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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000931-MR

JOHNNY R. COX — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. TRAVIS, JUDGE
ACTION NO. 16-CR-00052

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; GOODWINE AND MCNEILL, JUDGES.

GOODWINE, JUDGE: Johnny R. Cox ("Cox") appeals a judgment and sentence of the Fayette Circuit Court convicting him of one count of first-degree sexual abuse of a minor[1] and one count of being a second-degree persistent felony

[1] Kentucky Revised Statutes (KRS) 510.110 (Class D felony).

offender.[2] Cox was sentenced to a total of five years of imprisonment and twenty years of sex offender registration, and was required to complete the sex offender treatment program. After careful review, finding no error, we affirm.

BACKGROUND

On November 23, 2015, the Lexington Police Department responded to a complaint that Cox touched a nine-year-old girl on her vagina. Detective Joseph Oliver interviewed Cox at police headquarters regarding the incident, which was recorded on audio and video. Detective Oliver took Cox's personal information and read him his *Miranda*[3] rights. The detective asked Cox multiple times if he understood his rights, and Cox said, "Yeah." Record (R.) at 110. "At around the 13-minute mark of the interview, [Cox] answered a question from Det. Oliver by seemingly saying, 'So when they try to accuse me of doing something [inaudible] talk to a [expletive] lawyer. I'm serious, man.' Det. Oliver responded, 'Sure. Okay. That's fine,' and continued with the interview." R. at 88. After approximately twenty minutes of further questioning, Cox confessed.

On April 21, 2017, the circuit court held a suppression hearing regarding whether Cox invoked his right to counsel. During the hearing, Detective Oliver testified "he did not understand [Cox] to have asked for an attorney, and

[2] KRS 532.080(2).

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

that if he had so understood, he would have discontinued the interview[.]" *Id.* Based on the detective's testimony and the audio recording of the interview, the circuit court entered an order on May 2, 2017 finding Cox did not invoke his right to counsel.

On June 22, 2017, the circuit court held a second suppression hearing regarding whether Cox knowingly and intelligently waived his *Miranda* rights. Cox presented expert testimony from forensic psychologist Dr. Eric Drogin, who opined that Cox did not knowingly and intelligently waive his rights. Dr. Drogin testified that he evaluated Cox numerous times, and Cox had below-average mental capacity; had been diagnosed with dementia, schizoaffective disorder, schizophrenia, and an unspecified psychotic disorder; had an IQ in the 60s; and showed a limited understanding of his *Miranda* rights when asked about them.

On August 11, 2017, the circuit court entered an order finding Cox's waiver valid. The court found that although Dr. Drogin's testimony weighed in favor of a finding that the waiver was not knowingly and intelligently made, other factors "require the conclusion that the waiver was valid." R. at 184. Further, the court opined that Cox had been convicted of multiple felonies, which led to the inference that Cox understood his rights and the effect of waiving them.

On August 6, 2018, the circuit court conducted a competency hearing. The court heard conflicting testimony from four expert witnesses. The court found

the testimony of Dr. Jaclyn Williams of the Kentucky Correctional Psychiatric Center (KCPC) was the most persuasive. Dr. Williams evaluated Cox on two separate occasions, and her evaluations were more extensive than the other witnesses' evaluations.

ANALYSIS

On appeal, Cox argues the circuit court erred in: (1) denying his motion to suppress regarding invocation of his right to counsel; (2) denying his motion to suppress regarding waiver of his *Miranda* rights; (3) finding he was competent to stand trial; and (4) finding him eligible to complete the sex offender treatment program.

First, Cox argues the circuit court erred in denying his motion to suppress his confession as he unequivocally invoked his right to counsel. "When reviewing a trial court's denial of a motion to suppress, we utilize a clear error standard of review for factual findings and a *de novo* standard of review for conclusions of law." *Jackson v. Commonwealth*, 187 S.W.3d 300, 305 (Ky. 2006) (citing *Welch v. Commonwealth*, 149 S.W.3d 407, 409 (Ky. 2004)). Although "a suspect 'need not speak with the discrimination of an Oxford don[,]'" he must "articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Bradley v. Commonwealth*, 327 S.W.3d 512, 516 (Ky. 2010)

(citations omitted). Stated differently, "[i]f reasonable minds could differ on whether a request for an attorney had been made, the language is perforce ambiguous or equivocal.'" *Id.* (citation omitted).

In its order denying Cox's motion to suppress, the circuit court transcribed the interaction as follows:

> Detective Oliver: So, Joey thought that, that you tried touching—who is it?
>
> Cox: [inaudible]
>
> Detective: Amber?
>
> Cox: Yeah. So when they try to accuse me of doing something [inaudible] talk to a [expletive] lawyer. I'm serious man.

