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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000504-MR

RUFUS ANTONIO HODGES — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 14-CR-000649-002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, STUMBO, AND THOMPSON, JUDGES.

CLAYTON, JUDGE: Rufus Antonio Hodges appeals from a Jefferson Circuit Court judgment of conviction and sentence. Hodges entered a plea of guilty to first-degree robbery and first-degree assault conditioned on his right to appeal the circuit court's denial of his motion to suppress evidence and motion for a

continuance. He also argues that his guilty plea was involuntarily entered and that the trial court erred in denying his motion to withdraw it.

The following facts were elicited at the suppression hearing: Officer Andrew Barnett of the Louisville Metro Police Department testified that he pulled over a white Impala in response to a BOLO ("Be On the Lookout") call on the police radio. The vehicle had allegedly been involved in a home invasion with a shooting victim. At the time, Barnett and his partner were working a traffic accident scene at the intersection of 26th Street and Broadway in downtown Louisville. The officers had shut down the westbound traffic on Broadway when a car drove up which matched the BOLO description of a new model white Impala with dark tinted windows and a police-type spotlight on the hood.

Barnett initially followed the car without turning on his lights and radioed to discover if there was more information. Because the car matched the BOLO description so accurately, however, he turned on his emergency equipment and pulled it over at 25th Street and Broadway. Because he feared a firearm might be involved, he performed a felony stop, whereby he initially stayed in his car with his gun drawn and shouted orders to the driver of the Impala. The driver, Hodges, got out of the car. Officer Barnett approached the car and detected a strong odor of marijuana emanating from the vehicle. He also saw bullets on the front

floorboards on the passenger side. There was no one else in the vehicle. Hodges was detained and charged with being a convicted felon in possession of a handgun.

The information underlying the BOLO call was provided by a 911 caller from the scene of the shooting. A recording of the call was played at the suppression hearing. The caller told the operator that an individual had been shot in the arm, at 4225 Fordson Way. The caller gave his telephone number and explained that he was walking down the street when he heard a gunshot. A man he knew was with the victim on the porch of the house. The victim had told him to call the police. When the operator asked if the person who shot him was around, the caller described a 2007 white Chevy Impala with tinted windows and police light on the hood which kept on going around the corner. He further explained he had seen it go past, "riding around" and "scoping around"; he then heard the gunshot and the car was gone.

Detective Matthew Mount went to the hospital and interviewed the shooting victim, who said that some people came to his house to buy marijuana but instead robbed him of the packaged marijuana and shot him. The victim knew one of the robbers as "Ron" and described the others as two men, one wearing a white shirt and the other a red shirt. He did not see the vehicle used in the robbery.

Detective Mount was informed that a vehicle matching the description of the BOLO had been detained. He proceeded to the traffic stop at 25th Street and

Broadway and spoke with Hodges, who was wearing a red sweatshirt. Detective Mount detected the odor of packaged marijuana in the car.

Hodges, with two co-defendants, Tymarius Malone and Ronald Click, was ultimately charged with first-degree robbery and first-degree assault. Under the Commonwealth's theory of the case, Hodges, Malone and Click entered the Fordson Way residence at gunpoint and robbed the victim. A struggle ensued, and the victim was shot.

Hodges filed a motion to suppress the evidence recovered as a result of the BOLO stop. The circuit court denied the motion.

On the opening day of trial, the Commonwealth's Attorney informed the trial court that co-defendant Ronald Click was accepting the prosecution's offer of amended charges of facilitation in exchange for his testimony against Malone and Hodges. Counsel for Malone moved for a continuance which was denied. Counsel for Hodges objected vigorously to Click's agreement. The trial court reminded counsel that they would have until the next day to prepare for trial, as it appeared that *voir dire* would take up the rest of the day.

The next day, Hodges and Malone refused to leave the holdover cell. After the jury was sworn in and seated, Hodges's counsel stated that his client was not coming out because he believed "our defense isn't ready." He informed the court that he would withdraw as counsel if Hodges did not appear in the courtroom

because he was "not going to represent someone who's not here." The trial court informed him that he would not be allowed to withdraw. He then moved for a continuance which was denied.

