

RENDERED: February 18, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-000117-MR

ROBERT RHODES

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 03-CR-00148

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * **

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a denial of a suppression motion in a case in which appellant was ultimately convicted of second-degree burglary and being a persistent felony offender in the second degree (PFO II). Appellant argues that his confession to police was not voluntary and should have been suppressed because the interrogating officer represented to him that the case would be kept in district court (treated as a

misdemeanor) if he cooperated with police and gave a statement. Upon review of the record, we cannot say that the trial court abused its discretion in denying the motion to suppress. Hence, we affirm.

During December 2002, and January 2003, the residence of Nellie Millard was burglarized and some antiques and a dollhouse were stolen. On May 19, 2003, while Robert Rhodes was in the Muhlenberg County Jail on unrelated criminal charges, Rhodes was questioned by Detective Mike Smith of the Central City Police Department about the burglaries of the Millard home. After being read his Miranda rights and signing a waiver of rights form, Rhodes gave a statement to Detective Smith confessing to breaking into the Millard home in January 2003, and taking certain toys and a dollhouse. Subsequently on May 23, 2003, Rhodes was charged with second-degree burglary. In June 2003, Rhodes was indicted for second-degree burglary and PFO II.

Prior to the jury trial on the charges, a hearing was held on Rhodes's motion to suppress his statement to Detective Smith. Rhodes claimed that the statement was not made voluntarily because Detective Smith represented to him that the case would remain in district court as a misdemeanor if Rhodes would give a statement to police and return the dollhouse. After a full hearing on the motion in which only Detective Smith

testified, the trial court denied the motion and the trial proceeded. Rhodes was thereafter convicted of second-degree burglary and PFO II and sentenced to fifteen (15) years' imprisonment. This appeal by Rhodes followed.

Rhodes argues that the trial court erred in denying his suppression motion because the evidence established that his statement was not voluntary because of the promise made by Detective Smith that the case would stay in district court if Rhodes gave a statement.

An appellate court's standard of review of the trial court's decision on a motion to suppress requires that we first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. Based on those findings of fact, we must then conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law.

Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky.App. 2002)

(footnotes omitted).

During the suppression hearing, Detective Smith admitted that he told Rhodes prior to obtaining his statement that he would talk to the County Attorney about keeping the charges in district court if Rhodes would cooperate with the police. However, Smith maintained that he told Rhodes that he could not promise anything, only that he would talk with the County Attorney about it. Smith testified that he did, in fact,

talk with the County Attorney, Darris Russell, about the prospect of having the charge amended to a misdemeanor. According to Smith, Russell told him that he did not have any problem with keeping the matter in district court, but that he would have to wait until the case got into court before a final decision would be made.

In Hutto v. Ross, 429 U.S. 28, 30, 97 S. Ct. 202, 203, 50 L. Ed. 2d 194 (1976), the United States Supreme Court held that a confession is involuntary if it is "extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the extension of any improper influence." When examining the voluntariness of a confession, the totality of the circumstances surrounding the confession must be considered. Walker v. Commonwealth, 561 S.W.2d 656 (Ky. 1977). The Kentucky Supreme Court has identified three factors to be considered in assessing the voluntariness of a confession: "1) whether the police activity was 'objectively coercive;' 2) whether the coercion overbore the will of the defendant; and 3) whether the defendant demonstrated that the coercive police activity was the 'crucial motivating factor' behind the defendant's confession." Henson v. Commonwealth, 20 S.W.3d 466, 469 (Ky. 2000) (quoting Morgan v. Commonwealth, 809 S.W.2d 704, 707 (Ky. 1991)). In Skaggs v. Commonwealth, 694 S.W.2d 672, 677 (Ky. 1985), reversed in part on other grounds, 235 F.3d 261 (6th

Cir. 2000), the Court adjudged that "[t]he representation to an accused who is a cooperative confessor that the fact of his confession would be made known to the prosecuting authorities is not sufficient to render a confession involuntary."

In the present case, the only evidence submitted at the suppression hearing was the testimony of Detective Smith. Contrary to Rhodes's claim that Smith assured him that if he gave a statement, the charge would remain in district court, Smith testified that he only told Rhodes that he would talk to the County Attorney about the matter. Smith testified that he told Rhodes that he could not promise that the matter would remain in district court, only that there was a chance that it could happen.

The evidence in the record indicates that Rhodes was informed of his Miranda rights and voluntarily waived those rights prior to giving his statement. In our view, Detective Smith's statement that he would merely talk to the County Attorney about the matter did not constitute an implied or express promise to Rhodes that the case would be treated as a misdemeanor if he gave a statement. And Detective Smith made good on his word to talk to the County Attorney. Rhodes knew there was only a chance that the matter would be treated as a misdemeanor and nevertheless willingly gave his statement to police.

Rhodes also claims that the confession was involuntary because he was being represented by an attorney on other charges pending against him at the time he gave his statement and thus should not have been questioned without that attorney being present. This argument is without merit. Detective Smith testified that he was unaware that Rhodes was being represented by counsel at the time of his questioning and that Rhodes did not indicate that he wanted to speak to a lawyer at anytime prior to or during the questioning.

For the reasons stated above, the judgment of the Muhlenberg Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

J. Stewart Wheeler
Russellville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky