

RENDERED: October 24, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000444-MR

KENNETH HOWARD JENKINS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 02-CR-00872

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, COMBS, and DYCHE, Judges.

COMBS, JUDGE. Kenneth Howard Jenkins has appealed from a judgment of the Fayette Circuit Court of February 12, 2003, following his conditional plea of guilty to two counts of receiving stolen property and possession of drug paraphernalia. Pursuant to the plea agreement, Jenkins pled guilty to possessing property stolen from Professional Opticians and Eyeglass World. A similar charge with respect to property involving Dillard's was dismissed. The trial court sentenced

Jenkins to three years, probating the sentence. Entering his plea pursuant to RCr¹ 8.09, Jenkins reserved his right to appeal the denial of his motion to suppress an out-of-court identification of him. Finding no error in the ruling of the trial court on this item of evidence, we affirm.

The facts underlying this appeal are not in dispute. On May 31, 2002, Joe Strain, an employee of Professional Opticians in Lexington, observed a black man trying on merchandise in the store while apparently talking on a cell phone. The shopper was wearing a red Nike hat and a white shirt. Strain testified that he became suspicious of the man; consequently, he "watched him like a hawk" for several minutes. Moreover, although Strain approached the customer twice to ask if he could help him with anything, his offers were refused.

Several hours later on the same day, Strain received a call from security personnel at Dillard's department store. Strain was told that a person suspected of shoplifting at Dillard's had been arrested and that several items of eyewear had been found in the suspect's vehicle. Strain went to Dillard's and identified several of the items as having been taken from his store.

A police officer asked Strain if he had recently noticed any suspicious persons in his store. Strain described

¹ Kentucky Rules of Criminal Procedure.

the man he had seen earlier in the day. Strain testified that the police officer and the security employee then looked at each other and smiled. They proceeded to play a security tape recorded at Dillard's revealing a man who fit the very description that Strain had given. Strain identified him as the suspicious customer he had seen earlier in the day.

Strain was the only witness called to testify at the suppression hearing. Jenkins argued that Strain's identification of him on the surveillance video should be suppressed, contending that the procedure was unduly suggestive and, therefore, violative of his right to due process. However, after applying the relevant factors set forth in Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), the trial court concluded that Strain's identification was sufficiently reliable in order to preclude its suppression. Jenkins's conditional plea and this appeal followed.

We apply a two-part analysis to the ruling of a trial court on a motion to suppress evidence allegedly obtained in violation of a defendant's constitutional rights. Stewart v. Commonwealth, Ky.App., 44 S.W.3d 376, 380 (2000). First, we review the record to determine whether there is substantial evidence to support the court's findings of fact. If so, these findings are conclusive. RCr 9.78. Second, we review the trial court's conclusions of law *de novo*.

Jenkins argues that the trial court erred in denying his motion to suppress. Initially, the Commonwealth challenges the necessity to address the merits of the appeal.

[T]he use of the testimony by Mr. Strain in identifying the appellant as the man in the surveillance video had nothing to do with the charges he was convicted of. In fact, it is open to question as to whether this identification was even relevant.

(Appellee's Brief, p. 9.) We agree that the evidentiary ruling at issue is not dispositive of any of the charges to which Jenkins pled guilty. While RCr 8.09 is usually a means of reserving for appellate review rulings which are case-dispositive, it may be utilized for other purposes:

With the approval of the court a defendant may enter a conditional plea of guilty, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified trial or pretrial motion. A defendant shall be allowed to withdraw such plea upon prevailing on appeal. (Emphasis added.)

Therefore, we will address the merits of the appeal.

Jenkins argues that the "knowing look" and smiles exchanged between the police officer and security guard prior to starting the tape were so suggestive that they tainted Strain's identification, rendering it unreliable. However, suggestiveness alone does not mandate exclusion of identification evidence. Biggers, supra, 409 U.S. at 198-99. As recently reiterated by the Kentucky Supreme Court, the trial

court must determine whether the identification is reliable under the "totality of the circumstances." Roark v. Commonwealth, Ky., 90 S.W.3d 24, 28-29 (2002). The five factors to be considered in weighing whether a witness has made a misidentification include the following:

(1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness'[s] degree of attention; (3) the accuracy of the witness'[s] prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation.

Id. at 29, citing Biggers at 409 U.S. at 199-200.

Although all five factors do not apply in the case before us, the circumstances of this case, examined in light of the Roark criteria, support the ruling of the trial court. Strain testified that he observed Jenkins for several minutes; that he approached Jenkins and spoke to him twice; and that because of his suspicion, he watched Jenkins "like a hawk." Additionally, Strain gave an accurate description of Jenkins before ever watching the video. Finally, the reliability of his identification was bolstered by the fact that merchandise from his store was found in Jenkins's vehicle. Roark, 90 S.W.3d at 24. We find no error in the trial court's denial of the motion to suppress the identification.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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