

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000696-MR

ZACHARY TAYLOR HOWARD

APPELLANT

v. APPEAL FROM HART CIRCUIT COURT
HONORABLE LARRY D. RAIKES, JUDGE
ACTION NO. 99-CR-00002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, GUIDUGLI AND TACKETT, JUDGES.

GUIDUGLI, JUDGE. Zachary Taylor Howard (hereinafter "Howard") appeals from the Hart Circuit Court's judgment entered June 20, 2000, convicting him of cultivation of five or more plants of marijuana with the intent to sell. Following a jury trial, he was sentenced to four years and six months imprisonment. We affirm.

On August 13, 1998, the police located a patch of marijuana adjacent to Howard's property while surveying the area

by helicopter in Munfordville, Kentucky. Although the patch was not actually on his property, Howard's house was the closest residence to the patch of marijuana. Kentucky State Trooper Gary Travis (hereinafter "Trooper Travis") responded to the discovery of the spotted patch of marijuana by going to Howard's residence, where he knocked on Howard's door and identified himself as a police officer. Thereafter, Howard came outside the residence to meet Trooper Travis, and they had a discussion about the marijuana growing adjacent to the property. At trial, Trooper Travis testified that while outside the residence Howard confessed to him that the marijuana belonged to him. However, Trooper Travis did not record the confession, nor did he have Howard sign a written confession. Trooper Travis subsequently arrested Howard for possessing the marijuana with the intent to sell it.

The Hart County Grand Jury indicted Howard on one count of cultivating five or more plants of marijuana with the intent to sell. KRS 218A.1423. Prior to trial, Howard filed two motions to suppress his confession, claiming that his Miranda¹ rights had not been given to him before he made incriminating statements to the police. However, neither of those two motions received a formal hearing or ruling by the circuit court. Following his conviction, Howard appealed to

¹ Miranda v. Arizona, 384 U.S. 436 (1966)

this Court claiming that since his Miranda rights were not read to him prior to his confession and those statements were not suppressed at trial, he was entitled to a reversal of his conviction.²

In the first appeal, this Court rendered an opinion remanding the matter and ordering the trial court to conduct a suppression hearing and set forth its subsequent findings determining whether Howard had been informed of his Miranda rights, and if so, when. Pursuant to that opinion, the circuit court held a suppression hearing and concluded that Trooper Travis had read Howard his Miranda rights, and he had done so before Howard made the aforementioned confession.

Howard now appeals from the trial court's findings of fact and conclusions of law, which resulted from the preceding suppression hearing.³ Howard argues that the prosecution did not meet its burden of proving that the police abided by its procedural requirements as prescribed by Miranda v. Arizona, supra. In addition, Howard argues that since his alleged confession lacks corroborating evidence because it was not signed or recorded it should be suppressed.

² Howard v. Commonwealth, No. 2000-CA-001749-MR (not-to-be-published opinion rendered 11/02/01).

³ The Court notes that the parties did not file new or revised briefs for this appeal.

In Miranda, the United States Supreme Court set forth procedural safeguards that government agents must satisfy when interrogating or interviewing a suspect. Namely, the government agent must inform the person in custody, prior to the interrogation, that he has the right to remain silent and that he has the right to consult an attorney. In addition, any statements made by the suspect must be voluntary. If any of the aforementioned procedural safeguards are absent, then the prosecutor may not use statements stemming from that particular questioning or interrogation in the trial against the defendant.

Here, the dispute is whether Trooper Travis informed Howard of his Miranda rights when he questioned him about the marijuana growing adjacent to his property. Trooper Travis testified that he had read Howard his rights before Howard made the incriminating statements. However, Howard argues that no such rights were given to him at that time. Therefore, this Court must determine whether the trial court's determination that Trooper Travis had read Howard his rights prior to making incriminating statements was proper.

A court's finding that a defendant was informed of his Miranda rights prior to making incriminating statements is reviewed on a clearly erroneous standard. Hayden v. Commonwealth, Ky., 563 S.W.2d 720, 722 (1978). If supported by substantial evidence, the court's findings of fact are not

clearly erroneous. Black Motor Co. v. Greene, Ky., 385 S.W.2d 954 (1965). The prosecution bears the burden of proving by a preponderance of the evidence that the evidence demonstrates the defendant was informed of his Miranda rights. Tabor v. Commonwealth, Ky., 613 S.W.2d 133 (1981).

Here, pursuant to this Court's prior opinion, the trial court held a suppression hearing and determined that Trooper Travis had read Howard his rights prior to Howard's confession. Trooper Travis stated that at some point on the way to the marijuana patch he informed Howard of his Miranda rights, and that it was after those rights were read to him that Howard admitted the marijuana was his.

Furthermore, after Trooper Travis testified at the suppression hearing the trial court reviewed the trial tapes to determine whether Trooper Travis's testimony was consistent. Upon review of the tape, the trial court determined that Trooper Travis's testimony was in fact consistent and there were no significant differences between the testimonies.⁴

The trial court heard the testimony of all the witnesses, including Trooper Travis and Howard, and determined that Trooper Travis had Mirandized Howard prior to Howard making the incriminating statements. We believe the trial court's

⁴ Upon proper review of the tape, we too find no inconsistency in Trooper Travis's testimony between the trial and the suppression hearing.

determination that the Miranda safeguards were satisfied, was not erroneous, and therefore, will not be disturbed.

The prosecution must affirmatively establish the voluntariness of the confession at a suppression hearing. In the case at bar, Trooper Travis consistently testified at trial and at the suppression hearing that after he informed Howard of his Miranda rights, that Howard appeared alert, able to understand his rights, and that he was under no restraint at the time he made the incriminating statements. However, at trial, Howard testified that the police officers stated several times, "[w]ho do you think a judge is going to believe, law enforcement officers like us or a boy like you?". An appellate court shall give due regard to the opportunity of the trial court to judge the credibility of the witnesses. CR 52.01. See also Black Motor Co., 385 S.W.2d at 954. The trial court heard the testimony of both Trooper Travis and Howard and chose to accept Trooper Travis's testimony that Howard was read his Miranda rights, that he seemed to understand those rights, and that he voluntarily confessed. Review of the tapes of the trial and the suppression hearing offers no reason for this Court to determine that the trial court abused its discretion or that its decision was clearly erroneous. Therefore, the trial court's conclusion will not be set aside.

Howard's next argument is that since his confession was not recorded or signed it should be suppressed. However, it is well settled in Kentucky that a police officer's advising a suspect of his Miranda rights is not required to be in writing or recorded. Roberson v. Commonwealth, Ky., 490 S.W.2d 733 (1973). See also, RCr 9.60. Therefore, Howard's allegation of error based on a lack of recordation of his confession is not meritorious.

For the foregoing reasons, we believe that the trial court did not commit any error in denying Howard's motion to suppress, and affirm the judgment of conviction.

ALL CONCUR.

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