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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002602-MR

RICHARD MORRISON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 03-CR-00775

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; MOORE AND NICKELL, JUDGES.

COMBS, CHIEF JUDGE: Richard D. Morrison appeals from a judgment of the Fayette Circuit Court sentencing him to fifteen-years' imprisonment and ordering him to pay $445.50 in restitution following his entry of a conditional guilty plea to two counts of robbery and one count of being a persistent felony offender. Morrison contends that the trial court erred in failing to grant his motion to suppress statements that he made to a

Lexington police detective because they were "fruit of the poisonous tree."[1] After our review, we affirm.

Morrison was arrested on May 14, 2003, on charges of receiving stolen property valued at more than $300.00; fleeing and evading police, first-degree; and operating a motor vehicle on a suspended license. He was transported to the Fayette County Detention Center in Lexington and was placed in a holding cell. Some time later, Corporal Brian Blair, an officer at the detention center, received a call to help some other officers deal with Morrison, who was allegedly exhibiting "combative" behavior. Blair had dealt with Morrison before, and Blair believed the two had a certain degree of rapport.

According to Blair, when he arrived, Morrison knocked on a cell window and asked, "Can you hurry up and get me to the back?" He said that he was tired because he had been out all night drinking with a woman. Morrison then exclaimed – without any prompting by Blair – that he had "robbed some places." In response, Blair asked, "Man, what are you going through? What places did you rob?" Blair also testified that he may have instead asked Morrison, "What places did you hit?" The distinction is not important, however, as the context of the two questions is the same. Morrison answered by describing in detail how he had robbed a hotel and a gas station.

[1] This metaphor was first used by the United States Supreme Court in *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). It has since become part of the more colorful *patois* of Fourth Amendment analysis.

A short time later, Corporal Zerbest, Blair's supervisor, asked him about the conversation that she had overheard. She inquired, "Did I hear him state that he had robbed some places?" or "What did I hear him say?" Blair could not remember his exact response to Zerbest, but he testified that he told her the details of what Morrison had said. Zerbest then contacted detectives with the robbery-homicide unit at the Lexington Police Department. Six days later, on May 20, 2003, Morrison was brought to police headquarters to be questioned about the robberies by Detective Robert Sarrantonio. Before the interrogation began, Morrison was given *Miranda* warnings. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). He waived his rights, confessed to both robberies, and gave explicit details about his involvement in each one. Later in the same day, Morrison's picture was shown in a photographic line-up to a hotel clerk involved in one of the robberies; she identified Morrison as the person who robbed her.

On June 24, 2003, the Fayette County Grand Jury indicted Morrison on two counts of first-degree robbery and one count of being a first-degree persistent felony offender. (He was also indicted on a number of unrelated charges that are not part of this appeal.) He subsequently appeared in open court with counsel and entered a plea of "not guilty" to the indictment. Prior to trial, Morrison filed a motion to suppress the statements that he had made to Corporal Blair and to Detective Sarrantonio on the grounds that he had been improperly questioned by Blair without being Mirandized. The trial court held a hearing on the motion over the course of two days. On January 8, 2004,

the Commonwealth presented testimony from Blair and Sarrantonio. The hearing was continued until January 30, 2004, in order to allow Morrison to produce witnesses in support of his motion. It concluded on the 30th without the Commonwealth or Morrison calling any additional witnesses.

At the end of the hearing, the trial court ruled that Morrison's first unsolicited, casual statement to Blair that he had "robbed some places" was admissible as evidence at trial. However, the court also ruled that Blair should not have gone forward with his questioning of Morrison after this initial statement was made without a *Miranda* warning and ordered that Morrison's responses to those questions be suppressed. As to the later confession made by Morrison to Sarrantonio, the court found that Corporal Zerbest had overheard Morrison's voluntary statement that he had "robbed some places" and that this statement was the basis for her notifying the detectives. The court also considered the fact that Zerbest asked Blair to repeat Morrison's statement. It found no problem and declined to suppress Morrison's confession to Sarrantonio as "fruit of the poisonous tree," holding that it would be admissible at trial.

The case proceeded to trial on February 5, 2004, and the jury found Morrison guilty of first-degree robbery, second-degree robbery, and being a first-degree persistent felony offender. That verdict was thrown out, and a new trial was granted after a juror advised the trial court that the jury had considered evidence that had been ruled inadmissible.

