

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-000722-MR

JAMES ADKINS, JR.

APPELLANT

APPEAL FROM WOLFE CIRCUIT COURT  
v. HONORABLE LARRY MILLER, JUDGE  
ACTION NOS. 00-CR-00024 & NO. 01-CR-00015

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

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BEFORE: DYCHE, GUIDUGLI AND McANULTY, JUDGES.

GUIDUGLI, JUDGE. James Adkins, Jr., (hereinafter "Adkins") has appealed from the Wolfe Circuit Court's March 11, 2002, final judgments entered in each indictment pursuant to a conditional guilty plea. Adkins is appealing the trial court's orders denying his two motions to suppress his confessions and evidence obtained as a result of his statements, premised upon his claim that law enforcement officers violated his Miranda rights. We affirm.

On July 24, 2000, the Wolfe County Grand Jury returned an indictment<sup>1</sup> against Adkins, charging him with counts of first-degree burglary and theft by unlawful taking over \$300 in relation to a June 12, 2000, offense at the residence of Ralph and Mildred Rose. The indictment also contained the same charges for an April 2000 offense at the residence of Dr. Richard Capps. Adkins had stolen a firearm from Dr. Capps' residence, which he apparently had in his possession at the time of the burglary at the Rose residence. The trial court released Adkins on a \$2000 property/\$2000 surety bond on October 5, 2000. As a condition of his bond, Adkins was not permitted to have any contact with the Roses or Dr. Capps, or their respective properties.

On December 1, 2000, Adkins moved the trial court to suppress statements he made on June 14, 2000, to Kentucky State Trooper Timothy Gibbs (hereinafter "Detective Gibbs") and any evidence seized or obtained as a result. He argued that the statements were involuntary and that he had not been advised of his Miranda rights. The circuit court held a suppression hearing on December 7, 2000, at which Detective Gibbs, the arresting officer, was the only witness. Adkins argued that he was in a custodial situation when Detective Gibbs stopped his vehicle on KY-19, and that he should have been advised of his

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<sup>1</sup> Indictment No. 00-CR-00024.

Miranda rights at that time. Detective Gibbs did not do so until after Adkins had confessed to the crime, offered to show him where he had placed the stolen property, and allowed the detective to follow him to his residence. It was not until they arrived, separately, at the residence that Detective Gibbs advised Adkins of his Miranda rights and arrested him. The Commonwealth argued that Adkins was not in police custody when Detective Adkins initially asked him about the burglary. At a February 8, 2001, hearing and in an order entered February 15, 2001, the trial court denied the motion to suppress, holding as a matter of law that the first questioning was not a custodial interrogation, and finding that Adkins had voluntarily spoken to the officers.

By an order entered November 13, 2000, a trial was scheduled for March 12, 2001, but Adkins' counsel moved for, and received, a continuance on March 8, 2001. Court records from early April indicate that Adkins' bond had been revoked and that he was in custody again. Apparently, the sureties who posted his bond had decided to be removed from it on March 8, 2001, necessitating Adkins' re-arrest. Wolfe County Sheriff Rocky Dunn (hereinafter "Sheriff Dunn") took Adkins into custody later that night.

Also on March 8, 2001, Detective Gibbs was called in to investigate a burglar alarm at the residence of Dr. Richard

Capps<sup>2</sup>, and he suspected that Adkins was again the perpetrator. Detective Gibbs located Adkins in Sheriff Dunn's office while he was waiting for the jailer to arrive. Adkins later confessed to the burglary and was arrested for that offense. On April 5, 2001, the Wolfe County Grand Jury indicted Adkins on one count of second-degree burglary.<sup>3</sup> Adkins moved the trial court to suppress the statements he made on March 8, 2001, to Detective Gibbs and Sheriff Dunn, arguing that he was denied his right to counsel after he had exercised that right.

On September 6, 2001, the trial court held a suppression hearing on Adkins' second motion to suppress. The Commonwealth called Detective Gibbs, who testified concerning the events of March 8, 2001. That night, he had responded to a complaint at Dr. Capps' residence. During his investigation at the residence, he noted that a back window had been broken and saw an indication that someone had tried to pry the window frame out with a screwdriver. He also made plaster casts of a shoe print he located outside of the broken window. Detective Gibbs suspected that Adkins committed this crime due to a prior conversation in which Adkins stated that he watched crime shows on the Discovery Channel and had learned how to cover up an illegal entrance by prying out a window and then replacing it upon exiting. Detective Gibbs saw Adkins in the sheriff's

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<sup>2</sup> Dr. Capps was one of the victims named in the first indictment.

<sup>3</sup> Indictment No. 01-CR-00015.

office with Sheriff Dunn, and began speaking casually with him about the burglary and asked for his shoes so that he could compare them to the plaster cast. He and Adkins went into the hallway so that Adkins could use the men's room, and Adkins indicated that he wanted to talk to an attorney. Detective Gibbs did not ask any further questions.

Upon their return to his office, Sheriff Dunn began to ask Adkins a question about the burglary. Detective Gibbs stopped him, and indicated that Adkins told him that he did not want to talk about the burglary. Sheriff Dunn then told Adkins that if he wanted to talk about the burglary, then he would have to do so before the jailer arrived. Detective Gibbs immediately told Sheriff Dunn that Adkins had invoked his right to counsel. A short time later, Adkins asked if he could help get his sentences run concurrently, to which Detective Gibbs responded that he could not make any promises. Adkins then stated that he wanted to confess. Although Detective Gibbs reminded him several times that he had requested counsel, Adkins insisted that he had committed the crime and wanted to confess. Detective Gibbs had Adkins sign a waiver of his Miranda rights and draft a handwritten confession. Detective Gibbs then arrested Adkins and charged him with burglary. Sheriff Dunn testified consistently with Detective Gibbs' testimony, and also

stated that he had advised Adkins of his Miranda rights when he had picked him up earlier that night on the bond issue.