R. at 89.

Cox disputes the circuit court's transcription of the conversation and argues he clearly stated, "[w]ant to talk to a goddamn lawyer." He asserts this constitutes a clear and unequivocal invocation of his right to counsel. However, the record refutes Cox's interpretation. During the hearing, Detective Oliver stated he did not understand Cox's statement, and if he had, he would have discontinued the interview. After the hearing, the circuit court "reviewed the interview tape numerous times and attempted to transcribe the interchange at issue[.]" R. at 89. The circuit court determined Cox stated, "[inaudible] talk to a [expletive] lawyer. I'm serious man." *Id.* The circuit court applied the reasonable officer test and

concluded Cox's partially inaudible statement did not constitute a clear and unequivocal invocation of his right to counsel under the circumstances.

Before us is a mixed question of fact and law. First, Cox disputes the circuit court's interpretation of the statement at issue. Upon review of the suppression hearing, it is clear the statement was partially inaudible. Although Cox clearly said the word "lawyer," it is unclear what he uttered beforehand. As such, the circuit court's finding of fact is supported by substantial evidence and is not clearly erroneous. *Hallum v. Commonwealth*, 219 S.W.3d 216, 220 (Ky. App. 2007) (citing *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. App. 2002)).

Next, we must determine whether reasonable minds could differ on whether Cox requested an attorney. Applying this objective standard, it is impossible to conclude Cox's partially inaudible statement constitutes a clear and unequivocal invocation of his right to counsel. Under these circumstances, no reasonable officer would have understood the statement to be a request for an attorney. As such, the circuit court did not err in denying Cox's motion to suppress his confession.

Second, Cox argues the circuit court erred in denying his second motion to suppress because he did not knowingly and intelligently waive his *Miranda* rights. Before reaching Cox's argument, we must acknowledge the Commonwealth's assertion that Cox was not in custody for *Miranda* purposes.

However, because the Commonwealth raised this argument for the first time on appeal, we decline to address this unpreserved argument. *See Martin v. Commonwealth*, 409 S.W.3d 340 (Ky. 2013).

Again, we apply a two-part review of the denial of a motion to suppress. "First, the court must determine whether the factual findings of the trial court are supported by substantial evidence. Second, the trial court's conclusions of law are reviewed *de novo* to determine if the court's decision is correct as a matter of law." *Wise v. Commonwealth*, 422 S.W.3d 262, 269 (Ky. 2013) (citing *Jackson*, 187 S.W.3d at 305).

To determine whether Cox's waiver of his *Miranda* rights was valid, we apply the following test:

> Under *Miranda v. Arizona*, 384 U.S. 436, 445, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), statements made by an accused during a custodial interrogation are inadmissible unless the accused is advised of his rights. Specifically, "the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.*
>
> That police gave warnings, however, does not end the inquiry. The prosecution must also prove "that the accused 'in fact knowingly and voluntarily waived [*Miranda*] rights' when making the statement." *Berghuis v. Thompkins*, 560 U.S. 370, 382, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010) (quoting *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979), alteration in original). The waiver analysis "has two distinct dimensions." *Id.* (quoting *Moran v. Burbine*,

> 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986)). First, the "waiver must be 'voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception.'" *Id.* (quoting *Moran*, 475 U.S. at 421, 106 S. Ct. 1135). Second, the waiver must be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.* at 382-83, 130 S. Ct. 250 (quoting *Moran*, 475 U.S at 421, 106 S. Ct. 1135).

Id. at 269-70. Furthermore, the Commonwealth bears the burden of proving waiver of *Miranda* rights by a preponderance of the evidence. *Dillon v. Commonwealth*, 475 S.W.3d 1, 14 (Ky. 2015).

There is no dispute that Detective Oliver sufficiently advised Cox of his rights, and there is also no dispute Cox's waiver was voluntary. Cox argues, under the second prong of the test, that he was not fully aware of the nature of his rights or the consequences of waiving them.

On June 22, 2017, the circuit court held a suppression hearing during which Detective Oliver and Dr. Eric Drogin testified. Dr. Drogin testified he evaluated Cox to determine his intellectual abilities particularly in the context of understanding his *Miranda* rights. Dr. Drogin opined Cox had "a below-average mental capacity in areas such as concentration, short-term memory, and logical reasoning, and also showed that [Cox] likely was not malingering." R. at 182. Dr. Drogin also reviewed Cox's records, including "medical diagnoses of dementia, schizoaffective disorder, schizophrenia, and an unspecified psychotic disorder, and

his Fayette County Public School records that reflected special education classes and IQ test scores in the 60s." *Id.* Based on his evaluations, review of Cox's records, and the recording of Cox's interview with Detective Oliver, Dr. Drogin concluded Cox showed limited understanding of his *Miranda* rights and did not knowingly and intelligently waive his rights during the interview with Detective Oliver.

