

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002540-MR

GLENN WIDMARK ADAMS, JR.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
INDICTMENT NO. 04-CR-00758

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; McANULTY, JUDGE; PAISLEY, SENIOR JUDGE.¹

PAISLEY, SENIOR JUDGE: Glenn Widmark Adams, Jr., appeals from a judgment of conviction from the Fayette Circuit Court in which Adams entered a conditional guilty plea to one count of trafficking in a controlled substance in the first degree.

Finding no error, we affirm.

¹ Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On February 2, 2004, Detectives Holland, Lewis and Maynard, along with several other detectives from the Lexington Police Department, were carrying out undercover controlled drug buys in downtown Lexington. Detectives Holland and Lewis were in uniform and were on patrol in a marked cruiser while Detective Maynard was working undercover. The other detectives were covertly conducting surveillance, monitoring and video-recording the drug purchases made by Detective Maynard. In addition, Detective Maynard was wearing a radio transmitter which allowed the other officers to overhear the detective's conversations. At approximately 4:19 pm, Detective Maynard drove to the Coolavin Apartments on West Sixth Street. An individual wearing a purple Minnesota Vikings jacket, a purple Vikings toboggan, blue jeans and blue tennis shoes was loitering in one of the apartment complex's breezeways. This person sold a small quantity of cocaine to the detective. However, Detective Maynard did not arrest the individual; instead, immediately after the drug transaction, he broadcasted a detailed description of the drug-dealer to the other officers including Detectives Holland and Lewis.

At approximately 4:40 pm, Detectives Holland and Lewis went to the Coolavin Apartments and saw an individual standing in the breezeway who exactly matched Detective Maynard's description. This individual was Glenn Widmark Adams, Jr. The

detectives approached Adams, told him that they had received complaints about loitering and asked him for his name, address, date of birth and social security number. Adams voluntarily answered the detectives' questions. Finding no outstanding warrants for Adams, the detectives then took a digital photograph of Adams saying they could use the photograph to identify Adams as a resident of the apartment complex in case they received other loitering complaints. Prior to questioning Adams, the detectives did not advise him of his rights pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). We note, however, that Adams made no statements to the detectives which could be considered incriminating. Later at police headquarters, Detective Holland compared the digital photograph of Adams to the drug-dealer on the surveillance videotape and concluded that Adams was the person on the videotape who sold cocaine to Detective Maynard. Detective Holland then showed the digital photograph of Adams to Detective Maynard who also identified Adams as the individual who had sold drugs to him.

On June 15, 2004, the Fayette County Grand Jury indicted Adams for trafficking in a controlled substance in the first degree. Adams moved to suppress all the physical evidence against him and any statements he may have made to the detectives. In his motion, Adams insisted that he had been

seized within the meaning of the Fourth Amendment of the United States Constitution when the detectives approached him and asked for his personal information. According to Adams, the detectives had subjected him to custodial interrogation without first advising him of his Miranda rights. In addition, when Detective Holland showed the digital photograph to Detective Maynard, he did not include other photographs of other individuals. According to Adams, this identification procedure was highly prejudicial. After the Fayette Circuit Court denied Adams's suppression motion, he entered a conditional guilty plea reserving his right to appeal the suppression issues.

On appeal, Adams avers that when the police use only one photograph of a suspect to solicit an identification from a witness, such a confrontation procedure, known as a "single-person-showup," is inherently suggestive. He cites Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972) which sets forth five factors that a trial court should consider when determining whether an inherently suggestive identification is reliable under the totality of the circumstances. Adams argues that, in this case, the procedure the police used to solicit his identity from Detective Maynard violated his due process rights.

The five factors that the court must consider under Neil are as follows: 1) the witness's opportunity to view the

suspect during the commission of the crime, 2) the witness's attentiveness, 3) the accuracy of the witness's prior description of the suspect, 4) the degree of certainty demonstrated by the witness during the confrontation and 5) the length of time between the crime and the confrontation. Id. at 199-200.