When Hodges and Malone did eventually appear, they were not dressed in trial attire but in their jail-issued orange jumpsuits. Malone's attorney informed the court that they were in plea negotiations. Following a recess, Malone and Hodges agreed to plead guilty, reserving their right to appeal the denial of the motion to suppress and the motion for a continuance. Hodges entered a plea of guilty to first-degree robbery and first-degree assault. He received a sentence of ten years on each charge, to run concurrently.

Prior to sentencing, Hodges and Malone both moved to withdraw their guilty pleas. Hodges claimed he was pressured into pleading guilty and that his plea was not knowing, voluntary or intelligent. Following a hearing, the trial court denied the motion and this appeal followed.

The Denial of the Suppression Motion

Our standard when reviewing a suppression ruling is twofold: "we first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. 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." *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. App. 2002) (footnotes omitted).

Hodges does not contest the trial court's findings of fact. He argues, as a matter of law, that the BOLO call did not create a reasonable suspicion to justify the stop of his vehicle by Officer Barnett.

The Fourth Amendment to the United States Constitution secures our freedom from "unreasonable searches and seizures." *See also* Kentucky Constitution § 10. "A police officer may constitutionally conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." *Bauder v. Commonwealth*, 299 S.W.3d 588, 590–91 (Ky. 2009) (citing *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)).

A police officer may rely on a "BOLO" to justify stopping an individual if certain conditions are met. "[I]f a flyer or bulletin has been issued on the basis of articulable facts supporting a reasonable suspicion that the wanted person has committed an offense, then reliance on that flyer or bulletin justifies a stop to check identification, . . . to pose questions to the person, or to detain the person briefly while attempting to obtain further information." *United States v. Hensley*, 469 U.S. 221, 232, 105 S. Ct. 675, 682, 83 L. Ed. 2d 604 (1985) (internal citations omitted). "It is the objective reading of the flyer or bulletin that

determines whether other police officers can defensibly act in reliance on it." *Id*., 469 U.S. at 232–33, 105 S. Ct. at 682.

Hodges argues that the stop of his vehicle did not meet this standard because the BOLO was not based on articulable facts supporting a reasonable suspicion of wrongdoing. He points out that the caller who provided the tip to police was anonymous, and did not actually witness the home invasion or the shooting. The caller never stated that he knew to whom the white Impala belonged, whether he ever saw anyone enter or leave the vehicle, or provided any description of the number of passengers in the vehicle.

Hodges contends that the facts of his case are similar to those of *Brooks v. Commonwealth*, 488 S.W.3d 18, 22 (Ky. App. 2016). In that case, a police officer was flagged down by an unidentified woman who reported that she had just seen a domestic dispute occurring in a black car traveling towards a nearby trailer park. The witness did not give any further details about the car, but did describe its occupants as a female driver, male passenger and two children in the back seat. The officer did not seek any further information or identification from the woman, but proceeded immediately towards the trailer park and pulled over a vehicle matching her description. The Court held that the anonymous tip lacked sufficient indicia of reliability to justify the stop. *Brooks*, 488 S.W.3d at 22. The Court specifically noted, in reliance on *Alabama v. White*, 496 U.S. 325, 332,

110 S. Ct. 2412, 2417, 110 L. Ed. 2d 301 (1990), that there was no corroborative evidence in any form, such as a prediction of future behavior which would indicate that the tipster possessed a level of intimate knowledge of the individual to be detained. *Id*. The *Brooks* tipster did not even allege any criminal activity had occurred, nor any physical contact between the man and woman in the car. *Id*.

But an anonymous and uncorroborated tip may, under certain circumstances, justify a brief investigatory stop. In *Navarette v. California*, -- U.S. --, 134 S. Ct. 1683, 188 L. Ed. 2d 680 (2014), an unidentified motorist called 911 to report that a silver Ford 150 pickup truck had run her off the road. She provided the license plate number of the truck and the location on the highway where the incident occurred. The United States Supreme Court held that the call, although anonymous and uncorroborated by any other evidence, was sufficiently reliable to justify an investigative stop of the truck by the police. It cited the following factors as indicative of reliability: (1) the caller was an actual eyewitness with firsthand knowledge of the alleged dangerous behavior; (2) the contemporaneity of the call with the incident; (3) the fact that the call was made under the stress of excitement caused by a startling event; and (3) the caller's use of the 911 emergency system, which permits authorities to trace calls and punish people misusing the system. *Navarette*, 134 S. Ct. at 1689-90.