On August 20, 2004, Morrison filed another motion to suppress based upon the same grounds set forth in his previous motion. The trial court issued an order on October 6, 2004, re-affirming its previous rulings and denying the motion. Morrison entered a conditional guilty plea to the pending charges on November 7, 2005, reserving his right to appeal the suppression rulings. A judgment was entered against Morrison on November 23, 2005, sentencing him to fifteen-years' imprisonment and ordering him to pay $445.50 in restitution. This appeal followed.

"Fruit of the Poisonous Tree"

Morrison argues that the trial court erred in refusing to suppress Morrison's statements to Detective Sarrantonio in which he admitted to the two robberies. He contends that they were "fruit of the poisonous tree" in violation of the Fourth Amendment to the United States Constitution and Section Ten of the Kentucky Constitution. Morrison alleges that his confession to Sarrantonio should be deemed inadmissible because it was obtained as a direct result of his statements to Corporal Blair that had been suppressed. As it flowed from these tainted statements, the subsequent confession was thus rendered "poisonous."

However, Morrison was given a *Miranda* warning; he waived his rights before confessing to Sarrantonio. The question for our review is whether Morrison's confession was so tainted by Corporal Blair's suppressed questioning as to render his later waiver of *Miranda* rights ineffective, thus making his statements to Sarrantonio inadmissible into evidence.

In reviewing a trial court's decision on a motion to suppress, we must first determine whether the court's findings of fact are supported by substantial evidence. *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky.App. 2002). Our determination is governed by a "clearly erroneous" standard. *Welch v. Commonwealth*, 149 S.W.3d 407, 409 (Ky. 2004). If the findings are supported by substantial evidence and are not clearly erroneous, they are conclusive. We must then conduct a *de novo* review of the court's application of the law to those facts to decide whether its decision is correct as a matter of law. *Id.*; *Neal*, 84 S.W.3d at 923.

The trial court's findings of fact and conclusions of law were limited. The court found that Morrison's first statement to Corporal Blair was voluntary but that his other statements were the result of Blair's questioning. The court suppressed everything that followed Morrison's initial "boast" or "blurt-out" because a *Miranda* warning had not been given. The court further found that Corporal Zerbest contacted the Lexington Police Department solely because she overheard Morrison's voluntary statement to Blair. Even though she asked Blair more about the questioning that was suppressed, her action in summoning the police was sufficiently founded upon overhearing Morrison's first statement. The court effectively held that the voluntary statement was sufficiently severable from the tainted and suppressed interchange that followed. Thus, it concluded that anything flowing from that first statement was not objectionable. Morrison's statement to Detective Sarrantonio should not be suppressed.

For the most part, these findings are supported by substantial evidence. However, the record is unclear as to what Blair told Zerbest and what they told Sarrantonio to prompt his questioning of Morrison. Blair testified that he may have told Zerbest of Morrison's statement that he had robbed a hotel and a gas station. Sarrantonio testified that he was told that a hotel and liquor store had been robbed -- information upon which he based his interview of Morrison. It is at least arguable that Sarrantonio's line of questioning was prompted by information flowing from Blair's non-*Mirandized* questioning of Morrison. Regardless of the genesis of Sarrantonio's interrogation, Morrison was properly Mirandized **when he confessed**. That confession was admissible.

Custodial Interrogation: *Miranda*

All cases involving an allegation of a *Miranda* violation focus on whether the defendant was in custody at the time of interrogation. As he was fully Mirandized at the time of his confession to Sarrantonio, Morrison's only concern on this issue was whether he was "in custody" for purposes of this particular exchange with Blair. Only statements made during **custodial** interrogations may be suppressed pursuant to *Miranda*. *Jackson v. Commonwealth*, 187 S.W.3d 300, 305 (Ky. 2006). The Commonwealth argues that Morrison was not in custody for purposes of *Miranda* at the time Corporal Blair questioned him. However, after reviewing the record, we cannot find any point at which the Commonwealth raised this issue before the trial court. On the contrary, in its response to Morrison's renewed motion to suppress **and** during the hearing on

Morrison's original motion, the Commonwealth expressly acknowledged that Morrison **was in custody** when he was being questioned by Blair. Thus, we shall proceed under the assumption that Morrison was in custody within the meaning of *Miranda*. *Id.*

Although Morrison was in a detention center, it is highly questionable that he was ever subjected to "custodial interrogation" by Corporal Blair. The Supreme Court of Kentucky has defined *custodial interrogation* as "questioning **initiated by law enforcement** after a person has been taken into custody or otherwise deprived of freedom of action in any significant way." *Commonwealth v. Lucas*, 195 S.W.3d 403, 405 (Ky. 2006) (Emphasis added.). The Court has more specifically defined *interrogation* to include:

> any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect … focus[ing] primarily upon the perceptions of the suspect, rather than the intent of the police.

