

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001738-MR

GREGORY DEWAYNE EDMONDS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 05-CR-00135-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: SCHRODER,¹ JUDGE; KNOPF,² SENIOR JUDGE; AND MILLER,³
SPECIAL JUDGE.

SCHRODER, JUDGE: Gregory Dewayne Edmonds appeals from a final judgment and sentence of the Fayette Circuit Court pursuant to a conditional guilty plea to second-degree robbery and being a

¹ Judge Wilfrid A. Schroder completed this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

² Senior Judge William L. Knopf, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

³ Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

second-degree persistent felony offender. The conditional plea reserved the right to appeal the denial of Edmonds' motion to suppress his confession. Edmonds asserts that the trial court erred in denying the motion to suppress, on grounds that police officers did not honor his invocation of the right to remain silent, and that the confession was the product of coercion. For the reasons stated herein, we vacate and remand for further proceedings.

In an indictment returned on January 31, 2005, Edmonds was charged with first-degree robbery and being a second-degree persistent felony offender. The charges stemmed from a November 27, 2004, robbery at a Super Dollar store in Lexington, Kentucky, during which Edmonds allegedly demanded money from the clerk and threatened him with a pocket knife. Officers Mark Brand and Aaron Noel, responding to the call, spotted and arrested Edmonds who matched the description of the robber. The officers took Edmonds back to the scene of the crime, where the clerk identified him as the perpetrator. Edmonds was then taken to police headquarters, where he was interviewed by Detective Andy Cain and denied involvement in the crime. The next day, November 28, 2004, Edmonds was interviewed by Officers Brand and Noel, who obtained a confession.

Just prior to trial, Edmonds moved the trial court to suppress the statement he made to Officers Brand and Noel on

November 28, 2004. He argued that the statement, in which he confessed to having committed the crime and provided other relevant details, was obtained in violation of his right not to incriminate himself under the Fifth Amendment to the United States Constitution and Section 11 of the Kentucky Constitution. The trial court held a suppression hearing on April 28, 2005, and permitted the parties to file briefs supporting their respective arguments. On June 7, 2005, the court entered an Opinion and Order, which included the following findings of fact describing the circumstances of Edmonds' arrest and the subsequent interrogations:

On or about November 27, 2004 [Officer Mark] Brand and [Officer Aaron] Noel were on patrol duty when they received a call regarding a robbery that had just occurred at a Store located in the Waller Avenue Shopping Center in Lexington. The officers responded to the call and, while in route to the location, they observed a person (later identified as [Edmonds]) who matched the description and clothing of the person involved in the robbery. The officers stopped [Edmonds], placed him in handcuffs, and read the Miranda⁴ warnings to him. [Edmonds] replied that he had been to prison and understood his rights. [Edmonds] vehemently denied that he was the robber of the store. The officers transported [Edmonds] back to the store for a "show-up". The clerk of the store that had just been robbed identified [Edmonds] as the person who had just robbed him. The time between the robbery and the "show-up" where the clerk identified [Edmonds] was estimated to

⁴ Miranda v. Arizona, 384 U.S. 436 (1966)(footnote 1 in original).

be no more than 30 to 45 minutes. [Edmonds] was arrested and then taken to Police Headquarters by the officers.

The officers notified [Detective Andy] Cain about the situation and their arrest of [Edmonds] because Detective Cain was the detective on call at the time of the incident. Detective Cain met with [Edmonds] in an interrogation room at Police Headquarters. Officers Brand and Noel were not in the interrogation room with [Edmonds] and Detective Cain. Rather, officers Brand and Noel were outside the interrogation room completing their "paper work" on their investigation and arrest of [Edmonds]. The officers were in a position to over hear certain statements coming from the interrogation room even though they could not see [Edmonds] or Detective Cain. Officers Brand and Noel never heard [Edmonds] make a request for an attorney, state that he wanted to remain silent or any admissions made by [Edmonds]. The interview between [Edmonds] and Detective Cain lasted about ten minutes or so which ended in raised voices by both participants. [Edmonds] alleged that Cain called him a liar and a derogatory name and thereafter pushed [him] backwards causing his head to hit a wall of the interrogation room. [Edmonds] further alleged that Cain made other derogatory comments and made threatening statements to him in the interrogation room. Neither Brand nor Noel were able to hear the details of any dialogue between [Edmonds] and Cain except to hear their voices raised and the obvious anger exhibited between them.

