

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001737-MR

ANTONIO LAMONT PARKER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 04-CR-01421

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: McANULTY¹ AND SCHRODER, JUDGES; ROSENBLUM, SENIOR JUDGE.²

ROSENBLUM, SENIOR JUDGE: Antonio Lamont Parker (Parker) brings this appeal from a "Final Judgment, Sentence of Probation" of the Fayette Circuit Court, entered July 20, 2005, adjudging him guilty, upon a conditional guilty plea,³ of third-degree

¹ Judge William E. McAnulty, Jr. concurred in this opinion prior to his resignation effective July 5, 2006, to accept appointment to the Kentucky Supreme Court. Release of the opinion was delayed by administrative handling.

² Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

³ Kentucky Rules of Criminal Procedure 8.09.

burglary,⁴ criminal facilitation to third-degree burglary,⁵ and second-degree persistent felony offender (PFO II),⁶ and sentencing him to respective terms of imprisonment of five years and twelve months, enhanced to five years by virtue of PFO II status, said sentence probated for five years. We affirm.

Parker was originally indicted on eight counts of third-degree burglary for unlawfully entering or remaining in eight University of Kentucky campus buildings over a period of several days in late September, 2004. Before trial, he moved to suppress a statement in which he admitted the burglaries on two separate theories. Kentucky Rules of Criminal Procedure (RCr) 9.78.

First, he contended that police custodial questioning continued despite his request to consult with an attorney, in violation of his federal and state constitutional rights.⁷ At a hearing on the motion, Lt. Gregory Hall, an officer with the UK police department, testified that the department had been investigating a string of burglaries on campus in the spring and fall of 2004 in which vending machines located in campus buildings had been broken into after hours, and he wanted to

⁴ Kentucky Revised Statutes 511.040, class D felony.

⁵ Kentucky Revised Statutes 502.020.

⁶ Kentucky Revised Statutes 532.080.

⁷ U.S. CONST. amend. V; KY. CONST. § 11.

interview Parker because he was a suspect in almost identical crimes (same buildings, same vending machines, same time of day, same type of entry of machines) through matching a description given by witnesses and a foot pursuit by UK officers.

According to Lt. Hall's testimony, in the early morning hours of October 4, 2004, UK police officer Jeanna Wilson found Parker, along with Parker's pregnant girlfriend, in the old UK Fine Arts Building and gave them a ride to Good Samaritan hospital. Although Officer Wilson knew that Parker was being sought for the burglaries, she did not recognize him until after the couple was dropped off at the hospital. Once making this realization, she contacted Lt. Hall who advised her to look for Parker and to call him back if he was found. She located Parker coming from the hospital, and told him that Lt. Hall wanted to talk to him. She then transported Parker, unhandcuffed, to the UK police department in a police car. Parker was kept at the police department for thirty minutes before Lt. Hall arrived.

Lt. Hall testified that he and Officer Kevin Dolen were both present during most of Parker's interview in Lt. Hall's office. The interview was tape recorded. A portion of the taped interview was played during the hearing, and it is undisputed that on the tape Parker was advised of his rights pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16

L.Ed.2d 694 (1966). It is also undisputed from the tape that Parker signed a form waiving these rights. About halfway into the interview, after Parker had admitted some knowledge of the burglaries, although not his direct involvement, the tape was turned off for twenty to thirty minutes while Parker took the two officers to a couple of locations to ostensibly show them where the burglar's tools of the "real" burglars were hidden. When the search revealed nothing, all three returned to Lt. Hall's office. The tape was turned back on, and questioning resumed for thirty to forty-five more minutes. During this part of the questioning Parker admitted commission of the eight campus burglaries. Lt. Hall testified that Parker never, at any time, requested to speak with an attorney.

Parker testified to the following: He and his pregnant girlfriend were at a restaurant close to campus when she started bleeding. They began walking to the hospital when she cramped and started to vomit. They entered a campus building for her to go to the bathroom. Officer Wilson came in the building and chatted with Parker for several minutes, mostly about babies and being a parent, and then gave the couple a ride to the hospital. At the hospital, when told they had to wait, Parker's girlfriend became impatient and unhappy. The couple decided to leave, and as they exited the hospital several police cars pulled up. The officers had their hands on their weapons.

One officer gave Parker his Miranda rights and put him in a police car, advising him that Lt. Hall wanted to talk to him. Officer Wilson thereafter transported Parker to the UK police department. He was not handcuffed, and rode in the front seat. Parker's girlfriend was transported in a different car.