Wells v. Commonwealth, 892 S.W.2d 299, 302 (Ky. 1995), quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1980). Initially, there was no exchange between Morrison and Blair. Instead, Morrison literally blurted out that he had "robbed some places" in an unsolicited, unprompted statement – perhaps because he had been drinking. Regardless of the reason for his boasting or foolhardiness, whichever the case may be, he himself bodaciously made the statement. Thus, even though he was in custody, he was not "interrogated" within the meaning of "custodial interrogation." The

trial court so concluded, and the Commonwealth has failed either to preserve or to challenge this ruling. We need not consider the issue in more detail.

Another element ancillary to custodial interrogation is whether coercion was a factor. In *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), the United States Supreme Court concluded that "a simple failure to administer [*Miranda*] warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will" did not so taint the investigatory process as to render ineffective a subsequent voluntary and informed confession by the suspect made following his waiver of his *Miranda* rights. *Id.*, 470 U.S. at 309, 105 S.Ct. at 1293; *see also Grooms v. Commonwealth*, 756 S.W.2d 131, 141 (Ky. 1988). We believe that this principle is directly applicable here.

There was no coercion in Corporal Blair's questioning of Morrison. There is also no evidence that Blair deliberately withheld *Miranda* warnings for some sort of tactical advantage in order to circumvent Morrison's *Miranda* rights; *i.e.*, to question first and Mirandize later. *See Jackson*, 187 S.W.3d at 309; *see also Missouri v. Seibert*, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004) (plurality decision). Blair testified that his questions occurred in the course of casual conversation. He also testified that he had no intention of getting Morrison into additional trouble when Morrison admitted to the robberies. At the most, Blair's questioning without a warning was a simple "good-faith *Miranda* mistake." *See Seibert*, 542 U.S. at 615, 124 S.Ct. at 2612 (plurality

decision). We find no violation of *Miranda* with respect to the exchange between Morrison and Blair.

As to his confession to Detective Sarrantonio, its admissibility turns solely on whether it was knowingly and voluntarily made and whether the *Miranda* warnings were reasonably effective. *Elstad*, 470 U.S. at 309, 105 S.Ct. at 1293; *Seibert*, 542 U.S. at 612 n.4, 124 S.Ct. at 2610 n.4. There is nothing in the record to suggest that the confession was not knowingly and voluntarily made or that the *Miranda* warnings given to Morrison were ineffective.

Even in cases where a statement is deemed to have been coerced, "the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession." *Elstad*, 470 U.S. at 310, 105 S.Ct. at 1293. Morrison's confession was made six days after his original conversation with Corporal Blair; thus, it was sufficiently distant in time from the original conversation to extinguish any possibility of a tainted connection. In addition, Morrison's statement to Blair took place in an entirely different setting and location than his confession to Detective Sarrantonio; two different law enforcement officials were involved.

We suppress confessions on the basis of a *Miranda* violation by police officers in order to deter improper police conduct and to insure trustworthiness of the evidence pursuant to the Fifth Amendment. Neither goal comes into play in this case so

as to require suppression. *Id.*, 470 U.S. at 308, 105 S.Ct. at 1292. The U.S. Supreme Court in *Elstad* employed an analysis highly *apropos* to this case:

> There is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequences of disclosure of a "guilty secret" freely given in response to an unwarned but noncoercive question, as in this case.

Id., 470 U.S. at 312, 105 S.Ct. at 1295. We conclude that the confession was voluntary and informed and that it occurred after a valid waiver of *Miranda* rights. Therefore, the trial court did not err in holding that the confession was admissible as evidence. Nor did it err in refusing to suppress it as "fruit of the poisonous tree."

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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