

RENDERED: October 8, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002462-MR

JAMES W. RICHARDSON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 03-CR-00929

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, DYCHE, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: James W. Richardson (Richardson) appeals his conviction for unlawful imprisonment, persistent felony offender, second degree, and two misdemeanors, based on a conditional plea reserving the right to appeal the trial court's denial of a motion to suppress his statements to the police, contending he has limited intellectual capabilities and he was

intoxicated. We opine that intoxication was not a valid defense under the facts of this case and that the limited intelligence argument was not preserved. Hence we affirm.

Richardson was indicted for rape, first degree, a class B felony; unlawful imprisonment, a class D felony; and persistent felony offender, second degree (PFO 2nd), which would enhance the rape charge to a class A felony. He was also indicted on the class A misdemeanor offense of assault, fourth degree. Richardson made a pretrial motion to suppress the statements he made to the police. A hearing was held and the court denied the motion to suppress. Thereafter, Richardson entered a conditional guilty plea, with the Commonwealth recommending one year on the unlawful imprisonment charge, enhanced to five years by the PFO 2nd charge. The Commonwealth further agreed to amend the rape charge to sexual misconduct, a class A misdemeanor, and to recommend a sentence of twelve months thereon, in addition to twelve months for the assault, fourth degree. The court so sentenced Richardson to five years with the misdemeanor sentences running concurrently.

On appeal, Richardson contends the trial court erred in denying his motion to suppress his statements made to the police because the statements were not voluntarily based on first, his limited intellectual capabilities, and second, his intoxication. The trial court conducted a suppression hearing

on September 17, 2003. Unlike the appeal, the only issue argued below was that Richardson was too intoxicated to have voluntarily made the statements, and the statements should be suppressed.

Detective Albert Johnson testified that he Mirandized Richardson before he interviewed him on June 13, 2003. The interview was taped and the trial court reviewed the audio tape before the hearing. Detective Johnson testified that he was experienced with inebriated persons, and Mr. Richardson did not appear intoxicated, had no odor of intoxicants, could walk, and talk okay. The interview lasted about an hour and Richardson remembered the details just as the victim recited until he got to the actual rape. At that point, Richardson gave different accounts and would forget explanations given five minutes earlier for how the victim received her injuries. However, Richardson never did confess to the rape. The interview itself started about 4:00 p.m. and Richardson had been picked up at 3:30 p.m. from his home. The police had first arrived about 12:34 p.m. and stayed until they brought him in. Detective Johnson acknowledged inebriated people do have trouble remembering.

Sergeant Jack Dawson, a seventeen-year veteran of the police force, observed the interview through closed circuit TV and opined that Richardson was not intoxicated. He also

testified that he had experience with hundreds upon hundreds of inebriated persons. Sergeant Dawson also acknowledged inebriated persons have trouble remembering.

Richardson testified on his own behalf. Richardson testified that he is an alcoholic, that he drank the night before, and had two or three beers that morning before the police came, as well as part of a half pint of TJ's.¹ That afternoon before he went downtown, he finished the half pint and consumed four more beers. He felt he was intoxicated or had a high when he was being interviewed. He did say he could not read or write but did not put the statement in any context.

The trial court introduced a copy of the tape into the record, explained he reviewed it, and made findings based on the interview as well as the testimony heard at the suppression hearing. The trial court concluded that Richardson was not inebriated and denied the motion to suppress.

Mills v. Commonwealth, Ky., 996 S.W.2d 473 (1999), cert. denied, 528 U.S. 1164, 120 S. Ct. 1182, 145 L. Ed. 2d 1088 (2000), dealt with a motion to suppress a statement (confession) based on the grounds that the defendant's intoxication (and injuries) rendered the confession involuntary and unreliable. The Mills Court said, "[t]he voluntariness of a confession is assessed based on the totality of circumstances surrounding the

¹ Possibly TJ Swann, a wine.

making of the confession." (citations omitted.) Id. at 481. In the case of intoxication, the Court stated, "(the issue is not whether a drunk's confession is a product of free volition, but rather whether the confessor was in sufficient possession of his facilities to give a reliable statement)." Id. Also, the "Commonwealth only needs to prove waiver of Miranda rights by a preponderance of evidence." (citations omitted.) Id. at 482.

In this case, the trial court conducted a pretrial hearing, heard witnesses, including Richardson, and played back the tape of the police interrogation. The trial court made findings in open court and concluded that Richardson was not so intoxicated as to render the incriminating statements involuntary. The voluntary waiver of rights and the evaluation of witness credibility are issues for the trial court. Crawford v. Commonwealth, Ky., 824 S.W.2d 847 (1992). We review a trial court's determination that a defendant voluntarily, knowingly, and intelligently waived his Miranda rights on an abuse of discretion standard. Mills, 996 S.W.2d 483. We adjudge there was no such abuse and affirm on the intoxication issue.

The second argument of Richardson was that his statements to the police were not voluntary, because he is of limited intelligence, was not presented to the trial court, and hence was not preserved. We will not discuss it for the first time on appeal. See Henson v. Commonwealth, Ky., 20 S.W.3d 466,

470 (1999). Nor is this a case of manifest injustice. See RCr 10.26. Our review of the tape shows Mr. Richardson testifying on his behalf. He does state that he cannot read or write, and moves on his own behalf, for a new attorney, describing his complaints. While it may be clear that his requests were pro se, he was articulate, and we do not automatically equate illiteracy with limited intelligence.

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

ALL CONCUR.

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