

RENDERED: OCTOBER 5, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

**SUPREME COURT ORDERED OPINION NOT PUBLISHED:
SEPTEMBER 10, 2008
(FILE NO. 2007-SC-0813-D)**

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-001883-MR

MICHAEL RICHARD SHEARER

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
INDICTMENT NO. 05-CR-00887

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: KELLER, LAMBERT, AND STUMBO, JUDGES.

LAMBERT, JUDGE: Michael Richard Shearer appeals from a denial of his Motion to Suppress his confession to first degree robbery. For the reasons set forth herein, we affirm the judgment of the Fayette Circuit Court.

Detective Robert Jody Stowers testified that Shearer was identified by accomplices to a taxicab robbery during Stowers' investigation of the incident. Stowers

interviewed Shearer on June 20, 2005, at the Woodford County Detention Center where Shearer was incarcerated on unrelated charges. Shearer had been in jail six days when the interview took place. Stowers stated that Shearer appeared very aware and cognizant of the questions he was asked. The interview was recorded and a tape entered into evidence at the suppression hearing.

During the course of the interview, Shearer stated he was bipolar and suffered from obsessive compulsive disorder (“OCD”). He also claimed to have done LSD in the past but denied any use of drugs or alcohol within twenty-four hours of the interview. Shearer also told Stowers that he had taken medication for being bipolar until he was told he no longer needed it, which was a “long time” ago.

Stowers advised Shearer of his Miranda rights, and Shearer indicated that he understood his rights and expressed a willingness to discuss the case. Shearer's version of the events was that his co-defendants knew that he had a dagger and they all formed a plan to use the dagger in the robbery. He also claimed to have resisted the plan but was coerced into participating because he was “tripping” on LSD and/or mescaline. While he stated that he could not remember a lot of what happened, he admitted holding the knife and asking the cab driver for his money. He further claimed to have prevented his companions from taking the cab driver's cell phone or inflicting other mistreatment upon the driver.

On November 4, 2005, Shearer made an oral motion to suppress his confession, alleging that he was “extremely intoxicated” at the time he confessed. At the suppression hearing, however, the motion did not address intoxication; rather it alleged that Shearer suffered from mental illness and was not taking his medication at the time he

spoke to the police. The motion to suppress was denied. Shearer subsequently entered a conditional guilty plea to second-degree robbery and was sentenced to ten years' imprisonment. This appeal followed.

Shearer argues that the trial court wrongfully denied his Motion to Suppress his confession because the combination of his intoxication and mental defects rendered him unable to voluntarily waive his due process rights. We disagree.

The Kentucky Supreme Court has stated that if the trial court's conclusion regarding voluntariness of the confession is supported by substantial evidence it is conclusive. *See Henson v. Commonwealth*, 20 S.W.3d 466 (Ky. 1999); *Bailey v. Commonwealth*, 194 S.W.3d 296, 300 (Ky. 2006). Furthermore, any determination of the voluntariness of a confession requires an examination of the totality of the circumstances surrounding it. *See Henson*, 20 S.W.3d at 469 (citing *Arizona v. Fulminante*, 499 U.S. 279, 286-88, 111 S.Ct. 1246, 113 L.Ed. 2d 302 (1991)). Kentucky courts have additionally held that coercive state action is required before a confession may be deemed involuntary. *See Commonwealth v. Cooper*, 899 S.W.2d 75, 76 (Ky. 1995) (following the Supreme Court holding in *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed 2d 473 (1986)).

Shearer identifies no coercive activity on the part of the police. He instead asserts that the act of interrogation in and of itself was impermissibly coercive because of his alleged mental illness and intoxication. However, “. . . a defendant's mental condition, by itself and apart from its relation to official coercion, should [n]ever dispose of the inquiry into constitutional 'voluntariness'. . . .” *See Colorado v. Connelly*, 479 U.S. at 164. Additionally, the rejection of “flashbacks” as preventing a voluntary confession is

in line with similar authority involving the use of hallucinogenic drugs at a time much more proximate to the confession than that proposed in this case. *See e.g., U.S. v. Taylor*, 508 F.2d 761, 763 (5th Cir. 1975); *U.S. v. Wilkins*, 477 F.2d 323, 325 (8th Cir. 1973).

The three criteria the trial court uses 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.” *See Henson*, at 469; *Morgan v. Commonwealth*, 809 S.W.2d 704, 707 (Ky. 1991) (adopting federal due process standards of *McCall v. Dutton*, 863 F.2d 454 (6th Cir. 1988)). The subjective state of mind of a confessing defendant is not even inquired into absent a threshold determination that police extorted the confession from the accused by means of coercive activity. *See McCall*, at 459.

Shearer presented no evidence of coercive activity on the part of the police. Furthermore, the sum total of evidence presented in support of the premise that Shearer suffered from mental illness at the time of his confession was his assertion that he had once been prescribed medication for bipolar disorder and depression but was told he no longer needed to take the medication. Shearer additionally failed to offer any proof as to how prior use of hallucinogenic drugs would thereafter render a person incapable of ever giving a voluntary statement to police.

In sum, substantial evidence supported the trial court's decision to deny Shearer's Motion to Suppress his confession as involuntary. Accordingly, we affirm the judgment of the Fayette Circuit Court.

ALL CONCUR.

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