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Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-002745-MR

LASHAWN JOHNSON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 03-CR-000762

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, KNOPF, AND TAYLOR, JUDGES.

KNOPF, JUDGE: Lashawn Johnson appeals from a judgment of the Jefferson Circuit Court, entered November 21, 2003, convicting him of receiving stolen property[1] and sentencing him to four years in prison. Johnson was accused of possessing a car he knew was stolen. He contends that his trial was rendered unfair by the admission into evidence of his un-Mirandized statement to a police officer, by the exclusion of evidence tending to show that he did not know the car was stolen, and by a court clerk's

[1] KRS 514.110.

misstatement concerning his criminal history. He also contends that he was entitled to a new trial when a witness who had failed to appear subsequently became available. We affirm.

Shortly after midnight on December 31, 2002, several Louisville police officers stopped a white Lincoln Town Car near the intersection of Bardstown Road and Taylorsville Road. One of the officers had observed the car run a red light, and his license check indicated that the car had been stolen. The officers approached the car with their guns drawn and ordered its occupants, four young African-American males, to exit the vehicle with their hands up. When the driver, Johnson, did not promptly comply, one of the officers smashed the driver's window with his flashlight and hauled Johnson through the window opening. He pinned Johnson to the ground, handcuffed him, then locked him in the rear of a police car. Without advising Johnson of his Miranda rights, the officer asked him whether he knew the car was stolen and who had stolen it. Johnson did not immediately reply, but a couple of minutes later, after the officer had moved away to question the other occupants, Johnson called him back and, according to the officer, said that he had not stolen the car but knew who had. He would cooperate, he said, if the officer would make a deal with him.

Johnson was indicted for receiving stolen property. At his trial the owner of the car, Charles Hunt, testified that

a couple of days before Johnson's arrest he, Hunt, had left his car running at a gas pump while he was inside the station paying, and an African-American youth had driven it away. Also testifying for the Commonwealth was one of Johnson's passengers, Daniel Sauileone, who said that he had encountered Johnson at McDonald's on December 30, 2002, and that Johnson had invited him and another young man to go riding around in the Lincoln. After driving for awhile, they had stopped at a different McDonald's and there had met a fourth young man, Michael Unseld, who is Johnson's cousin. The four stopped briefly at a club on Bardstown Road and were on their way home when the police pulled them over.

Johnson denied knowing that the car had been stolen. He testified that he was at McDonald's waiting for a ride home when Unseld drove up in the Lincoln. Unseld invited Johnson, Sauileone, and the other young man to go riding and allowed Johnson to drive. As did Sauileone, Johnson testified that they had been stopped soon after their visit to a Bardstown Road club.

Unseld, who apparently was also facing charges, was thus a key witness for Johnson, but at the time of Johnson's trial he had escaped from custody and did not come to court to testify. Given Unseld's unavailability, Johnson sought to introduce out-of-court statements Unseld allegedly made to

Johnson and to an investigator for the Public Defenders Office. Both statements were to the effect that Hunt, the car's owner, had loaned the car to Unseld in exchange for cocaine. Johnson wished to testify that this is what Unseld told him when Unseld drove up in the Lincoln at the McDonald's. The trial court did not permit the hearsay testimony, but it did allow Johnson to testify that when Unseld arrived they discussed the car and that after the discussion he had no reason to think that the car had been stolen. Nor did the court permit the defense investigator to testify, as she was prepared to do, that not long before the trial, several months after the offense, Unseld had told her that he had borrowed the car from Hunt in exchange for cocaine.