The unrefuted evidence shows that Detective Maynard went to the Coolavin Apartments and observed a person wearing a purple Minnesota Vikings jacket, a purple Vikings toboggan, blue jeans and blue tennis shoes standing in one of the complex's breezeways. This person sold cocaine to Detective Maynard. Immediately after the crime was committed, the detective broadcasted a very detailed and specific description of the person who sold cocaine to him. Detectives Holland and Lewis heard this description, and the record clearly reflects that they found Adams, approximately twenty minutes later, in the same breezeway where cocaine was sold to Detective Maynard. They also observed that Adams was wearing exactly the same clothing as the person who sold cocaine to Detective Maynard. Detective Holland took a picture of Adams at the Coolavin Apartments approximately twenty minutes after the drug transaction occurred. Later, Detective Holland showed this photograph of Adams to Detective Maynard and he confirmed that Adams was the person who had sold cocaine to him. As the facts

in the present case make clear, the procedure used by Detective Holland to solicit Adams's identity from Detective Maynard was not inherently suggestive. Even if we were to conclude that the identification was inherently suggestive, applying the five factors set out in Neil, it is clear that the identification of Adams was reliable under the totality of the circumstances. The trial court did not err when it refused to suppress the identification of Adams made by Detective Maynard.

In addition, Adams cites Mendenhall v. U.S., 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980) and Baker v. Commonwealth, 5 S.W.3d 142 (Ky. 1999) and argues that when the detectives approached him and asked for his personal information, they had seized him for Fourth Amendment purposes. To support this proposition, Adams points out that, at the suppression hearing, Detective Holland testified that he would have arrested Adams if Adams had refused to identify himself. Furthermore, while Adams admits that the detectives only sought his personal information, he argues that the police used this very information to obtain a warrant for his arrest; therefore, he reasons that the detectives were required to advise him of his Miranda rights prior to questioning him.

When we review suppression issues, we initially examine the trial court's findings of fact to determine if they are supported by substantial evidence. If so, then the findings

are conclusive. Then we review *de novo* the trial court's application of the law to the facts. Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky.App. 2002).

In the present case, the facts are not in dispute, so the trial court's findings are conclusive.

Adams points out that Detective Holland testified that he would have arrested Adams if Adams had refused to identify himself. Thus, Adams reasons that he had been seized for Fourth Amendment purposes. However, this is not the test to determine whether a person has been seized for Fourth Amendment purposes.

According to the United States Supreme Court:

[A] person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

U.S. v. Mendenhall, 446 U.S. 544, 554-555, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)(citations omitted). The trial court analyzed the encounter between Detective Holland and Adams

moment by moment and concluded that when the detective asked for Adams's personal information, Adams had the choice to either answer the detective or to walk away. However, the trial court noted that Adams freely chose to answer the detective's questions. Furthermore, the trial court found that, since there were only two police officers present, they neither created a threatening presence nor displayed a show of authority that would have indicated to Adams that he was not free to leave. The detectives did not physically seize Adams either. Given the evidence adduced at the suppression hearing, it is apparent that under the totality of the circumstances a reasonable person in Adams's position would have believed that he was free to leave. Thus, the trial court properly applied the law and did not err when it found that Adams was not in custody at the time.

Moreover, whenever a person, who is in police custody, is subjected to interrogation, the police must first advise that person of his Miranda rights. Rhode Island v. Innis, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). For Miranda purposes, "interrogation" means any express questioning by the police that will elicit an incriminating response or any words or actions by the police that the police should reasonably know will elicit an incriminating response. Id. An "incriminating response" is any response, either inculpatory or exculpatory, that the prosecution might later seek to introduce at trial.

Id. We are aware of no authority for the proposition that the police must advise a suspect of his Miranda rights before asking for identifying information.

When Detective Holland asked Adams for his personal information, the detective did not subject Adams to custodial interrogation since the detective's questions were not meant to, nor did they, elicit any incriminating response from Adams. Thus, prior to questioning Adams, the detective was not required to advise Adams of his Miranda rights. The Fayette Circuit Court correctly applied the law and correctly denied Adams's suppression motion.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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