Thereafter, Brand and Noel transported [Edmonds] to the Detention Center where he was lodged on the charge of robbery. [Edmonds] made no statements in route to the Detention Center and requested no medical attention. There is no contention that [Edmonds] made any incriminating statements

to either Cain or to Brand and Noel on the date of the robbery and his arrest.

The next day, namely November 28, 2004, Brand and Noel went to the Detention Center to meet with [Edmonds] at approximately 7:00 p.m.. They met in a "break room" where, again, [Edmonds] was given his Miranda warnings and again [Edmonds] replied that he understood these rights. [Edmonds] was relaxed and calm. Noel was dispatched to obtain a soft drink for [Edmonds]. Unbeknownst to [Edmonds], Brand was secretly recording the conversation with a tape recorder inside his coat pocket. Brand prefaced the discussion with an "apology" to [Edmonds] for Detective Cain's behavior the night before. In truth and in fact, Brand's "apology" was a subterfuge and was intended to establish rapport with [Edmonds] "to get a confession." [Edmonds] indicated that he did want to talk with an attorney, but NOT about his rights involving the criminal charge of robbery arising out of the incident the day before, but about filing charges against Cain because of the alleged physical pushing, coercion and threatening statements made to [him] by Cain in the interrogation room the night before. During the course of the remainder of the conversation between Brand and [Edmonds], there was no statement made by [Edmonds] about sustaining any injury in the interrogation by Cain and no request by [Edmonds] to stop the interview with Brand for any reason or to stop the questioning for any reason or to request an attorney in regard to the robbery charge or for any reason other than wanting to file charges against Cain because of the allegations involving the interrogation the night before. The statements made by [Edmonds] to Brand in this "second interview" at the Detention Center on November 28, 2004, which were secretly tape recorded, are the subject of the pending Motion to Suppress.

The trial court then denied the motion, determining that the officers had scrupulously honored Edmonds' rights and had not coerced his confession. On June 24, 2005, Edmonds opted to enter a conditional guilty plea to an amended charge of second-degree robbery, with a recommended sentence of five years enhanced to fifteen years by his persistent felony offender status. The trial court accepted his conditional plea, and sentenced him in accordance with the Commonwealth's recommendation. This appeal followed.

On appeal, Edmonds contends that the trial court erred in denying his motion to suppress his confession, on two grounds. First, Edmonds contends that the police officers failed to honor his right to remain silent when they reinitiated their interrogation the following day. Second, Edmonds contends that his confession was involuntary because it was coerced.

Our standard of review of a trial court's ruling on a suppression motion is as follows. "First, the factual findings of the court are conclusive if they are supported by substantial evidence. The second prong involves a *de novo* review to determine whether the court's decision is correct as a matter of law." Stewart v. Commonwealth, 44 S.W.3d 376, 380 (Ky.App. 2000)(citations omitted). We shall review the trial court's ruling accordingly.

I. RIGHT TO REMAIN SILENT

Edmonds first argues that Officers Brand and Noel failed to scrupulously honor his invocation of the right to remain silent at the end of the first interrogation with Detective Cain, when they initiated the second interrogation the next day. The Commonwealth, while arguing that Edmonds did not actually invoke his right to remain silent during the first interview, asserts that, even if he did so, the second interview was constitutionally permissible.

We shall first address the Commonwealth's assertion that Edmonds did not invoke his right to remain silent. Edmonds claims that at the end of the first interview, November 27, he said that he had "nothing else to say", which constituted an invocation of the right to remain silent. Detective Cain testified that Edmonds did not make such a statement. In its Opinion and Order denying the motion to suppress, the trial court noted that the testimony was disputed as to whether Edmonds had explicitly invoked this particular right, but assumed for purposes of ruling on the motion that Edmonds had advised Detective Cain that he had invoked this right.