The circuit court weighed Dr. Drogin's testimony against Detective Oliver's testimony and the recording of the interview. During the interview, Detective Oliver read Cox his *Miranda* rights and then asked if Cox understood them. The following is a transcription of the conversation that followed:

> Cox: What's going on now?
>
> Detective: Well, I'm just reading your rights like we do. Do you understand those rights?
>
> Cox: What's going on now?
>
> Detective: What do you mean what's going on? You are not under arrest. You haven't been charged with anything. You're not —
>
> Cox: Turn the page. Let me say something. Come on.
>
> Detective: Turn the page?
>
> Cox: Yeah, turn the page. Come on. I used to be a lawyer, bro.
>
> Detective: That's a blank page. That's just a note page. That's if you tell me anything, anything good or you

> wanted to write anything down, that's what that's for. So do you understand your rights?
>
> Cox: Yeah.
>
> Detective: Yeah, you understand.
>
> Cox: You got to understand, I ain't done nothing.

R. at 109-10.

Despite Dr. Drogin's testimony, the circuit court denied Cox's motion to suppress. The court found that "in viewing the totality of the circumstances surrounding the interview by Det. Oliver, [Cox] did knowingly and intelligently waive his Miranda rights. Various factors pull in opposite directions in making this determination." R. at 184. Although Dr. Drogin's testimony weighed in favor of a finding that Cox's waiver was not knowingly and intelligently made, the court found his testimony was not binding. The court noted that Dr. Drogin evaluated Cox months after the interview, so the test results may not be an adequate representation of his mental state and capacity during the interview. The court found that "after having his [*Miranda*] rights explained to him and being asked (multiple times) if he understood them, [Cox] indicated that he did. Detective Oliver did not state that he ever believed that [Cox] was unable to understand his [*Miranda*] rights." *Id.*

"The 'totality of the circumstances surrounding the interrogation' must show 'the requisite level of comprehension [before] a court [can] properly

conclude that the *Miranda* rights have been waived.'" *Dillon*, 475 S.W.3d at 14 (quoting *Moran v. Burbine,* 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986)). In *Dillon*, the defendant was shot in the head during the incident that led to his arrest and suffered a massive head trauma. *Id.* at 5. When interviewed by police, he was able to state his name, follow commands, and answer "simple yes-or-no questions[.]" *Id.* at 14.

Here, although Cox had documented mental health diagnoses and frequently changed the topic of conversation during the interview, he generally spoke in full, coherent sentences. After trying to redirect the conversation and being asked three times, Cox replied, "Yeah," when asked if he understood his rights. Furthermore, when Detective Oliver asked him why he was at the police station, he explained it was because a man named Joey accused him of inappropriately touching his niece's daughter.

"The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege." *Colorado v. Spring*, 479 U.S. 564, 574, 107 S. Ct. 851, 857, 93 L. Ed. 2d 954 (1987) (citations omitted). Even Dr. Drogin testified Cox understood he had an attorney, he had some rights that had to be read to him, and anything said would be recorded against him according to a lawyer. Although Dr. Drogin testified that a lot was missing from Cox's understanding of *Miranda*, Cox did not

have to understand every consequence to validly waive his rights. Based on the foregoing analysis, we hold the circuit court's finding of facts are supported by substantial evidence. We further hold the circuit court correctly concluded Cox knowingly and intelligently waived his *Miranda* rights.

Third, Cox argues the circuit court erred in finding him competent to stand trial. We review a "competency determination . . . based on the preponderance of the evidence standard. We may disturb a trial court's competency determination only if the trial court's decision is clearly erroneous (*i.e.*, not supported by substantial evidence)." *Keeling v. Commonwealth*, 381 S.W.3d 248, 262 (Ky. 2012) (internal quotation marks and citations omitted).

Under KRS 504.060(4), "'Incompetency to stand trial' means, as a result of mental condition, lack of capacity to appreciate the nature and consequences of the proceedings against one or to participate rationally in one's own defense[.]" Furthermore, "the test for whether an individual is competent to stand trial is 'whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.'" *Keeling*, 381 S.W.3d at 262 (quoting *Dusky v. United States*, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960)).

The circuit court held a competency hearing on August 6, 2018, during which the court heard testimony from four witnesses. Cox presented testimony from two expert witnesses and one lay witness. The two expert witnesses, Dr. Timothy Houchin, a forensic psychiatrist, and Dr. Eric Drogin, who has a Ph.D. in psychology and a J.D., testified they believed Cox had "psychological and cognitive deficiencies and that he may be incompetent to stand trial" as summarized by the circuit court. R. at 268. Cox also presented the lay testimony of Emily Swintosky, a DPA investigator, who worked on Cox's case for over two and a half years. Ms. Swintosky testified regarding Cox's erratic behavior and rambling communication style. Cox also introduced as an exhibit a video of a meeting Cox had with his attorneys to further illustrate his behavior.