In the case before us, the caller contacted 911 almost contemporaneously with the alleged home invasion and shooting. Although he was coherent, the caller was highly agitated and acting under the stress of a shocking event, which the *Navarette* Court characterized as an indicator of reliability, likening it to the hearsay exceptions for "present sense impression[s]" and "excited utterances." 134 S.Ct. at 1689. Although the caller did not actually witness the shooting, he heard the shots and was asked by the victim himself to contact the police. He did not give his name (and the operator did not request it), but he did provide a phone number. Although he did not observe anyone in the white Impala commit the crime, he did describe the car scoping around the area and then vanishing immediately after the shooting. His description of the vehicle was very detailed, providing its year, make, model, color and distinctive characteristics of the police-type spotlight and tinted windows. Additionally, the caller reported an incident that was undeniably of a very serious criminal nature.

Under the totality of the circumstances, the tip in this case demonstrated sufficient indicia of reliability to provide reasonable suspicion for the police to make an investigatory stop. "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." *Tucker v. Commonwealth,* 199 S.W.3d 754, 759 (Ky. App. 2006)

(quoting *Adams v. Williams*, 407 U.S. 143, 145, 92 S. Ct. 1921, 1923, 32 L. Ed. 2d 612 (1972)). The trial court did not err in denying the motion to suppress.

The Denial of the Motion for a Continuance

The trial court "upon motion and sufficient cause shown by either party, may grant a postponement of the hearing or trial." Kentucky Rules of Criminal Procedure (RCr) 9.04. We review the denial of a continuance for an abuse of discretion. *Hudson v. Commonwealth*, 202 S.W.3d 17, 22 (Ky. 2006), *as modified on denial of reh'g* (Oct. 19, 2006). "The trial court's discretion under this rule is very broad, and the denial of a motion for a postponement or continuance does not provide grounds for reversing a conviction unless that discretion has been plainly abused and manifest injustice has resulted." *Bartley v. Commonwealth*, 400 S.W.3d 714, 733 (Ky. 2013) (internal citations and quotation marks omitted).

We consider the following factors in determining whether denial of a continuance constitutes an abuse of discretion: "length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay is purposeful or is caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice." *Hudson*, 202 S.W.3d at 22.

Hodges argues, in reliance on *Eldred v. Commonwealth*, 906 S.W.2d 694 (Ky. 1994) *as modified on denial of reh'g* (Sept. 21, 1995) *abrogated on other*

grounds by Commonwealth v. Barroso, 122 S.W.3d 554 (Ky. 2003), that the trial court failed to give sufficient weight to the surprise caused by his co-defendant Click's sudden decision to testify on the morning of trial.

As the Commonwealth points out, however, agreements by co-defendants to testify occur frequently during the course of criminal trials. Click's decision, while disadvantageous to Hodges, could not have been completely unexpected. Furthermore, granting a continuance at that point would unquestionably have caused considerable inconvenience to the jury members, who had already been seated, and to the witnesses, including the victim.

Most importantly, however, Hodges never explains with any specificity how additional time would have helped his case or how his case was prejudiced by the denial of the continuance. By contrast, in *Eldred,* the defendant, who was accused with a co-conspirator of killing the victim at the request of the victim's ex-wife, Sue Melton, learned shortly before trial that she was planning to testify against him. He was also facing the death penalty. His counsel requested a continuance based upon the Commonwealth's failure to reveal the agreement with Melton, as well as the need for additional investigation. Specifically, defense counsel explained

> that he would now need to interview additional witnesses, whom he had not previously needed to consider in light of the severance of the trial of the co-defendants, and the anticipated order preventing any

> statements from them being introduced; carefully consider the insurance policy issued on the life of the decedent, which might have been a motive for Melton to kill, as had been suggested by one of the investigating detectives; and follow up on any new leads revealed in this new information, and information which was to be disclosed concerning payments made by the police to, or on behalf, of Moore [the defendant's ex-girlfriend who turned him in to the police].

Eldred, 906 S.W.2d at 698.

By contrast, the facts of this case are less complex and Hodges has not specified why additional time to investigate or prepare for trial was necessary. "Identifiable prejudice is especially important. Conclusory or speculative contentions that additional time might prove helpful are insufficient. The movant, rather, must be able to state with particularity how his or her case will suffer if the motion to postpone is denied." *Bartley*, 400 S.W.3d at 733 (citing *Hudson*, 202 S.W.3d at 23). Because Hodges failed to make such a showing, the trial court did not abuse its discretion in denying the continuance.