Parker testified that he remained at the police department for forty-five to fifty minutes waiting for Lt. Hall. While trying to calm his girlfriend, he kept telling her that he was not going to say anything until he saw an attorney. He saw his picture on a board at the police department concerning a December, 2002, arrest. When Lt. Hall arrived, he took Parker to his office to start the interview. In direct conflict to the tape and Lt. Hall's testimony, Parker testified that he signed a statement waiving his Miranda rights before Lt. Hall started the tape recorder. He testified that he signed the waiver only because Lt. Hall asserted that the signed paper was confidential between the two of them. Parker was scared, and began crying and mumbling. Lt. Hall alerted Parker to cameras on the wall of the office. While Lt. Hall was on a phone call, Parker asked for an attorney. Lt. Hall began taping the interview, and then at Parker's request went to check on Parker's girlfriend. During this time Lt. Hall paused the tape. While the tape was paused, another officer accused Parker of lying. Parker asked for an attorney. Parker then went out of the office with the

officers, riding in the backseat of the police car. While out, Parker did not repeat his request for an attorney.

The trial court made the following findings:

From hearing the witness and from hearing the tape that was played it is apparent to the court that he was given his rights. He was told that he had a right to have an attorney if he wanted to and had a right not to testify if he did not wish to. He was then read a document and asked to sign it which appears that he did from listening to the tape which also gave him his rights. The only issue here is about this twenty to thirty minute gap when testimony was that they were traveling to try to verify some information that he had given them in the first part of the interview and the court just can't find that there is any evidence by which this defendant was asking for an attorney and was denied an attorney or was forced to talk in any way or was ignored when he made that request. I tend to have a bigger question with - so I will overrule the motion with regard to the fact that he was not given an attorney when requested. I don't think there is any evidence to support that theory of the evidence.

The trial court did express concern about the legality of the stop, inviting a motion to suppress on that particular ground. Parker thereafter filed a second suppression motion, arguing that he was stopped and detained by the police without reasonable suspicion, then unlawfully placed in custody

resulting in his statement made without benefit of counsel, in violation of federal and state constitutional rights.⁸

At the hearing on this motion, the Commonwealth started off by introducing Parker's judgment on Fayette Indictment No. 03-CR-00182, a guilty plea to three counts of third-degree burglary of UK campus buildings. According to the judgment, Parker's sentence of nine years was probated for five years, one condition of probation being that Parker was to "[s]tay off the University of Kentucky campus."

Officer Dolen testified that a couple of hours before Officer Wilson located Parker and his girlfriend in the old Fine Arts Building, he was making a traffic stop when he passed Parker in the area outside the UK student center. The officer had been alerted via emails from Lt. Hall that Parker and possibly a female were suspects in the campus building vending machine break-ins. Officer Dolen also knew that Parker was not supposed to be on UK's campus. Upon finishing the traffic stop, Officer Dolen notified Officer Wilson, the other officer on shift that evening, that he had seen a person matching Parker's description and where he had been seen.

Officer Wilson testified that, while making rounds around midnight checking the second level of the old Fine Arts Building, she checked the area of the vending machines and heard

⁸ U.S. CONST. amend. IV; KY. CONST. § 10.

talking coming from the other end of the hall. She rounded the corner and saw Parker and a female who was pregnant. The couple responded that they were not students, but that they were in the building to use the restroom. Parker started a conversation about the vending machines and about problems with them being broken into. Officer Wilson asked for the couple's names and dates of birth. With this information, Officer Wilson ran a records check, but no outstanding warrants were found. Officer Wilson told the couple that they had to leave the building because, since they were not students, they were trespassing. She escorted them out to the lower floor. The couple talked about needing a ride and Parker indicated that he could get a ride home from the hospital. Wanting to help out because the woman was pregnant, Officer Wilson dropped them at Good Samaritan hospital. Before leaving the parking lot, she realized that Parker could be the person that Lt. Hall was looking for, who was not supposed to be in the campus buildings. She notified Lt. Hall on her cell phone. He confirmed her suspicions, and because he wanted to talk to Parker, he asked her to take Parker to the police department. Officer Wilson contacted dispatch and was met at the hospital by other officers, including Officer Dolen. To Officer Wilson's memory, one of the officers went in the hospital and asked Parker to come outside. Officer Dolen and Officer Wilson confronted

Parker outside the emergency room. Officer Wilson noted to Parker that he did not mention to her that he was not supposed to be on campus. She then told him that Lt. Hall had some questions for him and to come back to the police station, but neither he nor his girlfriend was under arrest. Parker was placed in Officer Dolen's car, and the girlfriend in Officer Wilson's, and both were brought back to the UK police department. Officer Wilson waited with them for Lt. Hall. Parker made a phone call and the girlfriend's mother was also called.