The Kentucky Supreme Court addressed a similar situation in Furnish v. Commonwealth, 95 S.W.3d 34 (Ky. 2002). In Furnish, police officers questioned the appellant in a police department conference room regarding a murder. Furnish's responses were "'I don't know what you're talking about' and 'I

got nothing else to say.'" Id. at 47. The Supreme Court held in this instance that Furnish had not remained silent or invoked any constitutional rights, but merely denied that he had any knowledge of the crime. Furnish's statement that he had nothing else to say after indicating that he was not involved in the crime is very similar to Edmonds' alleged response in the present case. Edmonds denied any involvement, then told Detective Cain that he had nothing else to say. However, the trial court did not make a factual finding on this issue, instead opting to assume for purposes of its ruling that Edmonds had invoked his right to remain silent. We shall do the same.

We now address whether the police officers honored Edmonds' invocation of his right to remain silent. The parties do not dispute that the controlling law on this issue in Kentucky is Mills v. Commonwealth, 996 S.W.2d 473 (Ky. 1999). Mills, in turn, relied upon the United States Supreme Court's opinion in Michigan v. Mosley, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975), which held that "the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his 'right to cut off questioning' was 'scrupulously honored.'" Mosley, 423 U.S. at 104. The Mills court identified a list of factors that the Mosley Court relied upon in determining that police officers had

scrupulously honored the defendant's right to cut off questioning. These factors included:

(1) Mosley was carefully advised of his rights prior to his initial interrogation, he orally acknowledged those rights, and signed a printed notification-of-rights form; (2) the detective conducting the interrogation immediately ceased questioning Mosley after he invoked his right to remain silent and did not resume questioning or try to persuade Mosley to reconsider his decision; (3) Mosley was questioned about a different crime more than two hours later at a different location by a different officer; and (4) Mosley was given a fresh set of *Miranda* warnings prior to the second interrogation.

Mills, 996 S.W.2d at 482-83, citing Mosley, 423 U.S. at 104-105.

Mills observed that the Mosley Court did not state that these factors were exclusive or exhaustive, nor that any single factor was elevated above the others. Mills, at 483. Rather, the Mosley analysis is to be approached on a "case-by-case basis," examining all the relevant factors. Id.

There is no dispute in the present case that Edmonds was advised of (and indicated that he understood) his Miranda rights prior to both interrogations, that Detective Cain ceased questioning him once he indicated that he had nothing to say, and that the second interrogation took place about twenty-four hours later at a different location and by different officers. The only circumstance that differs from Mosley is that the second interrogation was in relation to the same crime. In

considering this factor, however, the Mills Court observed that “the constitutionality of a subsequent police interview depends not on its subject matter, but rather on whether the police in conducting the interview sought to undermine the suspect’s resolve to remain silent.” Mills, 996 S.W.2d at 483 (citation omitted). Looking at all of the circumstances surrounding the two interrogations, we agree with the trial court that the police officers scrupulously honored Edmonds’ right to remain silent. See Mills, 996 S.W.2d at 483. We see no error in the trial court’s ruling on this issue.

II. POLICE COERCION

We shall next address Edmonds’ claim that his confession during the second interrogation was involuntary as it was the result of police coercion. Edmonds contends that Detective Cain’s actions and threats during the first interrogation coerced him into confessing the following day.

It was established at the suppression hearing that the first interrogation took place on November 27, 2004, in a detention cell at police headquarters. Only Detective Cain and Edmonds were in the cell during this interview, which was not recorded.

Per his testimony at the suppression hearing, Edmonds’ version of events is as follows. When he (Edmonds) denied any involvement in the robbery, Cain kept saying he was lying. When

Cain started calling him a "lying son of a bitch", Edmonds got upset and started raising his voice. Cain kept accusing him of lying and saying that he was the one who did the robbery. Edmonds could not recall exactly what was then said, after which Cain told him to "stand up and say it again." Edmonds stood up and Cain took his hand and shoved Edmonds against the wall, causing Edmonds' head to bounce off the wall. Edmonds testified that Cain also told him that he (Cain) could take his own gun and shoot and kill Edmonds with it, and that Cain would be believed because he wears a badge and Edmonds is a convicted felon. At the end of the interview, just before Cain walked out, he (Cain) said "Fine. I'll just send your ass to prison and you get fucked like a little bitch." When Brand and Noel came to interview him at the jail the next day, Brand apologized to Edmonds for Cain's behavior. Edmonds acknowledged that he was given his Miranda rights again, and did talk to Brand and Noel. Edmonds testified that he was concerned because Cain "acted like he didn't give a damn if I did get shot or what happened to me, he just wanted an easy confession and go on with it, he wanted an open and shut case, that's it." Edmonds testified that because of the threats Cain had made the day before he didn't know what would have happened if he had to go in front of Cain again and they were locked in a room by themselves, and that he took Cain's threats seriously.