Motion to withdraw the guilty plea

Under the terms of RCr 8.10, a criminal defendant who has pleaded guilty may withdraw the plea under certain conditions. "If the plea was involuntary, the motion to withdraw it must be granted. However, if it was voluntary, the trial court may, within its discretion, either grant or deny the motion." *Rigdon v. Commonwealth*, 144 S.W.3d 283, 288 (Ky. App. 2004)

(internal citations omitted). The trial court's determination on whether the plea was voluntarily entered is reviewed under the clearly erroneous standard. *Id*. A decision which is supported by substantial evidence is not clearly erroneous. *Id*. If, however, the trial court determines that the guilty plea was entered voluntarily, then it may grant or deny the motion to withdraw the plea at its discretion. This decision is reviewed under the abuse of discretion standard. *Id*. A trial court abuses its discretion when it renders a decision which is arbitrary, unreasonable, unfair, or unsupported by legal principles. *Id*.

"The test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986) (citing *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 164, 27 L.Ed.2d 162 (1970)). "There must be an affirmative showing in the record that the plea was intelligently and voluntarily made." *Id*. (citing *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969)).

In January 25, 2016, Hodges, represented by new counsel, filed a motion to withdraw the guilty plea he had entered on May 13, 2015. As grounds for the motion, he claimed he was misinformed that he would receive a forty-year sentence at 85 percent parole eligibility if he proceeded to trial. He also claimed that he was unaware that under the facts of his case, the charges of first-degree

robbery and first-degree assault could potentially merge because of state and federal double jeopardy protections. He alleged that his attorney coerced him to enter the plea by threatening to withdraw if Hodges did not appear in the courtroom. According to Hodges, he did not believe his defense was ready for trial because of Click's last-minute decision to testify.

The trial court held a hearing on the motion, found that the plea was voluntarily entered and denied the motion to withdraw it. As its basis for denying the motion, the court noted that Hodges was represented by counsel, given time to discuss the resolution of his case, and was fully aware that he was entitled to a jury trial. He was also aware that the police and other witnesses, including Click, were prepared to testify. The trial court also emphasized that Hodge participated in a full plea colloquy and replied in response to the court's questioning that he was not coerced or threatened in any way to enter the plea.

On appeal, Hodges argues that he was coerced to plead guilty by his trial counsel, who told him he would receive a sentence of forty years at 85 percent parole eligibility if he did not accept the agreement. As further evidence of coercion, he points to his defense counsel's statement that he intended to withdraw if Hodges did not appear in the courtroom, which he describes as manipulative, and by the circumstances of Click's last-minute agreement to testify.

The charges against Hodge did not necessarily implicate double jeopardy. The Kentucky Supreme Court has held that "the physical-injury theory of robbery does not subsume assault for double jeopardy purposes." *McNeil v. Commonwealth*, 468 S.W.3d 858, 870 (Ky. 2015). Thus, if the case had gone to trial, the jury could have convicted of Hodges of first-degree robbery and first-degree assault, both class B felonies carrying a maximum sentence of twenty years each for a total of forty years if imposed consecutively. See Kentucky Revised Statutes (KRS) 515.020; KRS 508.010; KRS 532.060(2)(b). Because Hodges could qualify as a violent offender under KRS 439.3401(1), he could also be subject to the 85 percent parole eligibility rule. KRS 439.3401(3). His attorney's decision to inform him of this worst-case scenario was professionally responsible and does not equate to coercion.

Furthermore, just because Hodges was placed in a disadvantageous position by Click's decision to testify does not render his plea involuntary or coerced. As we have already noted, co-defendants regularly decide to testify during the course of a trial and a defendant must weigh his or her options in deciding whether to proceed with the trial or accept a plea agreement. After weighing his limited options, Hodges chose to enter a guilty plea. *Williams v. Commonwealth*, 233 S.W.3d 206, 211–12 (Ky. App. 2007). Under the

circumstances, he made a reasonable choice. Consequently, the trial court did not abuse its discretion in denying his motion to withdraw the plea.

For the foregoing reasons, the Jefferson Circuit Court judgment of conviction and sentence entered on March 14, 2016, is affirmed.

STUMBO, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

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