The trial court made the following findings:

The defendant when he was taken into investigatory detention by these officers was at that time subject to an arrest for criminal trespass for grounds that he did not have any lawful permission to be on the grounds and further that he had specific probationary conditions which banned him from the campus. For that reason, the detention was not unlawful at that time. Then after he makes - I didn't hear the tape last time. Did he ever make an admission? (Prosecutor: Yes) I know they went out for a ride and came back - I'm trying to see - and then later in the tape he makes an admission (Prosecutor: Yes) - OK so that after they question him, and the court did hear the interview, and he was given his rights orally and there was testimony that he signed a document - that document was supposed to be produced to the defense, was it? (Prosecutor: Yes, same day) And therefore the other alleged grounds for suppressing the confession would also not hold merit for purposes of a suppression.

So therefore I'll overrule the motion to suppress.

On June 14, 2005, the trial court accepted a conditional guilty plea from Parker. In exchange for the plea, the Commonwealth recommended five years on count one, third-degree burglary, enhanced to five years on PFO II; twelve months on count eight, amended to criminal facilitation to third-degree burglary; and dismissal of the remaining six third-degree burglary counts. Parker was sentenced pursuant to the Commonwealth's offer on the plea. The court sentenced Parker to five years' probation. As a condition of the plea, Parker reserved his appeal rights on the two suppression hearing rulings.

Before us, Parker argues that the trial court erred in overruling his motions to suppress the statement admitting guilt. The proper standard of appellate review on a suppression issue is stated in Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky.App. 2002):

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. Kentucky Rules of Criminal Procedure (RCr) 9.78. 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.

Adcock v. Commonwealth, Ky., 967 S.W.2d 6, 8 (1998); and Commonwealth v. Opell, Ky.App., 3 S.W.3d 747, 751 (1999).

Parker first contends that the trial court erred in refusing to suppress his admission to the burglaries given his alleged request for an attorney during police custodial questioning. Where the defense objects to the introduction of a defendant's confession at trial, the prosecution must establish by a preponderance of the evidence that the statement was voluntarily made. Tabor v. Commonwealth, 613 S.W.2d 133, 135 (Ky. 1981). We must, therefore, first address whether the trial court's finding that Parker did not ask for an attorney is supported by substantial evidence, defined as "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." Owens-Corning Fiberglas Corp. v. Golightly, 976 S.W.2d 409, 414 (Ky. 1998) (citing Kentucky State Racing Commission v. Fuller, 481 S.W.2d 298, 308 (Ky. 1972)). It is undisputed that Parker was advised of his Miranda rights - such is evident on the tape, and evident in his signature on the waiver. Parker also admitted being advised of his Miranda rights when he came out of the hospital. Although Parker testified that he did request an attorney during questioning when the tape was turned off, ultimately the trial court was persuaded by Lt. Hall's unequivocal testimony that Parker never requested to speak with an attorney. Because the

trial court's findings are supported by substantial evidence, we decline to disturb them. The issue next becomes, in our *de novo* review, whether the trial court violated the rule of law in applying the established facts. Having concluded that Parker did not request an attorney, it was established by a preponderance of the evidence that the statements were voluntarily made. Tabor, 613 S.W.2d at 135. Thus, the trial court properly denied Parker's motion to suppress the incriminating statements.

Parker next contends that the trial court erred in refusing to suppress his admission to the burglaries given his alleged seizure by the police without a proper legal basis, in violation of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), holding that a police officer is justified in making a brief investigatory stop only if he has reasonable, articulable suspicion that criminal activity is afoot. Undisputed evidence supports the trial court's finding that Parker did not have lawful permission to be on the UK campus and thus subject to an arrest for criminal trespass, as well as being subject to specific probationary conditions which banned him from the campus. Thus, we decline to disturb the findings.

Following from these findings, the trial court concluded that Parker's detention was not unlawful due to his being subject to arrest for criminal trespass and for violation

of conditions of probation, both on the grounds of being on the UK campus. Our review is whether the court violated the rule of law in applying these facts. In Devenpeck v. Alford, 543 U.S. 146, 153-56, 125 S.Ct. 588, 593-95, 160 L.Ed.2d 537 (2004), the United States Supreme Court held that the arrest of a driver for impersonating an officer or obstruction of justice could be supported by probable cause, notwithstanding the fact that the offenses were not closely related to the offense that was subsequently dismissed that was stated by officers as the reason for arrest. In so holding, the court concluded that an arresting officer's state of mind is irrelevant to the existence of probable cause to arrest, and that the arresting officer's subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause. Herein, it is undisputed that Parker was subject to arrest for criminal trespass by Officer Wilson for his presence in the Fine Arts Building and for violation of the conditions of his probation to remain off the UK campus when he was detained and taken to the UK police department for questioning by Lt. Hall on the burglaries. The detention was thus proper under Devenpeck, and the trial court's action in overruling the motion to suppress was proper.

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

ALL CONCUR.

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