Johnson contends that the trial court erred by excluding Unseld's statements because although they were hearsay they were admissible under KRE 804(b)(3). In pertinent part, that rule provides that a hearsay statement by an unavailable declarant need not be excluded if, at the time of its making, the statement

> so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Among the circumstances courts have looked to as bearing on the trustworthiness of statements against penal interest proffered as exculpatory evidence are the relationship between the declarant and the witness; the time the declaration was made; whether the statement was made during custodial interrogation or spontaneously to disinterested parties; whether the statement was made to hurt an enemy or help a friend; whether the declarant had any other probable motive to falsify; the existence of corroborating evidence in the case; and whether the declarant suffered from emotional or psychological instability.[2] Here, Unseld's alleged statement to Johnson was not made to a disinterested party, and the statement to the investigator was not made until months after the incident, and could have been motivated by Unseld's desire to help his cousin. There is also an utter absence of corroborating evidence. Sauileone's testimony, on the contrary, was strong evidence belying Unseld's alleged statements.

The Commonwealth contends that these issues were not properly preserved and that Unseld's alleged statements were not against his interest. We need not address these contentions, for even if these issues were properly preserved, even if Unseld be deemed unavailable for the purposes of KRE 804 (b)(3), and

[2] Morales v. Portuondo, 154 F.Supp.2d 706 (S.D.N.Y. 2001); State v. Cochran, 749 A.2d 1274 (Maine 2000).

even if his statements be thought to subject him to criminal liability "in a real and tangible way,"[3] the circumstances did not otherwise clearly indicate that his statements were trustworthy, and thus the trial court did not abuse its discretion by excluding them.

Nor did the exclusion deprive Johnson of his right to present a defense. As he correctly notes, "the hearsay rule may not be applied mechanistically to defeat the ends of justice."[4] But properly applied, as it was here, the hearsay rule does not offend the constitution.[5]

Johnson filed a timely motion for a new trial, and while the motion was pending the police arrested Unseld and returned him to custody. Johnson thereupon moved to supplement his new-trial motion with the argument that he was entitled to a new trial at which Unseld could be called as a witness. He contends that the trial court abused it discretion by denying that motion. We disagree.

RCr 10.02 permits the court, upon timely motion, to "grant a new trial for any cause which prevented the defendant

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[3] United States v. Price, 134 F.3d 340, 347 (6th Cir. 1998); Varble v. Commonwealth, 125 S.W.3d 246, 253 (Ky. 2004) (internal quotation marks omitted).

[4] Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049, 35 L. Ed. 2d 297 (1973); Morales v. Portuondo, *supra.*

[5] Chambers v. Mississippi, *supra.*

from having a fair trial." Newly discovered evidence that is reasonably certain to result in a different verdict is one such cause, but our Supreme Court has noted that a known witness who was unavailable at trial does not become "newly discovered" merely by becoming available after trial.[6] Even if Unseld had agreed to testify at a new trial, therefore (he did not and would likely invoke his right not to incriminate himself), and even if his testimony were thought reasonably certain to alter the verdict (it is not, given the obvious credibility issues it would raise), the trial court would not have abused its discretion by denying Johnson's motion.[7] Apparently, moreover, Johnson declined to seek a continuance when it became apparent that Unseld would not be in court at trial. The trial court did not abuse its discretion by ruling, in effect, that his waiver of that less disruptive remedy precludes his resort to a more disruptive remedy now.

Prior to trial, Johnson moved to suppress the statement he allegedly made to the arresting officer. As noted above, the officer recalled Johnson's having said, "I did not steal the car, but I know who did and I would be willing to make a deal." Johnson argued that the statement had been elicited in

[6] Anderson v. Commonwealth, 63 S.W.3d 135 (Ky. 2001) (citing Carwile v. Commonwealth, 694 S.W.2d 469 (Ky.App. 1985)).

[7] *Id.*

violation of his rights under Miranda v. Arizona,[8] which requires police officers to advise suspects of their rights against self-incrimination and to an attorney prior to subjecting them to custodial interrogation. There is no dispute that a Miranda violation occurred. Johnson was in custody when the officer asked him whether he knew the car was stolen and who had stolen it, which are questions likely to evoke an incriminating response. The officer admitted that he failed to preface the questions with the warnings required by Miranda. Johnson's response should have been suppressed.