On February 11, 2002, the trial court denied the motion to suppress both on the record and in a handwritten calendar order. The trial court found that Adkins' statements were voluntary and were not given in response to any questions by either Detective Gibbs or Sheriff Dunn, but were made after having been advised of his Miranda rights and in an effort to get his sentences run concurrently. Adkins then moved the trial court to allow him to enter guilty pleas in both cases, conditioned upon his right to appeal from the two suppression rulings. The trial court accepted Adkins' guilty pleas and entered a judgment accordingly. Pursuant to the Commonwealth's recommendation, the trial court sentenced Adkins to concurrent sentences of twelve years on each of the burglary convictions and of five years on the theft by unlawful taking convictions in indictment No. 00-CR-00024, and of five years on the burglary conviction in indictment No. 01-CR-00015. This appeal followed.

Prior to addressing the merits of this appeal, we must first address an issue we raised in an order entered October 1, 2003. We noted that in the brief, Adkins' appointed counsel only addressed the motion to suppress filed in indictment No. 01-CR-00015. Therefore, we made the record on appeal available to counsel and provided an additional thirty days to file a

brief addressing the ruling on the motion to suppress in indictment No. 00-CR-00024. In the order, we made it clear that "the failure to file a brief within that time shall result in the waiver of that issue." Counsel for Adkins did not file a brief pursuant to the October 1, 2003, order. Therefore, we shall consider that omission to constitute a waiver and we shall not review that issue. However, we note that the issue has no merit.

As to the issue raised in his brief, Adkins argues that the police continued questioning him after he had invoked his right to counsel, that his waiver was not knowing or intelligent, that he was in continuous custody from the time he invoked his right to counsel until he made the incriminating statements, and that the officers violated his right to counsel. On the other hand, the Commonwealth argues that substantial evidence supports the trial court's finding that Adkins' statement was not made in response to any questioning after he had invoked his right to counsel.

RCr 9.78 provides that a trial court must hold an evidentiary hearing if a defendant moves to suppress a confession or other incriminating statements, and enter findings of fact resolving any issues of fact raised by the motion. The rule provides that the trial court's findings are conclusive if supported by substantial evidence. See also Canler v.

Commonwealth, Ky., 870 S.W.2d 219 (1994); Harper v.

Commonwealth, Ky., 694 S.W.2d 665 (1985).

In the present matter, there does not appear to be any dispute that at the time Adkins confessed, he was in continuous custody and had invoked his right to counsel. The only questions before us, then, are whether the officers violated his right to counsel by continuing an interrogation and whether his confession was voluntary. We agree with the Commonwealth that the officers did not violate Adkins' right to counsel and that his confession was voluntary, and hold that the trial court did not abuse its discretion in denying the motion to suppress as substantial evidence supports its findings.

In Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 1884-85, 68 L.Ed.2d 378, 386 (1981), the United States Supreme Court held:

[W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.[] We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with police. (footnote omitted.)

First, we must hold that the officers did not violate Adkins' right to counsel after it was invoked. When Sheriff Dunn began asking Adkins questions upon his and Detective Gibbs' return to his office, Detective Gibbs immediately indicated that Adkins did not want to speak about the burglary. Apparently, Sheriff Dunn interpreted this to mean that Adkins wished to invoke his right to remain silent because he then made the statement regarding the arrival of the jailer. Detective Gibbs immediately corrected this false impression by telling Sheriff Dunn that Adkins had invoked his right to counsel. Based upon the totality of the circumstances, Sheriff Dunn's questions and statements, as well as Detective Gibbs' statements, including his statements about not needing a confession because he had Adkins' tennis shoes to compare to the plaster casts, are not sufficient to constitute further interrogation in violation of his right to counsel.

We also must hold that Adkins' confession was voluntary, that it was not made in response to any interrogation by either Sheriff Dunn or Detective Gibbs, and that Adkins was not pressured into making any incriminatory statements. The Commonwealth had the burden of proving that Adkins' statements were voluntary. Canler v. Commonwealth, Ky., 870 S.W.2d 219 (1994). In Henson v. Commonwealth, Ky., 20 S.W.3d 466, 469 (1999), the Supreme Court of Kentucky held that, "[t]o determine

whether a confession is the result of coercion, one must look at the totality of the circumstances to assess whether police obtained evidence by overbearing the defendant's will through making credible threats." The determination of whether a confession is voluntary is a mixed question of law and fact, and a trial court's determination is conclusive if it is supported by substantial evidence. Id.

In the present matter, there is substantial evidence to support the trial court's finding that Adkins' confession was voluntary. The officers were not attempting to coerce his confession by overbearing Adkins' will or by making threats. Detective Gibbs merely indicated that he could use Adkins' tennis shoes to compare to the plaster cast he made at the scene of the burglary. Furthermore, Adkins' statement that he wanted to confess came only after he had himself reinitiated communication and asked the officers if they could help him receive concurrent sentences. Adkins waived his Miranda rights and drafted a confession only after Detective Gibbs reminded him several times that he had requested counsel. The evidence elicited at the suppression hearing constituted substantial evidence, which supports the trial court's findings that Adkins' statements were voluntary, that they were not given in response to any further questioning, and that they were made in an effort to receive a more favorable sentence.

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

ALL CONCUR.

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