The Commonwealth presented testimony from KCPC psychologist Dr. Jaclyn Williams. The circuit court summarized Dr. Williams' testimony as follows:

> Dr. Williams evaluated [Cox] on two separate occasions at [KCPC], and her evaluations of [Cox] were more extensive than those of other witnesses. Dr. Williams found that [Cox] was competent to stand trial and testified that in her opinion, [Cox's] behavior was "contrived and goal directed." When Dr. Williams reviewed the video submitted as an Exhibit by [Cox], . . . she stated her belief that while [Cox's] behavior may have been "difficult and frustrating, there was no evidence that [Cox] was suffering from any disorganization or psychosis." As such, in her opinion, [Cox] was capable of appreciating the nature and

> consequences of the proceedings against him and participating rationally in his defense.

R. at 267-68.

Having considered the testimony of all four witnesses and written arguments, the circuit court determined Dr. Williams' testimony was "particularly persuasive" because of her "more extensive evaluation history with [Cox.]" *Id.* at 268. Thus, the circuit court found Cox competent to stand trial.

We agree with the circuit court that the preponderance of the evidence supported a finding that Cox was competent to stand trial. Dr. Williams' recommendation supporting a finding of competency was based on her evaluations of Cox in November 2016 and December 2017. Dr. Houchin performed a limited evaluation and did not evaluate Cox for purposes of competency. Dr. Drogin previously evaluated Cox and testified in the first competency hearing on February 23, 2017. However, Dr. Drogin's evaluation for the competency hearing at issue was limited to observing Cox's interaction with his attorneys.

Based on the evidence presented at the competency hearing, we hold the circuit court's competency determination was supported by substantial evidence and was not clearly erroneous. Despite Cox's documented mental health history, Dr. Williams' testimony supported a finding that Cox had the ability to communicate with his attorney and understood the proceedings against him.

Finally, Cox argues he is not eligible to complete the sex offender treatment program under KRS 197.410 because he has an intellectual disability. The Commonwealth argues Cox failed to preserve this issue because Cox's plea documents did not state he intended to seek appellate review of this issue. We only consider the following three categories of issues raised on appeal from a conditional guilty plea:

> (1) involve a claim that the indictment did not charge an offense or the sentence imposed by the trial court was manifestly infirm, or (2) the issues upon which appellate review are sought were expressly set forth in the conditional plea documents or in a colloquy with the trial court, or (3) if the issues upon which appellate review is sought were brought to the trial court's attention before the entry of the conditional guilty plea even if the issues are not specifically reiterated in the guilty plea documents or plea colloquy.

Dickerson v. Commonwealth, 278 S.W.3d 145, 149 (Ky. 2009). Cox pled guilty on March 6, 2019, and did not raise this issue until May 3, 2019, when the circuit court discussed sentencing with counsel. Therefore, Cox asserts that including the sex offender treatment program as part of his sentence was manifestly infirm and requests palpable error review under RCr[4] 10.26.

KRS 197.410 provides:

> (1) A person is considered to be a "sexual offender" as used in this chapter when he or she has been adjudicated

[4] Kentucky Rules of Criminal Procedure.

> guilty of a sex crime, as defined in KRS 17.500, or any similar offense in another jurisdiction.
>
> (2) A sexual offender becomes an "eligible sexual offender" when the sentencing court or department officials, or both, determine that the offender:
>
> (a) Has demonstrated evidence of a mental, emotional, or behavioral disorder, but not active psychosis or an intellectual disability; and
>
> (b) Is likely to benefit from the program.
>
> (3) "Department" is the Department of Corrections.

Cox argues he is not eligible for the sex offender treatment program because he has an intellectual disability. By including the sex offender treatment program as part of Cox's sentence, the circuit court found Cox eligible for the program. Thus, the circuit court clearly did not believe Cox suffered from an intellectual disability barring him from the sex offender treatment program despite his history of diagnoses of dementia, schizoaffective disorder, schizophrenia, an unspecified psychotic disorder, and low IQ. KRS 197.400-.440 provides the circuit court wide latitude to determine whether an offender is eligible because it does not define what constitutes an "intellectual disability" barring eligibility for the sex offender treatment program. As such, the circuit court did not abuse its discretion by ordering Cox to complete the sex offender treatment program. This finding, however, does not preclude the Department of Corrections from making

its own determination as to whether Cox suffers from an intellectual disability that would preclude participation in the sex offender treatment program.

For the foregoing reasons, we affirm the judgment and sentence of the Fayette Circuit Court.

CLAYTON, CHIEF JUDGE, AND MCNEILL, JUDGE, CONCUR IN RESULT ONLY.

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