It is true, as the Commonwealth argues, that a Miranda violation does not taint subsequent statements sufficiently removed from the violation to be deemed either the product of a valid Miranda waiver[9] or a spontaneous utterance,[10] but here the officer never gave the Miranda warnings and the delay of just a few minutes between the improper questions and Johnson's response did not render the response spontaneous. The custodial circumstances had not changed, the delay was brief, and the

[8] 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed. 2d 694 (1966).

[9] Oregon v. Elstad, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985); *but see* Missouri v. Seibert, ___ U.S. ___, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004) (holding that deliberately withholding Miranda warnings until after some questioning is an improper tactic).

[10] People v. Torres, 262 Cal. Rptr. 323 (Cal.App. 1989).

questions clearly evoked the statement. The trial court erred by denying Johnson's motion to suppress.

We are convinced, however, that the error was harmless beyond a reasonable doubt. Miranda violations are subject to harmless error review.[11] The reviewing court must ask "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."[12] The Second Circuit recently identified four factors pertinent to this determination: "(1) the overall strength of the prosecution's case; (2) the prosecutor's conduct with respect to the improperly admitted evidence; (3) the importance of the wrongly admitted testimony; and (4) whether such evidence was cumulative of other properly admitted evidence."[13]

This was a simple case for the Commonwealth and a strong one. Johnson was caught red-handed driving a recently stolen car. From the fact that he was driving the jury could infer that he possessed the car. And from the fact that he possessed recently stolen property, the jury could infer that he

[11] Talbott v. Commonwealth, 968 S.W.2d 76, (Ky. 1998); United States v. Wolf, 879 F.2d 1320 (6th Cir. 1989); Zappulla v. New York, 391 F.3d 462 (2nd Cir. 2004).

[12] Talbott v. Commonwealth, 968 S.W.2d 76, 84 (Ky. 1998) (citation and internal quotation marks omitted).

[13] Zappulla v. New York, 391 F.3d 462, 468 (2nd Cir. 2004).

knew the property was stolen.[14] Johnson's alleged statement that he knew who stole the car was, of course, additional evidence that he knew the car was stolen, and the Commonwealth made use of that evidence. It mentioned Johnson's statement during both its opening and closing arguments, and the statement was emphasized during the arresting officer's testimony. On the other hand, the officer also testified, properly, that Johnson gave him a false name, age, and social security number, untainted evidence lending considerable weight to the inference that Johnson knew the car was stolen. In attempting to rebut that inference, Johnson relied on his story that Unseld supplied the car, a story completely at odds with the disinterested testimony of Sauileone. Notwithstanding the Commonwealth's use of Johnson's statement, we are convinced that the case against Johnson was otherwise so strong that it cannot reasonably be thought that the jury might have relied on the tainted evidence. Accordingly, the trial court's error in refusing to suppress the statement was harmless beyond a reasonable doubt and does not provide a basis for relief.

Finally, Johnson contends that he should be resentenced because a circuit clerk, testifying about Johnson's prior conviction for third-degree burglary, improperly referred to the fact that he had been charged with first-degree burglary.

[14] KRS 514.110(2).

Johnson's motion for a mistrial was denied, and the clerk clarified that Johnson's prior conviction was for the lesser offense. We agree with the Commonwealth that this minor error, which was immediately corrected, was not apt to arouse the jury's vindictiveness and did not otherwise undermine the fairness of Johnson's sentencing.[15] The trial court did not abuse its discretion by refusing to declare a mistrial.[16]

In sum, the trial court did not err by excluding out-of-court statements attributed to Michael Unseld. Although arguably the statements were against Unseld's penal interest, they were not sufficiently trustworthy to be excepted from the hearsay rule. And though Johnson's statement to the arresting officer should have been suppressed, its admission into evidence was a harmless error without bearing on the result. Accordingly, we affirm the November 21, 2003, judgment of the Jefferson Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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[15] Taylor v. Commonwealth, 987 S.W.2d 302 (Ky. 1998).

[16] Grundy v. Commonwealth, 25 S.W.3d 76 (Ky. 2000).