Detective Cain, and Officers Brand and Noel testified at the suppression hearing as well. Cain acknowledged having raised his voice in the interview, but denied making threats or derogatory statements or physically assaulting Edmonds. Brand and Noel both testified that they were outside the room during the interview, and could not see what was going on. Both heard raised voices but denied hearing any physical altercation. Brand testified that at one point he looked in the room, at which time Edmonds looked at him (Brand) and said, "That man has a badge and what he did was an assault." Brand testified that his apology the next day was only to establish rapport with Edmonds.

Our Supreme Court discussed the voluntariness of confessions in Henson v. Commonwealth, 20 S.W.3d 466 (Ky. 1999), and in particular discussed police coercion. The Court explained:

To determine whether a confession is the result of coercion, one must look at the totality of the circumstances to assess whether police obtained evidence by overbearing the defendant's will through making credible threats. *Arizona v. Fulminante*, 499 U.S. 279, 286-88, 111 S. Ct. 1246, 1252-53, 113 L. Ed. 2d 302 (1991); *Allee v. Commonwealth*, Ky., 454 S.W.2d 336, 341 (1970). The three criteria used to assess voluntariness are 1) whether the police activity was "objectively coercive;" 2) whether the coercion overbore the will of the defendant; and 3) whether the defendant showed that the coercive police activity was

the "crucial motivating factor" behind the defendant's confession. *Morgan v. Commonwealth*, Ky., 809 S.W.2d 704, 707 (1991) (adopting federal due process standards of *McCall v. Dutton*, 863 F.2d 454 (6th Cir.1988)[]). Any statement that was not the product of the defendant's free choice at that time was not voluntary.

The issue of voluntariness of a confession is a mixed question of fact and law. . . . When the trial court is faced with conflicting testimony regarding the voluntariness of a confession, its determination, including its evaluation of credibility, if supported by substantial evidence, is conclusive. *Crawford v. Commonwealth*, Ky., 824 S.W.2d 847, 849 (1992); *Harper v. Commonwealth*, Ky., 694 S.W.2d 665 (1985); *Edwards v. Commonwealth*, Ky., 500 S.W.2d 783 (1973); RCr 9.78.

Henson, at 469.

In its order denying the suppression motion, the trial court agreed that the allegations of Edmonds against Cain, if true, were inexcusable, but went on to conclude that "the Court does not feel that it is necessary for purposes of this pending Motion to attempt to resolve the disputed testimony or to make Findings of Fact regarding what happened during this first interrogation by Cain." The court found that the lapse of 24 hours between the first and second interviews, the fact that the second interview was conducted in a different location, and the fact that Edmonds was given Miranda warnings before the second interview along with the court's finding that his rights had been "scrupulously honored" by Brand and Noel, served to dispel

any taint arising from any alleged improprieties in the first interview.

We disagree. We believe that if the events did, in fact, occur as alleged by Edmonds, it would be grounds for suppressing the confession because the threat of death or sodomy still exists at least as long as the defendant is in custody. See Henson, 20 S.W.3d at 469-70 (indicating "offensive practices or oppressive conduct by the police officer" and physical abuse would be considered coercive police activity); Arizona v. Fulminante, 111 S. Ct. at 1253 (credible threat of becoming victim of physical violence in prison sufficient to find confession product of coercion). See also, Hager v. Commonwealth, 300 Ky. 585, 189 S.W.2d 867 (1945)(confession inadmissible where there was evidence that police officers used violence in obtaining confession). Accordingly, we conclude it is necessary to remand to the trial court for findings of fact as to what occurred during the interrogation by Detective Cain on November 27, 2004, and application of the law thereto.

For the aforementioned reasons, the order of the Fayette Circuit Court denying Edmonds' motion to suppress is vacated, and the case remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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