he were innocent he'd want to share his story, Detective Middleton explained to Ruff that he did not have to speak with him and acknowledged that Ruff had invoked his right to counsel. Notably, Ruff offered no incriminating statements while speaking to Detective Middleton, and Detective Middleton did not ask any follow-up questions after making the comment. In fact, Detective Middleton testified that that brief exchange marked the end of his interaction with Ruff in the central area of the homicide office. In *Bradley v. Commonwealth,* we concluded that a suspect did not reinitiate questioning with law enforcement when an officer badgered him immediately after the suspect invoked his right

[12] It is clear to the Court, and the Commonwealth does not dispute, that Ruff was in custody for *Miranda* purposes. The test to determine if an individual is in custody is whether, considering the surrounding circumstances, a reasonable person would believe he or she was free to leave. *Baker v. Commonwealth*, 5 S.W.3d 142, 145 (Ky. 1999) (citing *United States v. Mendenhall*, 446 U.S. 544 (1980)). Ruff was being held at Louisville Metro Corrections on unrelated charges when he was transported to the homicide office on December 3 and December 5. Ruff remained handcuffed while he awaited a polygraph exam on December 5. Ruff was, at all times, "in custody" for *Miranda* purposes on December 3 and December 5.

to an attorney. 327 S.W.3d at 518. The officer in *Bradley* engaged in a dogged attempt to induce the suspect to speak, saying "Do you want to tell us? Just tell us what happened. It's nothing we can't get through. I mean there may be circumstances here that change this whole thing. Only you can tell us." *Id.* at 515. While our main inquiry in *Bradley* focused on the suspect's invocation of the right to an attorney, the case clearly illustrates an impermissible attempt to secure a confession after a suspect has invoked his *Miranda* rights. *See id.* at 21. Here, Detective Middleton's statement does not rise to the level of overreaching displayed by the officer in *Bradley*. Overall, we remain unconvinced that Detective Middleton coerced Ruff into offer incriminating statements. In our view, there was substantial evidence to support the trial court's determination that Ruff's resumption of questioning with Sergeant Butler was a product of his own volition, and not a response to Detective Middleton's isolated statement.

As for the waiver issue, we agree with the trial court's conclusion that Ruff knowingly and voluntarily waived his right to counsel after initiating questioning with law enforcement. Sergeant Butler testified that Ruff, handcuffed in a rolling chair, rolled himself into his office and stated that he wanted to talk. When Sergeant Butler refused to speak with him because he had invoked his right to an attorney, Ruff said "f*** the attorney" and asked for a "ten-year deal." After hearing his *Miranda* rights for a second time, it was Sergeant Butler's impression that Ruff "without a doubt" understood his rights, and insisted on continuing their conversation. Ruff made statements and

answered questions without requesting an attorney or asking to stop the interrogation.

In sum, we agree with the trial court's conclusion that Ruff resumed questioning and voluntarily waived his rights. The uncontroverted evidence presented at the suppression hearing indicates that Ruff initiated the conversation with Sergeant Butler, and then knowingly waived his *Miranda* rights before giving a statement. As such, the trial court did not err in denying Ruff's motion to suppress his December 5th statements.

CONCLUSION

The trial court properly denied Ruff's *Batson* challenge after the Commonwealth offered a race-neutral reason for striking an African-American juror. Furthermore, Ruff's motions to suppress items found in a car in which he was a passenger and his statements made to police officers were properly denied. Accordingly, we affirm the Judgment of Jefferson Circuit Court.

All sitting. All concur.

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